

## RECENT DEVELOPMENTS IN CORPORATE CRIMINAL LAW AND CORPORATE LIABILITY TO MONETARY PENALTIES\*

BRENT FISSE\*\*

### I. INTRODUCTION

The purpose of this paper is to review some major recent developments in corporate criminal law and corporate liability to monetary penalties. The discussion relates to the following areas:

The Environmental Offences and Penalties Act 1989 (N.S.W.)

The Review of Commonwealth Criminal Law *Interim Report*

The mental element of prescribed interest offences

The nature and scope of liability for structured transactions under the Cash Transaction Reports Act 1988 (Cth)

The settlement of enforcement actions as under the *Toshiba Deed*

The assessment of fines or monetary penalties against corporations in light of the *Commodore* and *Sony* cases

---

\* This article is based on a paper presented on 24 October 1990 at The University of Sydney, in the Committee for Postgraduate Studies in Law lecture series.

\*\* LL.B. (Cantuar.) LL.M. (Adel.) Professor of Law, University of Sydney.

## II. THE ENVIRONMENTAL OFFENCES AND PENALTIES ACT 1989 (N.S.W.)

The Environmental Offences and Penalties Act 1989 (N.S.W.) (hereafter the "EOPA"), although a milestone in Australian corporate regulation, is open to criticism in a number of fundamental respects. The discussion below focuses on the following three flaws:<sup>1</sup>

- (1) the common law basis of corporate criminal liability under the statute is unworkable;
- (2) the basis of individual criminal liability of corporate officers under the statute is sweeping and unprincipled; and
- (3) excessive reliance is placed on the fine as a sanction against corporate offenders.

### A. UNWORKABILITY OF THE COMMON LAW BASIS OF CORPORATE CRIMINAL LIABILITY

The EOPA creates certain offences that, for corporate offenders, carry a \$1 million fine. These offences are wilfully or negligently disposing of waste (s.5), wilfully or negligently causing leaks or spills of harmful material (s.6), and wilfully or negligently emitting an ozone depleting substance (s.6A).

Hard-hitting as these provisions may seem, they are partly undermined by the common law basis of corporate criminal liability under *Tesco Supermarkets Ltd v. Nattrass*<sup>2</sup> and related case law. The *Tesco* principle limits the responsibility of a company to the conduct and fault of the board of directors, the managing director, or another person to whom a function of the board has been fully

---

1 For other criticisms of the EOPA see D. Farrier, "Criminal Law and Pollution Control" (1990) 14 *Crim LJ* 317.

2 [1972] AC 153. D Ltd, a supermarket operator with over 800 stores throughout the United Kingdom, was charged under the Trade Descriptions Act 1968 (U.K.) with offering goods to consumers at a price for which they could not in fact be bought. Soap-powder was advertised at a reduced price but an assistant at one of the supermarkets had placed normally-priced packets on the shelves. She had not notified M, the manager of the supermarket, and he had failed to ensure that the packets on the shelves were displayed at the advertised price. A statutory defence of reasonable precautions and due diligence was available, but if M's lack of reasonable precautions or due diligence was attributable to D Ltd the company could not successfully plead this defence. It was held at first instance and in the Court of Appeal that D Ltd was vicariously responsible for M's lack of care and the defence failed. On appeal to the House of Lords, however, it was held that the statutory provisions did not rebut the common law presumption that criminal liability required personal fault, and M was not a manager of sufficient station in D Ltd's organisation for his lack of care to be attributable to the company personally. Since D Ltd had exercised reasonable precautions and due diligence at the level of top management (a compliance system was in place) D Ltd's conviction was quashed.

delegated.<sup>3</sup> Thus, there is no liability under s.5 for wilfully or negligently disposing of waste unless the element of wilfulness or negligence can be proven against a relevant top-level representative of the company.

There are four major criticisms:

- (1) The *Tesco* principle fails to reflect the concept of organizational blameworthiness. Fault on the part of an individual representative of a corporation is fault on the part of an individual representative and does not necessarily mean that the corporation was at fault. It is extraordinary that corporations should be exposed to fines of the severity authorised under the EOPA when liability can be established without showing organizational blameworthiness.
- (2) The notion of personal corporate liability is based on the anthropomorphic fallacy that corporations are clones of individuals and that the law should therefore focus on a corporate guilty mind located in the head of the entity. Corporate decision making is not confined to the highest levels of the entity but is diffused throughout an organisation. In the corporate world many employees have an input in management and the people at the top of an organisational hierarchy are often remote from the day-to-day sources of operational power.
- (3) The *Tesco* principle is unworkable in the context of larger corporations because it fails to reflect the diffused nature of decision-making in large or even medium size organizations.<sup>4</sup> Offences committed on behalf of organisations often occur at the level of middle- or lower-tier management<sup>5</sup> whereas the *Tesco* principle requires proof of fault on the part of a top-tier manager, or a delegate in the sense of a person given full discretion to act independently of instructions in relation to part of the functions of the board.<sup>6</sup> It is easier to prove fault on the part of a top

---

3 Compare Great Britain, Law Commission, Report No 143, *Codification of the Criminal Law*, 95, where *Tesco* is interpreted as supporting the position that a controlling officer is a "director, manager, secretary or other similar officer". This test does not clarify the position where the representative performs an important function in an organisation (e.g. sales manager for a company's national operations, general counsel, chief engineer), is not a director or secretary, and has been instructed by the board that he is required to act under the supervision and control of the managing director in relation to all matters.

4 See G. Williams, *Textbook of Criminal Law* (2nd ed.), 973; B. Fisse, "Consumer Protection and Corporate Criminal Responsibility: A Critique of *Tesco Supermarkets Ltd v. Natrass*" (1971) 4 *Adelaide L Rev* 113; Review of Commonwealth Criminal Law, *Interim Report* (1990), 26.5.

5 Consider e.g., *Universal Telecasters (Qld) Ltd v. Guthrie* (1978) 18 ALR 531. See further J. Coffee, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response" (1977) 63 *Virginia L Rev* 1099.

6 *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153, 172, 174-175 per Lord Reid.

manager of a small company, but if that can be done there is usually little need to prosecute the company as well as the manager.

- (4) It is notorious that well-advised corporations can take steps to insulate themselves from liability under the *Tesco* principle. The leading judgments in *Tesco* suggest that the principle does not extend to managers exercising substantial managerial functions provided that the board of directors has been sufficiently astute to have retained a formal right of veto or intervention.<sup>7</sup> If so, the principle greatly restricts the scope of corporate criminal liability, and opens up an obvious opportunity for corporate evasion. It is not difficult to devise a compliance system which reserves to the board the power to direct operations.<sup>8</sup>

Considerations of this kind have led to the frequent abrogation of the *Tesco* principle by statute, especially under Commonwealth legislation. These provisions typically make a corporation vicariously liable for the conduct or mental state of an officer, employee or agent.<sup>9</sup> A different approach has been taken under s.10(4) of EOPA, as amended in 1990. Section 10(4) provides as follows:

Without limiting any other law or practice regarding the admissibility of evidence, evidence that an officer, employee, or agent of a corporation had, at any particular time, a particular intention, is evidence that the corporation had that intention at that time.

---

7 *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153, 174-75, 180-81, 188, 192-93, 201. See also *Linehan v. The Australian Public Service Association* (1983) 67 FLR 412, 435-436; *Universal Telecasters v. Guthrie (Qld) Ltd* (1978) 18 ALR 531, 548-49; *R. v. Spot Supermarkets Inc* (1979) 50 CCC(2d) 239.

8 See *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153; *Universal Telecasters (Qld) Ltd v. Guthrie* (1978) 18 ALR 531. Consider also *R. v. HM Coroner for East Kent, ex parte Spooner* (1987) 152 JPR 115, (1989) 88 Cr App R 10. Not surprisingly, the principle has often been watered down to cover middle-managers in the absence of any finding that they have been delegated an unfettered power by the board. See *Kehoe v. Dacol Motors Pty Ltd* [1972] Qd R 59, 79; *Universal Telecasters (Qld) Ltd v. Guthrie* (1978) 18 ALR 531, 541-542 per Nimmo J. dissenting; *Brambles Holdings Limited v. Carey* (1976) 15 SASR 270; *Miller v. TCN Channel Nine* (1988) 36 A Crim R 92; *St Andrews Weatherfoil Ltd* [1972] 1 All ER 65; *Morris v. Wellington City* [1969] NZLR 1038, 1045; *Meulen's Hair Stylists v. Commissioner of Inland Revenue* [1963] NZLR 797, 800; *R. v. Waterloo Mercury Sales Ltd* (1974) 38 CCC(2d) 248; *R. v. St. Lawrence Corp* (1969) 3 CCC(2d) 263, 281; *R. v. JJ Beamish Const Co* [1968] 2 CCC 5; I. Muir, "Tesco Supermarkets, Corporate Liability and Fault" (1973) 5 *New Zealand Universities L Rev* 357. But see *S & Y Investments (No 2) Pty Ltd v. Commercial Union Assurance Company of Australia Ltd* (1986) 85 FLR 285, 310; *Universal Telecasters (Qld) Ltd v. Guthrie* (1978) 18 ALR 531.

9 See e.g., *Proceeds of Crime Act 1987* (Cth), s. 85.

This provision does not introduce a rule of vicarious liability as under s.85 of the *Proceeds of Crime Act* but relates merely to evidence of intention under the *Tesco* principle. The section thus tinkers with the *Tesco* principle without trying to resolve the basic weaknesses. The possibility of finding a more satisfactory basis of liability than the *Tesco* principle has recently been discussed in the *Interim Report* of the Review of Commonwealth Criminal Law (the Gibbs Committee). The proposals of the Gibbs Committee are assessed in Section III below.

## B. SWEEPING AND UNPRINCIPLED CORPORATE OFFICER LIABILITY

Section 10 of the EOPA exposes corporate officers to criminal liability on a sweeping and radically unprincipled basis. The section provides as follows:

10. (1) If a corporation contravenes, whether by act or omission, any provision of this Act, each person who is a director of the corporation or who is concerned in the management of the corporation is to be taken to have contravened the same provision unless the person satisfied the court that
  - (a) the corporation contravened the provision without the knowledge actual, imputed or constructive of the person; or
  - (b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
  - (c) the person, if in such a position, used all due diligence to prevent the contravention by the corporation.
- (2) A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or been convicted under that provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act.

This section represents an extreme and unjustified form of rugged individualism. It should be stressed that liability under the section is no trifling matter but exposes an accused to a maximum term of seven years jail and a fine of up to \$250,000.

- (1) There is no requirement of subjective blameworthiness. Negligence is sufficient under s.10, which imposes liability on the basis of imputed or constructive knowledge. To impute or to construct "knowledge" on the basis of an objective reasonable person standard is to impose liability for negligent inadvertence. This approach is inconsistent with the long established principle at common law that serious offences require intention, knowledge, recklessness, or some other subjectively blameworthy state of mind.<sup>10</sup> It may also be noted that the degree of negligence required does not appear to be criminal.
- (2) There is no apparent justification for going so far beyond the scope of liability for complicity. Complicity requires at least knowledge of the

---

<sup>10</sup> See *Parker v. R.* (1963) 111 CLR 610; *He Kaw Teh v. R.* (1985) 157 CLR 523.

essential matters constituting the principal offence.<sup>11</sup> The knowledge requirement for complicity may be too restrictive but a far less drastic solution than that adopted under s.10 would be to extend liability for complicity to recklessness in the sense of advertence to a substantial risk.

- (3) There is no apparent justification for departing from the approach taken under the Clean Waters Act and Clean Air Act, as governed by the State Pollution Control Commission Act 1970 (N.S.W.), s.30B. Corporate officer liability under that legislation requires that the person concerned in the management of the company "knowingly authorised or permitted the contravention." See also Ozone Protection Act 1989 (N.S.W.), s.22. Compare further the Occupational Health and Safety Act 1983 (N.S.W.), s.50(1) where knowledge is the basis of liability, not imputed or constructive knowledge.
- (4) An accused carries the persuasive burden of proof under s.10. This is inconsistent with the *Woolmington* principle that the prosecution carries the burden of proving the elements of liability beyond a reasonable doubt.<sup>12</sup> The inversion of the persuasive burden of proof under s.10 is doubly objectionable given the gravity of the punishment authorised under s.10. Compare the offence of being knowingly concerned in serious offences under Commonwealth criminal law (Crimes Act 1914 (Cth), s.5B). There is no inversion of the persuasive burden of proof under s.5B of the Crimes Act (Cth) despite the high gravity and considerable corporate complexity of many of the forms of social harm against which the Crimes Act is aimed.
- (5) The scope of liability and the inversion of the persuasive burden of proof under s.10 is to be contrasted with the relatively soft line taken against corporate offenders. As explained above, corporate liability is subject to the *Tesco* principle, which tends to shield larger corporations against criminal liability. It may also be noticed that the persuasive burden of proof is not inverted in the context of corporate defendants. The EOPA is inconsistent with the orthodox understanding of the inter-relationship between individual and corporate criminal liability. If an extreme law and order approach is to be taken the appropriate targets are corporations rather than sentient beings.<sup>13</sup>
- (6) The operation of s.10 is supposedly even-handed but the common law basis of corporate liability for offences under the EOPA biases the law against the corporate officers of small companies. The *Tesco* principle

---

11 *Giorgianni v. R* (1985) 156 CLR 473.

12 Inversion of the persuasive burden of proof is however a feature of some offences that are often invoked against street offenders; see e.g., Crimes Act 1900 (N.S.W.), s.527C.

13 See *Von Lieven v. Stewart*, (1990) 8 ACLC 1014 per Handley J.A.

is relatively easy to establish in the context of a small company but much more difficult in the case of larger organisations. This means that the directors of large companies will rarely be exposed to the application of s.10 whereas the officers of small companies will be much easier to catch in the net. Bias of this kind is indefensible.

- (7) No adequate attempt has been made in the EOPA to use less drastic means of achieving individual accountability for unlawful harm causing or risk taking. Injunctions under s.25 could now be used for this purpose but this is unlikely in the absence of explicit statutory direction. Corporate probation conceivably could be used to insist upon individual accountability at the level of internal corporate discipline but the EOPA is preoccupied with the use of fines and fails to exploit the preventive potential that probationary conditions have in the context of corporate offenders.<sup>14</sup>

### C. LIMITATIONS OF THE MILLION DOLLAR CORPORATE FINE STRATEGY

The EOPA depends heavily on a million dollar corporate fine strategy. The relevant provisions are these:

- (8) A person who is guilty of an offence against this Act is liable to a penalty not exceeding \$1,000,000 in the case of a corporation or, in any other case, \$150,000 or seven years imprisonment, or both.
- (9) In imposing a penalty for an offence against this Act, the court is to take into consideration (in addition to any other matter the court considers relevant):
- (a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence; and
  - (b) the practical measures which may be taken to prevent, control, abate or mitigate that harm; and
  - (c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence; and
  - (d) the extent to which the person who committed the offence had control over the causes which gave rise to the offence; and
  - (e) whether, in committing the offence, the person was complying with orders from an employer or a supervising employee.

The fine-dependent approach to sanctions against corporations under the EOPA is unlikely to work well.<sup>15</sup> The more significant limitations of fines as a sanction against corporations may be summarised as follows:

- (1) Fines, no matter how large, do not guarantee that corporate offenders will respond by taking internal disciplinary action against those

<sup>14</sup> See part (C) below.

<sup>15</sup> Fines are not the only means of disposition: consider the possible application of Crimes Act 1900 (N.S.W.) s.556A; see *Smith v. Cnizonom Pty Ltd*, unreported, Land and Environment Court of New South Wales, 25 March 1982.

responsible. The cheapest and least embarrassing response may be simply to write a cheque in payment of the fine and continue with business as usual. It is readily apparent that companies have incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive,<sup>16</sup> embarrassing for those exercising managerial control, encouraging for whistle-blowers,<sup>17</sup> or hazardous in the event of civil litigation against the company or its officers. Section 9 of the EOPA does not even mention internal disciplinary action as an important factor in the assessment of a fine.

- (2) Fines, no matter how large, do not guarantee that corporate offenders will respond by revising their internal operating procedures or physical protection devices in such a way as adequately to guard against repetition of the offence. The response may be simply to write a cheque in payment of the fine. Section 9 does not specifically deal with the adequacy or inadequacy of a corporation's compliance efforts in response to violation.
- (3) Fines convey the impression that offences are purchasable commodities whereas the conventional understanding of serious offences is that they are unwanted even if a given offender is prepared to pay for them in cash. This partly explains the use of imprisonment, community service and other non-monetary sanctions against individual offenders.
- (4) Fines are an indirect method of achieving sanctioning impacts on managers and other personnel in a position to control corporate behaviour. As a result, a fine may have little impact on the supposed targets and yet may inflict substantial loss on shareholders, workers, consumers, and other bystanders.
- (5) The level of fines required to reflect the gravity of an offence may exceed the capacity of a corporation to pay. In that event, the unpalatable options presented to a sentencing court are either: (a) to impose a low fine or a time payment plan that depreciates the gravity of the offence committed; or (b) to impose a commensurate and immediately payable fine that sends the company into liquidation. The practical significance of this consideration is particularly acute in Australia, which has fostered a corporate culture of high leverage and low capacity to pay debts.
- (6) Fines are prone to asset-stripping and other techniques of evasion. This is recognised under EOPA by adopting the solution of creating a charge upon property that passes into the hands of subsequent parties. While recovery of fines from luckless third parties may be satisfying from an

---

16 Consider e.g., the extensive internal disciplinary inquiry described in J. McCloy, *The Great Oil Spill* (1976).

17 J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1984), 402.



accounting standpoint, it is difficult to see the deterrent efficacy of fines that are recouped, not from the offender, but from third parties who have acquired an interest in the offender's property.

- (7) Fines are far from ideal in the context of offences committed by instrumentalities of the Crown or quasi-governmental authorities. Fines may occasion some budgetary shuffling with money deducted from one arm of government passing back into general revenue, and then possibly passing back again in order to enable the offender to continue providing essential public services. There is no necessary impact at the critical level of reforming deficient organizational controls.

These limitations of fines against corporations impel a search for additional or alternative forms of sanction. One promising possibility is corporate probation, in the sense of a judicially supervised period during which a corporate offender is required to undertake such remedial or internal disciplinary action as is specified in the conditions of probation.<sup>18</sup> Corporate probation is authorised under the US *Criminal Code* and its application has been the subject of detailed consideration by the US Sentencing Commission.<sup>19</sup>

Corporate probation offers various possible advantages. The potential advantages, as compared with the fore-mentioned limitations of fines, are these:

- (1) Probation can be used to insist that a corporate defendant undertake satisfactory internal disciplinary action in response to the commission of an offence. This potential is a well-recognised feature of probation and has been discussed in a number of commentaries.<sup>20</sup>
- (2) Probation can be used to insist that a corporate defendant rectify defective operating procedures or physical devices in such a way as to

---

18 Corporate probation can be ordered under Crimes Act 1914 (Cth) s. 19B; see *John C Morish Pty Ltd v. Luckman* (1977) 30 FLR 89; *Sheen v. George Cornish Pty Ltd* (1978) 34 FLR 466; *Lanham v. Brambles-Ruys Pty Ltd* (1984) 55 ALR 138. Compare Probation and Parole Act 1983 (N.S.W.) ss5-16 (wording appears to preclude probation orders against companies). Consider also the possible application of Crimes Act (N.S.W.), s. 556A; see *Smith v. Cnizonom Pty Ltd*, note 15 *supra*.

19 See R. Gruner, "To Let the Punishment Fit the Organisation: Sanctioning Corporate Offenders through Corporate Probation" (1988) 16 *American Journal of Criminal Law* 1; American Bar Association, 3 *Standards for Criminal Justice* (1980) 18.162-163, 18.179-184. In California a Bill providing for corporate probation under the *Penal Code* passed both Houses in 1990 before being vetoed by the Governor.

20 See e.g., R. Gruner, note 19 *supra*; B. Fisse and J. Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney L Rev* 468; J. Coffee, "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan L Rev* 386.

guard against repetition of the offence. Again, this potential is well-recognised and has been widely discussed in the literature.<sup>21</sup>

- (3) Probation is capable of conveying the unwanted nature of serious offences in a manner beyond the capacity of fines. Emphasis can be placed on the need to avoid engaging in the conduct prohibited whereas fines are more evocative of licence fees.
- (4) Probationary conditions can target managers and other key players in an organisation. Since the impact is borne primarily by managers and others in a position of control, there is more chance of preventive efficacy. The prime impact is non-monetary and, unlike the monetary impact of fines, cannot be passed straight on to shareholders, workers or consumers.
- (5) Corporate probation is sufficiently flexible to handle highly leveraged corporations that are unable to pay a fine commensurate with the severity of their offences. Corporations of this kind can be subjected to probationary conditions that match the need for precautions against repetition of serious offences. The more serious the offence and the less able the ability of the company to pay a high fine then the greater the justification for imposing stringent monitoring of the company's future activities. The more serious the offence and the less adequate the financial sanction that can be exacted from the company then the greater the justification for imposing intrusive monitoring controls on the company.
- (6) Probationary conditions, if well designed, can fasten on particular individuals and a particular enterprise in such a way as to apply if the corporate defendant tries to take evasive action. Obligations imposed under probationary conditions can be constructed in such a way as to follow the organisation and any of its individual managers. If the probationary conditions are not complied with then the individuals and the corporation are liable. There is no need for charges on corporate property that is transferred to other parties. The sanction is not one that requires money to be taken out of the purses of luckless third parties who happen to acquire an interest in the corporation's property.
- (7) Probation makes more sense than a fine in the context of governmental instrumentalities. The focus is on internal organizational controls, as opposed to the quixotic spectacle of one arm of government paying a fine into general revenue and then being re-allocated the funds in order to allow it to continue to perform its public function.

One possible reaction is that corporate probation is unworkable because the probation service is untrained in corporate affairs. However, there is no need to enlist the probation service for the purpose of administering a corporate

---

21 See R. Gruner, note 19 *supra*.

probationary order. An alternative approach, endorsed by the American Bar Association and adopted in various US statutory models,<sup>22</sup> is to appoint a lawyer or other professional consultant as an officer of the court, and to require the corporate offender to pay the costs of administration.

Another concern is whether probationary conditions against corporations could be used without subjecting corporations to inefficient and excessively intrusive governmental intervention. However, the danger seems controllable. First, the customary sentencing practice of imposing severe sanctions only for serious offences is unlikely to be abandoned. Secondly, sentencing criteria could and should be devised so as to maximise freedom of enterprise in compliance systems. One possibility is to stipulate in the empowering legislation that, wherever practicable, corporate defendants are to be given the opportunity to indicate before sentence what disciplinary and other corrective steps they propose to take in response to their conviction.<sup>23</sup>

### III. THE GIBBS COMMITTEE PROPOSALS

The recent *Interim Report* of the Gibbs Committee *Review of Commonwealth Criminal Law* advances proposals for revising the basis of corporate criminal liability under Commonwealth criminal law.

A proposed s.4BA of the Crimes Act (Cth) is born, with seven legs:

- (1) For the purposes of a proceeding against a body corporate for an offence against a law of the Commonwealth not involving any fault element, being an offence:
  - (a) constituted by conduct of a director, servant or agent of the body corporate acting within the scope of his or her office, employment or engagement; and
  - (b) that is stated in terms that are capable of applying to the body corporate as well as to the director, servant or agent; the conduct of the director, servant or agent and, where relevant, the state of mind of that person in relation to that conduct, are to be attributed to the body corporate.
- (2) In relation to any other offence against a law of the Commonwealth, subsection (3) applies unless the law creating the offence indicates that subsection (4) is to apply.
- (3) For the purposes of a proceeding against a body corporate for an offence against a law of the Commonwealth:
  - (a) conduct engaged in by a controlling officer of the body corporate acting within the scope of his or her office, employment or engagement and, where relevant, the state of mind of that person in relation to that conduct, are to be attributed to the body corporate; and
  - (b) conduct engaged in by a director, servant or agent of the body corporate, acting within the scope of his or her office, employment or

---

22 See R. Gruner, note 19 *supra*, American Bar Association.

23 See United States Sentencing Commission, *Draft Guidelines for Organizational Defendants* (1990), s. 8D1.3(e).

engagement and, where relevant, the state of mind of that person in relation to that conduct, are to be attributed to the body corporate if the body corporate failed to take measures that, in the circumstances, were appropriate to prevent, or reduce the likelihood of, the commission of the offence.

- (4) For the purposes of a proceeding against a body corporate for an offence against a law of the Commonwealth, conduct engaged in by a director, servant or agent of the body corporate acting within the scope of his or her office, employment or engagement and, where relevant, the state of mind of that person in relation to that conduct, are to be attributed to the body corporate.
- (5) Where a body corporate is charged with an offence against a law of the Commonwealth and subsection (4) applies for the purposes of a proceeding for the offence, it is a defence to the charge if the body corporate establishes that it had taken measures that in the circumstances, were appropriate to prevent, or reduce the likelihood of, the commission of the offence.
- (6) Notwithstanding the preceding provisions of this section, for the purposes of a proceeding against a body corporate for any offence against a law of the Commonwealth, conduct by way of communication in relation to a matter engaged in by a person who is an authorised agent of the body corporate in relation to that matter and, where relevant, the state of mind of the agent in relation to that communication, are to be attributed to the body corporate.
- (7) A reference in this section to a person acting within the scope of his or her office, employment or engagement in relation to a body corporate does not include a case where the person acts with the intention of doing harm, or concealing harm done by him or her or by another person, to the body corporate.

"Controlling officer", as relevant under s.4BA(3)(a), is defined as a person who has authority to determine, or actual control over:

- (a) the general conduct of the affairs or activities of the body corporate; or
- (b) the conduct of the part of the business of the body corporate in which a particular act is done.

These new provisions seek to impose corporate criminal liability on a more cogent basis than the *Tesco* principle without going to the extreme of adopting a general principle of vicarious liability.<sup>24</sup> The aim is commendable but the execution seems less than successful. The provisions suggested are problematical in several key respects:

- (1) the provisions are not based on the concept of organizational blameworthiness;
- (2) the unsatisfactory *Tesco* principle is preserved under s.4BA(3)(a) in an extended and ill-defined form;
- (3) the communication" basis of liability under s.4BA(6) is unprincipled and capricious in operation; and

---

24 Compare Trade Practices Act 1974 (Cth), s.84.

- (4) the "intention to harm" or "conceal harm" limitation in s.4BA(7) is unclearly defined and may excessively restrict the scope of corporate criminal liability.

#### A. ORGANIZATIONAL BLAMEWORTHINESS

A highly problematic feature of the Gibbs Committee proposals is that they are not based on an articulate analysis of the concept of organizational blameworthiness. This concept, which lies at the foundation of attempts to redefine the principles of corporate criminal liability, is alluded to by the Committee. However, there is no systematic attempt to pin down what it means or what the implications are for redefining the basis of corporate criminal liability. The proposals are thus built on quicksand. They are also prone to attack by corporate lobbyists on the understandable ground that corporations should not be subject to severe forms of sentence unless there is corporate fault in some real sense. Given the growing demand for more severe forms of punishment to fit the worst forms of corporate crime, it is inevitable that corporations and their advisers will scrutinise the basis of corporate criminal liability with increasingly assiduous care.

The approach of the Committee is to patch up the present law in three main ways:

- (a) by extending the scope of the *Tesco* principle to the conduct of "controlling officers" as broadly defined;
- (b) by subjecting corporations to liability for a broad range of agents and employees where there has been a failure by the corporation to take reasonable precautions; and
- (c) by exposing corporations to vicarious liability in relation to communications of agents.

Patch (a) is inconsistent with the concept of organizational blameworthiness, as explained in part (2) below. Patch (b) reflects the concept of organizational blameworthiness to the extent of recognising the concept of organizational negligence<sup>25</sup> but leaves one wondering as to the relevant concept of corporate intentionality. Patch (c) is inconsistent with the precept of organisational blameworthiness, as elaborated in part C below.

---

25 But note the individualistic preoccupation of the Gibbs Committee in 26.16 where it is said that "What preventative measures were appropriate in the circumstances would depend on the nature of the offence, whether the offender's position in the corporation and access to facilities provided by the corporation facilitated the offence and the frequency of occurrence of such offences." With respect, this explanation misses the point that s.4BA(3)(b) is concerned with the failure of a "*body corporate*" (emphasis supplied) to take reasonable precautions.

The approach taken by the Gibbs Committee compares unfavourably with the model provided by s.65 of the Ozone Protection Act 1989 (Cth). Section 65, in relevant part, provides as follows:

- (1) Where, in proceedings for an offence against this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:
  - (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
  - (b) that the director, servant or agent had the state of mind.
- (2) Any conduct engaged in on behalf of the body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

The approach taken under s.65 differs fundamentally from that of Gibbs Committee. Section 65(2), unlike s.4BA(3), provides a defence of corporate reasonable precautions in *all cases* of unlawful conduct covered by the provision, including those where a controlling officer acted with the guilty mind required by the definition of an offence (compare the effect of s.4BA(3)(a)). Another difference is that s.65(2) places a persuasive burden of proof on the defendant. The Gibbs Committee recommended against any general inversion of the persuasive burden of proof,<sup>26</sup> but the attention devoted to the *Woolmington* principle sits oddly with the Committee's brief discussion of the more fundamental issue of organizational blameworthiness. It remains unclear why there should be any departure from the general principle of organizational blameworthiness, a principle reflected in s.65(2) of the Ozone Protection Act.

The statutory exemplar of s65(2) could be refined to advantage. The following basis of liability might be adopted:

- (1) the external elements of the offence have been committed by a person for whose conduct the corporate defendant is vicariously responsible;<sup>27</sup> and

---

26 Paragraph 26.18: "While in the case of special Acts such as the Trade Practices Act, it may be appropriate to place the onus of proof as to such a matter on the defendant, in a provision of general application different considerations apply. The present proposals, taken as a whole, represent a significant extension of the criminal liability of corporations and this paragraph would only be applied when the preceding paragraphs, themselves of considerable width, had been found inapplicable. Having regard to these matters, the Review Committee believes that the onus of proof of this matter should rest on the prosecution."

27 Compare Trade Practices Act 1974 (Cth), s.84(2). Contrast the position under the *Tesco* principle, which requires that the external elements of an offence be committed by a company through a high-level officer; see e.g., *HM Coroner for East Kent; ex parte Spooner* (1987) 152 JPR 115, (1989) 88 Cr App R 10. The *Tesco* principle, it is submitted, is too restrictive and ill-tuned to the nature of corporate behaviour. In larger companies top

- (2) the corporation has been at fault in one or other of the following ways:
- (a) by having a policy that expressly or impliedly authorises or permits the commission of the offence or an offence of the same type;
  - (b) by failing to take reasonable precautions or to exercise due precautions to prevent the commission of the offence or an offence of the same type;
  - (c) by having a policy of failing to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence; or
  - (d) by failing to take reasonable precautions or to exercise due diligence to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence.

This approach has three key features. First, vicarious liability is imposed in relation to the external elements of an offence but not in relation to the mental element. Secondly, liability in relation to the mental element is not based on the *Tesco* principle but on the concept of organisational blameworthiness, as reflected by a corporate policy of non-compliance<sup>28</sup> or a failure to take reasonable precautions and to exercise due diligence.<sup>29</sup> Thirdly, liability is extended to cases of reactive corporate fault.

Under the approach suggested, a corporation is taken to be blameworthy as an organisation where it has a policy of non-compliance with the law, or where it has been negligent in failing to comply with the law.

Corporate policy is the corporate equivalent of intention,<sup>30</sup> and a company that conducts itself with an express or implied policy of non-compliance with a criminal prohibition exhibits corporate criminal intentionality. It is therefore false to assume that the idea of a guilty mind "has no meaning when applied to a

managers are typically far removed from the scene; see J. Coffee, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response" (1977) 63 *Virginia L Rev* 1099.

28 See further P. French, *Collective and Corporate Responsibility* (1985), ch 4; B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California L Rev* 1141, 1190-91.

29 Compare Trade Practices Act 1974 (Cth), s 85; *Videon v Barry Burroughs Pty Ltd* (1981) 37 ALR 365; *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531. See further Note, "Developments in the Law - Corporate Crime: Regulating Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions" (1979) 92 *Harvard L Rev* 1227, 1257-1258.

30 See P. French, *Collective and Corporate Responsibility*, ch4; P. Nonet, "The Legitimation of Purposive Decisions" (1980) 68 *California L Rev* 263; Canada, Law Reform Commission, Working Paper 16, *Criminal Responsibility for Group Action*, 20.

corporate defendant, since an organization possesses no mental state".<sup>31</sup> Nor can the concept of corporate criminal intentionality be dismissed as a "metaphorical" notion:<sup>32</sup> the concept is not based on the metaphor of the human mind but on the real phenomenon of corporate policy.

The concept of negligently failing to comply with the law is also applicable to a corporation as a collectivity.<sup>33</sup> Corporations perform corporate roles in society and have collective capacities. Accordingly, they are subject to distinctively corporate standards of care.<sup>34</sup>

Although it is possible to define corporate fault in terms of corporate policy and corporate negligence, the worry is that corporations will develop compliance systems that look immaculate on paper but which are not meant to be taken seriously by their personnel.<sup>35</sup> One solution is to recognize that corporation may have an implied policy of non-compliance and to deem that a company has an implied policy of non-compliance in a defined range of situations.<sup>36</sup> Thus, a policy of non-compliance could be deemed to exist where an employee connected with the commission of the offence charged has reason to believe that the company expected him to act as he did and that complaining about the matter would be ineffective or would provoke retaliatory action against him. There would also be merit in a rule that a company is deemed to have a policy of non-compliance where the company has failed to have in place a system whereby employees could report suspected or anticipated episodes of non-compliance directly to top management. It will be noticed that these suggested solutions avoid looking at a company's policies and procedures from

- 
- 31 Compare Note, note 29 *supra*, 1241. Compare also *The King v. Grubb* [1915] 2 KB 683, 690; J. Smith and B. Hogan, *Criminal Law* (6th ed.), 170.
  - 32 Compare the observation of the Gibbs Committee at 26.14: "Metaphorical arguments as to the mind of the corporation are, it is suggested, unrealistic in days where large corporations are the rule rather than the exception."
  - 33 J. Andrews, "Reform in the Law of Corporate Liability" [1973] *Crim L Rev* 91 at 97; Note, note 29 *supra*, 1257-1258.
  - 34 It is sometimes said that the question is whether due care has been taken by individual superior officers (see e.g., *R. v. HM Coroner for East Kent, ex parte Spooner* (1987) 152 JPR 115, (1989) 88 Cr App R 10; *R. v. City of Sault Ste Marie* (1978) 40 CCC(2d) 353, 377-378) but since the criminal liability in question is that of the company it is submitted that such an approach is incorrect.
  - 35 Consider e.g., *Australian Stevedoring Industry Authority v. Oversea and General Stevedoring Co Pty Ltd* (1959) 1 FLR 298. The classic example is General Electric's antitrust compliance policy as honoured more in the breach than the observance in the heavy electrical conspiracy cases; see R. Smith, *Corporations in Crisis*, chs 5-6.
  - 36 Compare S. Kreimer, "Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction" (1976) 86 *Yale LJ* 317.



a limited "top-down" perspective.<sup>37</sup> The focus is not merely on the proclamations about compliance made at the level of the board of directors or top-level management but on the perceptions of the middle- and lower-level employees by whom the external elements of corporate offences are typically committed.

The role of the concept of reactive corporate fault should also be taken into account.<sup>38</sup> Reactive fault is fault in failing to respond satisfactorily to the commission of the external elements of an offence, as where no action is taken to rectify unsafe procedures after being advised of an unjustified violation of some prohibition. One reason for making reactive fault a basis of corporate criminal liability is that corporate blameworthiness often depends not so much on a corporation's behaviour at the time of committing the external elements of an offence as on the adequacy or otherwise of a corporation's response to having committed those external elements. Communal attitudes of resentment intensify if corporations fail to react diligently where their activities have led to unjustified harm-causing or risk-taking;<sup>39</sup> it is highly provocative for a company to remain inactive despite having been put on notice that responsive action is required.<sup>40</sup> Moreover, the concept of reactive corporate fault grows directly out of the extensive reliance placed on civil modes of enforcement in corporate regulation. The perception prevalent among enforcement agencies is that enforcement depends initially upon civil measures and that criminal prosecutions are needed mainly where a company has inexcusably failed to comply with warnings, enforcement notices or other civil measures.

Another consideration in favour of recognition of the concept of reactive corporate fault is ease of proof. It is rare to find a company displaying a criminal policy at or before the time of commission of the external elements of an offence: companies usually have in place general compliance policies proclaiming a stance of full compliance with the law, together with compliance procedures that manifest the taking of reasonable precautions. Compare the position if the time-frame of inquiry is extended so as to include a company's reactions to the commission of the external elements of an offence. What matters then is not the company's general compliance policies and procedures, but its specific policy and programme for undertaking internal discipline or preventive reform. This means that a corporate policy of non-compliance (or a

---

37 Compare the "top-down" orientation apparent in *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153.

38 B. Fisse, note 28 *supra*, 1183-1213.

39 B. Fisse and J. Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983), 270-271.

40 Management by exception (most corporate affairs are treated as routine matters for inferiors unless a significant problem arises) is a feature of organisational life; see L.R. Bittel, *Management by Exception* (1964) H. Mintzberg, *The Structuring of Organizations* (1979), ch 21.

negligent corporate compliance programme) can be exposed more readily than would otherwise be the case: if a company is placed on notice that it is expected to react by creating and implementing a convincing and responsive programme of preventive action, failure to comply within a specified feasible time would usually reveal a corporate policy of non-compliance, or at least a negligent corporate failure to promote compliance.

The approach outlined above is discussed more fully elsewhere.<sup>41</sup>

## B. TESCO PRESERVED IN AN EXTENDED AND ILL-DEFINED MANNER

A sufficient basis of corporate criminal liability under the Gibbs Committee proposals is that the conduct alleged has been engaged in by a "controlling officer" (s.4BA(3)(a)). This approach echoes the *Tesco* principle except that "controlling officer" is broadly defined and extends the scope of liability beyond the range of officers or other representatives who attract corporate criminal liability under *Tesco*.

Section 4BA, in relevant part provides:

- (3) For the purposes of a proceeding against a body corporate for an offence against a law of the Commonwealth:
  - (a) conduct engaged in by a controlling officer of the body corporate acting within the scope of his or her office, employment or engagement and, where relevant, the state of mind of that person in relation to that conduct, are to be attributed to the body corporate ...

It is difficult to follow the reasoning given by the Gibbs Committee for this basis of liability. In paragraph 26.8 the *Tesco* principle is rejected on two grounds. The first is that the narrow *Tesco* test does not adequately provide for the case of large corporations, where the involvement of management in an offence is much more likely to be demonstrable at say the level of a branch or district manager level than at head office level. Secondly, it is said that the *Tesco* principle "did not reflect corporate fault in the sense of organisational blameworthiness, but merely provided for vicarious liability for the conduct or fault of a restricted range of representatives." Section 4BA(3)(a) reflects the first of these two concerns about *Tesco* but is inconsistent with the second. Section 4BA(3)(a) extends the scope of the *Tesco* principle without in any way overcoming the problem that a corporation is not necessarily at fault merely because one representative happens to perform the elements of an offence: the conduct or fault of one representative of a company is the conduct or fault of one representative of a company. Later, in par 26.14, it is said that "if a corporation entrusts the control of part of its business and organisation to a person, it is reasonable that criminal responsibility be imposed on it for the actions of the manager within the scope of his or her office". This assertion

---

<sup>41</sup> B. Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model" in Faculty of Law, University of Sydney, *Centenary Essays* (1991, forthcoming).

begs the question of corporate blameworthiness. It does not justify the departure from the model provided by s.65(2) of the Ozone Protection Act. Worse, it advances a primitive concept of vicarious liability that violates the customary principle that criminal liability for serious offences requires fault in some genuine form.

Apart from preserving *Tesco* in a new guise, s.4BA(3)(a) introduces the problematic concept of "controlling officer". A "controlling officer" is defined as a person who has authority to determine, or actual control over:

- (a) the general conduct of the affairs or activities of the body corporate; or
- (b) the conduct of the part of the business of the body corporate in which a particular act is done.

Little has been learnt, it seems, from the trouble that courts and practitioners have had in working out the obscurities of the *Tesco* notion of a "directing mind".<sup>42</sup> Section 4BA(3)(a) introduces similar mysteries. What if the authority of a director or manager is circumscribed by a direction requiring approval from the board? What is meant by "actual control" in such case? Another set of problems is created by the phrase "part of the business in which a particular act is done". How is one to characterise the function performed by a clerical officer who is in charge of the day to day preparation of financial or tax records? In one sense he or she may be in actual control of "the part of the business" in which a particular act leading to prosecution occurs. But is so minor an employee a "controlling officer"? If the answer is "Yes", the effect of s.4BA is to impose vicarious liability under faint disguise. If the answer is "No", where exactly is the dividing line to be drawn? The weakness of the Gibbs Committee proposal at this point is that no adequate guidance is given as to what one is supposed to be looking for: the rationale is opaque and possibly non-existent. Although the Committee seems to accept that responsibility in large scale modern organisations is typically highly diffused, the notion of "controlling officer" defies that empirical reality by trying to single out a "controlling officer", or possibly some undefined class or plurality of controlling officers. Compare s.65(2) of the Ozone Protection Act. That section avoids the mire of concepts such as "controlling officer" and focuses on the central issue of whether the corporation was at fault in failing to prevent the conduct or events that have resulted in prosecution.

### C. "COMMUNICATION" AS AN UNPRINCIPLED AND CAPRICIOUS BASIS OF LIABILITY

Another odd and unsatisfactory feature of the Gibbs Committee proposals is that vicarious liability is imposed where the relevant conduct consists of a "communication" by an authorised agent. Section 4BA(6) is as follows:

- (6) Notwithstanding the preceding provisions of this section, for the purposes of a proceeding against a body corporate for any offence against a law of

---

<sup>42</sup> See note 8 *supra*.

the Commonwealth, conduct by way of communication in relation to a matter engaged in by a person who is an authorised agent of the body corporate in relation to that matter and, where relevant, the state of mind of the agent in relation to that communication, are to be attributed to the body corporate.

"Authorised agent" is defined to mean a person with either actual or apparent authority.

The explanation given for s.4BA(6) emerges from several paras:

26.16 ... a problem frequently encountered in the administration of the Commonwealth criminal law in relation to corporations was that false claims for benefits, subsidies and the like or other communications were sometimes signed by very junior employees of the corporation (one instance cited was signature by the receptionist). In the absence of special statutory provisions, difficulties could be experienced in proving to a criminal standard that the signatory had been authorised to sign. Older Commonwealth Acts sought to deal with this problem by requiring the appointment of a public officer to act in the name of the company: see Section 51 of the Income Tax Assessment Act 1915 (Cth), but later Acts recognised that returns might be signed on behalf of a corporation by any director, servant or agent: Income Tax Assessment Act 1936 (Cth), section 230 (since repealed). The Taxation Administration Act 1953 (Cth) now contains a provision (section 8ZD) to the general effect of [a provision such as s.65 of the Ozone Protection Act].

26.22 The Review Committee has concluded that, in relation to any offence, where a corporation has authorised a person to communicate to other persons on its behalf in relation to a matter or has conducted itself so as to give other persons reason to believe that a person is authorised by the corporation to so communicate, the conduct of such person, in so far as he or she engaged in communication in relation to the matter and, where relevant, the state of mind of the person in making the communication, are to be attributed to the corporation.

26.23 Thus, a corporation would be made criminally responsible for communications in its name without proof of actual authority, but as an inference from its conduct in relation to the person making the communication. The justification for this is the difficulty that a person outside a corporation will in many cases have (particularly in the case of a large corporation) in establishing actual authority. The person making the communication may not have sufficient status to qualify as a controlling officer and thus attract the first basis of liability described in paragraph 26.13.

The first criticism to be made is that the explanation given by the Gibbs Committee for s.4BA(6) focuses on the difficulty of proving that the relevant agent was authorised to make the communication that gives rise to prosecution. Few would quarrel with the proposition that liability should be imposed on the basis of actual or apparent authority. It is an entirely separate and more fundamental issue whether vicarious liability should be imposed in cases of the kind covered by s.4BA(6). Nothing in the explanation given by the Committee justifies the departure from the model of s.65(2) of the Ozone Protection Act, reference to which is made in par 26.16. Under s.65(2) it is a defence that the defendant took reasonable precautions to prevent the offence. There is no such defence under s.4BA(6).

A second criticism is that the concept of communication results in an arbitrary dividing line between vicarious liability and liability on the other bases

set out in s.4BA. This is apparent from the capricious results that s.4BA would produce in the context of s.16 of the Cash Transaction Reports Act 1988 (Cth).

Section 16 of the Cash Transaction Reports Act provides in relevant part as follows:

- 16.(1) Where:
- (a) a cash dealer is a party to a transaction; and
  - (b) the cash dealer has reasonable grounds to suspect that information that the cash dealer has concerning the transaction:
    - (i) may be relevant to investigation for an evasion, or attempted evasion of a taxation law;
    - (ii) may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a Territory; or
    - (iii) may be of assistance in the enforcement of the Proceeds of Crime Act 1987 (Cth) or the regulations made under that Act; the cash dealer, whether or not required to report the transaction under Division 1, shall, as soon as practicable after forming that suspicion;
      - (c) prepare a report of the transaction; and
      - (d) communicate the information contained in the report to the Director.
- (2) The report shall:
- (a) be prepared in the approved form;
  - (b) contain the reportable details of the transaction;
  - (c) contain a statement of the grounds on which the cash dealer holds the suspicion referred to in subsection (1); and
  - (d) be signed by the cash dealer.
- (3) The communication shall be made to the Director:
- (a) by giving the Director a copy of the report; or
  - (b) in such other manner and form as is approved by the Director, in writing, in relation to the cash dealer or to a class of cash dealers that includes the cash dealer.
- (6) In this section:
- "reportable details", in relation to a transaction, means the details of the transaction that are referred to in Schedule 4.

Consider the following test cases:

- (1) A suspect transaction report is communicated to the CTRA by a supervisor acting with apparent authority but in a manner that does not comply with the reportable details of the transaction. The employer, Omnibank, has taken all reasonable precautions to prevent supervisors and other employees from not complying with s.16.
- (2) A suspect transaction report is not communicated to the CTRA by a supervisor in circumstances where a report should be filed under s.16. The employer, Omnibank, has taken all reasonable precautions to prevent supervisors and other employees from not complying with s.16.

The result in case (1) under the Gibbs Committee proposals is that Omnibank would be liable. There is a communication by an authorised agent that gives

rise to prosecution and hence s.4BA(6) applies. Under s.4BA(6) it is irrelevant that the bank has taken reasonable precautions: the provision imposes vicarious liability.

By contrast, the result in case (2) under the Gibbs proposals is that Omnibank would not be liable. There is no communication and hence s.4BA(6) does not apply. Liability is governed by s.4BA(3). Assuming that the supervisor is not a "controlling officer", then s.4BA(3)(b) applies. Under s.4BA(3)(b) Omnibank would be entitled to an acquittal on the basis that it did in fact take reasonable precautions.

The new "communication" head of liability under s.4BA(6) is thus both unprincipled and irrational in operation. In my view, s.4BA(6) should be scrapped.

#### D. "INTENTION TO HARM" OR "CONCEAL HARM" AS AN EXCESSIVE RESTRICTION

Section 4BA(7) excludes corporate criminal liability where the conduct alleged was performed by a person who acted with "the intention of doing harm, or concealing harm done by him or her or by another person, to the body corporate". This limitation is not clearly defined and, depending on what it is taken to mean, may be too generous to corporations.

The position is unclear where an employee acts partly with intent to benefit the company and partly in order to harm it. For instance, an employee may receive a corrupt payment partly with intent to benefit the company as a result of the deal for which the bribe has been paid, and partly with intent to harm the company by not accounting for a secret profit. Section 4BA(7) is open to the possible interpretation that corporate liability is precluded in such a case: the employee was acting with an intent to harm the company. It is difficult to understand why liability should be precluded in such situation.

Dispute may also arise as to the meaning of "intention". Does intention include knowledge of likelihood or substantial risk?<sup>43</sup> If so, then s.4BA(7) conceivably could have the effect of excluding corporate liability where, for instance, an employee commits a tax offence in the hope of saving the company money and yet in the realisation that there is a substantial risk of detection and hence of harm resulting to the company through prosecution. Such a result would be perverse but is perhaps countenanced by the wording of s.4BA(7).

The aim of s.4BA(7), it seems,<sup>44</sup> is to exclude corporate liability in cases where an employee or agent acts within the scope of apparent authority and yet in a manner aimed solely at benefiting the employee or agent.<sup>45</sup> If so, it would be preferable to express the limitation in those terms.

43 Compare the proposed s.3F, which advances an elliptical definition of "intention" that fails to indicate what the position is in relation to consequences.

44 The rationale is not stated in the *Interim Report*: compare paras 25.25, 26.24.

45 Compare *Canadian Dredge & Dock Co Ltd v. The Queen* (1985) 19 CCC (3d) 1.

#### IV. THE MENTAL ELEMENT OF PRESCRIBED INTEREST OFFENCES

In *Stewart v. Von Lieven*<sup>46</sup> it was held by McInerney J. that the prescribed interest offences under s.169 and s.174 of the Companies (New South Wales) Code<sup>47</sup> impose absolute liability notwithstanding the possible jail term of five years.<sup>48</sup> This draconian decision has now been over-ruled by the Court of Appeal of New South Wales in *Von Lieven v. Stewart*<sup>49</sup> and the companion case of *Kemish v. Godfrey*.<sup>50</sup> It was held that the prescribed interest offences do not require intention or knowledge but that an accused has available the *Proudman v. Dayman* defence of reasonable mistaken belief. The decision is important for promoters who try to by-pass the requirement of a registered prospectus. The decision is also an instructive example of the difficulties the courts still encounter when interpreting the fault requirements in statutory offences.

The leading judgment in *Von Lieven v. Stewart* and *Kemish v. Godfrey* was delivered by Handley J.A. (with Mahoney J.A. concurring, and Clarke J.A. concurring in relation to Handley J.A.'s analysis of the mental element of the substantive offences). His Honour rejected the argument that the prescribed interest offences required intention or recklessness, on various grounds.

One major reason given for rebutting the common law presumption of intention or recklessness was that the offences were not criminal "in a real sense":

Section 169 prohibits the relevant acts being done except by companies as defined or their agents authorised under seal. Conduct which is lawful when carried out by such companies or their appropriately authorised agents cannot become criminal in any real sense when carried out by agents not so authorised or by or on behalf of other companies.

So far as s.170(1) is concerned the gravamen of the offence is the failure to register a relevant statement in writing with the Commission. This offence can be committed before such a statement has been registered and also when such a statement is never registered. The distinction between conduct which contravenes the section because it takes place prior to registration, and the same conduct after registration is significant for legal purposes but it is difficult to describe the former conduct as criminal.

The section will be contravened even though members of the public who are offered or invited to subscribe for prescribed interests receive a copy of a statement in writing which although unregistered otherwise complies with the Code and has been prepared honestly and carefully. Honest and careful behaviour

---

46 (1988) 14 NSWLR 537.

47 And s.43 of the Securities Industry (New South Wales) Code.

48 The issue of interpretation discussed here also arises under the Corporations Act 1989 (Cth), s.1605(1).

49 (1990) 8 ACLC 1014.

50 No 40289/90. It should be disclosed that the author appeared as junior counsel on behalf of the Applicant.

which is unlawful merely because a document has not been registered with a public official is hardly criminal.

Section 171(1) prohibits the issue etc. of prescribed interests unless there is in force, in relation to the interest, a deed which is an approved deed. The proscribed conduct is unlawful even though the scheme is honest and sound, and regulated by a deed which complies with the Code in all respects except that it has not been approved by the Commission. While the absence of the relevant approval renders the defined conduct unlawful, once again it can hardly be said to make it criminal.

...

... despite the maximum penalties provided by s. 74(1), in my opinion the sections in the words of Gibbs C.J., (approved by Mason J.) in *He Kaw Teh v. The Queen* (1985) 157 CLR 523 at 530 "deal with acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty".

A second major reason for rebutting the common law presumption of intention or recklessness was that the legislation would be ineffective if the prosecution were required to prove a subjectively blameworthy mental state on the part of the accused:

In my opinion the evident purpose of Div 6 demonstrates that Parliament intended to strictly control the circumstances in which prescribed interests would be issued to the public. Section 169 limits this activity to companies as defined and their agents appropriately authorised. Sections 170(1) and 171 forbid the activity unless an appropriate statement in writing has been registered by the Commission and an approved deed is in force. Heavy sanctions for contravention are provided.

One may readily conclude that the Parliament did not intend to make knowledge of the circumstances in which the physical acts were done an essential element of these offences.

Proof of the constituent facts in these offences is already a difficult and complex task. Proof that an alleged offender had knowledge of all these facts at the time would be extremely difficult. Such a construction would, in my opinion, seriously hamper the enforcement of these sections by criminal proceedings. ...

... A construction of the statute which does not impose on the prosecution an original obligation to prove mens rea materially assists in the enforcement of these sections, and casts on companies and their executives an effective and enforceable obligation to ensure that they are complied with.

Nonetheless, it was held that a common law defence of reasonable mistaken belief is available:

...the conclusion that these offences are penal rather than strictly criminal does not necessarily lead to the further conclusion that there is no requirement of mens rea. There still remains a presumption that mens rea is an essential ingredient in these offences, and since the decision in *He Kaw Teh v. The Queen* (1985) 157 CLR 523 the presumption is a strong one. See at pages 528-9, 552, 554, 565-6, 591 and 594. In the words of Brennan J. at 567:

"It requires clear language before it can be said that a statute provides for a person to do or to abstain from doing something at his peril and to make him criminally liable if his conduct turns out to be prohibited because of circumstances that that person did not know ...".

...if the sections are construed so that criminal responsibility depends upon the absence of an exculpatory belief on the part of an offender the prosecution's task will be significantly simplified but "luckless victims" will not be penalised. A person who engages in the prohibited conduct after he has been informed by his



solicitor or by a public official that a deed has been approved or a statement in writing registered would not be criminally responsible if he believed on reasonable grounds what he had been told. Similarly a sales person who thinks that he is dealing with an existing investor when there is a reasonable mistake as to identity, or who approaches a person reasonably but mistakenly thought to possess some special character which would prevent the offer or invitation being one to the public would not incur criminal responsibility for having acted under those mistakes.

The common law presumption that a defence of reasonable mistaken belief is available was not rebutted by the provision of roughly comparable statutory defences in ss14, 229, 375 and 556 of the *Companies Code*. Justice Handley rejected the contrary view taken by McInerney J.<sup>51</sup>

... the sections referred to do not specifically incorporate this ground of exculpation. Section 14(3) creates a statutory *defence* in similar terms under which the legal onus is on the accused. The defence under s.229(9) appears to have no application to reasonable mistaken beliefs on the part of the accused. Section 375(9) and (10) penalise certain acts or omissions done without reasonable excuse. However the onus of proof is on the prosecution in each case and grounds of exculpation are not limited to reasonable mistaken beliefs. Finally s. 556(2)(b) allows a *defence* based on reasonable mistaken beliefs but again it is a true defence and the onus of proof is on the accused.

Moreover, there is considerable support in *He Kaw Teh v. The Queen* (above) at pages 557-8 and 594 for the proposition that the existence of express requirements for some form of *mens rea* in other provisions of the same statute is of little weight in determining whether any and what mental element is impliedly required in other offences. The considerations referred to by His Honour involve an application of the *expressio unius* principle. This is that the express statement of a matter in some circumstances excludes any implied statement of the same matter in other circumstances. However as the High Court said in *Hussein v. Under Secretary Department of Industrial Relations* (1982) 148 CLR 88 at 94:

"That maxim must always be applied with care, for it is not of universal application and applies only where the intention it expresses is discoverable upon the face of the instrument. ... It is a valuable servant but a dangerous master".

Justice Handley also rejected the opinion expressed by McInerney J.<sup>52</sup> that the defence of reasonable mistake of fact would create undue difficulty of proof for the prosecution:

This ground of exculpation is ... a narrow one and is only available where the defence introduces evidentiary material either by cross-examination or in the defence case to establish that the defendant acted under a mistaken belief which was both reasonable and relevant to culpability. Once such material is introduced the ultimate onus lies upon the prosecution to negative the existence of such a belief.

The effective enforcement of these provisions does not require that those who only contravene because of reasonable mistakes of fact should be penalised and I am unable to discern Div 6 any intention that this should happen.

---

51 (1988) 14 NSWLR 537 at 546.

52 *Ibid.*

If the promoters have substantially complied with Div 6 there is little public interest in penalising those who contravene only because of mistakes. On the other hand if the promoters have not substantially complied with or attempted to comply with Div 6 prosecutions can and should be brought on that basis. In such circumstances mistakes of fact will not exculpate because the promotion as a whole will be illegal.

His Honour added that it was increasingly difficult for promoters to avoid Div 6 by arranging a private issue.<sup>53</sup> Moreover, criminal proceedings were not to be seen as the best or primary method of enforcing Div 6:

In my opinion the effective method of enforcement is by civil proceedings for injunctions which can shut down illegal activity very quickly and *before* investors have parted with their money. Given adequate resources and reasonable diligence and efficiency on the part of the enforcement authorities it should be possible to quickly detect and shut down illegal schemes which attempt to use the media. Illegal schemes promoted directly by canvassers and sales persons will take longer to detect but are less likely to attract significant investment except over a much longer period. One also suspects that it would be far more expensive to attempt to raise funds from the public in this way.

His Honour later observed that ignorance or mistake of law was no defence and hence it would not be enough for a defendant merely to entertain a reasonable mistaken belief that the transaction was unregulated or that the prescribed interest provisions had been complied with: to provide a defence, the reasonable mistaken belief must relate to a factual situation, such as whether a deed had in fact been approved by the CAC.

The clarification of the law in *Von Lieven v. Stewart* is, with respect, welcome. The decision also raises a number of issues that may require further exploration:

- (1) The Australian courts have yet to consider in any detail the approach taken by the New Zealand Court of Appeal in *Millar v. Ministry of Transport*.<sup>54</sup> Under the approach taken in *Millar*, knowledge (or wilful blindness) is the relevant basis of liability but only if the defendant pleads lack of knowledge and satisfies the evidentiary burden of providing sufficient evidence in support. *Von Lieven v. Stewart* proceeds on the basis that the common law presumption of intention or recklessness is rebutted because of the difficulty of requiring the prosecution to prove knowledge. That difficulty could be relieved by making the element of intention or recklessness an issue only where a defendant is able to furnish credible evidence of absence of intention or recklessness.
- (2) It remains unclear what exactly is meant by the test whether an offence is "criminal in the real sense". In *Von Lieven v. Stewart* it is stressed that the offences in issue are not criminal in the real sense because they can be committed in situations where there is no dishonesty. A contrary

---

<sup>53</sup> Compare *Hurst v. Vestcorp Limited* (1988) 12 NSWLR 394.

<sup>54</sup> [1986] 1 NZLR 660.

possible interpretation, with respect, is that the offences are criminal "in the real sense" because in reality they are not concerned primarily with technical or innocent breaches but are aimed above all at dishonest scams. On this interpretation, the sentence of imprisonment has been authorised in order to provide a form of punishment commensurate with the typical kinds of dishonest investment schemes against which the legislation is primarily aimed. If the offences were merely of a technical or administrative nature there would be little or no justification for authorising a sentence of imprisonment: a fine or a term of community service would suffice. The absence of any explicit requirement of dishonesty may be explained on the basis that it would be too demanding to expect the prosecution to prove dishonesty. It does not follow from that concession to expediency that the offences also dispense with the need for intention, recklessness or some other subjectively blameworthy state of mind.

- (3) The desirability of differentiating between corporate criminal liability and individual criminal liability was expressly recognised in *Von Lieven v. Stewart*. Justice Handley pursued the possibility of adopting an interpretation that would confine the operation of strict liability to corporate defendants but was obliged by the statutory provisions to hold otherwise:

Section 164(1) contains a special definition of company for the purposes of Div 6, so that in general only a public company may do the relevant acts. In some circumstances one might construe sections such as 169 as directed only to principals, and not to persons who act as servants or agents. Compare *Ex parte Rowston; re Roddy*.<sup>55</sup> In one sense only a principal can "issue" prescribed interests and any offer or invitation is really that of the principal, although it may be communicated by some servant or agent. If such a construction was open, a conclusion that the offences were ones of strict liability would not have harsh consequences for the servants or agents of the principal, because the offences of secondary participation of which they might be guilty would require proof of intent with knowledge of the relevant facts.

However desirable such a construction might be it is not available in respect of s.169. The section specifically exempts agents of a company authorised for that purpose under its common seal. This exemption presupposes that the offence can be committed by agents as well as by principals. In particular it presupposes that although a company as defined which did the relevant acts could not contravene the section, its agents who did the same acts would do so unless appropriately authorised.

- (4) The interpretation adopted in *Von Lieven v. Stewart* means that principal offenders can be convicted on the basis of an honest but unreasonable mistake of fact. By contrast, accomplices are subject to liability only if they know all the essential matters constituting the principal offence.<sup>56</sup>

55 (1959) 76 WN (NSW) 374.

56 *Giorgianni v. R* (1985) 156 CLR 473.

It may be fortuitous in the context of corporate dealings in prescribed interests whether a given individual employee happens to be a principal or an accomplice. Yet the basis of liability is significantly different. The risk of fickle variation in the basis of liability would be minimised if the common law presumption of intention or recklessness were upheld in relation to principal offenders.

- (5) Presumably the defence of reasonable mistake of fact does not apply where civil proceedings are based on violations of the proscribed interest offences. There is no obvious reason why the fault requirements for the purpose of civil liability should parallel those required for criminal liability. Absolute liability may well be appropriate for the purpose of civil remedies, as in the context of injunctive relief against potentially harmful unregistered investment schemes. There is authority to support the proposition that the mental element of civil and criminal liability should be determined separately: *Hurst v. Vestcorp Ltd*,<sup>57</sup> *United States v. United States Gypsum Co.*,<sup>58</sup> but see *Waugh v. Kippen*.<sup>59</sup> This approach is consistent with a purposive interpretation: the compensatory or remedial purpose of the legislation is served by imposing absolute liability where civil liability is relevant; the deterrent and punitive aims of the legislation are served by adhering to the customary common law principles of liability where criminal liability is in issue.
- (6) The line of statutory interpretation followed in *Von Lieven v. Stewart* proceeds on the footing of *He Kaw Teh v. The Queen*. In *He Kaw Teh v. The Queen* the judgments pay almost no attention to the application of the canon of statutory construction that genuine ambiguity in penal statutes is to be resolved in favour of a narrow construction.<sup>60</sup> In contrast, the later High Court decision in *Murphy v. Farmer*<sup>61</sup> depended on the application of this canon of interpretation; see also *O'Sullivan v. Lunnon*<sup>62</sup>, *Waugh v. Kippen*; *Beckwith v. R.*<sup>63</sup> It remains unclear why the canon of strict construction of penal statutes is applied to some ambiguously defined offences and yet not to others. Genuine ambiguity arose in *He Kaw Teh v. R* just as it did in *Murphy v. Farmer*. Genuine ambiguity also infected the prescribed interest offences construed in *Von Lieven v. Stewart*. The High Court has yet to resolve the puzzle it has created.

---

57 (1988) 13 ACLR 17, 26 per Kirby P.

58 (1978) 438 US 422, 436-443.

59 (1986) 160 CLR 156, 165.

60 (1985) 157 CLR 594 per Dawson J.

61 (1988) 165 CLR 19, 28.

62 (1987) 163 CLR 545, 553 per Brennan J.

## V. THE NEW OFFENCE OF SMURFING

Section 31 of the Cash Transaction Reports Act (Cth) makes it an offence to conduct transactions so as to avoid reporting requirements under the Act. This is a new offence of largely indigenous origin. The section provides as follows:

- 31.(1) A person commits an offence against this section if:
- (a) the person is a party to two or more non-reportable cash transactions; and
  - (b) having regard to:
    - (i) the manner and form in which the transactions were conducted, including, without limiting the generality of this, all or any of the following:
      - A. the value of the currency involved in each transaction;
      - B. the aggregated value of the transactions;
      - C. the period of time over which the transactions took place;
      - D. the interval of time between any of the transactions;
      - E. the locations at which the transactions took place; and
    - (ii) any explanation made by the person as to the manner or form in which the transactions were conducted; it would be reasonable to conclude that the person conducted the transactions in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the currency involved in the transactions was transferred in a manner and form that:
      - (iii) would not give rise to a significant cash transaction; or
      - (iv) would give rise to exempt cash transactions.
- (2) A person commits an offence against this section if:
- (a) the person conducts two or more non-reportable transfers of currency; and
  - (b) having regard to:
    - (i) the manner and form in which the transfers were conducted, including, without limiting the generality of this, all or any of the following:
      - A. the value of the currency involved in each transfer;
      - B. the aggregated value of the currency involved in the transfers;
      - C. the period of time over which the transfers occurred;
      - D. the interval of time between any of the transfers;
      - E. the locations at which the transfers were initiated or conducted; and
    - (ii) any explanation made by the person as to the manner or form in which the transfers were conducted;

it would be reasonable to conclude that the person conducted the transfers in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that no report in relation to the currency involved in the transfers would be made under section 15.

- (3) A person who commits an offence against this section is punishable, upon conviction by:
- (a) if the offender is a natural person - a fine not exceeding \$10,000, or imprisonment for a period not exceeding 5 years, or both; or
  - (b) if the offender is a body corporate - a fine not exceeding \$50,000.

A number of difficulties arise:

- (1) The mental element of the offence does not require intention or recklessness as to the structuring of transactions in such a way as to get around the reporting requirements. An objective test is imposed, namely that it is reasonable to conclude from the matters stipulated in s.31(1)(b)(i) and (ii), or s.31(2)(b)(i) and (ii), that the dominant purpose was to evade the reporting requirements. This objective test cuts against the grain of the traditional requirement for serious offences that the accused must entertain a subjectively blameworthy state of mind. The corresponding offence under US federal law, by contrast, requires knowledge and intention to evade,<sup>64</sup> a basic difference utterly misrepresented by the implication in the Explanatory Memorandum that the US counterpart is very similar.<sup>65</sup>
- (2) The "reasonable to conclude" test is odd. The test is not that of a reasonable person in the position of the accused. Nor is it that of a reasonable person in the position of the other party to the transaction. Rather, the test is whether the inference can reasonably be drawn from the factors specified in the section that the objective dominant purpose of the person was to evade the reporting requirements. There is no need for proof that the accused in fact intended to evade the reporting requirements. It is unclear whether there must be proof beyond reasonable doubt that the major object served by the transactions was evasion of the reporting requirements. Perhaps it is sufficient that the trier of fact is able to come reasonably to that conclusion. In either event, the test to be applied by the trier of fact is confusing. It is difficult to see why the section is not defined in a more orthodox way. One possibility would be to require proof beyond reasonable doubt of an intention to evade the reporting requirements. Another would be to provide a less serious offence of engaging in transactions where there is reason to believe that the defendant has an intention to evade the

---

64 See S. Welling, "Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions" (1989) 41 *Florida L Rev* 287.

65 *Id.*, 27-28.

reporting requirements and to provide an affirmative defence of lack of intention to evade those requirements.

- (3) Section 31 follows the principle of juristic personality and hence treats individuals and corporations together under the same head of liability. No attempt is made to differentiate between the mental element of the offence in the context of corporate defendants and the mental element applicable to individual defendants. A more stringent basis of liability might well be appropriate in the context of corporations.
- (4) No attempt is made in s.31 to differentiate between civil and criminal liability, and to use different fault requirements for each form of liability. The objective test of liability imposed under the section may be defensible for the purpose of civil liability but, as discussed in (1) above, is too stringent for serious criminal offences, at least in the context of individual defendants.
- (5) The scope of liability is ill-defined. Apart from the uncertainty surrounding the concept of "dominant purpose", the section is vacuous on the key question of what exactly banks and other cash dealers are supposed to do to keep track of deposits made at their various branches. If a bank has a computer-based tracking capability that enables it instantaneously to aggregate all deposits made at any branch within say a 24 hour period, then it may well be "reasonable to conclude" on the basis of the information available to that bank that the sole or dominant purpose of the customer was to evade the reporting requirements. On the other hand, if a bank does not have such a computer-based capacity, perhaps it is unreasonable to arrive at the same conclusion. Section 31 fudges the most critical question here, which is whether or not banks are expected to install systems that will enable aggregation of deposits made at all branches, whether instantaneously or within a daily or other period. Many financial institutions in Australia do not presently have the capacity to aggregate deposits at all branches even on a daily basis. If they are expected to acquire some greater capacity, there is an element of unfairness in making them run the gauntlet of a vaguely defined penal provision. Installing adequate systems takes time and systems cannot sensibly be installed until it is known what exactly the expected standards of aggregation are. It is therefore instructive to compare the aggregation regulation recently proposed by the US Treasury. Under the proposed regulation certain categories of financial institution would be required to have the capacity to aggregate client deposits on a business day basis.
- (6) It is unclear at what point of time the "reasonable to conclude" test is to be applied to the conduct of the defendant. If the relevant point of time is the moment when the defendant was a party to a transaction covered by the section, then the provision seems unduly lenient and ill-suited to

the purpose of controlling smurf support by banks. It would usually take some time after the transaction for a bank to check what other deposits have been made by a client, whether at the same branch or at other branches. It follows that, at the time of the transaction, it would usually be unreasonable to conclude that the client was engaged in smurfing. Since this interpretation makes almost a mockery of the provision from the standpoint of controlling the behaviour of banks, perhaps the "reasonable to conclude" test is to be applied at some unspecified point of time after the transaction. But that seems untenable. The section prohibits entry into a transaction in circumstances where it would be reasonable to conclude that the main object was to evade the reporting requirements. The section does not penalise failure to withdraw from a transaction after making a check from which it is apparent that the client was smurfing.

- (7) It is perhaps unclear whether the value of different currencies is to be aggregated under s.31. It has been suggested that each parcel of a given currency should be treated separately and that aggregation should apply only to parcels of the same currency.<sup>66</sup> However, this interpretation could easily lead to abuse and there seems little justification for reading down the section in such a way.
- (8) There is no safe harbour provision for financial institutions that assist enforcement by being a party to a structured transaction in order to string along a suspect and find out more about his or her identity or associates. Perhaps in such a case the financial institution would lack a "dominant purpose" to evade the reporting provisions, but that would be irrelevant if the institution were charged with complicity: liability for complicity could be imposed on the basis of assisting another party to engage in a transaction knowing that the other party was acting with a dominant purpose of evasion. Compare s.17 of the Cash Transaction Reports Act: s.17 provides a safe harbour against liability for money-laundering offences (as principal or accomplice) where the matter is reported under s.16 as a suspect transaction.

---

66 J. Hewett and F. Kalyk, *Understanding the Cash Transaction Reports Act* (1990), 133.



## VI. THE TOSHIBA DEED

In 1990 the Trade Practices Commission entered into a Deed<sup>67</sup> with Toshiba under which certain compliance obligations were undertaken by the company and under which the Commission agreed not to pursue proceedings against the company for resale price maintenance. This case is a landmark in Australia where, as compared with the position in the USA, negotiated agreements of this kind have been relatively rare or unpublicised. The approach adopted in the *Toshiba* case is not free from difficulty, however, and invites constructive criticism.

The background is set out in the Commission's *Annual Report 1989-1990*:

Instead of taking legal action against Toshiba (Australia) Pty Ltd for alleged resale price maintenance (RPM), the Commission negotiated a deed under which the company agreed to undertake a very comprehensive three-year program of in-house training in the requirements of the Act.

The Commission found evidence that between March and September 1988 four Toshiba personnel had tried to stop five resellers advertising or selling Toshiba computer hardware at discount prices. Toshiba admitted it had contravened the Act and indicated it was willing to give undertakings about future conduct and staff training.

...RPM appears to be strongly entrenched in the computer hardware industry. The Commission decided to pursue the training option instead of litigation because it believes it is more likely to break down the pattern of non-compliance.

The deed (which was signed in July 1990) sets out strict performance criteria which the training must meet, and provides for Toshiba to meet the cost of the program and the Commission's costs in monitoring its effectiveness over three years. It requires Toshiba to offer training to executives, relevant staff and agents. It also requires Toshiba to write to all its resellers - both present and future - making it quite clear that they do have the right to discount and setting out what action they can take if pressured not to.

Failure to comply with the deed would render Toshiba liable to legal action by the Commission for RPM and therefore maximum penalties of \$250,000 for each contravention.

The agreement the Commission negotiated is equivalent to a community service order encouraging appropriate behaviour. Such an approach breaks new ground for the Commission. Though the Commission has settled breaches administratively, this was the first time it attempted to do so on such a scale.

One of the very real benefits of the exercise is that its cost, and the Commission's costs in administering the agreement and monitoring the training program, will be borne by Toshiba Australia, rather than by the tax-payer.<sup>68</sup>

---

67 The Deed is not a public document but has been released to the author for the purpose of research. In the opinion of the author, deeds of compliance should be public, as is the position under U.S. federal law. For a discussion of that law and the abuses which led to it, see E. Branfman, "Antitrust Consent Decrees - A Review and Evaluation of the First Seven Years under the Antitrust Procedures and Penalties Act" (1982) 27 *Antitrust Bulletin* 303.

68 *Id.*, 40-41.

The expediency and cost saving achieved is undeniable but several limitations are apparent:

- (1) Toshiba was let off relatively lightly as compared with Commodore<sup>69</sup> and Sony,<sup>70</sup> to mention two other recent resale price maintenance cases. For instance, Commodore was penalised \$195,000, subjected to an injunction, and exposed to legal costs. The difference in approach does not appear to be explained or justified in the Commission's *Annual Report*.<sup>71</sup> It does not seem enough merely to point to the costs of compliance imposed on Toshiba because the expectation of a company in the position of Commodore or Sony is also that it will thoroughly upgrade its compliance activities. The only extra cost burden imposed on Toshiba, it seems, is payment of the Commission's costs, subject to a ceiling of \$26,000 (see cl 12). In this light, the terms of the deed seem mild and over-generous. The explanation may be that the Commission now has insufficient bargaining chips when negotiating a deed of this kind. The position would be different if the maximum penalties under part IV of the Trade Practices Act (Cth) were increased to \$5 million as the Commission has recommended.<sup>72</sup> The Commission would also have more leverage if supervision of compliance procedures and other internal controls were expressly authorised under s.80, or if corporate probation were introduced as an option for dealing for violations of part IV and Part V.<sup>73</sup>
- (2) There is no specific requirement under the deed that Toshiba's top management be responsible for the compliance initiatives required under the agreement. Clause 3(iii) contemplates that one employee will be nominated as the person responsible for the design and implementation of the compliance program. The person nominated need not be a senior manager and only one person need be nominated. The Second Schedule, cl.3(b), requires that the compliance programme extend to management but that is not the same as nominating particular managers as responsible for ensuring that the compliance programme is implemented and works effectively. Empirical research has confirmed the importance of the attitude of top management toward compliance

---

69 (1990) ATPR 41-019. It should be disclosed that the author acted as a consultant on behalf of the company in the Full Federal Court appeal against the initial penalty of \$250,000.

70 Unreported, Federal Court of Australia, Pincus J.

71 But see the general policy expressed at 4: "... the cost and delays involved in such litigation act as as powerful general disincentive to seek solutions through the court. Moreover, in the Commission's experience it is only rarely that it can be confident that even an apparently 'successful' prosecution produces a commercially significant sanction with long-term deterrent effect."

72 *Annual Report 1989-1990*, 4.

73 Corporate probation is discussed in section II *supra*.

efforts.<sup>74</sup> In light of this research, a better approach would be to insist on a task force comprised of designated representatives from senior and middle management. The use of a managerial task force for dealing with crises is not uncommon as a matter of self-regulation, one example being the 30-strong task force deployed by Ford in response to the emissions-testing fraud that occurred in 1971-1972.<sup>75</sup>

- (3) Provision is made under the Deed and the Second and Third Schedules for monitoring the compliance programme. Toshiba is required annually to certify that the programme has been implemented and detailed provision is made under the Third Schedule for a certificate of compliance. It may be questioned however whether certification by one nominee goes far enough to ensure that due compliance will in fact take place.<sup>76</sup> Imposing the duty of certification on designated members of a task force (see (2) above) would accentuate the sense of obligation within the corporation and would help to reduce the risk of some loyal stooge being nominated to perform the task of certification. Better still, the compliance system would be audited by an outside auditor employed by the Commission at the expense of the company. It may also be questioned whether the Deed goes far enough to ensure that there is compliance in the market-place as well as in the company's seminar rooms. The deed does require a standard letter to be sent to resellers (see cl.7, Fourth Schedule). However, there seems to be no requirement that the actual impact on resellers be tested. In light of Toshiba's prior conduct, it would seem appropriate for an independent auditor at least to check whether the resellers previously exposed to resale price maintenance have been subjected to similar oppressive conduct during the operation of the required compliance programme. Spot checks of other resellers would also seem warranted.
- (4) The deed does not specifically require that the individual persons implicated in resale price maintenance be subjected to internal disciplinary action. Clause 10 contains a covenant that Toshiba will do "all other things reasonably necessary or appropriate prevent any contravention of the Act..." but this seems more a nostrum than a requirement of internal discipline. Perhaps the employees concerned were in fact dismissed or otherwise disciplined but this is not recited in the deed. In negotiated settlements of this kind, in my opinion, the

---

74 M. Clinard, *Corporate Ethics and Crime: The Role of Middle Management* (1983); J. Braithwaite, "Taking Responsibility Seriously: Corporate Compliance Systems" in B. Fisse and P. French (eds), *Corrigible Corporations and Unruly Law* (1985), ch 3.

75 See B. Fisse and J. Braithwaite, note 39 *supra*, ch 4.

76 The terms of compliance deeds in the U.S. are often far more demanding. See e.g., *U.S. v. Western Electric Company*, Civil Action No. 82-0192, Civil Enforcement Consent Order (2 Feb. 1989), U.S. District Ct., Washington, D.C.

focus should be on individual accountability for the events leading to enforcement action as well as on the need for compliance programme. Individual accountability is supposedly the foundation of social control in Western democracies. As discussed elsewhere, the most expedient way of achieving individual accountability for corporate violations is to use corporate liability as a lever for activating internal discipline against those implicated.<sup>77</sup> From this standpoint, the Toshiba deed does not provide an adequate model.

- (5) A weakness of the arrangement struck in the Toshiba case is that the sanction for non-compliance is subjection to enforcement proceedings for the original violation. One difficulty with this sanction is that the evidence may get stale. Another is that the original violation may fall outside the limitation period. Above all, the substance of the matter is not so much the original violation as the persistent non-compliance of the defendant despite clear and specific warning. A better approach, in my view, would be to enable proceedings for contempt against the defendant and the nominated members of a task force (see (2) above). This would require an amendment to the legislation, as by amending s. 80 so as to give Toshiba-style agreements the same backing as an injunction.
- (6) The *Annual Report* states that the Toshiba agreement is akin to a community service order. The agreement is aimed more at prevention than at community service. To think in terms of community service, however, leads one to ask why Toshiba was not required to place in the public domain and to make freely available<sup>78</sup> the full product of its work in devising training information, operating procedures and any other material prepared pursuant to the deed.

## VII. ASSESSMENT OF FINES OR MONETARY PENALTIES AGAINST CORPORATIONS

Fines and monetary penalties against corporations are typically assessed by rough and ready application of a string of salient factors. The *Commodore* and *Sony* cases are recent illustrations in the context of Part IV of the Trade Practices Act (Cth). This process of "intuitive synthesis"<sup>79</sup> may not matter a

---

77 B. Fisse and J. Braithwaite, note 20 *supra*.

78 Compare cl.6(b), which requires Toshiba to give the TPC information about the implementation of the compliance programme.

79 *R. v. Williscroft* [1975] VR 292 at 300. See further ALRC, Interim Report No 15, *Sentencing of Federal Offenders* (1980), ch 11; D. Weatherburn, "Sentencing for What?" in M. Findlay, S. Egger, and J. Sutton, (eds), *Issues in Criminal Justice and its Administration* (1983), 126;

great deal when, as is now the position under the Trade Practices Act, the maxima are low. The position is quite different however if penalties are substantially increased, as is the current trend. It may therefore be useful to consider the guideline approach that has been advanced by the US Sentencing Commission.

There is now a strong trend toward increased monetary penalties. Mention has already been made of the \$1 million maximum fine authorised under the Environmental Offences and Penalties Act (N.S.W).<sup>80</sup> More recently, the Trade Practices Commission has called for a twenty-fold increase in the maximum penalties under Part IV.<sup>81</sup>

The penalties and remedies, including injunctive relief and damages, presently available under the Act may be inadequate to control the activities of very large corporations in positions of power acquired over many years free of competition.

Other jurisdictions are adopting more commercially realistic penalties to underpin enforcement. If Australia follows changes to New Zealand law and increases penalties to a maximum of \$5 million for major breaches of the law the community will be given a clear signal that government and the courts regard breaches of competition law seriously.

The *Commodore* case<sup>82</sup> exemplifies the process of "intuitive synthesis" and the difficulty of effectively challenging a monetary penalty on appeal. Commodore had engaged in resale price maintenance in relation to the Amiga line of computers. A clause in its dealer agreement prohibited the advertising of the computers at less than a recommended price. The company had received incorrect legal advice that such a prohibition was lawful. The legal advice also conveyed that it was unlawful to prohibit the sale of the computers for less than a recommended price but that part of the advice had not been communicated to dealers. There was evidence that some dealers had acted on the understanding that resale at less than the recommended price was prohibited by Commodore. Some 150 dealers across the country were subject to the dealer agreement. There was little evidence of a compliance programme, either at the time of the violations or subsequently. At first instance, a penalty totalling \$250,000 was imposed by Einfeld J. On appeal the penalty was reduced to \$195,000, the reason being that Einfeld J. had erred in law in treating several closely related violations as separate when they should have been penalised as one. In other respects there was no manifest error. Although at the "upper end" of the range,

---

D. Weatherburn, "Sentencing principles and Sentencing Choice" (1987) 11 *Criminal Law Journal* 213; G. Zdenkowski, "Sentencing: Problems and Responsibility" in D. Chappell, and P. Wilson, *The Australian Criminal Justice System* (1986), ch 11.

80 See part II.

81 *Annual Report 1989-1990*, 4.

82 (1990) ATPR 41-019. It should be disclosed that the author acted on behalf of the company as a consultant in the appeal against penalty.

the penalty was within the discretion of the primary judge to impose.<sup>83</sup> The Full Federal Court refused to enter into a detailed comparison of the penalties imposed in previous decisions such as *TPC v. General Corporation Japan (Australia) Pty Ltd*,<sup>84</sup> where episodes of flagrant resale price maintenance attracted penalties of \$130,000.

Little guidance emerges from *Commodore* as to how exactly a penalty should be assessed. Justice Einfeld recited the relevant factors to be taken into account without attempting in any systematic way to indicate their relative weight. It is not clear for instance what particular weight was attached to the apparent lack of an adequate compliance programme. The judgment of the Full Federal Court focussed on the factual basis for the penalties, and rejected the argument that the breaches were relatively minor. The Court did not attempt a critical analysis of the way in which Einfeld J. weighed up each of the various factors to be taken into account.

The assessment of penalty by Pincus J. in the later case of *Sony*<sup>85</sup> also exemplifies the difficulty of assessing monetary penalties on a consistent basis. In this case, also one of resale price maintenance, there was a hearing on penalty and, unlike the position in *Commodore*, there was evidence of significant compliance initiatives after the event. His Honour imposed penalties totalling \$250,000 against Sony. These penalties were based on a detailed assessment of the evidence relating to the deliberate nature of the contraventions and other critical factors. However, the exact weighting is inarticulate except for the way in which penalties were assessed against the Sony managers who were implicated. His Honour observed that the course had sometimes been taken of assessing the penalty against an individual defendant at 20% of the amount of the penalty imposed on the corporate employer. In the present case, however, the penalties were set at 10% of those imposed against Sony because there was no evidence that the individual defendants had formulated the strategy of resale price maintenance they were implementing.

The explicit relative weighting of individual and corporate penalties articulated in *Sony* leads to the question whether a comprehensive matrix of weighted factors might usefully be devised. Such an approach has been advanced in the US Sentencing Commission's *Draft Guidelines for Organizational Defendants* (1990).<sup>86</sup> The *Draft Guidelines* set out a Chapter of

---

83 The implication is that there is some "tariff" but the amount and how it is arrived at remains obscure. Compare *R. v. Whitelaw* (1979) 3 *Crim LJ* 119; *Mason v. Pryce* (1988) 34 *A Crim R* 1; *R. v. Watene* (1988) 38 *A Crim R* 353; *Gundry v. The Queen* (1989) 39 *A Crim R* 227; *Stol v. The Queen* (1989) 44 *A Crim R* 137.

84 (1989) *ATPR* 40-922.

85 Unreported, Federal Court of Australia, Pincus J.

86 The final version of the *Guidelines* has been published since this article went to press. Many modifications and refinements have been made which confirms the point below that the guidelines approach is worth serious consideration by Australian law makers.

detailed provisions that seek to regulate the sentencing of organizations under the US *Code* in a coherent and consistent manner.

Part A prescribes general application principles. These principles, contained in s.8A1.2(a)-(h), require a court to undertake a certain sequence of steps when assessing the sentence to be imposed. This sequence in part requires the following steps to be taken:

- (d) Determine from Part B of this Chapter the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.
- (e) Determine from part C of this Chapter the sentencing requirements and options relating to fines.
- (f) Determine from part D of this Chapter the sentencing requirements and options relating to probation.

Part B lays down the general principle that a convicted organization should, as a first priority, be required to make restitution to identifiable victims of its criminal conduct and to take other remedial action necessitated by that criminal conduct. Section 8B1.1 requires that a restitution order be made except where full restitution or compensation has already been made, or where the complication or delay in fashioning a restitution order outweighs the need to provide compensation to victims the criminal justice process. Section 8B1.2 makes a Policy Statement that a remedial order, imposed as a condition of probation, may require the organization to reduce or eliminate the risk that its offence will cause further harm. Section 8B1.3 advances the further Policy Statement that an organization may be ordered to perform community service which is reasonably designed to repair the harm caused by the offence.

Part C sets out detailed guidelines for determining the amount of fines. Section 8C2.1 formulates a maximum and minimum guideline fine range. The maximum and minimum amount of a fine is determined by a formula based on (1) the grade of the offence (the offence level), (2) the pecuniary gain or loss stemming from the offence or the amount specified for the offence, whichever is the greater, and (3) the multiplier factor specified for the grade of offence.

The multiplier factor is specified according to a points-based mitigation scoring system. Where the mitigation score is 0, the minimum multiplier is 2.0 and the maximum 3.0. Where the mitigation score is 9 (the highest attainable), the minimum multiplier is 0.15 and the maximum 0.25. Points are prescribed for different forms of mitigating behaviour. For instance, the mitigation score is 4 points where the management of the organization voluntarily and promptly reported the offence to appropriate governmental authorities prior to public disclosure, the commencement of a government investigation, and the imminent threat of disclosure of the wrongdoing. Three points are added to the mitigation score if the organization had and continues to maintain "an effective program to prevent and detect violations of law". Where both of the above mitigating factors apply, a maximum of only 4 points is added to the mitigation score. Two points are added if the offence occurred without the knowledge of any

person who held a policy-setting or legal compliance position within the organisation, or who exercised substantial managerial ability in carrying out the policies of the organisation. Two points may also be added if the organisation co-operation fully with governments investigation of the offence. A further point may be added if the organization, in a timely manner prior to adjudication of guilt, accepted responsibility for the offence, and took prompt and reasonable steps to remedy the harm caused by the offence.

Once the minimum and maximum range of the fine is determined, courts are directed under the U.S. Code, ss3553(a) and 3572(a), to consider various factors when assessing the fine to be imposed. These factors include the defendant's income, earning capacity, size and financial resources, and the extent to which internal disciplinary action has been taken within the organization responsible for the offence. The *Draft Guidelines* spell out additional factors that should be taken into account. These include the extent to which steps were taken to prevent detection of the offence, civil liability arising from the defendant's conduct, and the degree of culpability of the personnel whose conduct led to the liability of the organization for the offence.

The guidelines fine range may be departed from in a variety of circumstances. There may be a departure downwards where, for example the shareholders are themselves victims of the offence, or where the organization has been acquired by innocent owners after the commission of the offence. A departure upwards is called for where the offence resulted or involved a foreseeable risk of death or serious bodily injury, threatened national security, created a threat to the environment not adequately reflected by the guideline for the particular offence, or jeopardised the integrity of a market in a way not adequately reflected by the guidelines for the particular offence.

The US Sentencing Commission's approach is an understandable attempt to introduce consistency and considered judgment into the process of assessing fines at a time when multi-million dollar fines are becoming a prevalent feature of American corporate life. In principle, such an approach seems commendable. However, the guidelines suggested may require further refinement.

One fundamentally questionable element of the US Sentencing Commission *Drafting Guidelines* is the weight attached to lack of corporate blameworthiness. Consider especially s.8C2.1(2). Under this guideline there is a mitigation score of only 3 points where the organization had and continued to maintain an effective compliance program. From the standpoint of corporate blameworthiness it is difficult to see why a corporate defendant should be held criminally liable for an offence that occurs notwithstanding the exercise of all due diligence. At most, the punishment should be nominal, which is not to deny the liability of the defendant to pay restitution or to take remedial measures against repetition.

There are other complications that may need further consideration. One is the difference between fines for offences, on the one hand, and civil monetary



penalties, on the other. Civil monetary penalties may include a special component of liquidated damages, and considerations of blameworthiness may be less relevant. Another dimension again is the balance between individual and corporate penalties, an issue explicitly raised in *Sony* where individual and corporate liability was imposed. What weight is to be attached to the fact, say, that no individual defendants have been held liable? What weight if many individuals have been held accountable at the level of internal corporate discipline?

The task of devising a suitable scoring system for assessing penalties against corporations has yet to be attempted in Australia but may well be pursued if the trend toward higher fines and more severe sanctions continues. Corporations subject to multi-million dollar penalties will expect more of our courts than brilliant intuitions.