



Australian Government

Corporations and Markets

Advisory Committee

PERSONAL LIABILITY FOR CORPORATE FAULT

Report

**September
2006**

Corporations and Markets **Advisory**
Committee

Personal liability for
corporate fault

Report

September 2006

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8 September 2006

The Hon. Peter Costello, MP
Treasurer
Parliament House
Canberra

Dear Treasurer

I am pleased to present a report prepared by the Advisory Committee on *Personal liability for corporate fault*.

The report reviews the way in which directors and other individuals involved in companies may incur personal liability in consequence of corporate misconduct. It puts forward recommendations for a principled and consistent approach to personal liability across the various jurisdictions.

The report was prepared in response to the reference to the Advisory Committee in July 2002 by the then Parliamentary Secretary to the Treasurer of issues relating to directors' duties and personal liability. Other aspects of the reference were dealt with in the Advisory Committee report *Directors and Officers Insurance* (June 2004).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richard St. John', written in a cursive style.

Richard St. John
Convenor

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1 Introduction

This chapter provides background to the review, looks at the way in which directors and other individuals involved in companies may incur personal liability in consequence of corporate fault, explains the review process and outlines the conclusions reached by the Advisory Committee.

1.1 Background

The Advisory Committee has reviewed the circumstances in which directors or other individuals involved in managing a company can incur personal criminal liability in consequence of misconduct by the company.

The Committee identified two principal areas of concern:

- a marked tendency in legislation across Australia to include provisions that impose personal criminal sanctions on individuals for corporate breach by reason of their office or role within the company (rather than their actual acts or omissions) unless they can establish an available defence
- considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance.

The Committee reviewed relevant provisions in Commonwealth, State and Territory environmental protection, occupational health and safety, hazardous goods and fair trading laws. While not exhaustive of all statutes containing personal liability provisions, those categories were chosen because of their significance to the commercial operations of many enterprises. They provided a useful sample of the ways in which directors and other corporate managers may incur personal criminal liability in consequence of breaches of the law by their companies.

This report does not question the policy goals of the relevant regulatory statutes, or the interest in achieving effective compliance by companies with their requirements. Rather, the concern is with overreach in the treatment of individuals where the company is in breach of the law, together with lack of harmony in the standards of personal responsibility required under various provisions.

The concerns identified by the Advisory Committee are not new. The report by the Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties* (1989) noted the trend towards imposing personal liability on directors for corporate fault and recommended further consideration of the appropriate mix of individual and corporate liability for corporate misconduct.¹

Subsequently, 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 [personal] 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.

The Australian Law Reform Commission (ALRC), in its report *Principled Regulation* (December 2002), commented that there has been an increasing trend towards deeming corporate officers to be

¹ Chapter 12, especially paras 12.37, 12.46.

personally liable for corporate misconduct because of their position in the company, noting that:

proof of knowledge of or involvement in the [corporate] contravention is not an essential element; generally, involvement in the management of the body corporate will be sufficient.²

The ALRC raised a number of concerns with this form of personal liability, including:

the harshness of attributing liability to an individual merely because of the office that individual holds within a body corporate, often in conjunction with a reversal of the onus of proof.³

The ALRC put forward a number of recommendations concerning the liability of corporate officers for corporate misconduct, which are further considered in Chapter 5 of this Advisory Committee report.

Personal liability for corporate fault was also considered by the Regulation Taskforce 2006 in its report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, which included a review of various cross-jurisdictional issues affecting financial and corporate regulation. The Taskforce noted that various respondents to its inquiry had referred to inconsistencies across jurisdictions in provisions imposing personal liability on company directors and officers for corporate fault, with consequential complexity and uncertainty for individuals in these roles. The report recommended that the Council of Australian Governments initiate reviews to achieve more nationally consistent regulation of various matters. These would include personal liability of company directors and officers for corporate fault, following the completion of the Advisory Committee review.⁴

The Commonwealth Government has indicated that it will consider the CAMAC report on personal liability for corporate fault and make

² Australian Law Reform Commission Report *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* (2002) (ALRC 95) at para 8.28.

³ *id.*, at para 8.84.

⁴ Recommendation 5.28.

appropriate recommendations to the Ministerial Council for Corporations.⁵

1.2 Individual liability in a corporate context

For the purpose of explaining the first concern referred to in 1.1, a distinction needs to be drawn between:

- an individual's criminal liability for his or her own misconduct in a corporate context
- an individual's criminal liability in consequence of misconduct by a company.

The concerns identified by the Committee centre on the latter form of liability.

1.2.1 Liability for own misconduct

An individual may incur criminal liability for his or her own misconduct in a corporate context. There is a range of provisions, under the Corporations Act and other statutes, which impose criminal liability on company directors, officers or other persons associated with companies for their own culpable conduct.

Individuals may also incur criminal liability for their own misconduct as accessories to the misconduct of companies.⁶ For

⁵ *Australian Government's Response* (August 2006) to Recommendation 5.28 of the Taskforce on Reducing Regulatory Burdens on Business.

⁶ The different forms of accessorial liability are referred to in s 11.2 of the Commonwealth *Criminal Code* and, in a more expansive form, in s 79 of the Corporations Act (involvement in contraventions).

In some instances, in the corporate context, a company is held not to be guilty of an offence in consequence of its breach of a provision, but individuals 'involved' in the breach under these accessorial principles are criminally liable. See, for instance, ss 256D, 259F and 260D of the Corporations Act, which provide that, where a company enters into a share capital reduction, a buy-back or a financial assistance transaction in breach of the legislation, the company is not guilty of an offence, but an individual commits an offence if he or she is dishonestly involved in the company's contravention. Another example is s 209 dealing with breach of the related party transaction provisions.

The general principles of accessorial liability are further discussed in Chapter 3.

instance, a director who intentionally orchestrates a corporate fraud would be criminally liable as being ‘knowingly concerned’ in, or a party to, that fraud. As the High Court in *Hamilton v Whitehead* (1988) 166 CLR 121 at 128 observed:

the company, being a legal entity apart from its members, is also a legal person apart from the legal personality of the individual controller of the company, and [the controller] in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done.

1.2.2 Liability for corporate misconduct

This report is principally concerned with a different situation, namely where legislation in effect deems an individual to be criminally responsible for a breach by a company of a statutory requirement. The individual is treated as responsible by virtue of the position or role that he or she has in the company and without the need to prove personal fault in the traditional way. The usual pattern in these statutes is to hold the individual criminally liable in consequence of the corporate misconduct unless he or she can prove one or more of the defences set out in the legislation.

Typically, the imposition of criminal liability on individuals for corporate fault is in addition to, rather than instead of, the imposition of criminal sanctions on the company in question.

In the environmental protection, occupational health and safety hazardous goods and fair trading statutes examined by the Advisory Committee, it is common, particularly in State and Territory legislation, for individuals to be treated as criminally responsible for corporate fault where:

- a company has breached the statute, and
- the company does not have a defence to that breach, and
- the individual comes within a relevant class of corporate personnel, and
- the individual has not established a relevant defence.

These steps are explained in greater detail in Chapter 2.

1.3 Diverse legislative approaches

The other concern of the Advisory Committee, referred to in 1.1, relates to the disparities in the terms of the provisions that currently impose personal liability for corporate fault, particularly in regard to the classes of persons potentially liable and the defences available to them.⁷

These differences in legislative approach, even in the same areas of regulation, and the consequential lack of harmony result in complexity and lack of clarity for individuals in considering their responsibilities. Directors and other individuals may be subject to differing standards of responsibility with divergent defences available to them under various statutes that affect the operations of their company in different jurisdictions. This very lack of harmony can impair ready communication of statutory requirements and effective compliance efforts.

1.4 The review process

1.4.1 Terms of reference

The letter by the then Parliamentary Secretary to the Treasurer, Senator the Hon. Ian Campbell, which referred aspects of directors' duties and personal liability to the Advisory Committee, 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

⁷ A detailed exposition of the many Commonwealth, State and Territory statutes that impose personal liability for corporate fault and the differences in approach between them, including but extending beyond the legislation reviewed in this report, has been set out by Bruce Cowley, Partner, Minter Ellison Brisbane, in his paper *Personal Liability for Nominee Directors*, Ampla Limited Twenty-Seventh Annual Conference July 2003.

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 report 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 report considers the criminal liability both of directors and of other corporate officers, given that much of the legislation reviewed 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).

1.4.2 The discussion paper

The Advisory Committee discussion paper *Personal liability for corporate fault* (May 2005) outlined, and invited submissions on, a range of issues, including:

- whether the current range of Commonwealth, State and Territory provisions that impose personal liability for corporate fault, and the differences between them, create compliance or other problems for affected companies and individuals
- whether, in principle, personal liability for corporate fault should be limited to, or go beyond, accessorial liability

- whether it would be appropriate to introduce one or more model uniform provisions in any situations where personal liability for corporate fault beyond accessorial liability may be justified.

This report incorporates all the material information and analysis found in the discussion paper and stands alone.⁸

1.4.3 Submissions on the discussion paper

The Advisory Committee received submissions on these matters from the respondents who are listed in Appendix 11. The submissions are available at www.camac.gov.au.

Respondents considered that the discussion paper raised issues of considerable importance for corporate regulation, including the need to consider carefully the rationale for imposing personal liability for corporate fault and the need to achieve greater uniformity between Commonwealth, State and Territory laws, including, but not confined to, the categories of legislation dealt with in the review.

The submissions have informed and assisted the Advisory Committee in its deliberations. The Committee thanks all respondents for their contributions.

1.5 Conclusions

1.5.1 The concerns

The Advisory Committee is concerned about the practice in some statutes of treating directors or other corporate officers as personally liable for misconduct by their company unless they can make out a relevant defence. Provisions of this kind are objectionable in principle and unfairly discriminate against corporate personnel compared with the way in which other people are treated under the law.

The encouragement of corporate compliance with applicable laws—which the Committee supports—does not justify a general

⁸ Appendices 1 to 10 contain much of the detailed information that was included in the discussion paper.

abrogation of the rights of individuals. Under some of the broad-brush liability provisions summarised in Chapter 2, corporate personnel may be deemed to be liable, and subject to penalties, for corporate conduct that they could not reasonably have influenced or prevented. Such provisions might be seen as delivering a rough form of justice in the context of a ‘one person company’. However that may be, they are not well-suited to the realities and complexities of governance of larger firms, including the currently favoured board model of a majority of non-executive or independent directors who are not involved in day-to-day operations.

The Committee is also concerned about the marked difference in the form of statutory provisions that impose personal liability for corporate fault. Corporate officers may find themselves subject to a variety of standards of responsibility and available defences under statutes applying to different aspects of a company’s operations in different parts of Australia.

1.5.2 Preferred approach

The Committee is of the view that, as a general principle, individuals should not be penalised for misconduct by a company except where it can be shown that they have personally assisted or been privy to that misconduct, that is, where they were accessories.

The Committee also considers that, generally speaking, there should be a consistent approach across all corporate and non-corporate organizations in regard to personal liability for organizational fault. In principle, officers of companies incorporated under the Corporations Act should not be exposed to personal penalties for organizational fault that a legislature would not be prepared to apply and enforce more generally.

The general principles are discussed in more detail in Chapter 3, with Chapters 4 and 5 discussing possible approaches for consideration in exceptional circumstances where a legislature sees a need—in the context of a particular piece of legislation—to tilt the balance somewhat further in the interests of achieving corporate compliance.

The Committee also sees a need for a more consistent, as well as a more principled, approach to personal liability across Commonwealth, State and Territory jurisdictions. A more

standardised approach would reduce complexity and aid understanding. It would assist efforts to promote effective corporate compliance and risk management, while providing more certainty and predictability for the individuals concerned. This matter and steps to achieve a more consistent and principled approach are discussed further in Chapter 6.

1.6 Functions and membership of the Advisory Committee

The Advisory Committee is constituted under Part 9 of the *Australian Securities and Investments Commission Act 2001*. Its functions under s 148 of that Act include, on its own initiative or when requested by the Minister, to provide advice to the Government on any aspect of corporate or financial markets law reform or any proposal to improve the efficiency of the financial markets.

The members of the Advisory Committee are selected by the Minister, following consultation with the States and Territories, in their personal capacity 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.

1.6.1 Advisory Committee

The members of the Advisory Committee during the course of preparing this report were:

- Richard St John (Convenor)—Special Counsel, Johnson Winter & Slattery, Melbourne
- Zelinda Bafile—General Counsel and Company Secretary, Home Building Society Ltd, Perth
- Louise McBride—Director, Grant Samuel Corporate Finance, Sydney
- Alice McCleary—Company Director, Adelaide
- Marian Micalizzi—Chartered Accountant, Brisbane

- Ian Ramsay—Professor of Law, University of Melbourne
- Robert Seidler—Partner, Blake Dawson Waldron, Sydney
- Greg Vickery AM—Chairman and Partner, Deacons, Brisbane
- Nerolie Withnall—Company Director, Brisbane
- the ASIC Chairman or his nominee.

1.6.2 Legal Committee

The function of the Legal Committee is to provide expert legal analysis, assessment and advice to the Advisory Committee in relation to such matters as are referred to it by the Advisory Committee.

The members of the Legal Committee are selected by the Minister, following consultation with the States and Territories, in their personal capacity on the basis of their expertise in corporate law.

The members of the Legal Committee during the course of preparing this report were:

- Nerolie Withnall (Convenor)—Company Director, Brisbane
- Julie Abramson—General Manager, National Australia Bank, Melbourne
- Elizabeth Boros—Professor of Law, Monash University, Melbourne
- 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
- Laurie Shervington—Partner, Minter Ellison, Perth
- Simon Stretton—South Australian Crown Solicitor, Adelaide

- Gary Watts—Partner, Fisher Jeffries, Adelaide
- Elizabeth Whitelaw—Partner, Minter Ellison, Canberra.

1.6.3 Executive

The Executive during the course of preparing this report were:

- John Kluver—Executive Director
- Vincent Jewell—Deputy Director
- Liam Burgess—Policy Consultant
- Thaumani (Timmi) Parrino—Office Manager.

2 Current position

This chapter reviews the steps in determining whether an individual is personally liable in consequence of a corporate breach under various current laws. It summarises differences in the tests for imposing personal liability.

2.1 Distinguishing between different forms of personal liability

As referred to in Section 1.2, a distinction is drawn between:

- an individual's criminal liability for his or her own misconduct in a corporate context
- an individual's criminal liability for misconduct by a company.

Appendix 1 summarises some of the principal provisions in the Corporations Act, as well as provisions in other statutes, that impose liability on individuals for their own culpable conduct, as they apply to persons involved in private (non-Government) sector and public (Government) sector bodies.

The Advisory Committee report *Corporate duties below board level* (April 2006) also reviews some of the relevant Corporations Act provisions.

This report deals with the second form of personal liability, namely where legislation deems an individual criminally liable for corporate misconduct by virtue of the position or role that person has in the company and usually in the absence of any requirement to prove personal fault. Typically, personal liability for corporate fault is in addition to corporate liability. A somewhat similar approach is found in some US laws (see Appendix 10).

2.2 Steps in determining personal liability for corporate fault

There are four steps in determining whether an individual who comes within the relevant class of persons is criminally liable for corporate fault under particular legislation:

- (1) *corporate liability*: has the corporation committed all the elements that are necessary for it to be criminally liable under the relevant statute?
- (2) *corporate defences*: does the corporation have any defences under the statute (as establishing any corporate defence would negate the liability of the corporation)?
- (3) *individual liability*: has the individual committed all the physical, and any fault, elements of any threshold test of personal liability for corporate fault under the statute?
- (4) *individual defences*: does the individual have any defences applicable to that person under the statute?

Each of those steps is discussed in the context of Commonwealth, State and Territory environmental protection, occupational health and safety, hazardous goods and fair trading statutes.

2.3 Steps 1 and 2: Corporate liability and defences

A director or other person associated with a company is only at risk of being held criminally liable for corporate fault if the company has breached a relevant statutory requirement and has no relevant defence. However, prior conviction of the corporation is usually not necessary. Statutes typically state that proceedings may be brought against a relevant individual even where proceedings have not been brought against the body corporate (in which case corporate fault would have to be proved in the proceedings against the individual).

As companies can act only through human agents, corporate criminal liability under various statutes is typically determined by reference to the conduct and state of mind of individuals associated with the company or by consideration of the ‘corporate culture’

within the organization. The range of associated individuals can be broad, extending to any officers, employees or other persons acting within the scope of their corporate authority, not just directors or other persons who could be described as constituting the ‘directing mind and will’ of the company.

The Commonwealth *Criminal Code* seeks to encapsulate general principles for determining corporate criminal responsibility under Commonwealth laws, including by reference to the ‘corporate culture’ concept. The Code provides for a due diligence defence.

The pattern in the State and Territory legislation reviewed in this report is to impose liability on a company by reference to the acts and state of mind of any of its officers or other persons acting within the scope of their actual or apparent corporate authority. Much of the legislation adopts the approach found in the *Trade Practices Act 1974*, namely:

84(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.

The effect is that a company may commit a criminal offence in consequence of the behaviour of one or more persons from within a large group of employees and other individuals. That may occur without any prior knowledge, active involvement or even acquiescence of those individuals who may be held by the statute to be personally liable in consequence of the corporate fault.

A variety of defences available to companies can be found in the State and Territory statutes under consideration, for instance:

- the alleged offence did not result from any failure on the company's part to take all reasonable and practical measures to prevent the offence
- the company took reasonable precautions and exercised due diligence to avoid the relevant conduct.

Further details concerning the steps necessary to determine corporate liability are set out in Appendix 2 (together with Appendix 3).

2.4 Steps 3 and 4: Individual liability and defences

The statutes analysed in this review differ considerably in regard to:

- the classes of individuals who are potentially personally liable in consequence of corporate fault
- whether any element of personal fault is required, and
- the range of available defences.

The general principles in regard to each of these matters are outlined below, with further details set out in Appendix 4 (together with Appendices 5–9).

2.4.1 Classes of individuals

The statutes under review employ one or more of the following tests to determine what classes of individuals should be subject to personal liability:

- *positional liability*: individuals who hold certain formal positions in the corporation, being directors (in all instances) and company secretaries and chief executive officers (in some instances)
- *managerial liability*: individuals who are concerned or take part in the management of the corporation, whether or not they are formally appointed as directors or officers of that corporation. This category may in practice include corporate group executives who play a part in relation to group companies of which they are not, strictly speaking, officers. It is based on the definition of ‘executive officer’ as it appeared in the Corporations Act prior to the repeal of that definition in 2004
- *designated officer liability*: individuals who are designated as having organizational 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 ordinary accessory liability.

Some of the statutes reviewed impose liability according to both positional and managerial criteria and thus cover directors (in all cases) and company secretaries or chief executive officers (in a few cases) and any other person who is concerned or takes part in managing a corporation.

Commonwealth statutes

The Commonwealth statutes under review reflect a range of approaches in identifying individuals who are potentially criminally liable for corporate fault. Some statutes apply positional tests, while others impose positional/managerial tests, managerial tests or designated officer tests.

State and Territory statutes

The State and Territory statutes under review also have a variety of approaches, as seen in the summary table below, with the positional/managerial test predominating.

	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
Designated officer	3	1	0	0	4
Participatory	2	2	1	1	6

These tests, as they apply to directors, assume collective board responsibility. They make no concession for dissenting directors. However, a director might refer to his or her dissent from a particular 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: see below).

2.4.2 Whether need to establish personal fault

The statutes under review can be divided into three categories:

- *accessorial fault*: a few statutes confine personal liability for corporate fault to circumstances where an individual has helped in or been privy to the misconduct in question, that is, where he or she was an accessory
- *other personal fault*: a few statutes also impose personal liability for corporate fault through another personal fault element
- *no personal fault*: most statutes impose personal liability for corporate fault without the need to establish personal fault on the part of the individual in question, but subject to various defences.

Accessorial liability only

A few of the statutes reviewed in this report confine personal liability for corporate fault to individuals who are accessories.

For instance, s 79 of the *Trade Practices Act 1974* provides, in part, that:

- (1) A person who:
 - (a) aids, abets, counsels or procures a person to contravene; or
 - (b) induces, or attempts to induce, a person (whether by threats or promises or otherwise) to contravene; or
 - (c) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
 - (d) conspires with others to contravene;

a provision of [the offence provisions] is taken to have contravened that provision and is punishable accordingly.

The prosecution must establish that the individual participated in the corporate contravention, according to the tests of accessorial liability (as explained in Chapter 3).

The fair trading statutes in some other jurisdictions follow the *Trade Practices Act* model by imposing personal liability on an accessorial basis.⁹

A contrasting approach is found in the fair trading statutes in other States (otherwise modelled on the consumer protection provisions of the *Trade Practices Act*), which expressly go beyond accessorial liability by also imposing on various individuals liability for corporate fault, without proof of personal fault, subject to those individuals establishing a statutory defence.¹⁰

Some statutes provide for accessorial liability, but reverse the onus of proof in that regard. An individual is treated as personally liable in consequence of a corporate breach unless he or she proves that he or she was not an accessory to that breach. For instance, the *Taxation Administration Act 1953* s 8Y provides, in effect, that:

⁹ *Fair Trading Act 1987* (NSW) s 62, *Fair Trading Act 1992* (ACT) s 40; cf *Fair Trading Act 1999* (Vic) s 143(1).

¹⁰ *Fair Trading Act 1987* (SA) s 90(3), *Fair Trading Act 1989* (Qld) s 96, *Fair Trading Act 1987* (WA) s 81(1).

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.¹¹

Other personal fault element

In a few of the statutes reviewed in this report, personal liability for corporate fault may be established on proof of some element of personal fault less than would be required to establish accessorial liability in accordance with ordinary principles.

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* ss 494, 495 and the Commonwealth *Hazardous Waste (Regulation of Exports and Imports) Act 1989* s 40B provide, in effect, that where a body corporate contravenes various provisions in the legislation, any person who:

- is a director or other executive officer of the company (being any person who is concerned in, or takes part in, its management)
- was in a position to influence the conduct of the company 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.

¹¹ In *Hookham v The Queen* (1994) 181 CLR 450 at 458-459, the High Court held that s 8Y of the *Taxation Administration Act 1953*, which provides that ‘it is a defence if the [defendant] proves’ certain matters, reverses the onus of proof which would otherwise rest upon the prosecution in regard to those matters.

These provisions go beyond accessorial liability by imposing liability on influential persons who have acted in a reckless or negligent manner in regard to the corporate misconduct. These elements would be easier to establish than the elements of accessorial liability, which ordinarily require proof that the individual was knowingly involved in the corporate breach.

There is no equivalent of these provisions in the State and Territory legislation included in this review.

No personal fault element

The overwhelming majority of State and Territory statutes reviewed in this report do not require proof by the prosecution of any personal fault on the part of the individual being prosecuted. The provisions in question impose personal liability on an individual coming within a relevant class simply upon proof of corporate misconduct, unless the individual is able to establish an available defence on the balance of probabilities.

A typical example is s 26 of the *Occupational Health and Safety Act 2000* (NSW), which provides that:

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:
 - (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
 - (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or

not the corporation has been proceeded against or been convicted under that provision.¹²

Similar provisions are found in a number of statutes in other jurisdictions.

2.4.3 Defences

The defences available to an individual where no personal fault element is required differ considerably between statutes.

The nature of the defences available to individuals under State and Territory provisions considered in this review, and the number of statutes that contain each type of defence, are summarised in the following table. Usually, the statutes provide more than one defence.

	Environmental	OH&S	Hazardous goods	Fair trading	Total
Due diligence	5	3	5	1	14
No influence	4	2	4	0	10
No knowledge	1	0	3	0	4
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
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

There are considerable differences between statutes in the various jurisdictions, even statutes dealing with the same area of regulated

¹² In *McMartin v Newcastle Wallsend Coal Company Pty Limited* [2004] NSWIRComm 202 at [827], it was held that s 50(1) of the *Occupational Health and Safety Act 1983* (NSW) (the forerunner of s 26(1) of the *Occupational Health and Safety Act 2000* (NSW)) reverses the onus of proof that would otherwise rest with the prosecution in regard to those matters.

activity, regarding the individuals potentially liable for corporate fault, the grounds for determining liability and available defences.

2.5 Issues for consideration

Current trends in legislative provisions that impose personal liability on individuals for failure by a company to comply with a law raise important questions of policy:

- whether, in principle, individuals should be exposed to personal penalties for corporate misconduct other than as accessories to that conduct
- whether there is scope for greater harmonization and consistency of approach in personal liability provisions across various statutes and in various jurisdictions.

These matters are discussed in Chapters 3–6.

3 Approaches to personal liability

This chapter considers whether and in what circumstances it is appropriate for individuals who control or manage a company to be held criminally responsible for a breach by the company of its legal obligations.

3.1 Corporate liability

3.1.1 Corporate penalties

Where companies contravene statutory requirements, they are normally subject to monetary penalties. Options for other penalties are provided in some legislation. These may extend beyond fines to injunctive relief, corporate probation, community service orders or mandatory audit orders.¹³ Some statutes reviewed in this report also impose joint and several liability on related companies for corporate

¹³ eg, *Trade Practices Act 1974* 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 NSW Law Reform Commission Report 102 *Sentencing: corporate offenders* (June 2003) and the Australian Law Reform Commission Report 103 *Same Crime, Same Time: Sentencing of Federal Offenders* (April 2006) Chapter 30 discuss the range of possible sentencing options for corporations, including orders disqualifying a corporation from undertaking certain activities, orders requiring a corporation to undertake activities for the benefit of the community and orders requiring a corporation to publicise its offending conduct.

fault.¹⁴ The courts therefore have some scope to tailor penalties to the circumstances of a breach, including to deal directly with the harm caused by the company as well as deter further corporate breaches.

It should not be assumed that the imposition of a penalty on a company itself has limited effect. Monetary fines or other penalties on companies, depending on their severity, will impair the value of a company for those with an interest in it. The exposure of a company to a sufficiently substantial penalty will act as an incentive to directors and others to ensure that their company complies with regulatory provisions. Shareholders of a company that incurs a penalty may question whether the directors have properly carried out their duties to manage and control the company's affairs. If sufficiently concerned, shareholders could move for the dismissal of directors or even initiate derivative actions against them for breach of duty.¹⁵

3.1.2 Going beyond corporate penalties

A corporate entity by its nature can only act by or through the agency of those people who run its affairs or carry out its business. The discussion paper referred to various arguments that have been put forward from time to time for going beyond corporate penalties and imposing liability on individuals in consequence of corporate fault:

- *limitations of monetary penalties:* companies, in effect, may 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

¹⁴ For instance, the *Environmental Management and Pollution Control Act 1994* (Tas) s 66 and the *Environment Protection Act 1993* (SA) s 137 provide that if a company contravenes the legislation, a 'related body corporate' (which, as defined by reference to s 50 of the Corporations Act, includes a holding company or a subsidiary) is jointly and severally liable to pay any amount payable by the contravening company under that legislation. In consequence, a holding company may be liable to pay criminal fines, remediation costs and civil penalties incurred by a subsidiary as a result of the subsidiary committing an environmental offence. A similar provision for lifting the corporate veil within a corporate group is s 492 of the *Environmental Protection Act 1994* (Qld).

¹⁵ Corporations Act ss 236–242.

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 harmful corporate 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 an 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 for corporate fault may act as an incentive for controllers and other managers of all companies to take appropriate steps to ensure compliance.

The discussion paper raised the question whether, in seeking to ensure that appropriate personal responsibility is taken for the conduct of companies, it is necessary to go beyond the principles by which corporate personnel who assist in or are privy to corporate misconduct may incur criminal liability as accessories.

3.2 Accessorial liability

In general, an accessory is someone who encourages or assists another to commit an offence. Accessorial liability applies to all offences unless expressly or impliedly excluded.¹⁶

¹⁶ See generally *Halsbury's Laws of Australia*, 130. Criminal Law, V. General Doctrines: (2) Complicity, at [130–7200] ff.

The common law principles of accessorial liability are often reflected in legislation. For instance, s 11.2(1) of the Commonwealth *Criminal Code* provides that:

A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

Similar provisions are found in other jurisdictions.¹⁷

Conviction of an individual as accessory to a corporate offence requires proof beyond reasonable doubt that the individual was an intentional participant, who knew the essential facts that constitute the corporate offence or was wilfully blind to them, and through his or her own conduct (by act or omission) was implicated or involved in the corporate offence.

The High Court in the leading judgment of *Giorgianni v The Queen* (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, in the sense that I have described, 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 stated 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.

¹⁷ For instance, *Crimes Act 1958* (Vic) ss 323, 324, *Criminal Law Consolidation Act 1935* (SA) s 267, *Criminal Code* (Qld) s 7, *Criminal Code* (WA) s 7.

In *ASIC v Adler* (2002) 41 ACSR 72, Santow J made further observations on the element of knowledge:

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]).

There is no need to prove that the individual was aware of all the details of the contravention, or even the identity of all the participants. Provided the individual is aware both of the general nature of the contravention and that the part played by him or her, whether by positive act or omission, will assist the offence, then the requirement of being 'knowingly concerned' is satisfied.¹⁸

The discussion paper referred to an argument for going beyond those principles of accessorial liability, namely that there should be an obligation on at least some corporate personnel to inform themselves and help forestall any misconduct by their companies. Ordinary accessorial liability may not achieve this result, as it only covers intentional participants, not individuals who were reckless or negligent as to corporate misconduct. On this view, ordinary principles of accessorial liability may not provide sufficient incentive for relevant corporate officers to take corporate compliance sufficiently seriously.

3.3 Summary of submissions

The overall view in submissions was that personal liability for corporate fault should generally be confined to accessorial liability. Respondents expressed strong reservations about, or opposed (either completely or other than in exceptional and clearly defined

¹⁸ See also *Kennedy v Sykes* (1992) 24 ATR 546. These principles are further dealt with in s 11.2 of the Commonwealth *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.

circumstances), the approach in many statutes (reviewed in Chapter 2) that goes beyond accessorial liability and imposes criminal liability on particular individuals for corporate fault, unless the individual can prove an available defence on the balance of probabilities.¹⁹

Reasons given by respondents included:

Accessorial liability is the appropriate liability test

- there should be a direct relationship between the actions or omissions of individuals and their consequential liability, as reflected in accessorial liability
- an individual should only be exposed to a penalty for a corporate offence to the extent that he or she is directly involved in that offence
- it is difficult to construct a scenario where, if the directors were close to the actions or omissions that led to the offence, their ‘negligence’ or ‘recklessness’ would not amount to ‘wilful blindness’ and therefore fall within the scope of accessorial liability. If the directors were not sufficiently close to the action or omission, it seems very likely that another individual, such as a company executive or manager, is more likely to be responsible for the action or omission and is likely to fall within the scope of accessorial liability

Fairness

- reversing the onus of proof by requiring an individual to prove a defence is inherently unfair and unreasonable and strikes at the presumption of innocence, contrary to Article 14(2) of the *International Covenant on Civil and Political Rights*, to which Australia is a party and which demands that ‘everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’

¹⁹ BCA, ABA, AICD, Insurance Council of Australia, Law Council of Australia, Law Institute Victoria, WA Chamber of Commerce and Industry, NSW Young Lawyers, UTS Corporate Law Group, VACC, Commercial Law Association, Accounting bodies, Anderson & Welsh, Chartered Secretaries Australia.

- the public interest in accountability must be balanced against the rights of individuals not to be exposed to criminal penalties where they could not reasonably have influenced or prevented the relevant conduct
- private individuals inflicting serious harm or death through their own direct actions have greater legal rights (presumption of innocence until proved guilty beyond reasonable doubt) than directors or senior executives of a corporation where an employee is seriously harmed or killed (deemed guilty unless the director or senior executive can establish a defence)
- the provisions that impose personal liability without proof of personal fault are based on an underlying unjust assumption that directors are at fault merely because a corporate breach has occurred
- it is not reasonable to impose personal liability on persons merely because of their position in a corporation, where the breach was caused by conduct outside their control and they made reasonable efforts to ensure that there were appropriate compliance systems and processes
- many corporate misdemeanours come down to processes or culture within the organization, not the conduct of a particular director or manager or something within their control
- there is often no reasonable causal nexus between the offence and the person who is subject to personal liability. It is possible, for instance, that directors could be held criminally liable for a safety or environmental incident:
 - where the company employed thousands of people at multiple sites
 - even though directors had no knowledge of, or ability to ameliorate, the circumstances giving rise to the incident and despite their best efforts
- criminal or civil liability should not be merely retributive, but should always relate to fault

Disincentive

- imposing personal liability without personal fault for a corporate breach is a significant disincentive to officers taking on directorships or other senior management roles
- directors may find the large evidential burden of establishing a defence on the balance of probabilities costly (with no likelihood of obtaining legal aid) and time-consuming (with some court hearings taking considerable time) and may therefore decide not to defend an action, even if they have a defence
- the costs of retaining lawyers and experts to establish a defence may be a disincentive for individuals to undertake corporate roles

Inappropriate

- many of the laws imposing personal liability on company officers for corporate fault seem to contemplate a small or family-based company with tightly held ownership and control. However, it is unreasonable to suggest that directors or senior officers of larger and more complex companies should automatically be regarded as being liable for every corporate breach of applicable legislation
- the current provisions oversimplify the structures of larger corporations, where corporate decisions and operations are often the result of corporate policies and procedures involving individuals at different levels of management, rather than individual decisions
- automatically punishing a director for the criminal behaviour of the corporation may not deter or prevent the corporation from repeat offending, as individuals within an organization are often expendable, with the organization dismissing convicted individuals and continuing on its way unhindered
- case law demonstrates that personal liability for corporate fault may extend to technical specialists who are not directors or in

any real or practical sense a part of the senior management of the company²⁰

Expediency

- the real reasons for imposing personal liability for corporate fault, without the need to prove personal fault, neither of which provides a sufficient rationale, are:
 - *prosecutorial expediency*—the onus of proof falls on the directors and employees of the corporation (to establish a defence), rather than on the prosecuting authorities (to establish personal fault), and
 - *political expediency*—governments are seen to be taking a tough stand against offences in areas of strong community emotion, such as occupational health and safety, hazardous goods, consumer protection and environmental laws.

Some respondents also opposed any extension of personal liability for corporate fault to individuals beyond directors and officers, as it may lead to increased liability without commensurate directors and officers insurance cover.

3.4 Advisory Committee view

The Committee is of the view that, as a general principle, individuals should not be made criminally liable for misconduct by a company except where it can be shown that they have personally helped in or been privy to that misconduct, that is, where they were accessories. There was strong support for this position in submissions.

The Committee is concerned about the trend in various pieces of legislation to treat directors or other corporate officers as criminally liable for misconduct by their company unless they can make out a relevant defence. Provisions of this kind are objectionable in principle and unfairly discriminate against corporate personnel compared with the way in which other people are treated under the criminal law:

²⁰ See, for example, *McMartin v Newcastle Wallsend Coal Company Pty Limited* [2004] NSWIRComm 202.

- the deeming of individuals to be guilty of an offence, by reason of an office they hold or a role they play, unless they can establish a defence, offends ordinary notions of fairness
- the reversal of the onus of proof inherent in such provisions is contrary to the general presumption of innocence in criminal law
- the fact that someone is a corporate officer should not subject that person to criminal liability in a way that an individual in other circumstances, or an individual in a responsible position in a non-corporate organization, would not be so subject
- the fact that a corporate officer may be able, in the circumstances of a particular case, to make out a relevant defence and thereby avoid conviction does not remove the seriousness of the risk to reputation and the apprehension, effort and expense to which he or she is subject by being exposed to criminal liability on a prima facie basis
- as a practical matter, whatever justification there may be, in the context of a small or closely-held company, for treating the individuals who run the company as personally responsible for its conduct, this approach becomes increasingly problematic in the case of larger corporate organizations. It does not fit at all well with the current Australian preferred governance model of boards constituted by a majority of non-executives
- an undue skewing of personal liability provisions, towards the interests of corporate compliance at the expense of individual fairness, will discourage people from accepting board or managerial positions in corporate enterprises.

Apart from objections in principle to this extended form of personal liability, the range and disparity in the form of the deeming provisions found in various pieces of legislation create complexity and work against clear understanding and effective compliance.

The Committee considers that:

- liability for breach of a legal requirement by a company should fall in the first place on the company itself. It should not be assumed that appropriately weighted monetary or other penalties will not have an impact on shareholders and others who have a

stake in the success of a company or will not influence the behaviour of those individuals who control and manage the company, whether through their being held accountable by shareholders or otherwise

- in addition, an individual who is personally implicated in such a breach—who helps in or is privy to the misconduct—should be exposed to personal liability as an accessory in accordance with ordinary criminal law principles.

Beyond the approach supported above, the Committee considers that great care should be taken in considering any extension of personal liability for the breach of a law by a company. Proper account should be taken of the individual rights of corporate officers—and how their proposed treatment compares with the way other citizens, including individuals involved in the governance of non-corporate organizations, are dealt with—as well as the interest in promoting corporate compliance with relevant statutory requirements.

The Committee acknowledges that in some circumstances a legislature may judge it appropriate to go beyond accessorial liability and impose a duty on a specified individual to ensure that a company complies with a particular legislative requirement. In effect, provisions of this kind impose a form of strict liability upon a designated officer. The Committee considers that any such provision should be confined to responsibility for ensuring that a company complies with a specific operational or administrative requirement, such as the filing of a return by a particular date. It should not extend to areas where compliance requires the exercise of significant judgment or discretion.

This designated officer approach, together with a model provision, is discussed further in Chapter 4.

The Committee also accepts that there may be circumstances in which a legislature judges it appropriate to impose on relevant corporate personnel a somewhat more positive duty of care than may be derived from ordinary principles of accessorial liability. Under those principles, wilful blindness as to the facts of the corporate offence is treated as equivalent to knowledge, and will attract

liability, but neither negligence nor recklessness is sufficient.²¹ In exceptional circumstances, the public interest in achieving compliance by a company may be seen as requiring officers to assume a more positive role within their sphere of influence and to risk personal liability where they have acted with reckless or negligent disregard of the company's relevant conduct.

An extended notion of accessorial liability along these lines, together with a model provision, is discussed further in Chapter 5.

The Committee also considers that it is highly desirable, in the interests of assisting corporate compliance as well as reducing compliance costs, that the various jurisdictions strive to achieve a consistent approach to the imposition of personal liability for corporate fault and the content of any legislation that goes beyond ordinary accessorial liability. The Committee discusses the benefits of greater harmonization, and how this might be achieved, in Chapter 6.

²¹ Refer to Section 3.2, including *Giorgianni v The Queen* (1985) 156 CLR 473 at 487-488.

4 Designated officer liability

This chapter discusses the elements of a model provision for the imposition of a duty on a specified individual to ensure that a company complies with certain operational or administrative requirements.

4.1 Possible rationale

The discussion paper raised the question of developing a standard provision for use in those circumstances where it is desired to go beyond accessorial liability and impose a specific statutory duty on a ‘designated officer’ to ensure that a company complies with particular legislative requirements.

The paper suggested that a designated officer approach may help increase overall levels of compliance by imposing responsibility on at least one individual in an organization to ensure compliance, rather than by focusing liability solely on the directors, who may lack the time or expertise in this regard. It would also be in the interests of a designated officer to request that the organization take any necessary remedial steps, including providing sufficient resources to guard against breach. Failure by the directors or other officers to act when so requested may provide evidence implicating them in any ensuing breach.

In the Committee’s view, a designated officer approach should only be considered where an individual is required to perform one or more specific ‘on the spot’ operational tasks or specific administrative obligations on behalf of a company, there is an important public purpose underpinning the specific tasks or obligations required of that officer, and, at most, only a limited element of personal discretion or exercise of judgment is required. For instance, company secretaries are required to ensure that their companies comply with various corporate administrative requirements, with personal liability in the event of a contravention

by the company.²² Similar duties and liabilities apply to a ‘public officer’ of a company in regard to various tax-related administrative obligations of the company.²³ This approach contrasts with cases where legislation imposes broad duties on individuals, with personal liability in the event of their own default.²⁴ Instances of that kind are much harder to justify.

The designated officer approach would not be appropriate unless the duties of the individual are specific and relate to an operational area reasonably regarded as within that person’s actual control, thus protecting that individual from an undue burden of potential personal liability.

4.2 Model provision

The discussion paper put forward for consideration a model designated officer provision in the following form:

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

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

²² Corporations Act s 188.

²³ The *Income Tax Assessment Act 1936* s 252 sets out the obligations on a company to appoint a public officer and the duties of that officer, who shall ‘be answerable for the doing of all such things as are required to be done by the company under this Act or the regulations, and in case of default shall be liable to the same penalties’.

²⁴ For instance, the *Mining and Quarrying Safety and Health Act 1999* (Qld) ss 30ff impose a range of obligations on particular persons, including the site senior executive, in regard to mine operations, with personal liability in the event of their own default. Likewise, the *Mine Health and Safety Act 2004* (NSW) imposes duties on various individuals, including mine supervisors, with personal liability in the event of their own default.

The ‘default’ clause in the model provision, whereby each director is deemed in some circumstances to be a designated officer, ensures that a company cannot avoid the provision by simply failing to appoint a designated officer.

4.3 Summary of submissions

4.3.1 Qualified support

One submission supported the principle of a designated officer approach, at least where the officer would have the ability to prevent or mitigate a breach of the legislation.²⁵ This respondent also recognised that people may be reluctant to assume senior management positions within an organization for fear of incurring liability for an event over which they could have had no control.

4.3.2 Possible support in certain circumstances

One submission did not support the principle of a designated officer approach at this time, but noted that the US ‘responsible corporate officer’ doctrine (see Appendix 10) permits a defendant to raise a defence that he or she was ‘powerless’ to prevent or correct the violation.²⁶

Another submission²⁷ suggested that the approach might be worthy of further consideration if it were to include appropriate safeguards, such as:

- making liability conditional on the person having failed in the performance of his or her tasks in a significant and demonstrable way, for example by failing to notify line managers of relevant laws or regulations or by misleading senior executives in relation to practices known to be unsatisfactory or unsafe
- meaningful defences, for instance, that he or she had not been properly trained but had sought that additional training or had notified superiors of systemic workplace problems.

²⁵ VACC.

²⁶ Chartered Secretaries Australia.

²⁷ AICD.

Another respondent supported in principle the devolution of immediate responsibility to a ‘designated officer’, but expressed concern if a ‘designated officer’ who was not in management ranks was appointed, because that person may be unable to influence processes.²⁸

4.3.3 Oppose

Some submissions expressed reservations about,²⁹ or opposed,³⁰ the principle of a designated officer approach.

Many of the concerns centred on the possibly burdensome obligations that such a provision could place on the particular individual, the disincentive for persons to take on that role, and the possibility that the provision may be perceived as a means to shield from liability other individuals within the company who may have equal or greater culpability for, or ability to influence, the corporate breach.

4.4 Advisory Committee view

A designated officer approach should only be considered in circumstances where:

- an individual corporate officer is required to perform one or more specific ‘on the spot’ operational tasks or specific administrative obligations on behalf of a company
- there is an important public purpose underpinning those specific tasks or obligations
- at most, only a limited element of personal discretion or exercise of judgment is required to perform those tasks or obligations, and

²⁸ Accounting Bodies.

²⁹ Commercial Law Association, ASIC, Law Council of Australia, AICD, Morrison & Anderson.

³⁰ NSW Law Society, UTS Corporate Law Group.

- it is considered that the practical difficulties for the prosecution in otherwise having to identify an individual responsible for a corporate default would unduly prejudice effective enforcement.

The Committee notes that the Australian Government *Guide to framing Commonwealth offences, civil penalties and enforcement powers* (2004) Section 4.5 states that offences of strict or absolute liability (which negate the requirement to prove personal fault) are generally only considered appropriate where each of the following considerations is applicable:

- the offence is not punishable by imprisonment and the maximum fine is relatively low, except where a higher maximum fine is considered appropriate where the circumstances of the offence will pose a serious and immediate threat to public health, safety or the environment
- the punishment of offences not involving fault is likely to enhance significantly the effectiveness of the enforcement regime in deterring offences, and
- there are legitimate grounds for penalising persons lacking fault, for example to place them on notice that they should guard against the possibility of any contravention.

The Committee considers that comparable considerations, including the existence of a low maximum fine and the need to achieve effective enforcement, should apply before a legislature decides to adopt a designated officer approach.

The Committee notes concerns expressed by some respondents that the designated officer approach could be perceived as a means to shield other culpable persons from liability for corporate fault. However, the Committee does not consider that the approach would have this effect as:

- it does not exempt or relieve other corporate officers from their own duties and obligations
- it would be in the interests of designated officers to ensure that necessary resources are made available to assist them to fulfil their responsibilities. This may involve informing or dealing

with other corporate officers, who may become implicated in a corporate default if they fail to respond appropriately.

The model provision set out above is proposed for use in circumstances where a legislature sees a need to make a designated corporate officer personally responsible for the discharge of a specified obligation.

5 Extended accessorial liability

This chapter reviews several provisions that might be considered for use in exceptional circumstances where it is judged necessary to subject directors and other corporate managers to a standard of responsibility for corporate misconduct extending beyond the ordinary principles of accessorial liability. The Advisory Committee favours the adoption of a provision based on proposals by the Australian Law Reform Commission as a model in these circumstances.

5.1 Criteria for a model provision

The Advisory Committee notes, in Section 3.4, that there may be circumstances in which a legislature sees a need to impose on relevant corporate personnel a more positive duty of care in regard to corporate conduct than may be derived from ordinary principles of accessorial liability. Reference was made to the care that is called for in considering any such extension of personal liability for the breach of a law by a company.

The discussion paper suggested three criteria for assessing the elements of any extended personal liability provision:

- *practicality and fairness*: the provision 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 a reasonable level of responsibility merely by reference to the size or complexity of their organization
- *suitability*: any defences provided for in the provision 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 for them are too narrow or difficult to satisfy. Equally, however, the provision should not contain defences that would permit persons to avoid a

reasonable level of responsibility merely through their inactivity or acquiescence

- *enforceability*: the public interest may not be served if the elements that the prosecution must prove beyond reasonable doubt under the provision impose such a burdensome evidential requirement, in the circumstances of corporate conduct, as to create an undue and inappropriate disincentive for regulators to prosecute apparent breaches.

For the purposes of further discussion and comment, the discussion paper put forward for consideration three possible extended liability provisions:

- a model provision based on a report by the Australian Law Reform Commission (ALRC)
- a model provision reflecting the predominant pattern in current State and Territory provisions
- a model provision reflecting an approach in a recent State statute.

5.2 The ALRC model

5.2.1 Elements of the model provision

The Australian Law Reform Commission report *Principled Regulation* (2002) made a series of recommendations in Chapter 8 (Recommendations 8-1, 8-2 and 8-4) that can be combined into a model provision similar to the provisions in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and the Commonwealth *Hazardous Waste (Regulation of Exports and Imports) Act 1989* that impose personal liability for corporate fault. (The relevant sections in these Acts are set out in Section 2.4.2.)

This model treats all the matters to which it refers as elements that the prosecution must prove beyond reasonable doubt. Some possible amendments to the model provision, as raised in the discussion paper, are set out in square brackets.

The ALRC model

Where a corporation contravenes a relevant provision, the prosecution must prove the following physical and fault elements in any criminal action against an individual in consequence of that contravention:

- 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'], and
- the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct, and
- 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 ALRC commented that the requirement to prove that the person was in a position of influence:

acknowledges that persons who hold certain positions within a corporation may not necessarily have influence over every aspect of a corporation's activities.³¹

Also, the requirement to prove personal fault in the form of knowledge, recklessness or negligence, reflects the principle that:

fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter.³²

³¹ Australian Law Reform Commission Report 95 *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* (December 2002) at para 8.91.

³² *id.*, at para 8.68.

Furthermore, in regard to the requirement to prove failure to take reasonable steps:

when a provision deems an individual liable for the contravening conduct of a corporation, it is appropriate to provide a further ‘hurdle’ to proving liability in the form of a ‘reasonable steps’ threshold test. Fairness would dictate that a corporate officer who took precautions to prevent a contravention, or acted immediately in response to a contravention, should not be held liable for the contravention of a corporation.³³

5.2.2 Summary of submissions

Support

Most submissions preferred this model provision to the other possible model provisions set out in the discussion paper, for various reasons, including:³⁴

- it provides a more reasonable means of imposing personal liability on individuals for corporate fault and reduces the risk of injustice
- it makes clear that the prosecution must make out its case beyond reasonable doubt, thereby respecting the right of any citizen to be regarded as innocent until proven guilty
- it best reflects a policy approach consistent with the principles in case law such as *Daniels v Andersen* (1995) 16 ACSR 607 and *Re Insurance Ltd v Adler* (2002) 41 ACSR 72 that the director’s proper role is that of guiding and monitoring management of the company, namely:
 - the director must be familiar with the fundamentals of the business in which the corporation is engaged
 - the director is under a continuing obligation to keep informed of those activities

³³ id, at para 8.85.

³⁴ WA Chamber of Commerce and Industry, Law Council of Australia, AICD, BCA, NSW Law Society, Chartered Secretaries Australia, ABA, NSW Young Lawyers, Morrison & Anderson, Promina, VACC, UTS Corporate Law Group.

- directorial management requires a general monitoring of the company's affairs and policies by way of attendance at board meetings
- the director must maintain familiarity with the financial status of the company by regular review of financial statements
- it provides the best balance between the need to impose appropriate liability and the desire to allow sufficient incentive for commercial activities to be undertaken in the corporate form
- it recognises the need for the individual to be in a position to influence conduct.

Qualified support

Where the ALRC model provision is appropriate

ASIC considered that the ALRC model provision might be appropriate where personal liability is imposed for serious misconduct by a company and the penalty that can be imposed on the individual is substantial.

However, even here, ASIC was concerned that the requirement for the prosecution to establish that a person 'was in a position to influence the conduct of a body corporate' might provide a mechanism for directors to escape responsibility inappropriately (even if the alternative formulation adding a specific reference to 'directors' were adopted). Directors should not be permitted to argue that they did not have the necessary influence.

Where the ALRC model provision is inappropriate

ASIC considered that the ALRC model provision is not appropriate where it would require the prosecution to establish difficult and complex matters in relation to strict liability regulatory offences where the penalty is not substantial. In those circumstances, ASIC may prefer the State and Territory model provision (see below).

Also, applying Chapter 2 of the Commonwealth *Criminal Code* (dealing with physical and fault elements of an offence) to Commonwealth statutes that adopt the ALRC model provision would require the prosecution to prove that the defendant intentionally failed to take all reasonable steps, in addition to having

to prove knowledge or recklessness as to whether the contravening conduct would occur. Intentional failure is generally difficult for the prosecution to establish. For strict liability regulatory offences, ASIC considered that it would be more appropriate if the issue of whether reasonable steps were taken was dealt with by way of a defence.

Oppose

One submission opposed the ALRC model provision, arguing that it places the onus on the prosecution rather than the defence, as is now the case for, say, safety in many States.³⁵

5.2.3 Advisory Committee view

The Advisory Committee prefers the ALRC model to the other two model provisions discussed in this Chapter as the basis for any extended personal liability provision.

The Committee considers that this provision (in its final form, as set out at Section 5.2.7) best satisfies the three criteria set out in Section 5.1, being practicality and fairness, suitability, and enforceability.

This approach extends the ordinary principles of accessorial liability by imposing on relevant corporate personnel a somewhat more positive duty of care, while at the same time balancing this by requiring the prosecution to establish an element of personal fault, namely that the individual knew that, or was reckless or negligent about whether, the contravening conduct by the company would occur.

The Committee further notes that, under this model provision, unlike the State and Territory model provision (see Section 5.3), the prosecution must also prove beyond reasonable doubt that the individual was in a position to influence the contravening conduct of the corporation. This criterion avoids persons being subject to personal liability for corporate fault where the breach by the company involves conduct outside their area of influence. It recognises that a board of directors of a large enterprise, while able to influence conduct in a general way through, for instance, the

³⁵ Alan du Mée.

development of corporate policies and implementation programs, may not realistically be able to exercise any effective control over particular operational or other matters in question. Likewise, some executive officers may have no power or influence outside their specific areas of responsibility.

However, it would not be necessary to establish actual exercise of influence. The prosecution could satisfy this element by proving a defendant's position of influence, even though the defendant failed to exercise that influence through, say, apathy or acquiescence.

The Committee notes that the Australian Government *Guide to framing Commonwealth offences, civil penalties and enforcement powers* (2004) states that:

Chapter 8 of ALRC Report 95: *Principled Regulation* addresses the circumstances in which an officer should be deemed to be responsible for a contravention of a law by a corporation. The recommendations and discussion in that chapter [as reflected in the ALRC model provision] should be taken into account where applicable.³⁶

5.2.4 Alternative formulation of ALRC model provision: persons covered

The issue

The discussion paper pointed out that the ALRC model provision 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. This raised the question whether the category of individuals liable should be amended by adding a specific reference to directors.

Some submissions³⁷ noted that the three possible general model provisions put forward in the discussion paper apply different tests to the classes of persons who would be subject to personal liability for corporate fault:

³⁶ Section 4.7 **Collective responsibility**.

³⁷ Law Council of Australia, AICD.

- an ‘individual, by whatever name called and whether or not the individual is an officer of the corporation’ who ‘is concerned, or takes part, in the management of the corporation’ (ALRC model)
- a ‘director or other person who is concerned, or takes part, in the management of the corporation’ (representative model)
- ‘an officer of the body corporate’ (alternative State model).

Some submissions supported adding a specific reference to a ‘director’ or alternatively applying the model provision to the same category of individuals who are subject to the statutory duties in ss 180 and 181 of the Corporations Act.³⁸

Another view was that the definition of the individuals who may be liable should be consistent with the recommendations for extending the ss 180 and 181 duties, as reviewed in the CAMAC discussion paper *Corporate duties below board level* (May 2005), that is, ‘directors, officers, or any other person who takes part, or is concerned, in the management of the corporation’.³⁹

Advisory Committee view

The CAMAC report *Corporate duties below board level* (April 2006) proposes that the duties under ss 180 and 181 of the Corporations Act should apply to directors, other officers and any other person who takes part, or is concerned, in the management of the corporation. The same approach should be taken in specifying the classes of individuals who should come within the ALRC model provision.

5.2.5 Alternative formulation of ALRC model provision: replacing ‘would’ with ‘might’

The issue

The discussion paper raised the question whether the obligation imposed by the ALRC model provision on the prosecution to prove the defendant knew that the contravening conduct ‘would’ occur, or was reckless or negligent in this regard, imposed an inappropriately

³⁸ Chartered Secretaries Australia, NSW Young Lawyers, Promina.

³⁹ UTS Corporate Law Group.

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. A possible alternative formulation raised in the discussion paper was knowledge that, or recklessness or negligence about whether, the conduct ‘might’ occur.

Some submissions supported this alternative ‘might’ formulation.⁴⁰ One reason given was that use of ‘would’ could be read as implying something close to absolute certainty of foresight. Reference was made to the Federal Court decision in *F v National Crime Authority* (1998) 154 ALR 471, which equated the words ‘may’ and ‘might’, both indicating possibilities, and the words ‘would’ and ‘will’, both indicating probabilities. The Court observed, at 481, that:

Something that ‘may or might’ happen is less likely to occur than something that ‘will or would’ happen.

Some submissions opposed this alternative ‘might’ formulation,⁴¹ arguing that:

- retaining ‘would’ is consistent with ensuring that the burden of proof rests with the prosecution
- it may lead to prosecutions where an individual does not have the necessary element of ‘mens rea’ that is required for most criminal prosecutions
- the test of ‘might’ is too vague.

Advisory Committee view

The ALRC model provision should retain the phrase ‘would occur’, given that the test is satisfied if the defendant was ‘reckless or negligent’ as to whether the contravening conduct would occur. In other words, the emphasis is on proof of recklessness or negligence, rather than on the probability of the event happening.

⁴⁰ ASIC, NSW Young Lawyers, UTS Corporate Law Group.

⁴¹ Chartered Secretaries Australia, Promina, VACC.

5.2.6 Alternative formulation of ALRC model provision: evidential onus on the defendant

The issue

The discussion paper pointed out that, under one possible interpretation of the ALRC model provision, the prosecution would have to negate every possible reasonable step that the defendant could have taken in the circumstances. A middle position might be to treat reasonable steps as a defence, with the defendant having an initial evidential burden to provide evidence of having taken one or more reasonable steps, which the prosecution would then have to negate beyond reasonable doubt.

Some submissions generally supported,⁴² or did not object to,⁴³ this alternative formulation.

Advisory Committee view

The Committee considers that it is not unreasonable to place an evidential onus on a defendant to point to reasonable steps that he or she has taken to prevent the contravening corporate conduct,⁴⁴ given that this information would be in the peculiar knowledge of that person, and it may be onerous for the prosecution to have to anticipate and disprove these steps in advance. Where that evidential onus is satisfied, the prosecution would still have to negate the alleged reasonable steps beyond reasonable doubt.

The Committee notes in this regard that the Australian Government *Guide to framing Commonwealth offences, civil penalties and enforcement powers* (2004) states that:

In general, the prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is

⁴² ASIC, NSW Young Lawyers, UTS Corporate Law Group.

⁴³ Chartered Secretaries Australia.

⁴⁴ This would require a defendant to adduce or point to admissible evidence that suggests a reasonable possibility of having taken particular reasonable steps. The test of reasonable steps is objective, having regard to the circumstances of which the individual 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.

peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.⁴⁵

The Committee considers that its recommendation is consistent with the policy in that Guide.

5.2.7 Reformulation of the ALRC model

The Advisory Committee recommends a modified version of the ALRC model, along the following lines:

The CAMAC recommended model

Where a corporation contravenes relevant provisions, the prosecution must prove the following physical and fault elements in any action against an individual based on that individual's position in the company in relation to that contravening conduct:

- the individual, by whatever name called, was a director or other officer of the corporation or otherwise took part, or was otherwise concerned, in the management of the corporation, and
- the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct, and
- the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.

It is a defence if the individual took all reasonable steps to prevent the contravening conduct. The individual has an evidential burden to raise that defence, which the prosecution would then have to negate beyond reasonable doubt.

5.3 State and Territory model

5.3.1 Elements of the model provision

The State and Territory representative provision (the representative model provision) seeks to reflect the predominant pattern of personal

⁴⁵ Section 4.6 **Appropriate use of defences.**

liability provisions in current State and Territory statutes (as summarised in Appendix 4).

This model provision treats all matters referred to therein, other than proof that a defendant was a director or otherwise took part or was concerned in management, as defences. A defendant would be personally liable for corporate fault solely by virtue of his or her position or role in the company, subject to proving, on the balance of probabilities, that he or she was not in a position to influence the relevant corporate conduct, or exercised due diligence or took all reasonable steps to prevent that conduct.

The representative model

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.

5.3.2 Summary of submissions

Support

One submission favoured the representative model provision, arguing that it provides a broad range of defences for an individual involved in management of a corporation.⁴⁶

Another respondent proposed a multi-tiered criminal and civil liability model, with the criminal provisions being limited to personal fault and the civil penalty provisions being based on the representative model provision.⁴⁷

⁴⁶ Accounting Bodies.

⁴⁷ Anderson & Welsh.

Qualified support

ASIC considered that the representative model provision might be appropriate in some cases where the potential penalties imposed upon the individual are not high.

ASIC noted that, if liability under this model provision is intended to be strict, it will need to be expressly so stated in Commonwealth statutes, to prevent the inclusion of fault elements under Chapter 2 of the Commonwealth *Criminal Code*. If this is done, a model provision of this nature will be appropriate in many situations.

ASIC supported the legal burden being on the defendant to establish the defences on the balance of probabilities, as those matters would be peculiarly within the defendant's knowledge.

ASIC questioned whether there is much practical difference between 'exercising all due diligence to prevent the relevant conduct' and 'taking all reasonable steps to prevent the relevant conduct' and whether it is necessary to include both defences.

Oppose

Most submissions that commented on the representative model provision opposed it, for the following reasons:⁴⁸

- it reverses the onus of proof (or the presumption of innocence)
- it is not clear how, in practice, directors and officers could prove that they exercised 'all due diligence' or took 'all reasonable steps' when a company has breached the law, notwithstanding the efforts of the directors or officers.

5.3.3 Advisory Committee view

The Committee does not support the representative model provision as, unlike the ALRC model provision, it lacks any personal fault element. In accordance with the views set out at Section 3.4, the Committee considers that, in principle, directors and others involved in management should only be criminally liable for corporate

⁴⁸ Law Council of Australia, AICD, Chartered Secretaries Australia, ABA, Morrison & Anderson, WA Chamber of Commerce and Industry, UTS Corporate Law Group, Alan du Mée.

misconduct where it is proved that they have been at fault in some manner.

The representative model provision also places a considerable burden on any defendant, who has to prove a defence on the balance of probabilities. This contrasts with the Committee's recommendation in relation to the ALRC model provision that a defendant have an evidential, but not a legal, burden to raise an applicable defence.

5.4 Alternative State model

5.4.1 Elements of the model provision

This model provision, which is based on the *Occupational Health and Safety Act 2004* (Vic) s 144, reflects an approach to personal liability for corporate fault that differs from most State and Territory legislation. The provision identifies various factors to take into account in determining whether an individual is liable in consequence of corporate fault.

The alternative State model

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.

5.4.2 Summary of submissions

No submissions that commented on this matter favoured this model provision.

Various submissions opposed this provision, for sometimes contrasting reasons:⁴⁹

- provisions of this kind are not common and there is no well-developed body of law about how they should be interpreted
- it is not immediately clear who will bear the onus of proof, in particular, who must prove the four factors to which regard must be had in determining whether an officer is guilty
- it is difficult for the prosecution to prove ‘knowledge’ of the officer
- the provision has the capacity to elevate mere negligence to an offence
- it may impose strict liability and a presumption of guilt on an individual
- it provides minimal defences.

ASIC considered that:

- while the model provision may not spell out where the legal burden lies, in reality the prosecution will have the onus of establishing failure to take reasonable care by reference to these factors
- the drafting of this model provision is unusual and might create uncertainty until the courts settle its construction.

⁴⁹ AICD, Chartered Secretaries Australia, Accounting Bodies, ABA, Morrison & Anderson, UTS Corporate Law Group, Alan du Mée.

5.4.3 Advisory Committee view

The Committee considers that the alternative State model provision has the merit of setting out factors for a court to take into account in determining an individual's guilt in consequence of corporate misconduct. However, in the Committee's view, the provision is too open-ended in the way it ties criminal liability to failure to take reasonable care.

The Committee prefers the ALRC model as an extended personal liability provision.

5.5 Business judgment defence

5.5.1 Possible extension of defence

The discussion paper noted that the question has been raised from time to time whether directors and other persons subject to personal liability for corporate fault should have a business judgment defence along the lines of s 180(2) of the Corporations Act.

5.5.2 Summary of submissions

Support

Some submissions⁵⁰ favoured a business judgment defence in legislation imposing personal liability for corporate fault where, for instance, the directors (or other officers), in adopting the particular corporate practice in question, have exercised their judgment in good faith and rationally believe that the practice was in the best interests of the company. In this context, the best interests of the company should include compliance with all statutory obligations and external matters that touch on the business of the corporation, including environmental and occupational health and safety matters.

This type of business judgment defence would be similar to, if not the same as, a 'due diligence' or 'reasonable reliance' defence in some current provisions imposing personal liability for corporate fault.

⁵⁰ Law Council of Australia, Accounting Bodies.

Oppose

Some submissions opposed a business judgment defence in the context of personal liability for corporate fault.⁵¹ Reasons given included that:

- it is unlikely that there would be many instances where it would be appropriate, as most offences arise from breach of specific corporate obligations
- it would be inappropriate if the defence permitted individuals to avoid criminal liability for corporate fault on the grounds that it was in the interests of the company to breach the law
- adopting a reasonable steps criterion in a model provision would effectively negate the need for a business judgment defence.

5.5.3 Advisory Committee view

The Advisory Committee considers that a business judgment defence is not appropriate in the context of personal liability for corporate fault, as:

- that defence currently focuses on a person's duties to a company, whereas the legislation under review deals with a company's external conduct and regulatory compliance obligations
- the defence currently applies to civil liability only, not criminal prosecutions
- it would be inappropriate if the defence could be construed as permitting individuals to avoid liability on the grounds that it was in the interests of the company to disregard a statutory obligation
- the key issue is to get agreement on suitable tests to determine personal liability for corporate fault, rather than introduce a more general exculpatory provision.

⁵¹ ASIC, NSW Young Lawyers, Morrison & Anderson, Chartered Secretaries Australia.

Also, the reasonable steps element in the ALRC model provision may provide suitable protection for those directors or other managers who, in good faith, seek to implement what they rationally consider to be appropriate steps to prevent breaches by their corporation.

5.6 Defences generally

5.6.1 Submissions

Two submissions⁵² said that some defences are necessary, regardless of the model provision selected. They preferred a due diligence defence (with which most company directors would already be familiar in other places, for instance the capital raising disclosure offences in Chapter 6D of the Corporations Act) and a defence based on reasonable reliance on information provided by others (such as that in s 189 of the Corporations Act).

Another respondent supported appropriate defences, including due diligence, reasonable steps, no knowledge, no control or influence, reasonable reliance on information provided by others and reasonable mistake.⁵³

5.6.2 Advisory Committee view

The Advisory Committee considers that the ALRC model provision adequately deals with these matters, without the need for further defences. For instance, that provision places the onus on the prosecution to prove informed, reckless or negligent behaviour by the defendant. Likewise, a possible defence based on reasonable reliance on information provided by others would probably be encompassed within a reasonable steps defence.

⁵² Law Council of Australia, AICD.

⁵³ ABA.

6 Harmonization of approach

This chapter considers the benefits of a more consistent and principled legislative approach across jurisdictions to the imposition of personal liability for corporate fault.

6.1 Disparities in current legislative approaches

Reference has already been made to considerable differences between statutes in various jurisdictions, even statutes dealing with the same area of regulated activity, regarding the individuals potentially liable for corporate fault, the grounds for determining liability and available defences.

The discussion paper invited submissions on whether companies and individuals have encountered problems in practice in consequence of the current differing legislative provisions that impose personal liability for corporate fault and whether these problems would be alleviated through greater harmonization.

6.2 Summary of submissions

Respondents pointed to various compliance problems, these being most marked for companies carrying on business in more than one jurisdiction.⁵⁴ For instance, the transfer of managers between jurisdictions may give rise to additional training costs and potential exposure to penalties through inadvertent breach of unfamiliar legislation.

Many submissions also supported greater harmonization of legislation that imposes personal liability, at least where such

⁵⁴ AICD, Accounting Bodies, ABA, Chartered Secretaries Australia, VACC.

legislation can be justified.⁵⁵ Reasons advanced by respondents included that:

- harmonization would remove unnecessary complexity, or any inconsistency, so that companies, directors and officers have greater clarity regarding their particular duties and responsibilities, particularly where companies operate across jurisdictions. This would reduce compliance costs
- directors and officers insurance premiums are likely to be reduced (by removing uncertainty about potential areas of liability)
- a consistent body of case law will be developed
- Australia will be more attractive for foreign investment, with a more certain regulatory environment (including by removing unnecessary and complex red tape).

One respondent referred to the Business Council of Australia publication *Business Regulation Action Plan for Future Prosperity*, which recommended that Governments adopt the principle that, where an area of regulation is a shared responsibility between jurisdictions, there should be a move towards a single, consistent national regime.

It is noted again that the Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, recommends that the Council of Australian Governments initiate reviews to achieve more nationally consistent regulation of personal liability of company directors and officers for corporate fault, following the completion of the Advisory Committee review.⁵⁶

⁵⁵ VACC, WA Chamber of Commerce and Industry, Law Council of Australia, ABA, Anderson & Welsh, Chartered Secretaries Australia, Accounting Bodies, AICD, NSW Law Society, NSW Young Lawyers.

⁵⁶ Recommendation 5.28.

6.3 Advisory Committee view

The Advisory Committee considers that the proliferation of differing approaches in statutes that impose personal liability for corporate fault:

- detracts from good corporate governance by reducing the clarity of understanding by individuals of their legal responsibilities in performing their corporate functions, and the sanctions they may face for breach
- complicates the efforts of corporate decision-makers to ensure corporate compliance
- increases compliance costs for businesses in identifying and responding to complex legal requirements
- acts as a general disincentive for individuals to undertake corporate roles.

It is difficult to discern a policy basis for differing liability tests and defences, within a jurisdiction or across jurisdictions, in relation to comparable conduct.

A more consistent and harmonized approach to personal liability for corporate fault would:

- reduce complexity, confusion and the cost of compliance by overcoming the need for companies and corporate personnel to consider and respond to differing standards across various pieces of legislation and across jurisdictions
- assist companies to adopt consistent compliance approaches and programs across their various activities
- assist corporate officers to understand fully what is expected of them.

The Advisory Committee recommends, as the basis for a more consistent approach across Australia:

- adoption of the general principle that personal liability for corporate fault be confined to ordinary principles of accessorial liability (as discussed in chapter 3)

- in exceptional circumstances where a need is seen—in the context of a particular piece of legislation—to go beyond those ordinary principles, adoption of either a designated officer model or an extended accessorial liability model (as discussed in Chapters 4 and 5), depending on the relevant circumstances.

6.4 Implementation

To implement the principles proposed above, and achieve a consistent approach, the Committee recommends that:

- the Australian Government publish a policy concerning the principles for imposing criminal liability on individuals for corporate fault in Commonwealth legislation, together with model provisions. The Government has already made some reference to this matter in its *Guide to framing Commonwealth offences, civil penalties and enforcement powers* (2004) (see Section 5.2.3 of this report). This should help achieve a consistent approach at the Commonwealth level
- steps be taken at inter-governmental levels, such as through an appropriate Ministerial body, to adopt similar principles and model provisions.

Consideration might also be given to a possible provision, in Commonwealth legislation, covering the field of personal liability for corporate fault on a generic basis.

Appendix 1 Liabilities for one's own misconduct

This Appendix outlines some key provisions in the Corporations Act and representative State legislation that impose criminal liability on directors and other individuals involved in companies for their own misconduct.

Private (non-Government) sector

Directors and other persons involved in private sector companies are subject to a range of personal duties and obligations that impose criminal and/or civil liability on them in the event of breach.

Some of the key provisions under the Corporations Act and applicable State legislation that impose liability on individuals for their own misconduct are set out below.

Corporations Act

The Corporations Act imposes duties and liabilities on a range of individuals, including directors, other corporate officers, employees and other persons.

Some provisions identify 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.

Some offences may require conduct by another party as well as personal fault by the individual. For instance, a director is only criminally liable under s 588G of the Corporations Act if the company incurs a debt while insolvent and the director is also at fault, according to the tests of personal culpability under subsections (2) and (3).

The following summary sets out some key provisions:

- 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 individual may be liable under the general liability provisions in boxes 8-9.

Description used in the Corporations Act	Relevant provisions
1. 'a director'	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 'officer' includes a director]	312, 323B [assisting auditor] (323B also covers auditors of controlled entities) 530A [assisting liquidator] 601HG(6) [assisting auditor]
3. 'a director or other officer'	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'	182, 184(2) [improper use of position]
6. 'a director or other officer or employee'	183, 184(3) [improper use of information]

Description used in the Corporations Act	Relevant provisions
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. 'person 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]
9. 'a person'	200C [improper benefit on transfer of corporate undertaking or property] 1101E [concealing corporate books] 1101F [falsifying corporate records] 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 1900</i> (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]

Other examples are the *Occupational Health and Safety Act 2000* (NSW) s 32A and the *Crimes Act 1900* (ACT) s 49D, both of which impose criminal liability on individuals whose conduct causes a workplace death.

Public (Government) sector

Individuals involved in managing Commonwealth, State and Territory government business enterprises (GBEs) (sometimes referred to as government owned corporations (GOCs)) that perform commercial or other activities on behalf of their governments may be subject to liability for their own misconduct.

The mode of regulation of GBEs is not uniform in the different Australian jurisdictions. While some GBEs are subject to the Corporations Act, others are excluded in whole or part from that Act (by virtue of s 5F of that Act) and 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 those GBEs that are, and those GBEs that are not, subject to the Corporations Act.

For instance, the fiduciary duties in the Corporations Act do not apply to officers of Commonwealth GBEs that are subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). Instead, under Part 3 Div 4 of the CAC Act, those officers have personal duties and liabilities that are expressed in terms comparable to those in ss 180–184 of the Corporations Act, including criminal liability for failing to act in good faith or misusing corporate position or information.

Under the CAC Act, ‘officer’ in relation to a Commonwealth authority is 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 (which is further discussed in Appendix 5).

An example of State regulation is the New South Wales *State Owned Corporations Act 1989* s 20G, which 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 personal duties and liabilities, including criminal penalties for breach, 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.

A similar pattern is found in other States. 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 comparable to those under the Corporations Act.

In regard to enforcement, ASIC has no regulatory or enforcement role in relation to the internal workings of those GBEs not subject to the Corporations Act. Instead, the responsibility for prosecuting any breaches by individuals involved in GBEs not subject to ASIC jurisdiction formally lies with the Minister or an authorised delegate, but generally speaking there is no mechanism or regulatory body equivalent to ASIC to investigate or prosecute possible breaches.

Appendix 2 Steps 1 and 2: corporate liability and defences

Chapter 2 indicates that there are four steps in determining personal liability for corporate fault:

- *corporate liability*
- *corporate defences*
- *individual liability*
- *individual defences.*

This Appendix analyses steps 1 and 2, with certain information in this Appendix set out in more detail in Appendix 3.

Appendix 4 analyses steps 3 and 4, with certain information in that Appendix set out in more detail in Appendices 5 to 9.

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 limited application, particularly in larger enterprises.

The statutes reviewed in this report 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 determining corporate liability.

In addition to the analysis below, information regarding corporate criminal liability is found in Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability*, Cambridge University Press, 1993; Celia Wells, *Corporations and Criminal Responsibility*, Clarendon Press, 1993; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations*, Oxford University Press, 2002; JC Coffee, 'No Soul to Damn, No Body to Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386; Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' [2003] *Journal of Business Law* 1; Australian Law Reform Commission report *Principled Regulation* (2002) Chapter 7.

Commonwealth legislation

Liability

The Commonwealth *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*) and hazardous goods legislation (*Hazardous Waste (Regulation of Exports and Imports) Act 1989*) are set out and analysed in Appendix 3.

Defences

The effect of the Commonwealth *Criminal Code* ss 12.3(3) (due diligence defence: refer Appendix 3) and 13.5 (standard of proof—'A legal burden of proof on the defendant must be discharged on the balance of probabilities.') 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’.

State and Territory legislation

Liability

Legislation (for instance, the *Dangerous Substances Act 1979* (SA)) may impose liabilities on corporations, without including any test of whose behaviour or state of mind binds the corporation. In these instances, common law principles apply, as discussed, for instance, in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and *ABC Development Learning Centres Pty Ltd v Wallace* [2006] VSC 171.

However, almost all the statutes included in this review specifically impose liability on a corporation for the acts of its officers or other persons acting within the scope of their corporate 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)(a)).

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.

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)).

Appendix 3 Corporate criminal liability

This Appendix outlines corporate liability under Commonwealth statutes, for the purpose of the analysis of corporate liability and defences in Appendix 2.

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 7 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 (for offences of 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 Commonwealth *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 Commonwealth *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) and (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) and (3)).

One effect of s 12.4 of the Commonwealth *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 4 Steps 3 and 4: individual liability and defences

Chapter 2 indicates that there are four steps in determining personal liability for corporate fault:

- *corporate liability*
- *corporate defences*
- *individual liability*
- *individual defences.*

Appendix 2 analyses steps 1 and 2, with certain information in that Appendix set out in more detail in Appendix 3.

This Appendix analyses steps 3 and 4, with certain information in this Appendix set out in more detail in Appendices 5 to 9.

Overview

This Appendix deals with the question of what individuals are potentially criminally liable for corporate fault under the statutes reviewed in this report and the defences available to them.

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.

General principles

Individuals potentially liable

The Commonwealth, State and Territory environmental protection, occupational health and safety, hazardous goods and fair trading statutes reviewed in this report 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 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
- *designated officer liability*: individuals designated as having organizational 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.

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 may be liable for corporate fault, 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 the categories of individuals who may be liable for corporate fault accommodate this manner of running corporate groups. For instance, statutes imposing managerial liability typically apply to all individuals who in fact 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 directors of a subsidiary corporation, at least by application of the definition of ‘director’ under the Corporations Act, where the formally appointed directors of that subsidiary were ‘accustomed to act’ in accordance with their instructions or wishes.

Burdens of proof

Under general principles of criminal law, there are three types of burden 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 that the defendant ‘satisfy the court’ in regard to a defence.⁵⁷

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 Commonwealth *Criminal Code* and s 141 of the *Evidence Act 1995* (NSW) (those sections are set out in Appendix 6). 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), 1101E(2), 1101F(2); *legal burden on the defendant*: for instance, ss 188(3), 592(2), 606(5), 1307(3)).

Commonwealth legislation

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 designated officer liability (as explained above).

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

⁵⁷ In *Hookham v The Queen* (1994) 181 CLR 450 at 458-459, the High Court held that s 8Y of the *Taxation Administration Act 1953*, which provides that ‘it is a defence if the [defendant] proves’ certain matters, reverses the onus of proof that would otherwise rest upon the prosecution in regard to those matters. In *McMartin v Newcastle Wallsend Coal Company Pty Limited* [2004] NSWIRComm 202, it was held, at [827], that s 50(1) of the *Occupational Health and Safety Act 1983* (NSW) (the forerunner of s 26(1) of the *Occupational Health and Safety Act 2000* (NSW)), which provides that, where a corporation contravenes any provision of the Act, each director and each person concerned in the management of the corporation shall be deemed to be liable ‘unless he or she satisfies the court’ in regard to certain matters, reverses the onus of proof that would otherwise rest with the prosecution in regard to those matters.

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.

Environmental and hazardous goods legislation

Positional/managerial liability with legal burden on the prosecution

The *Environment Protection and Biodiversity Conservation Act 1999 (Environment Protection Act)* ss 494, 495 and the *Hazardous Waste (Regulation of Exports and Imports) Act 1989 (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 recklessness and negligence are defined in the Commonwealth *Criminal Code* ss 5.4, 5.5. They are set out in Appendix 7.

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.

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 otherwise impose personal liability for a corporate breach.

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.

In *Hookham v The Queen* (1994) 181 CLR 450 at 458–459, the High Court held that s 8Y reverses the onus of proof that would otherwise rest on the prosecution in regard to those matters.

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.

Designated 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 imposes duties on a ‘responsible officer’ in connection with the holding of a financial services licence (s 913B), and on a ‘responsible person’ in regard to preparing product disclosure statements (s 1013A).

State and Territory legislation

Individuals potentially liable

Set out in the table below is a summary of those classes of persons who are potentially liable in consequence of corporate fault under the State and Territory legislation reviewed in this report. 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 8.

	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
Designated 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 liability only

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.

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 this Appendix.

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

Further details of defences are set out in Appendix 9.

	Environmental	OH&S	Hazardous goods	Fair trading	Total
Due diligence	5	3	5	1	14
No influence	4	2	4	0	10
No knowledge	1	0	3	0	4
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
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

Appendix 5 Meaning of 'Executive officer'

This Appendix outlines relevant case law concerning the tests of who is subject to managerial liability by virtue of being concerned or taking part in the management of a company, for the purpose of the analysis of personal liability for corporate fault in Appendix 4.

These concepts were found in the now-repealed definition of 'executive officer' in the Corporations Act.

This Appendix also compares the repealed 'executive officer' test with the current definition of 'officer' in the Corporations Act. The term 'executive officer' appears to cover a broader class of persons than the term 'officer'.

Executive officer

Most 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.

Summary

The concept of being concerned in or taking part in the management of a company was considered in the leading decision of Ormiston J in *Commissioner for Corporate Affairs (Vic) v Bracht* (1988) 14 ACLR 728.

Some subsequent cases considered the notion of taking part in management in the context of the insolvent trading provisions, at a time when personal liability for insolvent trading extended beyond directors to any other person who 'took part in the management of the company' (repealed s 556: see now s 592). In that context, the

courts narrowly interpreted the notion of taking part in management by confining it to persons whose corporate managerial role 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 provision imposing personal liability for insolvent trading (s 588G) is confined to directors.

Cases outside the area of insolvent trading have given the concept of being concerned in or taking part in management a wider interpretation. For instance, Santow J in *Forkserve Pty Ltd v Jack and Aussie Forklift Repairs Pty Ltd* (2001) 19 ACLC 299 at 312 ruled that the concept should be given a wide definition to include activities involving some responsibility and participation in the decision-making processes of the company, other than routine clerical or administrative duties associated with management. Likewise, 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’) took part in the management of the company: *ASIC v Parkes* [2001] NSWSC 377, para 84.

In *ASIC v Vines* (2005) 55 ACSR 617, Austin J at [1037]-[1056] considered the elements of ‘executive officer’ in the context of a corporate group and adopted the wider interpretation.

Elements of the term

An executive officer was any person who ‘is concerned in, or takes part in, the management’ of a corporation.

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 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).

In *ASIC v Vines*, Austin J at [1038] stated that the following activities do not constitute management:

- the execution of instructions by an agent while obeying orders
- merely administrative work performed by a company secretary or accountant
- carrying out day-to-day routine functions in accordance with predetermined policy.

His Honour then considered:

- (i) *segment responsibilities*: whether 'management' is confined to central management of the affairs of the company or extends to activities involving a segment of the company's overall business (such as production, sales or trading), and
- (ii) *intermediate executives*: whether 'management' may cover corporate officers who are not directors and do not report directly to the board.

Segment responsibilities

Austin J in *ASIC v Vines* at [1040] noted that Ormiston J in *Bracht* doubted that ‘management’ should be confined to ‘central management’. Austin J at [1041] quoted with approval the following observations of Ormiston J:

... 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).

Austin J contrasted this broader approach of Ormiston J in *Bracht* with the narrower approach of Burchett J in *Holpitt* who appeared to equate management with central management. Burchett J considered that ‘management’ extends to a delegate of the board with ‘full discretion to act independently’ or a person who has ‘the management of the whole affairs of the company’ or who is ‘entrusted with power to transact the whole of the affairs of the company’.

In adopting the approach of Ormiston J in *Bracht*, Austin J concluded:

In my view Ormiston J’s decision in *Bracht* should be followed ... in preference to Burchett J’s approach in *Holpitt*. In this statutory context, the purpose of the definition of ‘executive officer’ is to identify, among those who work for the corporation, that group whose responsibilities are significant enough to justify the imposition of special statutory duties. It would be very odd if, say, the national sales manager of a major listed corporation, whose dishonesty or disloyalty or negligence could cause very substantial harm to the corporation, were not an ‘executive officer’ subject to the statutory duties because his or her responsibilities were limited to the sales segment of the business, in circumstances where the statutory duty clearly applies to the company secretary. In *Holpitt*, Burchett J was concerned [about] the potential unfairness of making a company executive responsible for debts which he or she had no role in incurring. The problem does not arise in the present

context, where the issue is intrinsically confined to assessing the proper discharge of the executive's own responsibilities in his or her position in the corporation (at [1049]).

Intermediate executives

In *ASIC v Vines*, Austin J at [1051] noted that Ormiston J in *Bracht* thought that, in the case of a large company, management activities may be undertaken even by persons who are not directors or who do not communicate directly with the board (the broader view). His Honour also noted that Burchett J's approach in *Holpitt* might suggest that only directors and those executives who communicate directly with the board fall within the concept of management (the narrower view).

Austin J at [1052] found it unnecessary to decide the matter, given his conclusion that, on either view, the defendants in the case before him were involved in management.

'Concerned in' and 'takes part in' management

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.

Ormiston J in *Bracht* (at 735–736) said that 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.

In *ASIC v Vines*, Austin J at [1054] quoted Ormiston J in *Bracht* in support of his conclusion that being ‘concerned’ in management has a much wider operation than the concept of ‘taking part in’ management:

The idea of being ‘concerned’ in management was held by Ormiston J to have ‘a much wider operation’ [than ‘taking part in’ management], connoting ‘participation at a variety of levels and at differing intensities’, some of which ‘may be relatively modest’. It covered ‘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’. Merely clerical or administrative activities would be insufficient. ‘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 mere carrying out of directions as an employee would suffice.

Austin J also noted at [1054] that, according to Ormiston J in *Bracht*, the question is whether the defendant:

is given some measure of responsibility or some area of discretion, or ... his opinion is given some weight in the decision-making processes of management.

Austin J also noted at [1055] that Ormiston J’s approach to the expression ‘concerned in ... management’ was accepted by the New South Wales Court of Appeal in *Forge v ASIC* (2004) 52 ACSR 1 at [200].

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.

Some of the legislation reviewed in this report, such as the *Occupational Health and Safety Act 2004* (Vic), applies this definition in determining who is potentially liable for corporate fault in particular circumstances.

Comparison of 'executive officer' and 'officer'

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

However, the current definition of 'officer' may be narrower than the repealed 'executive officer' definition in that:

- the requirement in one part of the definition of 'officer' that the person 'makes, or participates in making, decisions that affect *the whole, or a substantial part*, of the business of the corporation' may not cover, for instance, some divisional managers whose areas of corporate responsibility, while significant in their own right, may be less than a substantial part of the company's overall business
- some managers may not satisfy the alternative 'officer' test of a person who has 'the capacity to affect significantly the corporation's financial standing'
- the definition of 'officer' no longer includes any reference to persons involved in policy and decision-making in relation to a corporation that 'may have some significant bearing ... on the conduct of its affairs' (as the test of 'executive officer' was interpreted by Ormiston J in *Bracht*)
- the definition of 'officer' no longer includes the concept of being 'concerned in management'.

Appendix 6 Standards of proof in criminal proceedings

This Appendix outlines Commonwealth and State provisions concerning burdens of proof, for the purpose of the analysis of personal liability for corporate fault in Appendix 4.

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 7 Recklessness and negligence

This Appendix outlines the concepts of recklessness and negligence under the Commonwealth Criminal Code for the purpose of the analysis of personal liability for corporate fault in Appendix 4.

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 8 Persons subject to personal liability for corporate fault under State and Territory legislation

This Appendix outlines the grounds of individual liability under the State and Territory environmental protection, occupational health and safety, hazardous goods and fair trading statutes dealt with in this review, for the purpose of the analysis of personal liability for corporate fault in Appendix 4.

The available defences referred to in this Appendix are set out in detail in Appendix 9.

Grounds of personal liability

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

- *designated officer liability*: individuals designated as having organizational 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.

An individual is liable unless he or she can prove an available defence. These defences are identified in this Appendix, but the relevant statutory provisions are stipulated and analysed in Appendix 9.

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, a form of designated officer liability and participatory liability.

In relation to positional and designated 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 (designated officer liability).

The statutory defences in relation to positional and designated 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/managerial liability and also a form of designated officer liability. It provides that, ‘if 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.

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 designated 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 designated 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 designated 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 designated officer, each officer of the body corporate is taken to be a designated 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 or she, 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 (s 5).

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/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 corporation's management, whatever the person's position is called and whether or not the person is a director of the corporation' (Schedule 2).

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 the following statutory defences:

- 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 positional/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 9 Defences for persons subject to personal liability for corporate fault under State and Territory legislation

This Appendix outlines the defences available to individuals under State and Territory environmental protection, occupational health and safety, hazardous goods and fair trading statutes dealt with in this review, for the purpose of the analysis of personal liability for corporate fault in Appendix 4.

Range of defences

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 (see Appendix 4 ‘Burdens of proof’)

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 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 (at 363).

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’. Paragraph 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 legislative requirements
- 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 Victorian legislation has a no knowledge defence.

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 for reporting 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 1974* s 85(1)(c), 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. 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 personal liability for corporate fault is corporate liability (see Chapter 2).

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 10 US approach to personal liability for corporate fault

Courts in the United States have developed a ‘responsible corporate officer’ (RCO) doctrine that is analogous to statutory provisions in Australia that impose personal liability for corporate fault. 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?' (1994) 25 *Loyola University Chicago Law Journal* 169, A Sgroi, 'Federal Food and Drug Act Violations' (2002) 39 *American Criminal Law Review* 609).

Appendix 11 List of respondents

- Australian Bankers' Association (ABA)
- Australian Securities & Investments Commission (ASIC)
- Allen du Mée
- Australian Institute of Company Directors (AICD)
- Australian Shareholders' Association
- Business Council of Australia (BCA)
- Chartered Secretaries Australia
- Commercial Law Association of Australia Limited
- CPA Australia & The Institute of Chartered Accountants in Australia (Accounting Bodies)
- David Morrison and Colin Anderson
- Helen Anderson and Michelle Welsh
- Insurance Council of Australia
- Law Council of Australia
- Law Institute Victoria (endorsed Law Council submission)
- NSW Young Lawyers
- Promina
- The Law Society of NSW
- UTS Corporate Law Group, University of Technology Sydney
- Victorian Automobile Chamber of Commerce (VACC)
- WA Chamber of Commerce and Industry