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The responsibilisation paradox. The legal route from deresponsibilisation to systemic corruption in the Australian financial sector

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Abstract
Recent corruption scandals suggest that the legal structures developed to responsibilise corporations might paradoxically enable the systematisation of corruption across entire industry sectors. This study uses grounded theory methodology to develop a preliminary theoretical model of the correlations between the law, responsibilisation and the causes of systemic corruption. Through a qualitative examination of documental evidence from the case study of the recent Australian banking scandal, this paper conceptualises a two-way process of 'legal deresponsibilisation'. On the one hand, legal dysfunctions fail to effectively support the situational and cultural goals of responsibilisation. On the other hand, the pursuit of such goals transforms the law in ways that can lead to the deresponsibilisation of both corporations and the state. The paper suggests that structural reforms are needed to correct this process and the underlying systemic imbalances between the legal promotion of financial interests and that of countervailing values of integrity and accountability.

Introduction

States are increasingly devolving the responsibility to prevent the normalisation of corporate corruption to private organisations and individuals. By 'corruption' we mean any abuse of entrusted power for private gain (Transparency International, 2009), whether formally prohibited by the law or not (Passas, 2005; Salter, 2010). This 'responsibilisation' strategy (Garland, 1996, 1997 and 2001) entails significant transformations in the law. Other than regulating business conduct, a mix of soft and hard law (Lobel, 2004) – legislation, regulation, and self-regulation – encourages companies to participate in lawmaking and enforcement through public-private partnerships and requires them to adopt internal controls such as risk management, codes of conduct, disciplinary action, and corporate policing. External controls are entrusted to a broad spectrum of self-regulators, regulators and criminal justice agencies (Lord and Levi, 2015; Gill, 2002). These enforce corporate responsibilities through a 'pyramid' of measures responsive to the circumstances of the case (Ayres and Braithwaite, 1992; Braithwaite, 2002a; Comino, 2011) – from collaborative approaches such as deferred prosecution agreements (King and Lord, 2018; Ryder, 2018; Hock, 2020; Søreide and Makinwa, 2020; Ivory and Søreide, 2020) to prosecution (Hawkins, 2002). The law also requires potential victims to act responsibly to prevent victimisation (Grabosky, 1992 and 1994).

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By encouraging the management of risks and vulnerabilities (O'Malley, 1992 and 2010; Goddard, 2012), responsibilisation should mitigate the *proximate causes* of corruption. These are situational and individual factors such as motivations (Coleman, 1987), opportunities (Coleman, 1992; Clarke, 2017; Benson and Simpson, 2018), lack of controls (Cohen and Felson, 1979; Graycar and Sidebottom, 2012), and rationalisation (Cressey, 1953; Sykes and Matza, 1957; Benson, 1985). By nurturing a sense of duty and a culture of compliance (Garland, 1996, 1997 and 2001; Shamir, 2008), it should also mitigate some *remote causes* of systemic corruption. These include socio-psychological and cultural factors such as an excessive emphasis on financial success (Durkheim, 1897; Messner and Rosenfeld, 2013) and the frustration caused by the lack of legitimate means to achieve it denounced by anomie and strain theory (Merton, 1938 and 1968; Passas, 1990 and 2000; Agnew, 2009), as well as the socialisation and institutionalisation of corruption through organisational processes (cf. Sutherland *et al.*, 1992; Ashforth and Anand, 2003; Goldstraw-White, 2012; Prabowo et al., 2018).

Unfortunately, corruption scandals around the world suggest not only that the legal structures that should responsibilise corporations often fail to prevent occasional corruption, but – more worryingly – that they can paradoxically enable its systematisation across entire industry sectors (Tillman and Indeergard, 2005 and 2007; Tillman, 2009). A paradigmatic case is that of the Australian financial industry, which has been affected for more than a decade by the widespread normalisation of corrupt practices such as bribery, fraud, forgery, mis-selling of financial products and deceptive advice (Economics References Committee, 2014; Royal Commission, 2018 and 2019). While the press blamed profit-oriented corporate culture, regulatory capture and sloppy enforcement (Ferguson, 2014 and 2019), the inquiry of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry found that one of the major causes of the normalisation of misconduct was the very same legal framework that was supposed to responsibilise the sector. In the Royal Commission's words: 'entities and individuals acted in the way they did because they could' (2019: vol. i, p. 2).

There is an increasing awareness of the situational and systemic corrupting effects of the law. Criminological and legal research shows that legislation can unintendedly create or aggravate opportunities and motivations for crime and corruption (Albrecht *et al.*, 2002; Albrecht and Kilchling, 2002; Savona, 2006 and 2016; Kotchegura, 2018; Pasculli, 2017 and 2020a) and that the legal implementation of legitimate policies can prompt creative adaptations to circumvent them (Grabosky, 1995; Morgan and Clarke, 2006; Jasinski and Ryder, 2020). Studies on regulation suggest that fundamental properties of the legal system may have more pervasive unintended consequences. Extensive corporate participation in regulation creates a 'regulatory space' where private organisations regularly lobby lawmakers and regulators in the attempt to regulate markets in their own interest (Scott, 2001; Gill, 2002). This can lead to criminogenic regulatory environments (Tillman and Indeergard, 2005 and 2007; Tillman, 2009), regulatory capture and 'institutional corruption' (Lessig, 2013a and 2013b; Amit *et al.*, 2017). Other studies suggest that the law has evolved into the 'code of capital', as its modules – company law, contract law, insolvency law etc. – are subservient to the production and preservation of the wealth of those who can 'master' the code (Pistor, 2019). According to these scholars, other than lobbying, structural characteristics of the law, such as its malleability, and access to lawyers allow companies to bend it to private interests without violating it and outside public scrutiny (Salter, 2010; Pistor, 2019). Unclear definitions of illegality (Passas, 2005), excessive regulation and 'buyer beware' approaches fuel criminal motivations and rationalisations (Karstedt and Farrall, 2006). Psychological theories of legitimacy explain that when the law is perceived as unfair, inefficient and ineffectively enforced its legitimacy

decreases and so does compliance (Darley *et al.*, 2004; Tyler, 2006a and 2006b; Hinds and Grabosky, 2010; Jackson *et al.*, 2012 and 2014).

While these studies capture many complementary aspects of the problem, their integrated reading invites a more holistic analysis of the risks of systemic corruption entailed by the legal structures implementing responsibilisation strategies. This paper offers a preliminary comprehensive and interdisciplinary theoretical model of the correlations between responsibilisation, the law and the causes of systemic corporate corruption based on a socio-legal analysis of the Australian case study. We will assess how and why legal design, enforcement and structures can frustrate the responsibilisation of the financial sector by enabling both proximate and remote causes of corruption. But we will also assess how and why the principles of responsibilisation can induce changes in the law that can paradoxically lead to a deresponsibilisation not only of corporations but also of the state.

Given the increasing diffusion and potential impact of responsibilisation across different legal systems and sectors of the economy (cf. Hock, 2019; de la Feria, 2020; Hufnagel and King, 2020; Zavoli and King, 2021), our study can have considerable practical implications. It can support academics, policymakers, lawmakers, regulators and enforcement agencies in any area and jurisdiction to assess and review responsibilisation policies and laws. It can contribute to promoting a better public understanding of systemic corruption as the result not only of malicious forces but also of legal structures and processes. In particular, it can integrate the existing literature on lobbying and regulatory capture with a holistic analysis of broader social and legal factors that determine or facilitate them. Hopefully, it will also stimulate a broader reflection on the social and cultural implications of contemporary legal systems.

The next section explains our methodology. The third section illustrates *how* specific deficiencies in the design and enforcement of Australian financial regulation enabled the normalisation of corruption in the sector. The fourth section develops our original theory of *legal responsibilisation* to explain *why* the legal implementation of responsibilisation strategies can lead to systemic corruption and proposes some policy recommendations. The final section presents our conclusions.

Methods

This study is part of an ongoing research project on the correlations between the law and systemic corruption comparing case studies from different industry sectors in various jurisdictions. Amongst these, the Australian case allows unique insights on financial regulation and responsibilisation and deserves autonomous discussion (O'Leary, 2017).

Grounded theory methodology (Glaser and Strauss, 1967; Corbin and Strauss, 2012) is used to generate explanatory concepts and categories from qualitative data from the following documental sources: a) Australian Commonwealth legislation; b) regulation and regulatory guidance; c) reports of official inquiries; d) news, press and media releases. Qualitative data and case study analysis are ideal to conduct holistic and exploratory causal inquiries (Shavelson and Townes, 2002; Yin, 2009; Corbin and Strauss, 2012; O'Leary, 2017). The choice of documental analysis is favoured by the unusual wealth of sources which allows robust triangulation (Bowen, 2009) and the broad coverage of time-span, events, and settings (Yin, 2009) required to study systemic corruption.

Case definition and selection

The Australian financial sector is our aggregated unit of analysis (Ellis *et al.*, 2010). The sub-units of analysis are the corporations, individuals and regulators involved in various typologies of misconduct pervading the sector from the early 2000s to 2019 (when the Royal

Commission's final report was published and our study began). This study compares their behaviours in relation to different properties of the law to identify common patterns.

The corporations examined are the major Australian providers of financial services and products, including Commonwealth Bank of Australia (CBA), Australian Mutual Provident Society (AMP), Australia and New Zealand Banking Group (ANZ), Macquarie Group, National Australian Bank (NBA), Westpac, and some of their subsidiaries, such as CBA's Commonwealth Financial Planning and Financial Wisdom. The regulators examined are mainly the Australian Securities and Investment Commissions (ASIC), the markets and financial services regulator, and the Australian Prudential Regulation Authority (APRA), the banking, insurance and superannuation regulator.

To assess and criticise legal definitions, we chose to examine both illegal behaviours and practices that, while formally legal, are still harmful abuses of corporate powers in line with our definition of corruption. Typologies of misconduct examined include: (a) irresponsible lending and mis-selling of financial products; (b) misleading or deceptive advice; (c) charging fees for no service; (d) conflict of interests in remuneration/bonus structures (so-called 'conflicted remuneration'); (e) dubious tactics to reject insurance claims; (f) unauthorised use of signatures and forgery of documents; (g) bribery; and (h) failure to prevent money laundering.

The Australian case study satisfies many selection criteria for single-case research design (Gerring, 2006; Yin, 2009). Firstly, it is intrinsically interesting because of the gravity and extent of misconduct, which garnered considerable media and public attention. Secondly, it is a typical case as it concerns a sector – the financial industry – typically exposed to corruption and typically targeted by responsibilisation strategies. However, it is also atypical, as it concerns a country commonly perceived as one of the least corrupt in the world (Transparency International, 2020). Thirdly, the case has a powerful revelatory nature because of the comprehensive evidence available on the interactions between the law and corrupt schemes. Fourthly, its longitudinal quality allows us to observe how changes in the law have affected the behaviours of the regulated. Finally, the case is critical as it allows to compare, combine and test theories from various social sciences.

Data collection and analysis

Data collection followed theoretical sampling: the collection of data was responsive to their conceptual analysis and continued in a circular process until we reached theoretical saturation (Glaser and Strauss, 1967; Corbin and Strauss, 1990 and 2012). Open, axial and selective coding supported by theoretical memos was used to interpret the data and produce concepts and categories (Corbin and Strauss, 1990). Data analysis followed the three main stages of documental analysis: skimming, reading and interpretation (Bowen, 2009).

The skimming of the reports of the Royal Commission and the Australian Senate's Economics References Committee and some press releases helped identify the main typologies of misconduct and the relevant areas of regulation, as well as additional sources. With the second reading, open coding started: data were broken down analytically and preliminary concepts and categories were identified (proximate/remote causes of corruption, law design/enforcement/structure, internal/external controls etc.). In the interpretative stage of analysis, we revised and integrated these concepts and categories (axial coding) and unified them into a comprehensive theoretical framework around the core category of 'legal deresponsibilisation' (selective coding). Doctrinal methodology supported the analysis of legislation and regulation (Hutchinson and Duncan, 2012).

To corroborate the rigour of our study and remove personal biases and gather objective feedback, we presented our findings at different stages of the research at various events –

namely, the international conferences 'Whistleblowers: The voices of justice' (Coventry University, London, 10 May 2019), the symposium 'To blow the whistle or not? A symposium on complicity and compliance in economic and social wrongdoing' (University of York, online, 10 July 2020) and the seminar series of the Centre for Financial and Corporate Integrity at Coventry University (Coventry, 5 February 2021). Later on, we sent a more refined analysis of the data and our preliminary theorisations to seven financial crime experts from the areas of law, criminology and finance for them to provide feedback. The many and helpful comments, critiques and suggestions received were carefully examined and, in some cases, meetings were arranged to discuss further. We also considered the peer feedback received in more informal and casual occasions. The analysis and our theory were then revised, integrated and amended and circulated back to the same experts for final comments. These were taken into account to further refine the analysis and develop the final draft of the paper.

Limitations

This is a single-case study. However, its purpose is to generate and generalise theory, not statistical frequencies (Yin, 2009). The aim is not to demonstrate that what happened in Australia is happening everywhere but to develop theoretical categories concerning general properties of the law, corruption and responsibilisation that can be used to assess other economic sectors and jurisdictions. The increasing transnational harmonisation of responsibilisation laws (cf. Hock, 2019; de la Feria, 2020) also helps the generalisability of our theorisations, although more comparative research would help refine them and clarify the scope of their applicability (this is the aim of our broader project).

Another limitation concerns the use of documental sources only. Practical constraints – such as the difficulty to access executives and employees of Australian corporations and regulators – prevented us from using primary sources such as surveys or interviews. To compensate for this, we relied on transcripts and videos of the hearings before the Royal Commission and relevant submissions from the companies involved. However, the amount and complexity of the documental sources available call for autonomous discussion and their findings can provide a preliminary framework to support future research.

The corrupting effects of Australian financial regulation

The Australian case study shows a generalised failure of corporate responsibilisation in the financial sector. Companies failed to put in place adequate compliance processes, investigate and respond to cases of misconduct, report them to regulators, and collaborate effectively with them (Royal Commission, 2018 and 2019). They engaged in cover-ups, resisted victims' claims and pressured them to accept insufficient compensation and sign non-disclosure agreements (Ferguson, 2014 and 2019).

The findings of the Royal Commission showed that such failure depended not just on corporate culture but on the systematic inability of the law to adequately implement the main principles of responsibilisation: a) conduct regulation; b) internal controls; c) external controls; d) victim responsibilisation. Numerous flaws in law design and law enforcement enabled opportunities and motivations for misconduct and its rationalisation and weakened both internal and external controls – thus compromising prevention and accountability. A regulatory culture that prioritised corporate and economic interests over those of victims and justice led to soft enforcement approaches that allowed impunity undermining deterrence and compliance. We will analyse these shortcomings in the first subsections of this section.

But it was not just a matter of occasional flaws in law design and enforcement. These are expected in any legal system and, while they can enable proximate causes of specific corrupt practices (Grabosky, 1995; Albrecht and Kilchling, 2001; Savona, 2006 and 2016; Kotchegura,

2018), they are unlikely, on their own, to compromise the whole responsibilisation strategy. What enabled the normalisation of misconduct across the sector was the overall structure of the legal system – that is, the interactions and aggregated effects of different sources, elements and properties of the law. Such interactions amplified the proximate causes of corruption triggered by individual dysfunctions and produced widespread cultural and socio-psychological effects that aggravated remote causes. We will analyse such structural amplifications in the last subsection of this section.

Conduct regulation

Australian statutes set both general principles of legality, honesty and fairness for companies and their directors – such as those under sections 124, 180(1) and 912A of the Corporations Act 2001 (CA) and 47 of the National Consumer Credit Protection Act 2009 (NCCPA) – and specific rules of conduct – such as the prohibition of unsolicited sales ('hawking') of financial services (ss. 736, 992A and 992AA CA). Regulation and self-regulation, such as ASIC's and APRA's regulatory guides and the industry codes of the Australian Banking Association and the Insurance Council of Australia, specify further principles and rules.

A major shortcoming of this framework was the insufficient prohibition and regulation of harmful business practices (cf. Passas, 2005). Focused as it was on promoting financial stability, rather than preventing misconduct (The Treasury, 2018), the regulation of 'conflicted remuneration' allowed the proliferation of toxic environments which pressured advisers into misleading financial advice (Economics References Committee, 2014; Royal Commission, 2019). The lack of regulation of the practice of automatically charging customers with ongoing fees for financial advice allowed Australian banks to charge, in less than ten years, about $850 million fees to unaware clients – including dead ones! – even when no advice was provided (Royal Commission, 2019; ASIC, 2016). Only in 2012, the Future of Financial Advice (FoFA) reforms finally prohibited conflicted remuneration (ss. 963-965 CA) and introduced disclosure obligations and best interest duties for companies (ss. 961B-961J CA) (The Treasury, 2018). Similarly, no regulation prohibited dubious insurance practices such as the surveillance of claimants and the use of outdated medical definitions to reject otherwise valid claims. These decreased only after the new Life Insurance Code of Practice in 2016 (8.12 and 3.2) explicitly restricted them (Ferguson, 2019).

Exemptions to existing prohibitions and ambiguous definitions created opportunities for 'gaming the system' (Salter, 2010; Royal Commission, 2019: vol. i, p. 17) also through 'creative compliance' (Baldwin *et al*., 2013: p. 232). The narrow definition of 'financial services' and 'products' in the CA excluded from the scope of its provisions critical services such as the handling of insurance claims and funeral expenses policies. Too many conditions to the prohibition of 'hawking' in the CA allowed the proliferation of pressure selling of insurance products (ASIC, 2018; Royal Commission, 2019; Ferguson, 2019). Sales conduct improved only after the new Life Insurance Code of Practice regulated sales practices (ASIC, 2018). The subjective definition of the offence of 'dishonest conduct' (ss. 1041G and 1311 CA) – which requires the conduct to be 'known' by the offender as 'dishonest according to the standards of ordinary people' – combined with the lack of prohibition of unscrupulous practices, allowed corporate executives and regulators to rationalise them as merely 'inappropriate', 'just professional negligence' or 'processing errors' (Economics References Committee 2014, pp. 122–125, 138–139, 176; Ferguson, 2019, pp. 108–109).

Internal controls

Corporate obligations to adopt internal controls derive from statutory obligations such as directors' duties of due care and diligence (ss. 180-183 CA), corporate duties to manage

conflict of interests, ensure the compliance and competence of its representatives (s. 912A), report significant breaches to their obligations of honesty, fairness, integrity and compliance (s. 912D), collaborate with regulators (s. 912E) and disclosure obligations (ss. 941A, 941B and 1012A-C). However, the more detailed specification of such requirements is left to hundreds of ASIC's and APRA's regulatory guides. These have proved unable to compel effective internal controls. Absent binding statutory requirements (cf. Avery and Harris, 2019), companies failed to establish effective internal reporting processes, follow up whistle-blowing or compliance reports (Economics References Committee, 2014), keep a register of breaches, and investigate and respond to misconduct (Royal Commission, 2019) – despite regulators' recommendations to do so.

Sometimes, legal prescriptions were present but poorly defined. The wording of the statutory requirement for financial services licensees to report to ASIC any 'significant' breach to their obligations of honesty, fairness, integrity and compliance within ten days 'after becoming aware' of it (s. 912D CA) allows for considerable interpretative discretion. To justify reporting delays, CBA and ANZ claimed that it takes a long time to collect enough information to 'become aware' of a breach and assess its 'significance' (ANZ, 2018; CBA, 2018). ASIC's regulatory guide RG78 (2014) might have further compromised reporting by stating that occasional and minor breaches and individual instances of misconduct (including fraud) are not necessarily 'significant' (Royal Commission, 2019). The wording style of ASIC's regulatory guides is also unnecessarily verbose and informal. Vagueness might compromise compliance (Zavoli and King, 2021) and permissive language may weaken the perceived prescriptiveness of the law.

External controls

External controls are mostly entrusted to ASIC and APRA. The Corporations Act 2001, the APRA Act 1998 and the ASIC Act 2001 grant them extensive investigative and enforcement powers. They can impose financial penalties through infringement notices, enter into negotiated settlements with corporations ('enforceable undertakings'), initiate civil proceedings, prosecute minor regulatory offences and refer criminal cases to the Commonwealth Director of Public Prosecution (CDPP) (ASIC, 2013; APRA, 2019). APRA explicitly recognises that '[t]he effectiveness of prudential supervision depends on regulated parties knowing that APRA will take firm action where prudential risks are not being properly addressed' (ibid., p. 6).

Unfortunately, this was not the case. The statutes that empowered regulators did not specify a timeframe for their implementation, nor any criteria to guide the selection of the most appropriate measures in each case. As of 2014, no statute determined how regulators should respond to whistle-blowing in the private sector. Such 'unfettered discretion' (Economics References Committee, 2014, p. 274) allowed regulators to determine their own enforcement approach and strike their own balance between public and corporate interests. Moreover, the lack of separation between regulators' supervisory and enforcement functions facilitated contiguity with the regulated companies and excessive corporate participation in law enforcement (Royal Commission, 2019). ASIC habitually engaged with banks under investigation to assess whether there had been a breach, review media releases on their wrongdoing and even determine the entity of sanctions (Ferguson, 2019).

Sanctions were also inadequate. Some precepts were not backed by any sanctions. There were no penalties for breaching the obligation to comply with the conditions of financial services and credit licenses (ss. 912A CA and 47 NCCPA), the duty of utmost good faith under the Insurance Contracts Act 1984 or superannuation trustees' and directors' covenants (Royal Commission, 2019). Some sanctions were too low. Until 2019, the financial penalty for

violating the duty to report breaches was $8,500 or imprisonment up to one year for individuals and just $42,500 for corporations. Following the recommendations of the Royal Commission, the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 raised these to $1.05 million (or three times the benefit gained or loss avoided) for individuals, and $10.5 million (or three times the benefit or loss) or 10% annual turnover capped at $525 million for the 12 months before the contravention for companies.

These regulatory deficiencies undermined the effectiveness of enforcement. ASIC was slow to respond to early warnings of corporate wrongdoing (public complaints were decided in two years on average: Ferguson, 2019) and quick to accept the assurances of investigated companies (Economics References Committee, 2014; Ferguson, 2014 and 2019; McGrath and Janda, 2014). ASIC rarely relied on litigation and prosecution (Royal Commission, 2019). In the five years before the Royal Commission's enquiry, it had not instigated any civil penalty proceedings against a financial adviser even in cases of fraud and forgery (Ferguson, 2014; Economics References Committee, 2014). In the previous decade, it had prosecuted just one financial services licensee, and it had never prosecuted a licensee for failing to report a breach in time (Ferguson, 2019). Most cases were resolved through infringement notices or enforceable undertakings, which do not entail any admission of responsibility. Prolonged negotiations allowed companies to perpetuate their misconduct during the investigations. Fines or community payments were often considerably lower than the profits of misconduct, fostering the perception that penalties are just a business cost (Royal Commission, 2018 and 2019).

This approach placed accountability mostly on companies and their assets. The most common consequences for individuals were internal. Rarely, companies applied remuneration cuts – not very effective, especially for executives with very generous salaries. More frequently, offenders' employment was terminated – also not ideal, as it still allows relocation to another company or another industry sector (Ferguson, 2019).

Victim responsibilisation

Australian financial regulation also seeks to stimulate victims to adopt responsible behaviour. The Insurance Contracts Act 1984 (s. 51), for instance, imposes on consumers a strict 'duty to disclose every matter that is known'. The National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, currently under the examination of the Australian Senate, proposes to shift from a 'lender beware' approach to a 'borrower responsibility' approach by increasing borrowers' accountability for the information provided to lenders (Australian Government, 2020a).

Such provisions are problematic. Too onerous consumer obligations aggravate the asymmetries between companies and clients (Royal Commission, 2019), decrease pressures on companies not to deceive (Karstedt and Farrall, 2006), create legal opportunities for them to resist complaints, and facilitate the denial of the victim (Sykes and Matza, 1957). Then CBA CEO Ian Narev told to the daughter of an old couple who lost most of their life savings to misleading financial advice that investing is a 'buyer beware activity' (Ferguson, 2019, p. 89).

Criminogenic asymmetries between companies and individuals are aggravated by structural hurdles to victims' access to justice and effective corporate accountability (cf. Pistor, 2019), such as procedural requirements, court fees, the long times and uncertainty of litigation, unclear court practice (Le Mire *et al.*, 2013), and judicial uncertainty about the enforceability of industry codes in court (Royal Commission, 2019; Ferguson, 2019). While many victims, including Senator John 'Wacka' Williams, eventually opted for inadequate compensation and non-disclosure agreements to avoid these hurdles, companies exploited them to sustain prolonged litigation and oppose enforceable undertakings (Ferguson, 2019).

Structural amplifications

All these legal dysfunctions do not happen in a vacuum. They interact with each other and with the inherent properties of the law. Such interactions amplify their corrupting effects and aggravate the remote causes of corruption, thus enabling its normalisation.

The general and abstract nature of the law and its relative durability multiply the criminogenic effects of defective provisions across the regulated sectors and perpetuate them in time, facilitating their rationalisation, socialisation and institutionalisation. Competition does the rest, as no company wants to stay behind by adopting self-restrictive interpretations of the law. The complexity and fragmentation of the law can widen the scope for self-interested interpretations and makes it inaccessible to potential victims who cannot afford expensive lawyer fees. The Australian Corporations Act has grown longer by 178% since 1981. Its words have increased by almost 50% between 2001 to 2015 only (ASIC, 2015). ASIC has published more than 450 regulatory guides and information sheets – an activity that has also likely distracted ASIC from enforcement (Royal Commission, 2018).

The interdependence between different areas of law and between law design and enforcement produces aggregated social and cultural effects. The combination of insufficient regulation of harmful practices, vague and permissive regulatory guidance, ineffective enforcement and lack of remedies for the victims advances the notion that financial goals and interests come before other societal values such as honesty, integrity and solidarity, in line with the findings of institutional anomie (Messner and Rosenfeld, 2013). By failing to clarify the boundaries between legality and illegality (Passas, 1990; Karsted and Farrall, 2006) and enforce corporate responsibilities the law also fails to regulate the unlimited desires which it contributes to foster (Durkheim, 1897; Passas, 2000). And when it does prohibit certain practices, it inevitably reduces the legitimate means for companies and individuals to attain the cultural goals they are otherwise pressured to achieve (Agnew *et al.*, 2009). This may induce perceptions of the law as unfair (Darley *et al.*, 2004; Tyler, 2006a and 2006b; Jackson *et al.*, 2012 and 2014) and proactive attempts not just to circumvent it taking advantage of its loopholes and natural indeterminacy (Baldwin *et al.*, 2013; Pistor, 2019), but also to influence both lawmaking and enforcement (Salter, 2010). Moreover, when the primary, if not the only sanction for misconduct becomes the payment of corporate money, responsibility gets commodified, and with it the dignity, rights and interests of victims (cf. Garland, 1996 and 2001; Loader, 1999; Shamir, 2005; Pasculli, 2020b).

The vicious circle of legal deresponsibilisation and what to do about it

So far, we have explained *how* the law failed to responsibilise corporations and enabled the systematisation of corruption. But *why* did this happen? And what can be done about it? Our analysis reveals a circular relationship – or a vicious circle – between responsibilisation and the law. We will call it 'legal deresponsibilisation'. On the one hand, dysfunctional legal structures fail to support the situational and cultural goals of responsibilisation. On the other hand, paradoxically, the pursuit of such goals prompts substantial and structural transformations in the law that erode its responsibilising capabilities. Understanding this two-way relationship is fundamental to find effective solutions.

Deresponsibilising laws

Legal dysfunctions in the implementation of responsibilisation strategies can depend either on lawmakers' and regulators' incompetence or on political choices. The Australian case shows evidence of both. We already saw various examples of poor legislative technique and enforcement practice. But there are also clear indications that some legal shortcomings were

the consequence of deliberate political choices giving precedence to economic interests such as financial stability or economic growth over competing public and private interests. For a long time, the Australian Government sided with industry in resisting the much-needed FoFA reforms. It also opposed the establishment of a Royal Commission, which was established only when four big banks requested it to restore trust and stability in the financial system. Even then, Prime Minister Malcolm Turnbull declared it a 'regrettable but necessary' step that 'will not be an open-ended commission' and 'will not put capitalism on trial' (Ferguson, 2019, p. 177). As of January 2021, two years after the publication of the Royal Commission's final report, more than half of its recommendations had either been rejected or yet to be implemented (Butler, 2021).

The contiguity between regulators and regulatees is, therefore, better explained as shared goals and interests than collusive relationships. It is the law that invites corporations to become co-regulators and co-enforcers (Parker, 2002; Verhage, 2011) to take advantage of their structures and expertise to govern the increasing complexity of economic life. Blaming corporate culture or regulatory capture alone fails to realise that many corporate values, goals and interests are endorsed by the legal system as legitimate public interests and, as such, prioritised over individual rights and interests (Passas, 2005; Pistor, 2019). When such political and legal endorsement of financial values, goals and interests becomes systemic, it reinforces profit-oriented corporate culture and obfuscates the cultural values of integrity, compliance and accountability promoted by responsibilisation strategies, thus frustrating their culture-changing ambitions.

Deresponsibilising responsibilisation

In such a legal environment, the legal transformations conceived to responsibilise the civic society can paradoxically lead to the deresponsibilisation not only of corporations but also of the state.

A first set of risks concerns the distribution of power between corporations, regulators and private citizens. The delegation of crime control responsibilities requires the attribution of the necessary powers to fulfil them. Imbalances in the distribution of power are a precondition for corruption (Klitgaard, 1988; Barak, 2017). Without appropriate checks and balances, the legal devices of corporate responsibilisation – deregulation, voluntary regulation, corporate discretion, corporate participation in regulation etc. – carry the risk of abuses and manipulations. The attribution of excessive responsibility to victims without sufficient powers facilitates victimisation and victim-blaming (Karstedt and Farrall, 2006). The transfer of enforcement powers from traditional law enforcement to regulators can upset the vital balance between persuasion and punishment (Braithwaite, 1985; Ayres and Braithwaite, 1992; Braithwaite, 2002a; Comino, 2011) and between individual and corporate accountability (Jordanoska, 2019). Lack of legislative parameters to constrain regulators' discretion jeopardises the effectiveness of the law. Excessive discretion also allows regulators to override legislative decisions on the necessity of punishment expressed through criminalisation. This frustrates deterrence, retribution and the communicative function of criminal law (cf. King and Lord, 2018) and undermines the democracy and perceived legitimacy of the legal process (Hinds and Grabosky, 2010).

A clear example of these risks and their interactions with legal structures is corporate participation in Australian financial regulation. Corporations have largely influenced regulatory design not only through informal means such as lobbying or 'revolving doors' (more than one-third of those registered in the Australian Government Register of Lobbyists are former government representatives: Robertson *et al.*, 2019) but also through official appointments. The 1996 inquiry on the financial system was spearheaded by Stan Wallis, then

director at the Australian Foundation Investment Company. The 2014 inquiry was led by former CBA CEO David Murray, who was responsible for introducing dubious sales practices at CBA (Ferguson, 2019). Except for one academic, all the members of the Committee and International Advisory Board of the Murray inquiry were executives of financial firms. No other stakeholders – such as consumers or whistle-blowers – were represented.

Such a prominent regulatory role of corporations led to corporate capture in lawmaking and law enforcement, causing significant distortions in both areas. The Wallis inquiry led to a 'light-touch' and 'buyer beware' approach through considerable deregulation (Hanratty, 1997; Ferguson, 2019). Despite taking place right after the Economics References Committee's exposed widespread systemic misconduct, the Murray inquiry focused mostly on economic growth and minimised such misconduct as 'unfair consumer outcomes' (FSI, 2014, p. xiii). Instead of improving hard law enforcement and access to civil and criminal justice, the inquiry proposed to expand consumer's access to alternative dispute resolution and regulators' powers. It led to replacing the Australian Financial Sector Advisory Council with the Financial Regulator Assessment Board to assess the regulators' overall performance. While 'precluded from examining […] the merits of particular regulatory or enforcement decisions', the Board would 'assess how regulators have used the powers and discretions available to them' (ibid., p. 239). Like its predecessor, the Board comprised only senior bankers (The Treasury, 2008 and 2016). In other words, the regulated would control the regulator. Moreover, as we saw, undue contiguity between ASIC and APRA and the regulated companies, and an excessive involvement of the latter in the activities of the regulators undermined the effectiveness of external controls.

Another set of risk factors concerns the prominent focus of responsibilisation on situational risks and vulnerabilities. This can have two main unintended consequences. First, it may prevent the state from appreciating systemic and aggregate risk factors (including those triggered by the law). One example is the failure of Australian lawmakers and regulators to appreciate the risks of social harm caused by systematic patterns of civil contraventions which, taken individually, would be relatively modest. The Australian Law Reform Commission is now proposing to introduce a new type of offence to criminalise such patterns of conduct (ALRC, 2020). Second, the focus on situational risks might lead the state to neglect its responsibilities to mitigate the remote causes of corruption. The fulfilment of these responsibilities requires not only social and welfare measures (Garland, 1996 and 2001), but also a systematic revision of those legal structures that foster anomic conditions, psychological strains and the socialisation and institutionalisation of corruption. Responsibilisation should complement, not replace social and legal reform.

To sum up, the circular process of legal deresponsibilisation shows that corporate corruption is no more the product of malicious agents seeking to circumvent or manipulate the law than of legal-institutional systems that, from industrialisation to globalisation, have become increasingly subordinated to economic life (Barak, 2017). The effective legal implementation of responsibilisation requires, therefore, a reflection that goes beyond situational and actuarial risks entailed by specific policies, provisions or practices and focuses, instead, on the socio-cultural and political risks of the legal system as a whole (Haines, 2011) and the role of the law as a tool to promote values, other than to protect interests (Bobbio, 1969).

Rethinking the system

Situational solutions are insufficient: structural changes are required. A first set of interventions should address the substance, form and processes of law design. Guidance and appropriate training for legislators and regulators should set principles of 'good rule-making' (Pasculli, 2017). These should address any aspect of legal drafting, such as clarity and precision of legal

precepts, proportionality of sanctions, simplification and accessibility of legal sources (Xanthaki, 2022). The Australian case study suggests that principle-based regulation (Black, 2008) might not be as effective as prescriptive rule-setting in curbing certain behaviours. Principles are necessary but not sufficient (Black *et al.*, 2007). The success of the new restrictions introduced by the Australian Life Insurance Code of Practice in reducing hawking and dubious insurance practices is a good example.

Lawmaking processes must also be revised to counterbalance corporate influences. Regulating lobbying and 'revolving doors' is necessary but insufficient. Institutional venues for non-corporate stakeholders and interest groups to participate in regulation must be provided. Consultations must be designed to facilitate the effective engagement of groups and individuals that might lack the expertise and resources available to corporations (Morison, 2016). Special forms of regulatory impact assessment to mitigate corruption risks in draft legislation should be embedded in legislative processes. Interesting models are the so-called 'legislative crime proofing' mechanisms tested on EU tobacco regulation and employed by Eastern European legislators (Savona *et al.*, 2006; Savona, 2016; Calderoni *et al.*, 2012; Caneppele *et al.*, 2013; Hoppe, 2014; Kotchegura, 2018). 'Better Regulation' strategies (e.g. Australian Government, 2020b; Council of Australian Governments 2007; European Commission, 2015) should address the social, cultural and political impact of regulation, other than the financial one (Haines, 2011).

Other interventions should address law enforcement. If responsibilisation has to change corporate culture, it cannot rely only on the goodwill of corporate executives (cf. Braithwaite, 1982; Gunningham, 2011; Jordanoska, 2018). Statutory provisions must limit regulatory discretion. Litigation and prosecution should be the default response to misconduct, not the last resort (Royal Commission, 2019; Hughes, 2019). Only pre-defined statutory exceptions such as lack of evidence or public interest should allow regulators to avoid referring criminal cases to prosecuting authorities. Statutory mechanisms must ensure the independence of regulators also by separating supervisory and enforcement functions (Royal Commission, 2019). Legislation should attribute clear responsibilities to roles and positions at all levels of organisational structures. A promising example is the Australian Banking Executive Accountability Regime (BEAR), recently added to the Banking Act 1959 and currently being extended across all APRA-regulated industries (The Treasury, 2020). BEAR establishes accountability obligations for senior executives and directors of deposit-taking institutions and consequences for their violations including remuneration cuts, disqualification and civil penalties. Sanctions for both companies and individuals should be proportionate, effective and integrated with more creative responses (Barak, 2016). A system of 'positive sanctions' (Kelsen, 1945; Bobbio, 1969) such as public accolades, tax benefits, whitelists and ranking systems could be used to incentivise and reward honest behaviour (Braithwaite, 2002b; Baldwin *et al*., 2013).

Periodic holistic assessments of legislation, regulation and enforcement are required not only to assess situational corruption risks but especially to ensure a right balance between economic interests and countervailing individual and public interests, starting from victims' rights. Post-legislative scrutiny can help (Xanthaki, 2018; De Vrieze and Norton, 2020). Systematic models such as the UK one, whereby the government submits periodic assessment reports on statutes to Parliament (Caygill, 2020), seem more suited than casual models such as the Australian one, whereby post-legislative scrutiny is left to *ad hoc* devices such as judicial review or sunset clauses (Moulds, 2020). Permanent advisory groups involving also non-corporate stakeholders and academics should be established not only to provide comprehensive *ex post* reviews of regulators' performance, but also ongoing *ex ante* guidance to public agencies on the corruption risks of policy and regulation. An example is the COVID-19

Counter Fraud Response Team (CCFRT) established by the UK government to mitigate the fraud risks of stimulus spending during the coronavirus pandemic (Pasculli, 2020b).

Conclusions

This seminal exploration of the correlations between the law, responsibilisation and systemic corruption in the Australian financial sector allowed us to closely observe *how* the law can enable the normalisation of corruption. Defects in law design and enforcement can aggravate proximate causes of specific corrupt practices, such as motivations, opportunities and rationalisation. Their interactions and aggregated effects (legal structure) can enable the normalisation of such practices by aggravating their remote causes, such as anomic conditions, psychological strains, socialisation and institutionalisation.

These observations led us to develop hypotheses as to *why* this happens. It seems that the corrupting effects of the law are not only the product of lobbying, regulatory capture, incompetence or short-sightedness of lawmakers and regulators but of a more complex two-way process of 'legal deresponsibilisation'. On the one hand, the law fails to effectively support the situational and cultural goals of responsibilisation. On the other hand, the pursuit of such goals transforms the law in ways that undermine its responsibilising effects. In a legal system that places too much emphasis on the promotion and protection of financial interests, the legal structures devised to responsibilise the civic society can paradoxically lead to the deresponsibilisation of corporations and the state. Corporate empowerment and participation can enable abuses, victim responsibilisation can become victim-blaming, regulatory powers and discretion can weaken law enforcement, and the focus on situational risks can distract from the management of aggregated risks and the remote causes of corruption.

Effective legal implementation of responsibilisation strategies requires a rethinking of the whole legal system and the values it promotes, as well as a critical assessment of the principles and objectives of responsibilisation and their intrinsic social, political and cultural risks. Targeted reforms to law design and enforcement are insufficient. Systemic mechanisms to ensure the right balance between financial interests and countervailing public and individual interests, between companies and consumers, between soft regulation and hard enforcement, and between corporate and individual responsibility should be in place. These should include 'legislative crime-proofing', post-legislative scrutiny, mechanisms to ensure the democratic participation of non-corporate stakeholders in regulation, legislative constraints to regulatory discretion, periodic enforcement reviews, advisory groups, positive sanctions.

Future research comparing different legal systems and industry sectors could help test and refine these preliminary theorisations and discovering more problems and solutions. It would be interesting, in particular, to assess whether and how context-specific features, such as differences in culture, legal tradition and business structures and practices, affect the law's ability to effectively implement responsibilisation strategies.

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