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**Corporations and Markets
Advisory Committee**

PERSONAL LIABILITY FOR CORPORATE FAULT

Discussion Paper

**May
2005**

Corporations and Markets **Advisory**
Committee

Personal liability for
corporate fault

Discussion Paper

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1 Introduction

This paper discusses the circumstances in which directors and corporate managers may be personally liable for corporate misconduct in consequence of the positions they hold or the functions they perform in their corporations. This derivative form of liability arises without the need to establish that these persons either breached the law through their own misconduct or were accessories to the misconduct of their corporation.

The paper reviews a range of Commonwealth, State and Territory statutes that impose derivative liability and puts forward for discussion possible model provisions to balance the public interest goals of the legislation and the rights of affected individuals.

*The Advisory Committee Discussion Paper **Corporate duties below board level** (May 2005) also applies to corporate managers. However, it differs from this paper in focusing on their personal duties and liabilities under the Corporations Act.*

1.1 Terms of reference

The letter from Senator the Hon Ian Campbell, the then Parliamentary Secretary to the Treasurer, setting out the terms of reference on directors' duties and personal liability, stated that:

- directors are subject to a range of general common law and statutory duties. A breach of duties imposed under the law may result in civil and/or criminal liability
- the duties being imposed on directors by various pieces of legislation may result in inconsistent compliance burdens and increased costs for business
- in certain circumstances, under the *Corporations Act 2001*, other State and Commonwealth legislation and the common law, directors can be held personally liable for breaches of duty owed to the company. They may also be personally liable to third parties.

The Parliamentary Secretary said that the Advisory Committee's consideration of the personal liability of directors, whether under the common law or statute, could include:

- whether this potential liability would result in a disincentive for persons to accept or continue to hold directorships or engage in entrepreneurial but responsible risk-taking
- the impact of directors' liability on the availability of professional indemnity insurance, and
- the consequences of rising insurance premiums.

This Discussion Paper deals with a key aspect of the disincentive issue, namely the circumstances in which an individual may incur penalties in consequence of corporate fault. For completeness, this paper considers the criminal liability both of directors and of other corporate officers, given that much of the legislation reviewed in this paper applies to persons who manage or are otherwise involved with a corporation, whether or not they are directors.

The matters relating to professional indemnity insurance and premium costs have been dealt with in the Advisory Committee Report *Directors and Officers Insurance* (June 2004).

1.2 Background to the review

Corporations operating in Australia can be faced with a plethora of Commonwealth, State and Territory statutory requirements, depending on the nature and location(s) of their business activities. In addition to imposing liability on corporations for breach, these statutes may also impose penalties on individuals involved in these corporations, either for their own misconduct (such as aiding or abetting a corporate breach) or simply in consequence of the position they hold or the function they perform in the company. This latter form of liability on individuals may be referred to as derivative liability.

The report by the Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties* (1989) noted the trend towards imposing derivative liability on directors for corporate

fault and recommended further consideration of the appropriate mix of individual and corporate liability for corporate misconduct.

More recently, the Corporate Law Economic Reform Program Paper No 3 *Directors' Duties and Corporate Governance* (1997) at 6.6 observed that:

The understandable motivation behind the [derivative] liability regimes in these areas is to provide a significant incentive for directors to put in place effective risk-management arrangements to ensure the corporation complies with its obligations. While the imposition of financial penalties on corporations for breaches of legislation provides some incentive towards compliance, it is considered that in certain key areas there is a need to place additional personal responsibility on directors who, in contrast with the shareholders who ultimately bear the costs of the financial penalty, have it within their means to seek to ensure compliance.

However, if directors risk personal liability for breaches incurred by the corporation, irrespective of the directors' culpability, they may be increasingly reluctant to serve on boards or may become overly concerned with compliance issues and processes rather than wealth creation. Certainly, it would be an unfair and unnecessary burden on directors if they can potentially be made responsible for breaches by their corporation, even where they have taken all reasonable steps to prevent such breaches.

Various concerns have been raised about derivative liability legislation, including that corporate officers may be unduly exposed to personal liability, including criminal sanctions, by reason of their formal position in the corporation, rather than their actual acts or omissions. The public interest in ensuring that corporations and influential individuals within them are fully accountable for any corporate misconduct needs to be balanced against the rights of individuals not to be exposed to penalties where they could not reasonably have influenced or prevented that conduct.

Also, undue reliance on derivative liability may make board service less attractive and deter able people from taking on roles where they may otherwise contribute. Furthermore, concern about derivative liability may be exacerbated by the wider ramifications for individuals of having a criminal conviction, including possible reputational damage, regardless of the nature or size of the financial

or other penalty and whether those persons can be directly or indirectly indemnified by the corporation.

1.3 Scope of this paper

This Discussion Paper reviews Commonwealth, State and Territory environmental protection, occupational health and safety, hazardous goods and fair trading statutes. These statutes have been chosen because of their significance to the commercial operations of many enterprises. They also typify the means by which directors and other corporate managers are deemed to be personally liable for breaches by their corporations.

The paper seeks to identify patterns in the derivative liability provisions under review and puts forward for comment options for a model derivative liability provision or template that each Australian jurisdiction could adopt. A more standardised approach should assist corporations and their directors and other managers in implementing effective and cost-efficient compliance and risk management strategies aimed at achieving the regulatory goals of the legislation, in an environment of greater legal certainty and predictability for the individuals concerned.

1.4 Impact of personal liability

The effect of derivative liability legislation is exemplified by a recent case involving an external administrator. The principles are equally applicable to any director or other person involved in managing a corporation.

In that case, a chartered accountant had been appointed as receiver and manager (receiver) of a company. The company's directors had resigned immediately prior to his appointment. The receiver continued to carry on the business of the company, as permitted under the terms of the appointment, with total control of its operations.

Four weeks later, an employee of the company was injured at work in circumstances that breached statutory safety requirements applicable to the corporation. The receiver was subsequently charged under occupational health and safety legislation that imposed

personal criminal liability on any person ‘concerned in the management’ of a corporation at fault. It was not disputed that the breach of the safety requirements had begun well before the receiver was appointed, that he was not aware of the continuing breach, and that he had done nothing to exacerbate it.

The receiver pleaded guilty to the charge, but sought an order from the Court that no criminal conviction be recorded against him. His counsel referred to the impact of a conviction on the receiver, including the possibility of professional or regulatory disciplinary proceedings. Counsel also argued that imposing a conviction in the circumstances of this case may result in other external administrators choosing to shut down, rather than continue, a business to overcome the possibility of being exposed to personal derivative liability.

The Court identified a series of steps that a prudent receiver (or any other external administrator) could take on appointment to verify that the corporation was complying with occupational health and safety legislation, and thereby protecting its workers. These steps include determining and assessing current health and safety procedures within the corporation and ensuring that there are individuals responsible for enforcing them. These steps, if undertaken by the receiver, would have constituted evidence that he had used ‘all due diligence’ to prevent or stop the contravention by the corporation, this being an available defence under the derivative liability provision.

The Court in this case granted the application that no criminal conviction be recorded against the receiver. However, the Court referred to case law to the effect that, taking into account the public interest in ensuring compliance with occupational health and safety legislation, use of this discretion in favour of a defendant ‘must be considered extraordinary and highly exceptional’.

1.5 US approach

Courts in the United States have developed a ‘responsible corporate officer’ (RCO) doctrine that is analogous to derivative liability. This doctrine was developed in the context of food and drug legislation to impose personal criminal liability on individuals, as well as the corporation, for corporate misconduct.

Under this doctrine, an individual who the court considers is in a position of corporate power or authority that allows him or her to prevent, detect or correct a corporate breach may also be held liable for that breach, without proof that he or she intentionally participated in the contravention or had an ‘awareness of some wrongdoing’.

In the leading case of *United States v Park* 421 US 658 (1975), the US Supreme Court held that the chief executive officer (CEO) of a nationwide retail food chain was criminally liable under food and drug legislation for contamination at one of its twelve food warehouses. The Court referred to the company’s constitution in determining that the CEO had sufficient power and authority within the corporation to have prevented the breach. The constitution provided that the CEO ‘shall, subject to the board of directors, have general and active supervision of the affairs, business, offices and employees of the company’. In imposing criminal liability on the CEO without requiring proof that he had a culpable state of mind, the Court said:

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them (at 672).

However, the RCO doctrine permits a defendant to raise a defence that he or she was ‘powerless’ to prevent or correct the violation.

US courts have applied the RCO doctrine in food and drug cases to persons at varying levels in the corporate structure, including individuals at the senior executive and operational levels.

The application of the RCO doctrine beyond food and drug laws to other ‘public welfare’ legislation, such as environmental protection and hazardous goods statutes, remains unsettled (see further B Hustis & J Gotanda, ‘The Responsible Corporate Officer: Designated Felon or Legal Fiction’ 25 *Loyola University Chicago Law Journal* 169 (1994), A Sgroi, ‘Federal Food and Drug Act Violations’ 39 *American Criminal Law Review* 609 (2002)).

1.6 Request for submissions

The Advisory Committee invites submissions on any aspect of the matters dealt with in this paper, including those set out at 2.6, 3.4, 7.2, 8.4, 9.8 and 10.4.

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If you are sending your comments otherwise than by email, please also send, if possible, a computer disk containing your submission, using Microsoft Word for Windows 2000.

If you have any queries, please phone (02) 9911 2950.

Please forward your submissions by **Friday 12 August 2005**.

This Discussion Paper is available under *What's New* and also under *Current Discussion Papers* on the Advisory Committee's Website www.camac.gov.au.

1.7 Functions and membership of the Advisory Committee

The statutory functions and membership of the Advisory Committee are set out in Appendix 8.

2 Direct and derivative personal liability

2.1 Overview

Legislation may impose liability on individuals arising from a corporate breach either for their own conduct, including as accessories, in connection with that breach (direct liability) or by virtue of their relationship with the corporation, for instance, the position they hold or the function they perform in that corporation (derivative liability).

This section further explains the distinction between direct and derivative liability, as the first step in analysing the balance between public interest considerations and individual rights in legislative approaches to personal accountability for corporate conduct.

This section also compares the position of private and public sector corporations, given that the same issues of effective regulation and corporate compliance, and the rights and responsibilities of individuals within those corporations, arise for both types of organisation.

2.2 Distinguishing direct and derivative liability

The distinction between direct and derivative liability can be exemplified by two different approaches to industrial manslaughter.

An example of direct liability is the *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT), which introduced s 49D into the ACT *Crimes Act* to create an offence of industrial manslaughter for any ‘senior officer’ of a corporate employer who *by his or her own conduct* ‘causes [substantially contributes to] the death of the worker and the senior officer is reckless ... or negligent’ in this regard. Personal liability does not depend on, or arise from, corporate liability.

The discontinued Victorian involuntary manslaughter Bill (the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001*), had it been enacted, would have imposed a form of derivative liability on certain classes of individuals in consequence of corporate fault. It provided that, where a body corporate has committed an offence, any director or other senior officer is also guilty of an indictable offence if:

- that person was organisationally responsible for the conduct, or part of the conduct, of the body corporate in relation to the commission of the offence by the body corporate, and
- in performing or failing to perform his or her organisational responsibilities, that person contributed materially to the commission of the offence by the body corporate, and
- that person knew or ought to have known that, as a consequence of his or her conduct, there was a substantial risk that the body corporate would engage in conduct that involved a high risk of death or serious injury to a person, and
- having regard to the circumstances known to that person, it was unjustifiable to allow that risk to exist.

2.3 Direct liability of individuals

2.3.1 Private sector corporations

Directors and other corporate officers are subject to significant direct legal responsibilities, and potential criminal and/or civil liabilities, in relation to their own conduct in managing a corporation. For instance, at common law, directors have a duty to act in good faith and for a proper purpose, which includes the duty to act in the corporation's interests, to avoid conflicts of interest and not to fetter one's discretion. Directors also have a common law duty to exercise care, diligence and skill.

The Corporations Act includes and develops or refines many of these common law duties. For instance, Part 2D.1 Div 1 imposes a range of duties on directors and others, including the duties of care and diligence, good faith, proper purpose, and proper use of corporate position or information. The Part sets out the tests for

determining when breach creates criminal as well as civil liability. Part 2D.1 Div 2 covers various types of conflict of interest, with criminal liability for various types of breaches. In addition, directors of insolvent corporations can be subject to criminal and civil liabilities if their corporations continue to trade.

Some key provisions imposing direct liability under the Corporations Act, and under the NSW *Crimes Act* (being an example of applicable State legislation), that apply to directors, officers, employees and other persons related to a corporation, are set out in Appendix 1.

2.3.2 Public sector corporations

Legal position of GBEs

The legal position of persons involved in private sector corporations may be compared with that of persons exercising comparable functions in not-for-profit organisations, or in public sector corporations such as Commonwealth, State and Territory government business enterprises (GBEs) that perform commercial or other activities on behalf of their governments.

The mode of regulation of GBEs is not uniform in the different Australian jurisdictions. While some GBEs are subject to the Corporations Act, others have their own statutory framework, which is not necessarily similar to that of the Corporations Act. Also, the method of enforcing the relevant provisions differs between GBEs and entities subject to the Corporations Act.

Duties

Under the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) Part 3 Div 4, officers of Commonwealth GBEs have duties and liabilities expressed in terms comparable to those under ss 180–184 of the Corporations Act, including criminal liability for breach of good faith or misuse of corporate position or information.

Under the CAC Act, ‘officer’ in relation to a Commonwealth authority is currently defined as:

- (a) a director of the authority; or

- (b) any other person who is concerned in, or takes part in, the management of the authority.

Paragraph (b) reflects the now-repealed definition of ‘executive officer’ in the Corporations Act.

At the State level, the New South Wales *State Owned Corporations Act 1989* s 20G excludes all GBEs owned by the New South Wales Government from the Corporations Act, subject to any specific regulations that declare a State owned corporation to be subject to all or part of that Act. However, s 33A and Schedule 10 of the New South Wales Act have the effect that directors and officers of GBEs are subject to a range of duties and liabilities, including criminal penalties, that are comparable to those applying to directors and officers under the Corporations Act (such as the directors’ duties under ss 180–184 and the insolvent trading provisions). In this context, Schedule 10 defines ‘officer’ as a director, the chief executive officer or another person who is concerned, or takes part, in the management of the GBE.

Similar legislation is found in other jurisdictions. For instance, the *State Owned Enterprises Act 1992* (Vic) s 36 and the *Government Owned Corporations Act 1993* (Qld) s 136 impose duties on directors of State GBEs similar to those under the Corporations Act.

Enforcement

ASIC has no regulatory or enforcement role in relation to the internal workings of GBEs, nor is there any equivalent regulatory body for GBEs. Instead, the responsibility for prosecuting any breaches by individuals involved in GBEs usually lies with the Minister or an authorised delegate, but generally speaking there is no mechanism or regulatory body to investigate or prosecute possible breaches.

2.4 Derivative liability of individuals

2.4.1 Private sector corporations

Commonwealth, State and Territory environmental protection, occupational health and safety, hazardous goods and fair trading laws impose personal derivative liability on directors, and other

individuals involved in private sector corporations, in consequence of breaches by those corporations. This derivative liability is separate from, and additional to, accessorial liability that may apply to individuals either under specific statutory provisions or by virtue of general criminal law principles.

A detailed exposition of the myriad Commonwealth, State and Territory statutes that impose derivative liability, including but extending beyond the legislation reviewed in this paper, has been undertaken by Bruce Cowley, Partner, Minter Ellison Brisbane in his paper *Personal Liability for Nominee Directors*, Ampla Limited Twenty-Seventh Annual Conference July 2003.

2.4.2 Public sector corporations

Persons in managerial positions in GBEs are subject to derivative liability in a comparable manner to officers of private sector corporations.

The Commonwealth/State/Territory environmental, occupational health and safety, hazardous goods and fair trading statutes reviewed in this paper generally bind GBEs to the extent permitted under the legislative power of each jurisdiction. For instance, the *Occupational Health, Safety and Welfare Act 1986 (SA)* s 58(5) provides that ‘proceedings for an offence against this Act may be brought against an agency or instrumentality of the Crown’ or ‘a person employed by or under the Crown’.

Some legislation makes specific reference to derivative liability within GBEs. For instance, the *Environmental Protection Act 1994 (Qld)* provides that if a corporation that is the Commonwealth or a State commits an offence, each ‘executive officer’ is also liable, subject to various defences. In this context, an executive officer is ‘a chief executive of a department of government or a person who is concerned with, or takes part in, the management of a department of government, whatever the person’s position is called’ (Schedule 3).

Some GBEs have been subject to criminal prosecution: for instance, *Environment Protection Authority v Sydney Water Corp Ltd (1999)* 102 LGERA 232. However, officeholders of GBEs are less exposed to derivative liability than their counterparts in private sector corporations to the extent that there are specific personal liability immunities in the enabling legislation of specific GBEs.

2.5 Focus on derivative liability

The grounds of direct criminal (as well as civil) liability of directors and other individuals involved in corporations, particularly under Part 2D.1 of the Corporations Act, have been closely reviewed over a number of years. The Advisory Committee does not propose to reopen these matters in this paper. Instead, this paper focuses on legislation other than the Corporations Act that imposes derivative liability on individuals in consequence of breaches by the corporation.

The review of legislation undertaken in this paper illustrates the lack of a uniform approach across Commonwealth, State and Territory derivative liability provisions. It points to the need for this type of legislation to balance regulatory efficiency (judged in terms of achieving the social goal of a responsible corporate compliance culture) and individual fairness (judged in terms of the criteria for penalising individuals for corporate breach).

One way to achieve a more harmonious approach between and within jurisdictions would be to develop and apply a legislative template for imposing derivative liability. A standard template may promote compliance, and reduce compliance costs, by removing the need for corporations to respond to differing standards and tests. It may also assist corporate decision makers to understand fully what is expected of them.

2.6 Issues for consideration

Respondents are invited to comment on any aspect of the discussion in this Section on the distinction between direct and derivative liability, including any aspect of the commonalities and differences between the application of direct and derivative liability to private sector corporations and government business enterprises.

3 Rationale for derivative liability

3.1 Overview

Any review of the principles of derivative liability raises the threshold question of how best to apportion responsibility for the misconduct of a corporation between the corporation itself and those individuals who control or manage it. For instance:

- is it necessary to go beyond direct corporate liability to derivative personal liability?
- do the principles of accessorial liability suffice without the need for derivative liability provisions?

3.2 Does corporate liability suffice?

The legislation under review contains various sentencing options against corporations in breach, which may extend beyond fines to corporate probation, community service orders or mandatory audit orders (eg, *Trade Practices Act* s 86C, *Occupational Health and Safety Act 2000* (NSW) ss 111 ff, *Protection of the Environment Operations Act 1997* (NSW) s 250, *Environment Protection Act 1993* (SA) s 133, *Environment Protection Act 1970* (Vic) s 67AC). The Australian Law Reform Commission Issues Paper *Sentencing of Federal Offenders* (January 2005) paras 15.57–15.62 further discusses the sentencing options for corporations.

Monetary fines or other penalties on corporations, if sufficiently substantial, may act as a strong incentive on corporate controllers better to ensure that their corporations comply with regulatory provisions. It is also possible that shareholders of corporations in breach may question whether directors have carried out their duties properly to manage and control the corporation's affairs. If sufficiently concerned, shareholders could move for the dismissal of directors or even initiate statutory derivative actions against them (under Part 2F.1A of the Corporations Act).

Given this, should individuals within a corporation, in addition to the corporation itself, be held criminally accountable for that entity's actions? Possible reasons for imposing liability on individuals, not just corporations, in consequence of corporate misconduct include:

- *limitations of monetary penalties*: corporations may, in effect, be able to pass on the cost of any penalties imposed on them to others, such as through reduced dividends to shareholders or higher prices to consumers. Imposing an additional monetary or other penalty on corporate controllers may make them more directly accountable
- *personal fault*: some individuals within a corporation should have a duty to prevent, as far as reasonably possible, the offending act. The corporate structure should not shield the persons who should be personally liable for socially damaging activities
- *social sanction*: individual liability is a means to express public censure or disapproval of the action or inaction of particular corporate officers in relation to a corporate breach
- *specific incentive*: the imposition of personal liability may act as a strong incentive for a defendant thereafter to monitor the corporation's activities and implement preventive programs to avoid a further breach
- *general incentive*: the possibility of personal liability may act as an incentive for controllers and other managers of all corporations subject to the relevant legislation to take appropriate steps to ensure compliance.

3.3 Does accessory liability suffice?

Accessory liability (complicity) is a form of direct rather than derivative liability, applicable to any person who intentionally and knowingly participates in a corporate breach. Accessories are referred to as principal offenders.

In its extended statutory form, as exemplified by s 79 of the Corporations Act, it applies to anyone who is involved in a contravention, namely a person who:

- (a) has aided, abetted, counselled or procured the contravention, or
- (b) has induced, whether by threats or promises or otherwise, the contravention, or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention, or
- (d) has conspired with others to effect the contravention.

The principles in s 79 are applied, for instance, in s 674(2A), (2B) and s 675(2A), (2B) of the Corporations Act, which impose personal liability on any individual involved in a breach by a disclosing entity of the continuous disclosure requirements, subject to the individual proving (on the balance of probabilities) that he or she took all reasonable steps to ensure compliance.

Does the fact that individuals connected with corporations may be subject to accessorial liability, either under particular legislation or by application of general criminal law principles, negate or substantially reduce the need for derivative liability?

Under general common law principles, accessorial liability focuses on the actual level of awareness and involvement of an individual in a contravention, not simply whether that person is a director or other officer of a corporation. The prosecution must prove beyond reasonable doubt that the person was an intentional participant, who knew the essential facts that constitute the offence or was wilfully blind to them and was implicated or involved in the contravention.

The High Court in the leading judgment of *Giorgianni v R* (1985) 156 CLR 473 at 487–488 said that:

No-one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness ... is treated as equivalent to knowledge but neither negligence nor recklessness is sufficient.

Likewise, the High Court in *Yorke v Lucas* (1985) 158 CLR 661 at 667 said that:

To form the requisite intent he must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime ... to have aided and abetted or counselled and procured [the relevant offence] the appellant must have intentionally participated in that offence and to have done so must have had knowledge of the essential matters which went to make up the offence on the occasion in question.

These principles are further dealt with in s 11.2 of the Commonwealth *Criminal Code* (*Cwlth Criminal Code*). They have also been applied to s 79 of the Corporations Act: *Edwards v R* (1992) 173 CLR 653; *ASIC v Doyle* (2001) 38 ACSR 606; *ASIC v Adler* (2002) 41 ACSR 72; *Forge v ASIC* (2004) 52 ACSR 1 at 52–53. In *Adler*, Santow J stated that:

Knowledge may be inferred from the fact of exposure to the obvious, though that does not obviate the need for actual knowledge of the essential facts constituting the contravention (at [209]).

That knowledge is actual and not constructive. But a combination of suspicious circumstances and the failure to make appropriate inquiry when confronted with the obvious, makes it possible to infer knowledge of the relevant essential matters (at [358]).

The fair trading statutes in some jurisdictions are confined to accessory liability (*Trade Practices Act* s 79(1), the *Fair Trading Act 1987* (NSW) s 62 and the *Fair Trading Act 1992* (ACT) s 40). By contrast, the fair trading statutes in other jurisdictions (otherwise modelled on the consumer protection provisions of the *Trade Practices Act*) expressly go beyond accessory liability by also imposing derivative liability on directors or other corporate officers for contraventions by their corporations, subject to various statutory defences.

An argument for going beyond accessory liability to derivative liability is that there should be an obligation on at least some individuals in key corporate roles to inform themselves and help forestall any misconduct by their corporations. Relying on

accessorial liability alone may not create a sufficient incentive, given that the general principles of this type of liability require a person to have actual knowledge, or be wilfully blind, about certain corporate conduct. It may result, for instance, in non-performing directors seeking to avoid accessorial liability by arguing that, even if they had acted negligently or recklessly, they were not aware of the circumstances leading to the corporate offence. Accessorial liability alone may not cause corporate officers to take compliance sufficiently seriously.

3.4 Issues for consideration

Respondents are invited to comment on any aspect of the discussion in this Section on the rationale for derivative liability, including in what circumstances, if any, is it necessary as a matter of public policy to go beyond accessorial liability and impose individual derivative liability.

4 Four steps in determining derivative liability

There are four steps involved in determining whether any individual is subject to derivative liability in consequence of corporate misconduct:

- *corporate liability*: has the corporation committed all the physical/fault elements that are necessary for it to be criminally liable under the legislation? However, prior conviction of the corporation is usually not necessary, given that statutes typically state that derivative proceedings may be brought against a relevant individual, whether or not proceedings have been brought against the body corporate. This is discussed in Section 5
- *corporate defences*: does the corporation have any defences under the legislation (as establishing any defence would negate the liability of the corporation)? This is discussed in Section 5
- *individual liability*: has the individual committed all the physical, and any fault, elements of any threshold test of personal liability? This is discussed in Section 6
- *individual defences*: does the individual have any defences applicable to that person under the relevant derivative liability legislation? This is discussed in Section 6.

5 Steps 1 and 2 of derivative liability: corporate liability and defences

5.1 Overview

Corporations can only act through human agents. Generally speaking, corporations will be held liable for the culpable conduct of those persons who constitute the ‘directing mind and will’ of a corporation (*Tesco Supermarkets Ltd v Nattrass* [1972] AC 153). However, the *Tesco* tests tended to restrict the relevant corporate officers to directors or high level managers, notwithstanding that persons at lower managerial or functional levels may often act on behalf of the corporation or influence its conduct. The *Tesco* tests therefore tend to have only a limited application, particularly in larger enterprises.

The statutes reviewed in this paper generally contain broader criteria than the *Tesco* tests to determine what states of mind or conduct of particular individuals constitute the state of mind or conduct of a corporation for the purpose of corporate liability.

In addition to the analysis below, information regarding corporate criminal liability is found in the article by Jennifer Hill, ‘Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?’ [2003] *Journal of Business Law* 1 and in the Australian Law Reform Commission report *Principled Regulation* (2002) Chapter 7.

5.2 Commonwealth legislation

5.2.1 Liability

The *Cwlth Criminal Code* Part 2.5 seeks to codify the general principles of corporate criminal responsibility under Commonwealth laws. That Code applies to all Commonwealth legislation, unless

expressly excluded or overridden in whole or in part in particular Commonwealth statutes.

The relevant provisions of that Code for determining corporate liability (including the ‘corporate culture’ concept) and their application to Commonwealth environmental legislation (*Environment Protection and Biodiversity Conservation Act 1999* (*Environment Protection Act*)) and hazardous goods legislation (*Hazardous Waste (Regulation of Exports and Imports) Act 1989* (*Hazardous Waste Act*)) are set out and analysed in Appendix 2.

5.2.2 Defences

The effect of the *Cwlth Criminal Code* ss 12.3(3) (refer Appendix 2) and 13.5 (refer Appendix 3) is that particular fault elements that otherwise may be attributed to a body corporate in consequence of the actions of a high managerial agent can be negated if the body corporate proves (on the balance of probabilities) that it exercised due diligence to prevent the conduct. A similar provision may also be expressly included in particular Commonwealth legislation. For instance, the *Occupational Health and Safety (Commonwealth Employment) Act 1991* s 78(2) provides that any conduct engaged in on behalf of a body corporate by various individuals is deemed to have been engaged in also by the body corporate ‘unless the body corporate establishes [on the balance of probabilities] that [it] took reasonable precautions and exercised due diligence to avoid the conduct’.

5.3 State and Territory legislation

5.3.1 Liability

A few statutes (for instance, the *Dangerous Goods Act 1975* (NSW) and the *Dangerous Substances Act 1979* (SA)) impose liabilities on corporations, without including any test of whose behaviour or state of mind binds the corporation. In these instances, the common law ‘directing mind and will’ principles in *Tesco* would apply.

The majority of statutes, however, specifically impose liability on a corporation for the acts of its officers or other persons acting within the scope of their authority.

Some statutes adopt an abbreviated formulation along the following lines:

For the purposes of proceedings for an offence against this Act, the conduct and state of mind of an officer [which includes a director], employee or agent of a body corporate acting within the scope of his or her actual, usual or ostensible authority will be imputed to the body corporate (*Environment Protection Act 1993* (SA) — s 127(1)).

However, the more common approach in State and Territory legislation is to adopt the more expansive model in the Commonwealth *Trade Practices Act* s 84, namely:

(1) Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate

- (a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

A comparable approach is found in s 769B of the Corporations Act.

5.3.2 Defences

Particular State and Territory statutes may include defences that are directly applicable to corporations. For instance, under some environmental legislation, a body corporate has a defence where it proves, on the balance of probabilities, that the alleged offence did not result from any failure on its part to take all reasonable and practical measures to prevent the offence (for instance, *Environmental Management and Pollution Control Act 1994* (Tas) s 55(1), *Environment Protection Act 1993* (SA) s 124). Likewise, some hazardous goods legislation provides that conduct by certain specified persons is taken to be the conduct of the body corporate unless the body corporate establishes, on the balance of probabilities, ‘that it took reasonable precautions and exercised due diligence to avoid the conduct’ (for instance, *Dangerous Goods (Transport) Act 1998* (WA) s 40(2), *Dangerous Goods Act 1998* (Tas) s 38(3)).

5.4 Social policy underlying corporate liability

This paper does not deal with the social policy goals underlying the legislation reviewed in this paper imposing corporate liability, such as protecting the environment, employees or consumers. For instance, there has been considerable debate in various jurisdictions about how best to frame occupational health and safety laws to protect the workforce. It is a matter for each jurisdiction to determine what types of corporate conduct to regulate or prohibit in this regard, the means by which corporate liability is determined, and the penalties on corporations for breach.

Instead, the remainder of this paper deals with the circumstances in which an individual associated with a corporation should also be liable for breaches by that corporation of this type of legislation.

6 Steps 3 and 4 of derivative liability: individual liability and defences

6.1 Overview

This section deals with the question of what individuals are potentially liable, and the defences available to them, in consequence of a breach by a corporation under the applicable laws dealt with in Section 5 of this paper.

In addition to the analysis below, information regarding individual liability and defences is found in the Australian Law Reform Commission report *Principled Regulation* (2002) Chapter 8.

6.2 General principles

6.2.1 Individuals potentially liable

The Commonwealth, State and Territory statutes reviewed in this paper employ one or more of the following tests to determine what classes of individuals may be criminally liable in consequence of the contravening conduct of their corporations:

- *positional liability*: individuals who hold certain formal positions in the corporation, being directors (in all instances) and company secretaries and chief executive officers (CEOs) (in some instances)
- *managerial liability*: individuals who are concerned or take part in the management of the corporation. This category is based on the definition of ‘executive officer’ as it appeared in the Corporations Act prior to the repeal of that definition in 2004. Appendix 5 of this paper summarises the relevant case law on the term ‘executive officer’ and compares it with the definition of ‘officer’ in s 9 of the Corporations Act

- *responsible officer liability*: individuals designated as having organisational or operational responsibility for the specific conduct dealt with in the legislation
- *participatory liability*: individuals who promote, authorise, permit, instigate, suffer, acquiesce in, consent to, approve of, connive in or neglect to prevent, a breach by the corporation. This category overlaps accessory liability.

Many of the statutes reviewed impose *positional/managerial liability*, which covers directors (in all cases) and company secretaries or CEOs (in a few cases) and any other person who is concerned or takes part in managing the corporation.

Application to boards

The tests for determining what categories of individuals are liable, as they apply to directors, assume collective board responsibility. They make no concession for dissenting directors. However, in some cases, a director might refer to his or her dissent from a particular board decision or course of conduct in arguing that he or she had taken all reasonable steps or had exercised due diligence to prevent the prohibited conduct (where such defences are available).

Application to corporate groups

Many medium to large enterprises are structured as corporate groups, with centralised executive committees making many of the operational and management decisions for group companies.

The tests for determining what categories of individuals are liable accommodate this manner of running corporate groups. For instance, statutes imposing managerial liability typically apply to all individuals who are concerned or take part in the management of a corporation, whether or not they are formally appointed as directors or officers of that, or any related, corporation. Also, under positional liability, persons in a centralised executive would be *de facto* directors of a subsidiary corporation, at least under the Corporations Act, if it could be established that the formally appointed directors of that subsidiary were 'accustomed to act' in accordance with their instructions or wishes.

6.2.2 Burdens of proof

Under general principles of criminal law, there are three burdens of proof in criminal proceedings that are applicable to the Commonwealth, State and Territory legislation under review.

- *Legal burden on the prosecution.* The prosecution must prove beyond reasonable doubt each physical and fault element of the statutory offence charged. The language of the statute indicates what factors stipulated therein are physical/fault elements (rather than defences)
- *Evidential burden on the defendant.* A defendant who wishes to rely on any statutory defence has an evidential burden to adduce or point to admissible evidence that suggests a reasonable possibility that the defence exists. Where a defendant satisfies this initial evidential burden, then, subject to the statute imposing a legal burden on the defendant (see below), the prosecution must prove beyond reasonable doubt that the alleged defence is unfounded in law or fact
- *Legal burden on the defendant.* Legislation may indicate through various formulations that a defendant must prove on the balance of probabilities (the civil standard) any defence that has been raised. These statutory formulations include requirements that a defendant ‘prove’ or ‘establish’ a particular defence or ‘satisfy the court’ in that regard.

These principles are set out in evidential and procedural laws that apply to the statutes reviewed in this paper, for instance ss 13.1–13.5 of the *Cwlth Criminal Code* and s 141 of the *Evidence Act 1995* (NSW) (those sections are set out in Appendix 3). These principles have also been adopted for some Corporations Act provisions (*evidential burden on the defendant*: for instance, ss 195(1A), 200C(3), 206A(1B), 1101F(2); *legal burden on the defendant*: for instance, ss 188(3), 592(2), 1307(3)).

6.3 Commonwealth legislation

6.3.1 Overview

Individuals potentially liable

The Commonwealth statutes reviewed in this paper have a range of approaches to what individuals are potentially criminally liable. Some statutes impose positional liability, while others impose positional/managerial liability, managerial liability or responsible officer liability (as explained in 6.2.1).

Burdens of proof

All Commonwealth statutes reviewed in this paper require the prosecution to prove beyond reasonable doubt (unless conceded by the defendant) that the defendant comes within the category of individuals potentially liable under the relevant statute. Some of these statutes treat each additional factor set out in the relevant provision as physical/fault elements that the prosecution must prove beyond reasonable doubt. By contrast, other statutes treat these additional factors as defences and also go beyond an evidential burden to impose a legal burden on a defendant to prove any defence raised on the balance of probabilities.

6.3.2 Environmental and hazardous goods legislation

Positional/managerial liability with legal burden on the prosecution

The *Environment Protection Act* ss 494, 495 and the *Hazardous Waste Act* s 40B provide in effect that, where a body corporate contravenes various stipulated provisions of the Act, any person who:

- is a director or other executive officer of the body corporate (being any person who is concerned in, or takes part in, the management of the body corporate)
- was in a position to influence the conduct of the body corporate in relation to the contravention

- knew that, or was reckless or negligent as to whether, the contravention would occur, and
- failed to take all reasonable steps to prevent the contravention

is guilty of an offence (or a contravention).

The statutes treat all these factors as physical/fault elements, which the prosecution must prove beyond reasonable doubt.

The concepts of ‘reckless’ or ‘negligent’ are defined in the *Cwlth Criminal Code* ss 5.4, 5.5. They are set out in Appendix 4.

The statutes provide guidance for determining whether a defendant has ‘failed to take all reasonable steps’ to prevent the contravention, by requiring the court to have regard to certain matters, including whether the officer took any action directed towards ensuring (to the extent that the action is relevant to the contravention) that:

- the body arranged regular professional assessments of the body’s compliance with the Act
- the body implemented any appropriate recommendations arising from such an assessment
- the body established an appropriate system for managing the effects of its activities (including any adverse consequences)
- the body’s employees, agents and contractors had a reasonable knowledge and understanding of the requirements of the Act, in so far as those requirements affect the employees, agents or contractors concerned (*Environment Protection Act* s 496(1), *Hazardous Waste Act* s 40B(4)).

The *Environment Protection Act* also requires the court to take into account what action (if any) the person took when he or she became aware of the contravention.

Positional/managerial liability with legal burden on the defendant

The *Road Transport Reform (Dangerous Goods) Act 1995* s 42(5) provides that, where a body corporate commits an offence under that Act, any director, secretary or manager is also liable unless that person ‘satisfies the court’ that he or she:

- did not know that the offence was committed, or
- was not in a position to influence the conduct of the body corporate in relation to the offence, or
- took reasonable precautions and exercised due diligence to prevent the commission of the offence.

A defendant must establish any of these defences on the balance of probabilities.

6.3.3 Fair trading

The fair trading provisions of the *Trade Practices Act* extend only to those individuals who are accessories to an offence. They do not go further and impose derivative liability on individuals in consequence of a corporate breach.

6.3.4 Other Commonwealth legislation

Managerial liability with legal burden on the defendant

The *Taxation Administration Act 1953* s 8Y provides in effect that:

- where a corporation commits a taxation offence, any person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed also to have committed that offence unless the person ‘proves’ that he or she:
 - did not aid, abet, counsel or procure the act or omission of the corporation concerned, and
 - was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation
- for the purposes of this provision, an officer of a corporation shall be presumed, unless the contrary is proved, to be concerned, and to take part, in the management of the corporation.

Positional liability (company secretary) with legal burden on the defendant

The Corporations Act s 188 provides that company secretaries are liable for certain contraventions by their companies, ‘unless [the defendant secretaries] show that they took all reasonable steps to ensure that the company complied with the section’. A defendant must prove the defence on the balance of probabilities.

Responsible officer liability

Some legislation requires corporations to identify specific officeholders who are to be responsible for particular regulated activities, with those individuals being personally liable in the event of breach by their corporations. Examples are the *Life Insurance Act 1995* s 230F(3) and the *Banking Act 1959* s 11CG(2), both of which impose duties on a stipulated officer to ensure that the company complies with particular directions. Also, the Corporations Act Part 7.9 imposes duties on a ‘responsible person’ in relation to the preparation of product disclosure statements.

6.4 State and Territory legislation

6.4.1 Individuals potentially liable

Set out in the table below is a summary of those classes of persons who are potentially liable under the State and Territory legislation reviewed in this paper, according to the categories described in 6.2.1. The most common category is positional/managerial liability. Also, some statutes, particularly the environmental legislation, impose more than one ground of individual liability.

Further details are set out in Appendix 6.

	Environmental	OH&S	Hazardous goods	Fair trading	Total
Positional/managerial	6	1	5	1	13
Positional (only)	2	1	0	2	5
Managerial (only)	0	1	0	0	1
Responsible officer	3	1	0	0	4
Participatory	2	2	1	1	6

Positional/managerial liability

Directors are specifically referred to in each of the thirteen instances of this form of alternative liability. Company secretaries are included in three of the five instances under hazardous goods and the single instance under fair trading.

Positional only liability

Directors are included in each of the five instances of this form of liability. CEOs are also included in the two instances under environmental legislation.

6.4.2 Burdens of proof and defences

As with the Commonwealth legislation, all State and Territory statutes reviewed in this paper require the prosecution to prove beyond reasonable doubt (unless conceded by the defendant) that the defendant came within the relevant category of individuals potentially liable.

The State/Territory statutes typically treat the remaining factors set out in the relevant provisions as defences, with a legal burden on the defendant to prove any defence raised on the balance of probabilities. In effect, an individual is presumed to be guilty unless he or she establishes a defence. This contrasts with some, but not all, of the Commonwealth legislation discussed in 6.3.

The range of individual defences available to defendants, and the number of statutes that contain each type of defence, are summarised in the following table, grouped according to the area of regulation. Most jurisdictions provide for more than one defence for each area of regulation.

Further details of defences are set out in Appendix 7.

Individual liability and defences

	Environmental	OH&S	Hazardous goods	Fair trading	Total
Due diligence	5	3	5	1	14
No influence	4	2	4	0	10
No knowledge	2	0	3	0	5
Reasonable steps	4	0	0	0	4
Fair trading defence	0	0	0	4	4
No reasonable knowledge	2	1	1	0	4
Reasonable mistake	0	0	0	4	4
Reasonable reliance on information	0	0	0	4	4
Statutory body corporate defence	4	0	0	0	4
Sudden or extraordinary emergency	2	0	0	0	2
Impractical to comply	0	1	0	0	1
No control	0	1	0	0	1
No authority, permission or consent	1	0	0	0	1

7 Implications of the current law

7.1 Impact on corporations and individuals

In response to the general question posed in the terms of reference, it is arguable that the complexities arising from the lack of uniformity both within and between jurisdictions in relation to the tests for imposing derivative liability on directors and other corporate officers may:

- detract from good corporate governance by reducing the possibility of directors and others having a full appreciation of their legal responsibilities in performing their corporate functions, and the criminal sanctions they may face for breach
- reduce the chances of corporations fully appreciating the best way to ensure corporate compliance
- increase significantly compliance costs for businesses in attempting to identify and respond to that complex legal environment. For instance, differences between jurisdictions in relation to the same type of legislation may force corporations to adopt arbitrary differences in compliance practices in various jurisdictions to accommodate variations in grounds of personal liability and defences
- act as a general disincentive for individuals to undertake corporate roles.

In many cases, there appears to be no clear policy reason justifying the different approaches taken in various jurisdictions.

The consequences of these statutory differences cannot be quantified and may differ considerably between corporations and between individuals. While comprehensive statistical information is not readily available, it appears that the number of prosecutions is

relatively small, with convictions typically resulting in relatively low fines. However, this pattern may change over time.

Also, for many individuals, it may be the prospect of any criminal conviction, rather than the amount of any monetary or other penalty, that may be the source of greatest concern. Furthermore, while directors and officers insurance policies may cover the cost of defending criminal proceedings, they may specifically exclude, or otherwise be unable to cover, any penalties imposed for criminal liability.

7.2 Issues for consideration

Respondents are invited to comment on any aspect of the discussion in this paper on the means by which statutes impose individual derivative liability, including:

- have respondents encountered in practice any problems with disparate Commonwealth, State and Territory statutes that impose individual liability and provide for various defences?
- if so, what have been the practical effects of these differences in approach, for instance, the impact on compliance programs?

8 Developing a derivative liability template

8.1 The purpose of a template

One of the reasons for imposing derivative liability is to encourage individuals connected with corporations to ensure, as best they reasonably can, that their corporations comply with regulatory standards and other requirements. This goal may be promoted by a legislative template that harmonises the approaches taken to individual liability and defences in the various jurisdictions, thereby enabling corporations to adopt uniform compliance strategies for the various aspects of their corporate activities.

The benefits of a legislative template have also been referred to by Bruce Cowley, Partner, Minter Ellison Brisbane, who considered that it may better ensure that ‘directors guide corporate vehicles in a manner which results in legislation being complied with whilst providing consistency and uniformity for directors and the consequent economic benefits of reducing corporate compliance costs’ (*Personal Liability for Nominee Directors*, Ampla Limited Twenty-Seventh Annual Conference July 2003).

8.2 Criteria for assessing a template

The criteria for assessing the merits of possible alternative templates might include:

- *practicality and fairness*: a template should not assume that directors or other managers of larger enterprises are, or can be, aware of every aspect of the day-to-day functioning of their corporations. Equally, however, corporate controllers should not be able to avoid their responsibilities merely by reference to the size or complexity of their organisation

- *suitability*: any defences provided for in a template need to be realistic. Directors or other corporate managers may have little incentive to implement corporate compliance systems or practices if the available statutory defences are too narrow or difficult to satisfy. Equally, however, a template should not contain defences that would permit persons to avoid liability merely through their inactivity or acquiescence
- *enforceability*: the public interest may not be served if the physical/fault elements that the prosecution must prove beyond reasonable doubt impose such a burdensome evidential requirement as to create an undue and inappropriate disincentive for regulators to prosecute apparent breaches.

8.3 Types of template

The remainder of this paper puts forward for discussion two different types of template:

- *a general derivative liability template*: three possible models are reviewed in Section 9
- *a responsible officer derivative liability template*: this model is reviewed in Section 10. It deals with situations where it is appropriate to identify one or more individuals who are required to ensure corporate compliance.

8.4 Issues for consideration

Respondents are invited to comment on any aspect of the discussion in this Section on developing a derivative liability template, including:

- are the criteria for assessing the alternative templates appropriate?
- should there be additional or different criteria?

9 Alternative general derivative liability templates

9.1 Overview

Theoretically, there are many possible combinations of individual liability, defences and burdens of proof that a general derivative liability template could adopt, as seen from the analysis in Section 6 of this paper. However, for the purposes of further discussion and comment, the Advisory Committee puts forward three possible alternative templates, the first proposed by the Australian Law Reform Commission (ALRC), the second reflecting the predominant pattern in current State and Territory legislation and the third reflecting a new approach in a recent State statute.

These alternative templates deal with different aspects of positional and managerial liability (as described in 6.2.1). They do not include responsible officer liability, which is a separate template discussed in Section 10 to deal with particular circumstances where it is appropriate to identify one or more persons with responsibility for the specific conduct dealt with under a statute.

The alternative general templates do not include participatory liability. This category significantly overlaps accessory liability, which applies to individuals under general criminal law principles and therefore may not need to be included in a derivative liability template.

The alternative general templates adopt different approaches to burdens of proof, as described in 6.2.2.

A general legislative template could be included in the Corporations Act (and apply within the constitutional ambit of that Act) or could be promoted as a model for each jurisdiction to take into account in developing or amending its derivative liability legislation.

9.2 Australian Law Reform Commission template

The ALRC report *Principled Regulation* (2002) (Recommendations 8–1, 8–2 and 8–4) proposed a template based on the Commonwealth *Environment Protection Act* and *Hazardous Waste Act*. The elements of those Commonwealth Acts are set out in 6.3.2.

The ALRC template treats all the matters referred to therein as physical/fault elements, each of which the prosecution must prove beyond reasonable doubt (refer 6.2.2 *Legal burden on the prosecution*).

The ALRC template provides that:

Where a corporation contravenes relevant legislation, the prosecution must prove the following physical and fault elements in any derivative liability action against an individual:

- the individual, by whatever name called and whether or not the individual is an officer of the corporation, is concerned, or takes part, in the management of the corporation [An alternative formulation would be to add a specific reference to 'directors']
- the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct
- the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur [An alternative formulation would be to substitute the word 'might' for 'would'], and
- the individual failed to take all reasonable steps to prevent the contravening conduct. [An alternative formulation would be to impose an evidential onus on the defendant in this regard.]

The three possible alternative formulations (not proposed by the ALRC) are further explained under 9.5 **Comparison of the general templates**, below.

9.3 State and Territory representative template

This template (the representative template) seeks to reflect the predominant pattern of derivative liability in State and Territory legislation (as summarised in the tables in 6.4.1 and 6.4.2, above). It is also comparable to some Commonwealth legislation (as set out in 6.3, above).

The representative template treats all matters referred to therein (other than proof that a defendant was a director or other manager) as defences, any of which a defendant must prove on the balance of probabilities (refer 6.2.2 *Legal burden on the defendant*).

The representative template provides that:

Where a corporation contravenes relevant legislation:

any director or other person who is concerned, or takes part, in the management of the corporation is also liable unless the person proves that he or she:

- was not in a position to influence the relevant conduct, or (if the person cannot prove this defence) that he or she
- exercised all due diligence to prevent the relevant conduct, or
- took all reasonable steps to prevent the relevant conduct.

9.4 Alternative State template

This template, which is based on the *Occupational Health and Safety Act 2004* (Vic) s 144, reflects an approach to derivative liability legislation that differs from most State and Territory legislation. Under that provision, the prosecution must prove beyond reasonable doubt that the defendant is an officer of the body corporate and failed to take reasonable care (refer 6.2.2 *Legal burden on the prosecution*). The legislation identifies various factors to take into account in determining whether the person failed in this regard, without there being a legal burden on either the prosecution or the defendant in relation to each of these specific matters.

The alternative State template provides that:

Where an offence committed by a body corporate is attributable to an officer of the body corporate failing to take reasonable care, that officer is also guilty of an offence.

In determining whether an officer of a body corporate is guilty of an offence, regard must be had to:

- what the officer knew about the matter concerned, and
- the extent of the officer's ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned, and
- whether the contravention by the body corporate is also attributable to an act or omission of any other person, and
- any other relevant matter.

'Officer' has the same meaning as in s 9 of the Corporations Act.

9.5 Comparison of the general templates

9.5.1 Individuals potentially liable

Directors

The ALRC template applies only to anyone who is concerned, or takes part, in the management of the corporation. The lack of a specific reference to directors leaves open the possibility of a director arguing that in the circumstances he or she was not in fact involved in the management of the corporation.

The representative template automatically includes all directors in the class of persons potentially liable.

The alternative State template applies to directors, as they are included in the definition of 'officer' under s 9 of the Corporations Act.

Participants in management

The ALRC template and the representative template apply to any individual who 'is concerned, or takes part, in the management of the corporation' (the 'executive officer' test). The alternative State template applies to any 'officer' as defined in s 9 of the Corporations Act, which no longer contains the 'executive officer' test.

Appendix 5 compares the 'executive officer' test with the definition of 'officer' in s 9. As explained in that Appendix, the term 'executive officer' appears to cover a broader class of persons than the term 'officer'.

9.5.2 Ability to influence conduct

This criterion avoids persons being subject to derivative liability merely because they are involved in the management of a corporation, where the breach by the enterprise involves conduct outside their area of influence. It recognises that a board of directors may not realistically be able to exercise any real control over particular day-to-day operational matters within an enterprise. Likewise, some executive officers may have no power or control outside their specific areas of responsibility.

The ALRC template treats ability to influence conduct as a physical element, which the prosecution must prove beyond reasonable doubt. However, it would not be necessary to establish actual exercise of that influence. The prosecution could satisfy this element by proof of a defendant's position of influence, even though the defendant failed to exercise that influence through, say, apathy or acquiescence.

The representative template treats inability to influence the relevant conduct as a defence, which a defendant must prove on the balance of probabilities.

The alternative State template treats the extent of an officer's ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned as a factor to take into account in determining whether that person has failed to take reasonable care.

9.5.3 Informed, reckless or negligent behaviour

The ALRC template treats these matters as fault elements, at least one of which the prosecution must prove beyond reasonable doubt. The alternative State template requires proof of negligent behaviour in that the defendant failed to take reasonable care. There is no equivalent of these elements of fault, recklessness or negligence in the representative template.

Substituting ‘might’ for ‘would’

The obligation imposed by the ALRC template on the prosecution to prove that the defendant knew the contravening conduct ‘would’ occur, or was reckless or negligent in this regard, may impose a particularly high standard of proof. On one interpretation, anything less than proof of certainty that the conduct would occur may be insufficient to satisfy this element. Possibly, a more appropriate standard might be knowledge that, or recklessness or negligence about whether, the conduct ‘might’ occur.

9.5.4 Reasonable steps

This criterion could cover a range of circumstances including, for instance, a board implementing compliance and risk management practices within the enterprise. The test of reasonable steps is objective, having regard to the circumstances of which the director knew or ought to have been aware: see, for instance, *Deputy Commissioner of Taxation v Saunig* (2002) 43 ACSR 387, *Deputy Commissioner of Taxation v Solomon* [2003] NSW CA 62.

The ALRC template treats absence of reasonable steps as a fault element. The prosecution would have to prove beyond reasonable doubt that a defendant had failed to take all reasonable steps to prevent the contravening conduct. By contrast, the representative template treats reasonable steps as a defence for a defendant to prove on the balance of probabilities. The alternative State template makes no reference to reasonable steps.

Adjusting the onus

Under one interpretation of the ALRC template, the prosecution would have to negate every possible reasonable step that the defendant could have taken in the circumstances. A middle position

(as reflected by the possible modification in square brackets in the final dot point of the ALRC template) would be to treat reasonable steps as a defence, with the defendant having an initial evidential burden to provide admissible prima facie evidence of having taken one or more reasonable steps, which the prosecution would then have to negate beyond reasonable doubt (refer 6.2.2 *Evidential burden on the defendant*).

9.5.5 Other matters

The ALRC template has no further physical and fault elements or defences.

Under the representative template, a defendant who choose to raise the due diligence defence must prove it on the balance of probabilities. Like the reasonable steps defence, this might be satisfied by defendant directors establishing that they had implemented suitable compliance and risk management systems within the enterprise.

The alternative State template contains various other factors that the court can take into account in determining whether an officer failed to take reasonable care, namely:

- what the officer knew about the matter concerned, and
- whether the contravention by the body corporate is also attributable to an act or omission of any other person, and
- any other relevant matter.

The final factor indicates that this template can take into account the particular circumstances of each case.

9.6 Burdens of proof

The ALRC template (subject to the possible onus amendment discussed in 9.5.4 *Adjusting the onus*) treats all the matters in the template as physical/fault elements, each of which the prosecution must prove beyond reasonable doubt.

The representative template treats all the matters (other than proof that a defendant was a director or other manager) as defences, with a legal burden on a defendant to prove, on the balance of probabilities, that he or she had no influence or, otherwise, exercised due diligence or took all reasonable steps.

Imposing this legal burden on the defendant under the representative template could be seen as eroding the presumption of innocence and the obligation on the prosecution to prove liability. However (as explained in 6.2.2), varying burdens of proof may be imposed under criminal law provisions, including in some instances an evidential or legal burden on a defendant.

Also, facts or other information relevant to establishing that a person was not in a position to influence the contravening corporate conduct, or had exercised all due diligence or taken all reasonable steps to prevent that conduct, may lie within the particular knowledge of that individual or in practice be significantly more accessible to him or her than to a prosecutor. Arguably, it is not unreasonable in these circumstances to place at least some onus on a defendant to raise these matters and provide, or point to, some admissible evidence in support.

Beyond that, however, should the representative template impose only an evidential, rather than a legal, burden on the defence in this regard, with the prosecution having to negate any defence so raised beyond reasonable doubt (refer 6.2.2 *Evidential burden on the defendant*)?

9.7 Business judgment rule defence

The question has been raised from time to time whether directors and other persons should have a business judgment rule (BJR) defence to derivative liability, along the lines of s 180(2) of the Corporations Act.

None of the templates contains a BJR defence. That defence focuses on directors' duties within a corporation, whereas the legislation reviewed in this paper deals with a corporation's external regulatory compliance obligations. Furthermore, the BJR applies to civil liability only, not criminal prosecutions. Also, it would be inappropriate if any defence could be construed as permitting

individuals to avoid liability on the grounds that it was in the rational (economic) interests of the corporation to disregard a statutory obligation.

The reasonable steps criterion in the ALRC and representative templates, the due diligence defence in the representative template, and the criteria set out in the alternative State template, may provide suitable protection for those directors or other managers who, in good faith, seek to implement what they rationally consider to be suitable steps to prevent breaches by their corporation.

9.8 Issues for consideration

Respondents are invited to comment on any aspect of the discussion in this Section on developing a general derivative liability template, including:

- should the Australian Law Reform Commission template be adopted, either as proposed by the Commission or with any of the following possible modifications, namely:
 - modify the category of individuals liable by adding a specific reference to directors
 - require the prosecution to prove that the individual knew that, or was reckless or negligent as to whether, the contravening conduct might (rather than ‘would’) occur
 - impose an evidential onus on a defendant to provide admissible prima facie evidence of having taken one or more reasonable steps, which the prosecution would then have to negate beyond reasonable doubt
- should the State and Territory representative template be adopted, either:
 - as set out, or
 - modified to impose only an evidential, rather than a legal, burden on the defence in relation to the defences?
- should the alternative State template be adopted?

- should some other general derivative liability template be adopted?
- should there be a business judgment rule defence?

10 Responsible officer derivative liability template

10.1 Purpose of the template

In some situations, it may be appropriate to impose a specific statutory duty on one or more individuals within a corporation to act, or supervise the conduct of others, to ensure that the corporation complies with its statutory responsibilities. An example is where a corporation is undertaking hazardous or potentially environmentally damaging activities (for instance, mining) that require close personal supervision by someone at the operational level to guard against injury to individuals or environmental damage.

A responsible officer template may help increase overall levels of compliance by imposing responsibility on at least one individual in an organisation to ensure compliance, rather than focus liability solely on the directors, who may lack the time or expertise in this regard.

It would also be in the interests of a responsible officer to request that the organisation take any necessary remedial steps, including providing sufficient resources to guard against breach. Failure by the directors to act when so requested may provide evidence of their lack of due diligence or failure to take reasonable steps in any prosecution against them under a general derivative liability provision.

10.2 Form of the template

The responsible officer template provides that:

A corporation must appoint an individual [or individuals] within the corporation to be a responsible officer [for particular designated purposes]. If the corporation fails to appoint a responsible officer, each director of the corporation is taken to be a responsible officer.

A responsible officer must take reasonable steps to ensure compliance by the corporation with its obligations under the Act [in relation to those designated purposes]. A responsible officer is liable for non-compliance unless that person proves that he or she took all reasonable steps.

10.3 Analysis of the template

The template requires the corporation to appoint a responsible officer. It reflects the approach in some responsible officer provisions that liability will be imposed on a broader range of persons where a corporation fails to appoint a responsible officer when required to do so (for instance, the *Occupational Health, Safety and Welfare Act 1986* (SA) s 61). This ensures that the public interest purpose of this type of legislation cannot be circumvented by a corporation simply failing to act.

The template requires the corporation to appoint a responsible officer for particular purposes. By contrast, under the US ‘responsible corporate officer’ (RCO) doctrine (as outlined at 1.5, above), the courts determine who has sufficient power or authority within a corporation to be liable for breaches by that corporation.

The template imposes a legal burden on the defendant to prove (on the balance of probabilities) that he or she took all reasonable steps to ensure compliance by the corporation with its obligations under the Act. Possible alternative approaches are to impose:

- a legal burden on the prosecution to prove beyond reasonable doubt that the responsible officer failed to take all reasonable steps (cf ALRC template in 9.2), or
- an evidential burden on the responsible officer to adduce or point to admissible evidence suggesting that the responsible officer has taken all reasonable steps, whereupon the prosecution must prove beyond reasonable doubt that this alleged defence is unfounded in law or fact (refer 6.2.2 *Evidential burden on the defendant*).

10.4 Issues for consideration

Respondents are invited to comment on any aspect of the discussion in this Section on developing a responsible officer derivative liability template, including:

- who should have what burden of proof in relation to reasonable steps?
- should some other responsible officer derivative liability template be adopted?
- in what circumstances, if any, should a responsible officer template substitute for a general derivative liability template?

Appendix 1 Direct liability under the Corporations Act and State legislation

Corporations Act

The Corporations Act imposes duties or liabilities on a range of individuals, including directors, other corporate officers, employees and other persons. Set out below are some of the principal provisions analysed according to the terms used in the Corporations Act.

Some provisions set out the specific circumstances in which a person is guilty of an offence, for instance, s 184. In other cases, s 1311 provides that any person who does an act or thing that the person is forbidden to do by the Act, or does not comply with or otherwise contravenes a provision of the Act, is guilty of an offence.

Directors are subject to the provisions in boxes 1-7.

Other corporate officers are subject to the provisions in boxes 2-3, 5-7 (and, in the case of company secretaries, also the provisions in box 4).

Other corporate employees are subject to the provisions in boxes 5-7.

Any of these individuals may also be liable under the provisions in boxes 8-10, depending on the particular circumstances.

Description used in the Corporations Act	Relevant provisions
1. 'a director' [only]	191 [disclosure of personal interests] 205G [disclosure of interests in securities] (Recommendation 1 of the Advisory Committee <i>Insider Trading Report</i> (2003) proposes to extend this provision beyond directors) 295(4), (5) [declaration in annual report] 303(4), (5), 306 [disclosures in half-year report] 317 [documents for AGM] 344 [compliance with financial requirements] 347A [solvency resolutions] 438B [providing assistance to administrator] 588G [insolvent trading]
2. 'an officer' [an ' <i>officer</i> ' includes a director]	312, 323B [assisting auditor] (323B also covers auditors of controlled entities) 530A(1)–(5) [assisting liquidator] 601HG(6) [assisting auditor]
3. 'a director or other officer' [This is the same as ' <i>officer</i> ', as the definition of officer includes a director]	181(1)(a), 184(1) [good faith] 181(1)(b), 184(1) [proper purpose] 323 [provide information for financial statements]
4. 'a director and secretary'	200B (by virtue of s 11(a) definition of 'associate') [retirement benefit only with shareholder approval] 475(1) [report to liquidator on company affairs]
5. 'a director, secretary, other officer or employee' [This could be reduced to ' <i>officer or employee</i> ', as the definition of officer includes a director or secretary]	182, 184(2) [improper use of position]
6. 'a director or other officer or employee' [This could be reduced to ' <i>officer or employee</i> ', as the definition of 'officer' includes a director]	183, 184(3) [improper use of information]
7. 'an officer or employee'	483(1) (also a contributory, trustee, receiver, banker or agent) [delivering property to liquidator] 590(1), (4), (4A) (also former officers and former employees) [various liquidation offences] 1307 (also former officers, former employees, members and former members) [falsification of books] 1309(1), (2) [false or misleading information]
8. 'chief executive function', 'chief financial officer function' [These terms are not defined]	295A [declaration about financial statements]

Description used in the Corporations Act	Relevant provisions
9. 'any person who is involved in a ... contravention'	79 [accessorial liability tests] 209(2) [related party benefits] 254L [redeeming preference shares] 256D [share capital reductions] 259F [buy-backs] 260D [financial assistance]
10. 'a person'	1308(2), (4) [false or misleading statements]

State legislation

The New South Wales *Crimes Act* is an example of applicable State legislation.

Description used in the <i>Crimes Act</i> 1900 (NSW)	Relevant provisions
'a director or officer' [The <i>Crimes Act</i> does not include a definition of 'director' and the definition of officer does not specifically refer to director]	173 (also members) [fraudulently appropriating property] 174 [omitting entries in corporate books] 175 (also members) [destroying books] 176 [publishing fraudulent statements] 176A (also members) [cheating or defrauding]

Appendix 2 Corporate criminal liability

Extract from the Commonwealth Criminal Code

Section 12.1 General principles

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the *Crimes Act* 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

Section 12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

Section 12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

- (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

- (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
- (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

“board of directors” means the body (by whatever name called) exercising the executive authority of the body corporate.

“corporate culture” means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

“high managerial agent” means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy.

Section 12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5 [see Appendix 4 of this Discussion Paper].

(2) If:

- (a) negligence is a fault element in relation to a physical element of an offence; and
- (b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Section 12.5 Mistake of fact (strict liability)

(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
- (b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Section 12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

Application of ss 12.1–12.6 to legislation

Physical elements

Section 12.2 of the *Cwlth Criminal Code* provides that any physical element of an offence is attributed to a body corporate if committed by any employee, agent or officer of that body corporate acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority.

These provisions apply, for instance, to Commonwealth environmental legislation (*Environment Protection and Biodiversity Conservation Act 1999 (Environment Protection Act)*) and hazardous goods legislation (*Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Hazardous Waste Act)*), which apply to corporations as well as individuals.

Fault elements

Section 12.3 of the *Cwlth Criminal Code* implicitly makes a compliance system (or lack of one) a relevant factor in determining corporate responsibility where any offence by a corporation under particular Commonwealth legislation stipulates a fault element. Subsection 12.3(1) provides that where, under any particular legislation, ‘intention, knowledge or recklessness’ is a fault element of an offence, that element is attributed to a corporation that ‘expressly, tacitly or impliedly authorised or permitted the commission of the offence’. Subsection 12.3(2) sets out the ways in which ‘authorisation or permission’ may be established, including any ‘corporate culture’ of non-compliance. Paragraphs 12.3(2)(c) and (d) imply a positive duty on a corporation to maintain a system that promotes compliance with Commonwealth laws if liability is to be avoided under s 12.3(1). Various factors that are relevant in determining a corporate culture are set out in s 12.3(4) of the Code.

These provisions apply to the *Environment Protection Act* and the *Hazardous Waste Act*, which, in some instances, impose criminal liability on any person, including a corporation, that acts intentionally, knowingly or recklessly in breach of the legislation (for instance, *Environment Protection Act* ss 18A(2), 27A(2) & (4), 207B; *Hazardous Waste Act* s 41A(2)). In various other circumstances, a corporation is liable if it merely commits the

physical elements (for instance, *Environment Protection Act* ss 18A(1), 27A(1) & (3)).

One effect of s 12.4 of the *Cwlth Criminal Code* is that negligence by a corporation, where relevant, may be established by aggregating the acts and omissions of any number of its employees, agents or officers. In consequence, the actions of various corporate officers, each of which may be innocent in isolation, can be combined to establish corporate negligence.

Appendix 3 Standards of proof in criminal proceedings

Extract from the Commonwealth Criminal Code

Section 13.1 Legal burden of proof—prosecution

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Code:

“legal burden”, in relation to a matter, means the burden of proving the existence of the matter.

Section 13.2 Standard of proof—prosecution

(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

Section 13.3 Evidential burden of proof—defence

(1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

(4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(5) The question whether an evidential burden has been discharged is one of law.

(6) In this Code:

“evidential burden”, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Section 13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

Section 13.5 Standard of proof—defence

A legal burden of proof on the defendant must be discharged on the balance of probabilities.

Extract from the New South Wales Evidence Act

Section 141 Criminal proceedings: standard of proof

- (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
- (2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

Appendix 4 Recklessness and negligence

Extract from the Commonwealth Criminal Code

Section 5.4 Recklessness

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Section 5.5 Negligence

- A person is negligent with respect to a physical element of an offence if his or her conduct involves:
- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

- (b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

Appendix 5 Comparison of the terms 'executive officer' and 'officer'

Executive officer

Much of the State and Territory legislation reviewed in this paper applies to any individual who is 'concerned or takes part in the management' of a corporation.

That expression was derived from the Corporations Act definition of 'executive officer', which, prior to its repeal in 2004, included any individual who is 'concerned in, or takes part in, the management' of a corporation.

The term 'executive officer' was considered in the leading decision of Ormiston J in *Commissioner for Corporate Affairs (Vic) v Bracht* (1989) 14 ACLR 728. His Honour first sought to define the concept of 'management' and then considered what constitutes 'takes part in' or is 'concerned in' management.

'management'

In *Bracht*, Ormiston J considered that:

the concept of 'management' ... comprehends activities which involve policy and decision making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs (at 733–734).

His Honour found it unnecessary to reach any conclusion on whether that management must be confined to the central direction of the

company's affairs, though he doubted that the term must necessarily be confined in that way.

It is the management of the corporation which is the subject of the prohibition. Thus, although the decisions of a branch manager, subject to predetermined restrictions, may not be comprehended, there are those involved in large, discrete parts of a corporation's business, who, although not participating in the central administration of that corporation, nevertheless are involved in its management to the extent that their policies and decisions have a significant bearing on its business and its overall financial health (at 734).

'takes part in'

According to Ormiston J in *Bracht* (at 734), the expression 'takes part in':

both connotes and proscribes the active participation of a ... person in the management of a corporation. Such participation would have to be real and direct, but not necessarily in a role in which ultimate control is exercised, although it would have to be more than the administrative carrying out of the orders of others responsible for a company's management.

'concerned in'

According to Ormiston J in *Bracht* (at 735–736), the expression 'concerned in' has a much wider operation than 'takes part in'. It covers:

a wide range of activities relating to the management of a corporation, each requiring an involvement of some kind in the decision-making processes of that corporation. That involvement must be more than passing, and certainly not of a kind where merely clerical or administrative acts are performed. It requires activities involving some responsibility, but not necessarily of an ultimate kind whereby control is exercised. Advice given to management, participation in its decision-making processes, and execution of its decisions going beyond the mere carrying out of directions as an employee, would suffice.

Subsequent case law

The case law since *Bracht* has tended to adopt a narrower or broader interpretation of the concept of ‘taking part or being concerned in’ management, depending on the context.

Some cases have given a narrow interpretation to this concept in the context of the former s 556 of the Companies Code, which imposed personal liability for insolvent trading on any director or other ‘person who took part in the management of’ the company. It was held that this expression is limited to persons whose management role in the company may be likened to that of a director (*Holpitt Pty Ltd v Swaab* (1992) 6 ACSR 488 at 491, *Sycotex Pty Ltd v Baseler* (1994) 13 ACSR 766 at 782, *Standard Chartered Bank of Australia Ltd v Antico* (1995) 18 ACSR 1 at 66). The current insolvent trading provision (s 588G) is confined to directors.

In other contexts, the concept has been given an apparently wider interpretation. For instance, a credit controller was held to be an ‘executive officer’ for the purpose of signing a statutory demand (*Hornet Aviation Pty Ltd v Ansett Australia Ltd* (1995) 16 ACSR 445 at 447). Also, authorising a person to use company cheques was evidence that the person giving the authority (who held the corporate title ‘financial controller’) did take part in the management of the company (*ASIC v Parkes* [2001] NSWSC 377, para 84).

Santow J in *Forkserve Pty Ltd v Jack and Aussie Forklift Repairs Pty Ltd* (2001) 19 ACLC 299 commented that the terms ‘take part in’ and ‘being concerned in’ for the purposes of liability under s 232(2) (prior to its repeal) should be given a wide interpretation:

Those terms include activities involving some responsibility and participation in the decision-making processes of the company but do not extend to routine clerical or administrative duties associated with management (at 312).

In this case, his Honour held that a service manager was an executive officer, and therefore was subject to the fiduciary duty under s 232(2) (since repealed) primarily as he was concerned with the management of staff and involved in the pricing and general ‘management’ side of the business.

Officer

Section 9 of the Corporations Act defines an ‘officer’ to include any person:

- who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- who has the capacity to affect significantly the corporation’s financial standing.

Comparison of ‘executive officer’ and ‘officer’

Both definitions apply to persons who have some involvement in the management of a corporation.

The notion of ‘management’ has not been defined in the Corporations Act. However, the tests in the definition of ‘officer’ in s 9 largely adopt the concepts used by Ormiston J in *Bracht* at 733–734 to describe ‘management’, namely:

- making or participating in making decisions ‘that affect the whole, or a substantial part, of the business of the corporation’ (s 9) [‘activities which involve policy and decision making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation’: *Bracht*]
- having a capacity ‘to affect significantly the corporation’s financial standing’ (s 9) [‘to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation’: *Bracht*].

The s 9 definition does not contain the additional test of management used by Ormiston J in *Bracht*, namely policy and decision making in relation to a corporation that ‘may have some significant bearing on ... the conduct of its affairs’.

Another difference between ‘executive officer’ and ‘officer’ is that the former applies to anyone who is ‘concerned or takes part’ in

management, while the latter applies to anyone who ‘makes or participates in making’ managerial decisions. In view of the lack of any case law on the expression ‘makes or participates in making’, it is not clear whether this difference is material.

Appendix 6 Persons subject to derivative liability under State and Territory legislation

The possible grounds of personal liability to which directors and other corporate officers may be exposed in consequence of breaches or contraventions of particular State and Territory legislation by their company are:

- *positional liability*: individuals who hold certain formal positions in the corporation, being directors (in all instances) and company secretaries and chief executive officers (CEOs) (in some instances)
- *managerial liability*: individuals who are concerned or take part in the management of the corporation. This category is based on the definition of ‘executive officer’ as it appeared in the Corporations Act prior to the repeal of that definition in 2004. Appendix 5 of this paper summarises the relevant case law on the term ‘executive officer’ and compares it with the definition of ‘officer’ in s 9 of the Corporations Act
- *responsible officer liability*: individuals designated as having organisational or operational responsibility for the specific conduct dealt with in the legislation
- *participatory liability*: individuals who promote, authorise, permit, instigate, suffer, acquiesce in, consent to, approve of, connive in or neglect to prevent, a breach by the corporation. This category overlaps accessorial liability.

Much of this legislation imposes *positional/managerial liability*, namely that the individual either held certain formal positions in the corporation or was otherwise concerned or took part in its management.

What may otherwise constitute absolute liability is tempered by the availability of statutory defences. These defences are summarised in this Appendix and are set out in detail and analysed in Appendix 7.

Environmental legislation

Northern Territory

The *Waste Management and Pollution Control Act 1998* (NT) s 91(1) adopts positional/managerial liability. It imposes liability on ‘every person who is a director of or who is concerned in the management’ of any body corporate that commits an offence under the Act.

The statutory defences are:

- due diligence
- reasonable steps
- body corporate defence
- no authority, permission or consent.

South Australia and Tasmania

The *Environment Protection Act 1993* (SA) s 129 and the *Environmental Management and Pollution Control Act 1994* (Tas) s 60 impose positional liability, responsible officer liability and participatory liability.

In relation to positional and responsible officer liability, the statutes (SA s 129(1), Tas s 60(1)) provide that, where a body corporate commits an offence, any person who is an officer of the body corporate is also liable. In both Acts, ‘officer’ is defined (in s 3) to include a director and the chief executive officer (positional liability) and any employee with [management: SA] responsibilities in respect of the matters to which the contravention or alleged contravention relates (responsible officer liability).

The statutory defences in relation to positional and responsible officer liability are:

- reasonable steps
- sudden or extraordinary emergency.

These statutes (SA s 129(3), Tas s 60(3)) also impose participatory liability by providing that where a body corporate contravenes the Act, any officer of the body corporate (as defined in s 3) who 'knowingly promoted or acquiesced in the contravention' is also guilty of an offence.

Australian Capital Territory

The *Environment Protection Act 1997* (ACT) s 147(1) adopts positional/(a form of) managerial liability and also responsible officer liability. It provides that, 'where a body corporate commits an offence, a prescribed officer is guilty of the offence'. In this context, a prescribed officer means:

- (a) a director of the body corporate or other person (however described), responsible for the direction, management and control of the body corporate; or
- (b) any other person who is concerned in, or takes part in, the management of the body corporate and whose responsibilities include duties in relation to the matters giving rise to the offence (s 147(4)).

The statutory defences are:

- due diligence
- no reasonable knowledge
- body corporate defence.

New South Wales

The *Protection of the Environment Operations Act 1997* (NSW) s 169 adopts positional/managerial liability. It provides that 'each person who is a director of the corporation or who is concerned in the management of the corporation' is liable for various environmental offences.

The statutory defences are:

- due diligence
- no influence
- no knowledge.

Victoria

The *Environment Protection Act 1970* (Vic) s 66B adopts positional/managerial liability. Under that provision, ‘each person who is a director or is concerned in the management of the corporation’ that has contravened the legislation is guilty of an offence.

The statutory defences are:

- due diligence
- no influence
- no knowledge
- body corporate defence.

Queensland

The *Environmental Protection Act 1994* (Qld) s 493 adopts positional/managerial liability. It provides that, if a corporation commits an offence against the Act, ‘each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure the corporation complies with this Act’. An executive officer of a non-government corporation is defined as ‘a person who is (i) a member of the governing body of the corporation; or (ii) concerned with, or takes part in, the corporation’s management’ (Schedule 3).

The statutory defences are:

- no influence
- reasonable steps.

Western Australia

The *Environmental Protection Act 1986* (WA) s 118 adopts positional/managerial liability. It provides that, 'if a body corporate commits an offence under this Act, each person who is a director or who is concerned in the management of the body corporate is taken to have also committed the same offence'.

The statutory defence are:

- due diligence
- no influence
- no reasonable knowledge
- body corporate defence.

Occupational health and safety

New South Wales

The *Occupational Health and Safety Act 2000* (NSW) s 26 adopts positional/managerial liability. It provides that 'each director of the corporation, and each person concerned in the management of the corporation', is liable for OH&S contraventions by the corporation.

The statutory defences are:

- due diligence
- no influence
- impractical to comply
- no control.

Tasmania

The *Workplace Health and Safety Act 1995* (Tas) s 53 adopts positional liability. It provides that each director of the body corporate is liable for contraventions by that corporation.

The statutory defences are:

- due diligence
- no reasonable knowledge.

Queensland

The *Workplace Health and Safety Act 1995* (Qld) s 167 adopts managerial liability. It provides that, if a corporation commits an offence against this Act, ‘each of the corporation’s executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision’. Executive officer ‘means a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer’ (Schedule 3).

The statutory defences are:

- due diligence
- no influence.

South Australia

The *Occupational Health, Safety and Welfare Act 1986* (SA) s 61 adopts responsible officer liability. It requires that each body corporate carrying on business in South Australia must appoint one or more officers of the company, resident in that State, to be responsible officers. An officer of the company includes a member of the governing body of the body corporate and an executive officer of the body corporate. The responsible officer ‘must take reasonable steps to ensure compliance by the body corporate with its obligations under this Act’. If a body corporate fails to appoint a responsible officer, each officer of the body corporate is taken to be a responsible officer.

Western Australia

The *Occupational Safety and Health Act 1984* (WA) s 55 imposes participatory liability. Subsection (1) provides that, where a body

corporate is guilty of an offence under this Act ‘and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity he, as well as the body corporate, is guilty of that offence’. Similar participatory liability tests are set out in subsection (1a). The Act does not define the term ‘officer’.

There are no defences in this legislation. However, the prosecutor must prove the above elements of liability.

Victoria

The *Occupational Health and Safety Act 2004* (Vic) s 144 imposes participatory liability. It provides that, where an offence against this Act committed by a body corporate is ‘attributable to an officer of the body corporate failing to take reasonable care’, that officer is also guilty of an offence.

In determining whether an officer of a body corporate is guilty of an offence, regard must be had to:

- what the officer knew about the matter concerned; and
- the extent of the officer’s ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned; and
- whether the contravention by the body corporate is also attributable to an act or omission of any other person; and
- any other relevant matter.

The Act adopts the same definition of officer as in s 9 of the Corporations Act.

Hazardous goods

New South Wales

The *Road and Rail Transport (Dangerous Goods) Act 1997* (NSW) s 42(5) adopts positional/managerial liability. It provides that, if a body corporate commits an offence against the Act, any person ‘who is a director, secretary or manager of the body corporate or who is otherwise concerned in the management of the body corporate’ is liable for any contravention by that entity.

The statutory defences for directors and employees are:

- due diligence
- no influence
- no knowledge.

South Australia

The *Dangerous Substances Act 1979* (SA) s 41 adopts positional/(a form of) managerial liability. It provides that, where a body corporate commits an offence, ‘each member of the governing body and the manager of the body corporate’ are also liable.

The statutory defences under this Act are:

- due diligence
- no reasonable knowledge.

Tasmania

The *Dangerous Goods Act 1998* (Tas) s 38(6) adopts positional/managerial liability. It provides that ‘a person who is a director, secretary or manager of the body corporate or who is otherwise concerned in the management of the body corporate’ is liable for any contraventions by that entity.

The statutory defences are:

- due diligence
- no influence
- no knowledge.

Western Australia

The *Dangerous Goods (Transport) Act 1998* (WA) s 40(5) adopts positional/managerial liability. It provides that ‘a person who is a director, secretary or manager of the body corporate or who is otherwise concerned in the management of the body corporate’ is liable for any contraventions by that entity.

The statutory defences are:

- due diligence
- no influence
- no knowledge.

Queensland

The *Dangerous Goods Safety Management Act 2001* (Qld) s 173 adopts positional/managerial liability. It provides that, if a corporation commits an offence against this Act, ‘each of the corporation’s executive officers also commits an offence, namely the offence of failing to ensure that the corporation complies with the provision’. ‘Executive officer’ ‘means a person who (a) is a member of the governing body of the corporation; or (b) is concerned with, or takes part in, the corporations management, whatever the person’s position is called and whether or not the person is a director of the corporation’.

The statutory defences are:

- due diligence
- no influence.

Victoria

The *Dangerous Goods Act 1985* (Vic) s 46 imposes participatory liability. It provides that, where an offence against this Act committed by a body corporate 'is proved to have been committed with the consent or connivance of, or to have been attributable to any wilful neglect on the part of, an officer of the body corporate or person purporting to act as such an officer, that officer or person is also guilty of that offence and liable to the penalty for that offence'.

Subsection 3(1) of this Act provides that 'officer' of a body corporate generally has the same meaning as in s 82A of the Corporations Act, which included a reference to 'executive officer' (defined in s 9 of the Corporations Act). Section 82A and the executive officer definition were removed from the Corporations Act in 2004.

There are no defences in the Victorian legislation. However, the prosecutor has to prove the elements of liability, including that any neglect is wilful.

Fair trading legislation

South Australia

The *Fair Trading Act 1987* (SA) s 90(3) adopts positional liability. It imposes liability on 'each director', subject to statutory defences for:

- due diligence
- fair trading defence
- reasonable mistake
- reasonable reliance on information.

Queensland

The *Fair Trading Act 1989* (Qld) s 96 adopts positional liability. It imposes liability on 'each director or member of the governing body of the body corporate' that commits an offence, subject to the following statutory defences:

- fair trading defence
- reasonable mistake
- reasonable reliance on information.

Western Australia

The *Fair Trading Act 1987* (WA) s 81(1) adopts a positional/(a form of) managerial liability. It imposes liability on each person who, at the time of the commission of the offence, was ‘a director of the corporation or was the manager, secretary or other similar officer of that body, or who purported to act in any such capacity’, subject to the following statutory defences:

- reasonable mistake
- reasonable reliance on information
- fair trading defence
- WA fair trading specific defence.

Victoria

The *Fair Trading Act 1999* (Vic) s 143(1) imposes participatory liability. It provides that: ‘If a body corporate contravenes any provision of this Act, each officer of the body corporate is deemed to have contravened the same provision if the officer knowingly authorised or permitted the contravention.’

The statutory defences are:

- fair trading defence
- reasonable mistake
- reasonable reliance on information.

Appendix 7 Defences for persons subject to derivative liability under State and Territory legislation

The range of individual defences available to directors, and the number of Acts that contain each type of defence, are set out below. Typically, the statutes:

- require a defendant to:
 - ‘prove’ a defence, or
 - ‘establish’ a defence, or
 - ‘satisfy the court’ of a defence, or
- provide a defence if ‘it is proved’ that the defence arises.

Any of those formulations imposes a legal burden on a defendant to prove the defence on the balance of probabilities (refer 6.2.2 *Legal burden on the defendant*).

1. Due diligence

This involves proof that the director exercised all due diligence to prevent the contravention by the corporation.

The leading case on the general principles for determining due diligence is *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 32 FLR 360. In that case, Bowen CJ said (at 363) that to establish a due diligence defence, a defendant would have to show that:

It had laid down a proper system to provide against contravention of the Act and that it had provided adequate supervision to ensure the system was properly carried out. ... [However,] the mere fact that its system and supervision has proved inadequate to prevent error does not necessarily establish that its system is defective.

In *State Pollution Control Commission v Kelly* (1991) 5 ACSR 607, Hemmings J held that although it was not necessary to show that a standard of perfection had been met, the defence of due diligence requires consideration of precautions that should have been taken — ‘a mind concentrated on the likely risks’:

Due diligence, of course, depends upon the circumstances of the case, but contemplates a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless also designed to ‘prevent the contravention’.

Whether a defendant took the precautions that ought to have been taken must always be a question of fact and, in my opinion, must be decided objectively according to the standard of a reasonable man in the circumstances. It would be no answer for such person to say that he did his best given his particular abilities, resources and circumstances. This particularly applies to activities requiring experience and acquired skill for proper execution (at 608–609).

Various commentators have stated that the defence requires the taking of active steps and practical measures to ensure that a corporation is undertaking best industry practice (for instance, P Lowe, ‘A Comparative Analysis of Australian and Canadian Approaches to the Defence of Due Diligence’ (1997) 14(2) *Environmental and Planning Law Journal* 102).

Environmental legislation

The environmental statutes in the Northern Territory, the ACT, New South Wales, Victoria and Western Australia have a due diligence defence.

Northern Territory

The *Waste Management and Pollution Control Act 1998* (NT) s 91(2)(d) provides a defence to a director or other manager who ‘establishes that’ he or she ‘could not by the exercise of reasonable diligence have prevented the commission of the offence by the body corporate’.

Australian Capital Territory

The *Environment Protection Act 1997* (ACT) s 147(2)(a) provides a defence that ‘the defendant exercised due diligence to prevent the body corporate from doing the act or making the omission alleged to constitute the offence or an element of the offence committed by the body corporate’. The ACT Act s 153(2)(b) lists various factors to which the court may have regard in determining whether a director, or other person responsible for the management of the activity in relation to which the environmental harm occurred, can establish the due diligence defence, namely:

- whether the defendant was personally familiar with the requirements of the environmental legislation
- whether the defendant had taken all reasonable steps to comply with these laws and standards
- whether the defendant had taken steps to ensure that other relevant persons were familiar, and complied, with the legislative requirements
- whether the defendant had taken steps to establish, and ensure that relevant persons were familiar and complied with, an environmental management system, and
- whether the defendant reacted immediately and personally on becoming aware of any non-compliance with the environmental management system or other incident of environmental harm.

New South Wales

The *Protection of the Environment Operations Act 1997* (NSW) s 169(1)(c) provides a defence where a defendant ‘satisfies the court’ that he or she ‘used all due diligence to prevent the contravention by the corporation’.

Victoria

The *Environment Protection Act 1970* (Vic) s 66B(1A)(c) provides that a defendant is not liable ‘if that person proves’ that he or she ‘used all due diligence to prevent the contravention by the corporation’.

Western Australia

The *Environmental Protection Act 1986* (WA) s 118(1)(b)(ii) provides a defence for any person who was in a position to influence the conduct of the body corporate in relation to the offence if the person ‘proves’ that he or she ‘used all due diligence and reasonable precautions to prevent the commission of the offence’.

Occupational health and safety legislation

The occupational health and safety legislation statutes in New South Wales, Queensland and Tasmania have a due diligence defence.

New South Wales

The *Occupational Health and Safety Act 2000* (NSW) s 26(1)(b) provides a defence if the defendant ‘satisfies the court’ that, notwithstanding that he or she was in a position to influence the conduct of the corporation in relation to the contravention, that person ‘used all due diligence to prevent the contravention by the corporation’.

Queensland

The *Workplace Health and Safety Act 1995* (Qld) s 167(4)(a) provides a defence to any executive officer who was in a position to influence the conduct of the corporation in relation to the offence if the officer can ‘prove’ that he or she ‘exercised reasonable diligence to ensure the corporation complied with the provision’. [For executive officers not in this position, see the ‘no influence’ defence.]

Tasmania

The *Workplace Health and Safety Act 1995* (Tas) s 53(1)(b) provides a defence to any director who ‘satisfies the court’ that he or she ‘used all due diligence to prevent the contravention or failure to comply by the body corporate’.

Hazardous goods

The hazardous goods statutes in New South Wales, Queensland, South Australia, Tasmania and Western Australia have a due

diligence defence, though the wording of that defence varies slightly between jurisdictions.

New South Wales

The *Road and Rail Transport (Dangerous Goods) Act 1997* (NSW) s 42(5)(c) provides a defence to any director or other manager who 'satisfies the court' that he or she 'took reasonable precautions and exercised due diligence to prevent the commission of the offence'.

Queensland

The *Dangerous Goods Safety Management Act 2001* (Qld) s 173(4)(a) provides a defence to any executive officer who was in a position to influence the conduct of the corporation in relation to the offence if that person can 'prove' that he or she 'exercised reasonable diligence to ensure the corporation complies with the provision'. [For executive officers not in this position, see the 'no influence' defence.]

South Australia

It is a defence under the *Dangerous Substances Act 1979* (SA) s 41 if the defendant 'proves' that 'he or she exercised all due diligence to prevent the commission of that offence'.

Tasmania and Western Australia

It is a defence under the *Dangerous Goods Act 1998* (Tas) s 38(6)(c) and the *Dangerous Goods (Transport) Act 1998* (WA) s 40(5)(c) if the defendant 'satisfies the court' that he or she 'took reasonable precautions and exercised due diligence to prevent the commission of the offence'.

Fair trading legislation

Only the South Australian fair trading statute has a due diligence defence.

South Australia

It is a defence under the *Fair Trading Act 1987* (SA) s 90(3) if 'it is proved' that the defendant director 'could not, by the exercise of

reasonable diligence, have prevented the commission of the offence by the body corporate’.

2. No influence

This involves not being in a position to influence events.

Environmental legislation

The environmental statutes in New South Wales, Victoria, Queensland and Western Australia have a no influence defence.

New South Wales

The *Protection of the Environment Operations Act 1997* (NSW) s 169(1)(b) provides a defence where a defendant ‘satisfies the court’ that he or she ‘was not in a position to influence the conduct of the corporation in relation to its contravention of the provision’.

Victoria

The *Environment Protection Act 1970* (Vic) s 66B(1A)(b) provides that a defendant is not liable if that person ‘proves’ that he or she ‘was not in a position to influence the conduct of the corporation in relation to the contravention’.

Queensland

The *Environmental Protection Act 1994* (Qld) s 493(4)(b) provides a defence to any executive officer who can ‘prove’ that he or she ‘was not in a position to influence the conduct of the corporation in relation to the offence’.

Western Australia

The *Environmental Protection Act 1986* (WA) s 118(1)(b)(i) provides a defence to a defendant who ‘proves’ that he or she ‘was not in a position to influence the conduct of the body corporate in relation to the commission of the offence’.

Occupational health and safety legislation

The OH&S statutes in New South Wales and Queensland have a no influence defence.

New South Wales

The *Occupational Health and Safety Act 2000* (NSW) s 26(1)(a) provides a defence where a defendant ‘satisfies the court’ that he or she ‘was not in a position to influence the conduct of the corporation in relation to its contravention of the provision’.

Queensland

The *Workplace Health and Safety Act 1995* (Qld) s 167(4)(b) provides a defence for any executive officer who can ‘prove’ that he or she ‘was not in a position to influence the conduct of the corporation in relation to the offence’.

Hazardous goods

The hazardous goods statutes in New South Wales (*Road and Rail Transport (Dangerous Goods) Act 1997* s 42(5)(b)), Queensland (*Dangerous Goods Safety Management Act 2001* s 173(4)(b)), Tasmania (*Dangerous Goods Act 1998* s 38(6)(b)) and Western Australia (*Dangerous Goods (Transport) Act 1998* s 40(5)(b)) have a no influence defence where the defendant ‘proves’ (Queensland) or ‘satisfies the court’ (the other jurisdictions) that he or she was not in a position to influence the conduct of the body corporate in relation to the offence.

3. No knowledge

This involves having no knowledge of the relevant element(s) of the offence.

Environmental legislation

The environmental statutes in New South Wales and Victoria have a no knowledge defence.

New South Wales

The *Protection of the Environment Operations Act 1997* (NSW) s 169(1)(a) provides a defence where a defendant ‘satisfies the court’ that ‘the corporation contravened the provision without the knowledge actual, imputed or constructive of the person’.

Victoria

The *Environment Protection Act 1970* (Vic) s 66B(1A)(a) provides that a defendant is not liable if that person ‘proves’ that ‘the contravention by the corporation occurred without the knowledge of the person’.

Hazardous goods legislation

The hazardous goods statutes in New South Wales, Tasmania and Western Australia have a no knowledge defence.

New South Wales

The *Road and Rail Transport (Dangerous Goods) Act 1997* (NSW) s 42(5)(a) provides a defence where the defendant ‘satisfies the court’ that ‘the person did not know that the offence was committed’.

Tasmania and Western Australia

The *Dangerous Goods Act 1998* (Tas) s 38(6)(a) and *Dangerous Goods (Transport) Act 1998* (WA) s 40(5)(a) provide that a defendant is not liable if that person satisfies the court that he or she ‘did not know that the offence was committed’.

4. Reasonable steps

This involves taking all reasonable steps to prevent the prohibited conduct by the company.

Environmental legislation

The environmental statutes in the Northern Territory, South Australia, Tasmania and Queensland have a reasonable steps defence.

Northern Territory

The *Waste Management and Pollution Control Act 1998* (NT) s 91(2)(c) provides a defence if the defendant ‘establishes that’ he or she ‘did not know [actual knowledge], and ought not reasonably be expected to have known [reasonable knowledge], that the offence was to be or was being committed and took all reasonable steps to prevent or stop the commission of the offence [reasonable steps]’.

South Australia and Tasmania

The *Environment Protection Act 1993* (SA) s 124(1) and the *Environmental Management and Pollution Control Act 1994* (Tas) s 55(1)(c) provide a defence if ‘it is proved’ that ‘the alleged offence did not result from any failure on the defendant’s part to take all reasonable and practicable measures to prevent the commission of the offence or offences of the same or a similar nature’.

These statutes set out various tests for determining what constitute reasonable and practical reporting measures to prevent a contravention, namely:

- proof that there were proper systems and procedures to report any actual or suspected contravention to the governing body of the body corporate
- proof that the governing body of the body corporate actively and effectively promoted and enforced compliance with the legislation (SA s 124(3), Tas s 55(3)).

Queensland

The *Environmental Protection Act 1994* (Qld) s 493(4)(a) provides a defence to any executive officer who is in a position to influence the conduct of the corporation in relation to the offence and can ‘prove’ that he or she ‘took all reasonable steps to ensure the corporation complied with the provision’.

5. Fair trading defence

This defence, which is modelled on the Trade Practices Act s 85, applies where a defendant ‘establishes’ that the contravention was due to the act or default of another person, to an accident or to some other cause beyond the defendant’s control and the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

The fair trading statutes in South Australia (*Fair Trading Act 1987* s 88(1)(c)), Queensland (*Fair Trading Act 1989* s 97(1)(c)), Victoria (*Fair Trading Act 1999* s 155(1)(c)) and Western Australia (*Fair Trading Act 1987* s 83(1)(c)) have this defence.

The *Fair Trading Act* (WA) s 81(1) provides an additional defence to a person who ‘proves’ that:

- the offence was committed without his or her knowledge, or that he or she did not authorise or permit the commission of the offence; and
- he or she was not in a position to influence the conduct of that corporation or body or, being in such a position, could not by the exercise of reasonable diligence have prevented the commission of the offence.

6. No reasonable knowledge

This involves a person having no knowledge of particular matters constituting an offence and no reasonable ability to have acquired that knowledge.

Environmental legislation

The ACT and Western Australian environmental statutes have this defence.

ACT

The *Environment Protection Act 1997* (ACT) s 147(2)(b) provides a defence that ‘an officer or employee of the body corporate

occupying the defendant's position could not reasonably have been expected to be aware of the contravention'.

Western Australia

The *Environmental Protection Act 1986* (WA) s 118(1)(a) provides a defence to any defendant who 'proves' that he or she 'did not know, and could not reasonably be expected to have known, that the offence was being committed'.

Occupational health and safety

Tasmania is the only jurisdiction whose occupational health and safety legislation (*Workplace Health and Safety Act 1995* (Tas) s 53(1)(a)) has this defence, namely the defendant 'satisfies the court' that the contravention by the body corporate took place without that person's knowledge and that the defendant was not reasonably able to have acquired that knowledge.

Hazardous goods

South Australia is the only jurisdiction whose hazardous goods legislation (*Dangerous Substances Act 1979* (SA) s 41) has this defence, namely if a defendant 'proves' that he or she 'did not know and could not reasonably be expected to have known of the commission of that offence'.

7. Reasonable mistake

This involves proof that the contravention was due to reasonable mistake.

Fair trading legislation

The fair trading statutes in South Australia, Queensland, Victoria and Western Australia have a reasonable mistake defence.

South Australia, Queensland and Western Australia

Under the *Fair Trading Act 1987* (SA) s 88(1)(a), the *Fair Trading Act 1989* (Qld) s 97(1)(a) and the *Fair Trading Act 1987* (WA)

s 83(1)(a), it is a defence if the defendant ‘establishes’ that the contravention was due to reasonable mistake.

Victoria

Under the *Fair Trading Act 1999* (Vic) s 155(1)(a), it is a defence if the defendant ‘establishes’ that the contravention was due to a reasonable mistake of fact (including a mistake of fact caused by a reasonable reliance on information supplied by another person).

8. Reasonable reliance on information

This involves reasonable reliance on information supplied by another person (other than a servant or agent of the defendant).

Fair trading legislation

The fair trading statutes in South Australia, Queensland, Victoria and Western Australia have a reasonable reliance on information defence.

South Australia, Queensland and Western Australia

Under the *Fair Trading Act 1987* (SA) s 88(1)(b), the *Fair Trading Act 1989* (Qld) s 97(1)(b) and the *Fair Trading Act 1987* (WA) s 83(1)(b), it is a defence if the defendant ‘establishes’ that the contravention was due to reasonable reliance on information supplied by another person.

Victoria

The *Fair Trading Act 1999* (Vic) s 155(1)(a) provides a defence if the defendant ‘establishes’ that the contravention was due to reasonable reliance on information supplied by another person. However, in that Act, the defence is limited to reasonable reliance that results in the defendant making a mistake of fact.

9. Statutory body corporate defence

This involves the defendant proving that the body corporate would have had a defence if charged with the same offence. Arguably, this

defence applies whether or not expressly stated in legislation, given that a prerequisite to any derivative liability is corporate liability (refer Section 5 of the main paper **Corporate liability**, above).

Environmental legislation

The statutes in the Northern Territory (*Waste Management and Pollution Control Act 1998* s 91(2)(a)), Victoria (*Environment Protection Act 1970* s 66B(1A)(d)) and Western Australia (*Environmental Protection Act 1986* s 118(1)(c)) each provide a defence to a defendant who can ‘establish’ (NT) or ‘prove’ (Vic, WA) a defence that was available to the body corporate, that is, that the body corporate would not have been found guilty of the offence by reason of its being able to establish a defence available to it under the legislation.

The ACT *Environment Protection Act 1997* s 147(2)(c) also has a body corporate defence.

10. Sudden or extraordinary emergency

Environmental legislation

The *Environment Protection Act 1993* (SA) s 124(2) and the *Environmental Management and Pollution Control Act 1994* (Tas) s 55(1)(d) provide a defence ‘if it is proved’ that ‘the act or omission alleged to constitute the offence was justified by the need to protect life, the environment or property in a situation of emergency and that the defendant was not guilty of any failure to take all reasonable and practicable measures to prevent or deal with such an emergency’.

11. Impractical to comply

This involves the director establishing that it was impractical for the director to comply with the legislation.

Occupational health and safety legislation

The *Occupational Health and Safety Act 2000* (NSW) s 28(a) provides a defence if the defendant ‘proves’ that ‘it was not reasonably practicable for the person to comply with the provision’.

12. No control

This involves the defendant proving that the commission of the offence was beyond his or her control.

Occupational health and safety legislation

The *Occupational Health and Safety Act 2000* (NSW) s 28(b) provides a defence if the defendant ‘proves’ that ‘the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision’.

13. No authority, permission or consent

This involves proof that the offence occurred without the defendant’s authority, permission or consent.

Environmental legislation

The *Waste Management and Pollution Control Act 1998* (NT) s 91(2)(b) provides a defence to a defendant who ‘establishes’ that the act or omission that constituted the offence took place without that person’s authority, permission or consent.

Appendix 8 Functions and membership of the Advisory Committee

Advisory Committee

Functions

The Corporations and Markets Advisory Committee is constituted under Part 9 of the *Australian Securities and Investments Commission Act 2001*.

Section 148 of that Act sets out the functions of the Advisory Committee:

CAMAC's functions are, on its own initiative or when requested by the Minister, to advise the Minister, and to make to the Minister such recommendations as it thinks fit, about any matter connected with:

- (a) a proposal to make corporations legislation, or to make amendments of the corporations legislation (other than the excluded provisions); or
- (b) the operation or administration of the corporations legislation (other than the excluded provisions); or
- (c) law reform in relation to the corporations legislation (other than the excluded provisions); or
- (d) companies or a segment of the financial products and financial services industry; or
- (e) a proposal for improving the efficiency of the financial markets.

Advisory Committee members

The members of the Advisory Committee are selected by the Minister in their personal capacity from throughout Australia on the basis of their knowledge of, or experience in, business, the administration of companies, financial markets, financial products and financial services, law, economics or accounting.

The members of the Advisory Committee during the preparation of this paper were:

- Richard St John (Convenor)—Special Counsel to Johnson Winter & Slattery, former General Counsel of BHP Limited and Secretary to the HIH Royal Commission
- Elizabeth Boros—Professor of Law, Monash University, Melbourne
- Barbara Bradshaw—Chief Executive Officer, Law Society Northern Territory, Darwin
- Philip Brown—Emeritus Professor, University of Western Australia, Perth
- Berna Collier—Commissioner, Australian Securities and Investments Commission (alternate to Jeffrey Lucy, Chairman, ASIC)
- Greg Hancock—Managing Director, Hancock Corporate Investments Pty Ltd, Perth
- Merran Kelsall—Company Director, Melbourne
- John Maslen—Chief Financial Officer and Company Secretary, Michell Australia Pty Ltd, Adelaide
- Louise McBride—Director, Grant Samuel Corporate Finance, Sydney
- Marian Micalizzi—Chartered Accountant, Brisbane
- Ian Ramsay—Professor of Law, University of Melbourne
- Robert Seidler—Partner, Blake Dawson Waldron, Sydney
- Nerolie Withnall—Company Director, Brisbane.

Legal Committee

The members of the Legal Committee during the preparation of this paper were:

- Nerolie Withnall (Convenor)—Company Director, Brisbane
- Elspeth Arnold—Partner, Blake Dawson Waldron, Melbourne
- Ashley Black—Partner, Mallesons Stephen Jaques, Sydney
- Elizabeth Boros—Professor of Law, Monash University, Melbourne
- Suzanne Corcoran—Professor of Law, Flinders University, Adelaide, and Professorial Fellow, Australian National University, Canberra
- Damian Egan—Partner, Murdoch Clarke, Hobart
- Brett Heading—Partner, McCullough Robertson, Brisbane
- Jennifer Hill—Professor of Law, University of Sydney
- Francis Landels—former Chief Legal Counsel, Wesfarmers Ltd, Perth
- Duncan Maclean—Special Counsel, Minter Ellison, Perth
- Laurie Shervington—Partner, Minter Ellison, Perth
- Gary Watts—Partner, Fisher Jeffries, Adelaide.

Executive

The Executive comprises:

- John Kluver—Executive Director
- Vincent Jewell—Deputy Director
- Thamani Parrino—Executive Assistant.