

Key Issues in Corporate Criminal Liability

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OVERVIEW



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PART 1

- **Principles of Corporate Criminal Responsibility under the Model Code**



Criminal Code (Cth) & Criminal Code (NT)

- Ch 2, Criminal Code 1995 (Cth) and Part IIAA, Criminal Code (NT) both based on Model Code
- **Definition of “person” includes body corporate**
 - s 17, *Interpretation Act* (NT) - “person includes a body politic and a body corporate”
 - s2C, *Acts Interpretation Act 1901* (Cth)
 - (1) “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another” and “whoever” includes a body politic or corporate as well as an individual
- How the Codes deal with **Corporate Criminal Responsibility** – ie corporation being a legal entity but being a person with a mind of its own:
- **Cth Code: Div 12.1, Part 2.5**
- **NT Code: Div 5, Part IIAA**
- **Cth Code, s 12.1(1) / s43BK NT Code – General Principles**
 - Code applies to bodies corporate in same way as individuals / natural persons (with modifications set out in the legislation)
 - Body corporate may be found guilty of *any offence*, including one punishable by imprisonment

Physical Elements

- **Cth Code, s 12.2 – Physical Elements**
- **NT Code, s43BL – 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**.

Fault Elements Other than Negligence

- **Cth Code, s 12.3 & NT Code, s43BM**
- (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;
 - (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.

Fault Elements Other than Negligence (cont)

- **Cth Code, s 12.3 & NT Code, s43BM**
- ...
- (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.

Relevant Definitions

- **Definitions in Part 2.5, Cth Code and Part IIAA, NT Code**
 - **"board of directors "**: the body (by whatever name called) exercising the executive authority of the body corporate.
 - **"corporate culture "**: 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 "**: 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.

Negligence

- **Cth Code, s 12.4; and NT Code, 43BN**
- (1) The test of negligence for a body corporate is that set out in section 5.5 Cth Code or s43AL NT Code.
- (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

Negligence (cont)

- **Cth Code, s 12.4; and NT Code, 43BN**
- **(3) fault element of negligence 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).
- **(4) 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.

Defences

- **Mistake of fact (strict liability)**

Cth Code, s 12.5; and NT Code, s43BO

- (1) A body corporate can only rely on s 9.2 Cth Code OR s43AZ NT Code (mistake of fact for strict liability offences) 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.

Defences (cont)

Intervening conduct or event

Cth Code, s 12.6; and NT Code, s43BP

- 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.

Extended Modes of Liability

- **CONSPIRACY**

- **s 11.5 Commonwealth Code & s43BJ NT Code**

Elements:

- a person entering into “an agreement” with another person
 - the person and at least one other intend that an offence would be committed pursuant to the agreement and
 - the person and at least another committed an overt act pursuant to agreement
-
- **s 11.5(3)(b) Cth Code / s43BJ(4)(b) NT Code** – person may be found guilty of conspiracy to commit even if:
 - the only other party to the agreement is a body corporate

Cth Law – Common Offences

- Corporations Act 2001 (Cth) & Corporations (Aboriginal & Torres Strait Islander) Act 2006 (Cth) – breaches of Director's Duties
 - **General Duties**
 - Exercise powers and duties with the **care and diligence** that a reasonable person would have which
 - taking steps to ensure you are properly informed about the financial position of the company
 - ensuring the company doesn't trade if it is insolvent
 - Exercise powers and duties in **good faith in the best interests of the company and for a proper purpose**
 - Duty not to improperly use position to gain an advantage for self or another, or to cause detriment to the company
 - Duty not to improperly use information obtained through position to gain an advantage for self or another, or to cause detriment to the company.
 - **Duty to not trade while insolvent**
 - **Duty to keep books and records**
- Cth Criminal Code:
 - Dishonesty offence (*Peters and Ghosh* test)
 - S70.2 Bribing a foreign public official
 - Penalties for body corporate set out in s70.2(5)

NT Code - Common Offences

- Division 4 Frauds by trustees, officers of corporations: false accounting
 - 232 Trustees fraudulently disposing of trust property
 - 233 False accounting
 - 234 False statements by officers of corporations, &c.
 - 235 Suppression, &c., of documents
- Division 5 Secret commissions
 - 236 Solicitation or receipt of secret commissions
 - 237 Independent advisor accepting secret commission
 - 269 Circulating false copies of rules or lists of members of societies or corporations

PART 2

- **Principles of Corporate Criminal Responsibility under**
- **Part II NT Criminal Code**
 - **and Common Law**

Part IIAA NT Code & Common Law

- If an NT Code offence is not a “schedule 1 offence” – or is not otherwise a “declared offence” to which Part IIAA applies, then principles of criminal responsibility under Part II applies
- NT Code, Part II Principles:
 - s22: Part II generally does not apply to regulatory offences
 - ss 23, 24 & 25: Person not guilty if conduct authorized, justified or excused
- NT Code Defences
 - s31: unwilled act / accident
 - s32: Mistake of fact
 - s33: Sudden and extraordinary Emergency
 - s40: Duress

Common Law Principles

- Common law principles apply to offences which apply Part II, NT Code
- Offences with a fault element involves a state of mind
- Corporations can be held liable by:
 - **Vicariously Liability** for crimes of employees working within their scope of authority
 - **Direct Liability** where the acts and state of mind are those of the corporation

Tesco Principle

*“A corporation ... must act through living persons, though not always one or the same person. **Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company.** There is no question of the company being vicariously liable. **He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company, or one could say, he hears and speaks though the persona of the company, within in his appropriate sphere, and his mind is the mind of the company.** If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company’s servant or agent In that case any liability of the company can only be a statutory or vicarious liability”*

Tesco Supermarkets Ltd v Nattrass [1972] AC 153 per Lord Reid at 170

When does it apply?

Meridian Global v Securities Commission [1995] 2 AC 500
per Lord Hoffmann at [67]

*The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. **This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability.** For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself," as opposed to his servants or agents. **This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself.** How is such a rule to be applied to a company?*

Meridian Global v Securities Commission [1995] 2 AC 500
per Lord Hoffmann at [67] (cont)

One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

Cases and Principles

- *Meridian*
- *Director General of Fair Trading v Pioneer Concrete (UK)* [1995] 1 AC 456
- *1168 Bilta (UK) v Nazir* [2015] 2 WLR 1168 (UKSC)
- *Presidential Security Services v Brilley* (2008) 73 NSWLR 241
- *DPP (NSW) v Fordham, Byrne & TCN Channel Nine Pty Ltd* [2010] NSWSC 795

Critically...

- **Must start with the construction of the relevant provision in its statutory context**
- **Analyse and distinguish physical and fault elements and look at authority, knowledge, intention in each context**
- **Always keep in mind the legal rules which apply to authorisation, e.g., Corporations Act, the company's constitution, resolutions of the board, contracts of employment/appointment, etc**

PART 3

- **Sentencing Corporations**

Commonwealth Sentencing

- *Crimes Act 1914* (Cth)
- s4B(1): A provision of Cth law relating to indictable or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons
- s4B(2): allows court to impose fine instead of, or in addition to, a term of imprisonment
- For a body corporate, **s4B(3)** allows a court to impose a **fine** or an amount not greater than **5 times the maximum fine** able to be imposed on an individual convicted of the same offence
- Penalty units defined in s4AA of the Act as **\$180**
- **Corporations can good behaviour bonds or non-conviction bond too**
 - Eg. Aboriginal Corporations failing to return annual reports, audit reports etc
 - Often a condition of a GBB to comply or risk being brought back to court for breach of bond

Sentencing of Corporations

- s1311: General Penalty provisions
- s1312 Corporations act 2001 (Cth): sets out penalties for bodies corporate
- s1312(1), if company is convicted of an offence against the Corporations Act, the penalty able to be imposed is a fine not exceeding 5 times the maximum amount that, but for this section, the court could impose.
- s1312(1) does not apply to certain provisions as set out – penalties for these provisions set out in Schedule 3.
- S1314: Continuing offences

Plea by Corporation

- **s337 Presence in court and plea where accused is a corporation**
- (1) Where an indictment is presented against a corporation, the **corporation** may be present in court by its representative and it **may**, on arraignment, **enter a plea in writing** by its representative.
- (2) Any plea so entered by the representative shall for all purposes be taken to be a plea entered by the corporation.
- (3) If the corporation is not present in court by its representative or if, though it is so present, it does not enter a plea in writing by its representative, the court shall order a plea of not guilty to be entered on behalf of the corporation.
- (4) A plea so entered has the same effect as if it had been actually pleaded and the trial of the corporation may proceed accordingly.
- (5) In respect of a trial, any requirement by law that anything shall be done in the presence of the accused person or shall be read or said to or asked of the accused person shall, in the case of a corporation present in court by its representative, be construed as a requirement that that thing shall be done in the presence of the representative or read or said to or asked of the representative.

Plea by Corporation (cont)

- **s337 Presence in court and plea where accused is a corporation**
- (6) If the corporation is not present in court by its representative it shall not be necessary for the thing to be done or read or said or asked.
- (7) Without limiting subsection (1) or section 360 where, in respect of a trial, anything is required to be done or said by the accused person personally, it may, in the case of a corporation present in court by its representative, be done or said by the representative and anything so done or said shall for all purposes be taken to be done or said by the corporation.
- (8) In this section **representative** means a person appointed by the corporation to represent it for the purposes of this section; but the person so appointed is not, by virtue only of being so appointed, qualified to act on behalf of the corporation before the court for any other purpose.
- (9) A representative need not be appointed under the seal of the corporation and a statement in writing purporting to be signed by a managing director of the corporation or by any other person, by whatever name called, having, or being one of the persons having, the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section shall be admissible without further proof as prima facie evidence that that person has been so appointed.

Sentencing under Specific Provisions of Statute

- Look to the offence and sentencing provisions in the specific Act
 - Different penalties for individuals and corporations
 - Different penalties for different “levels” of offending
 - “Continuous” offences may carry the same penalty *for each day the breach continues* (usually applies to omission offending)
 - Apply penalty units at the time the conduct occurred
- Example – offence against s76 of the *Water Act* (NT)
 - Water Act is a prescribed Act under *Environmental Offences and Penalties Act*
 - **EOPA** prescribes penalties for an “environmental offence level 3”
 - s 6(2) EOPA: a body corporate that is found guilty of an offence designated an environmental offence level 3 is punishable by a penalty of not less than 385 penalty units and not more than 3 850 penalty units.
 - s6(1) of the EOPA provides that the minimum penalty is 77 penalty units and maximum penalty is 770 penalty units.
 - S104 Water Act provides for continuing offences for every day that the offence continues after the complaint alleging the offence is laid, by virtue of inclusion of the definition of the term “Maximum default penalty”
 - The maximum default penalty applicable to an offence against section 76(1) of the Water Act is 4 penalty units or 20 penalty units for a body corporate.

Chemeq Sentencing Principles

- *Australian Securities and Investments Commission, in the matter of Chemeq Limited (CAN 009 135 264) v Chemeq Limited (CAN 009 135 264) [2006] FCA 936*
- *French J: "...[i]n considering the appropriate penalty for the contravention by a corporation of a regulatory requirement .. It is relevant to consider whether the corporation has in place policies and procedures designed to achieve compliance with such requirements."*
- *"... [t]he Court will consider the form and content of the policies and procedures and also the measures adopted by the corporation to ensure that they are understood and applied. A well drafted set of policies and procedures will mean little if there is no follow up in terms of training of company officers (including directors) ..."*
- *"a culture of compliance" is "a degree of awareness and sensitivity to the need to consider regulator obligations as a routine incident of corporate decision-making".*

Does a conviction have to be recorded?

- Can s.7(a) and s.8(1) of the *Sentencing Act (NT)* apply?
- If so, what principles apply?
- *Krucible Metals Ltd v Department of Mines and Energy* [2015] NTSC 71
- See also the definition of “person” in s.17 of the Interpretation Act (NT) and, in respect of the equivalent to s.8(1) in s.19B of the *Crimes Act 1914 (Cth)*, see *John C Morish Pty Ltd v Luckman* (1977) 16 SASR 143 at 144-5; *Sheen v Geo.Cornish Pty Ltd* (1978) 2 NSWLR 162 at 164-6; *Lanham v Brambles-Ruys Pty Ltd* (1984) 37 SASR 16 at 18.
- *Hales v Adams* [2005] NTSC 86 at [18], [34]

PART 4

•Common Issues in Prosecuting and Defending Corporations

Omission Offending

- Omission Offending (failure to do something)
 - Could a corporation be deemed to have done (or omitted to do) an act?
 - Does a proper construction of the charge (and elements of the offence) support a commission by the company of an offence?
 - Legal duty to perform the act or omission must have existed at the relevant time
 - *DPP (Cth) v Poniatowska* (2011) 244 CLR 408 – omission to perform an act which a person has no legal obligation to perform cannot be a physical element of an offence
- Note: s1311 Corporations Act 2001 (Cth) states that any contravention of the Act constitutes an offence
- Ch 2 Criminal Code applies, setting out general principles of criminal responsibility
- **IDENTIFY:**
 - Is the conduct alleged to be characterised as “commission” or “omission”?
 - Did a legal duty exist obliging the person to perform a duty that the person failed to perform?
 - What are the elements of the offence?
 - How do the elements sit with the applicable principles of corporate criminal responsibility?

Statute of Limitations

- **CORPORATIONS ACT 2001 - SECT 1316**
- **Time for instituting criminal proceedings**
 - Despite anything in any other law, proceedings for an offence against this Act may be instituted within the period of 5 years after the act or omission alleged to constitute the offence or, with the Minister's consent, at any later time.
- **CRIMES ACT 1914 (Cth) – Section 15B(1A) re: Body Corporate**
 - If max penalty for body corporate is fine of 150 penalty units or more in the case of a first conviction – at any time – s15B(1A)(a)
 - In any other case – any time within 1 year after commission of offence – s15B(1A)(b)
- **Must look to individual legislation first**
 - Eg. Prosecution under *Work Health and Safety Act* must be brought within 2 years after offence first came to the notice of the regulator – s 232, WHS Act

Privilege against Self-Incrimination

- **CORPORATIONS ACT 2001 - SECT 1316A**
- **Privilege against self-incrimination not available to bodies corporate in Corporations Act criminal proceedings**
- (1) In a Corporations Act criminal proceeding, a body corporate is not entitled to refuse or fail to comply with a requirement:
 - (a) to answer a question or give information; or
 - (b) to produce a book or any other thing; or
 - (c) to do any other act whatever;
- on the ground that the answer or information, production of the book or other thing, or doing that other act, as the case may be, might tend:
 - (d) to incriminate the body (whether in respect of an offence to which the proceeding relates or otherwise); or
 - (e) to make the body liable to a penalty (whether in respect of anything to which the proceeding relates or otherwise).
- (2) Subsection (1) applies whether or not the body concerned is a defendant in the proceeding or in any other proceeding.
- (3) In this section:
- "Corporations Act criminal proceeding" means a proceeding in a court when exercising jurisdiction in respect of a criminal matter arising under this Act.

Broader Considerations

- Consider
 - Making representations for alternatives to prosecutions – eg. Enforcement Undertakings for WHS breaches
 - The broader political environment (public interest) and how that can be framed in representations to discontinue
 - Likely penalties imposed
 - Whether matters should appropriately go to a defence or a plea in mitigation

