Criminal Law

The Attribution of Criminal Liability to Corporations: A Statutory Model

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INTRODUCTION

The attribution of criminal liability to corporations is an intractable subject; indeed, it is one of the blackest holes in criminal law. The two main bases of liability under the present law—personal corporate liability and vicarious liability—suffer from fundamental weaknesses. A more compelling approach is required, especially given the reliance placed on corporate criminal liability in many areas of regulation. The aim of this tract is to propose statutory general principles of corporate responsibility that crystallise the idea of corporate blameworthiness.[1]

The common law principle of personal corporate responsibility, as developed in *Tesco Supermarkets Ltd v. Nattrass*,[2] has been roundly criticised.[3] The *Tesco* principle is unsatisfactory mainly because it restricts corporate criminal liability to the conduct or fault of high-level managers, a restriction that makes it difficult to establish liability against large companies.[4] Offences committed on behalf of large organisations often

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[1] A concept elaborated in Fisse and Braithwaite, "Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney Law Review* 468.

[2] [1972] AC 153. See also *Universal Telecasters (Qld) Ltd v. Guthrie* (1978) 32 F.L.R. 361; *Nordik Industries Ltd v. Regional Controller of Inland Revenue* [1976] 1 N.Z.L.R. 194; *Canadian Dredge & Dock Co Ltd v. The Queen* (1985) 19 C.C.C. (3d) 1.

[3] See B Fisse, *Howard's Criminal Law* (5th ed, 1990), 600-603.

[4] See G Williams, *Textbook of Criminal Law* (2nd ed, 1983) 973; *HM Coroner for East Kent, ex parte Spooner* (1987) 152 J.P.R. 115, (1989) 88 Cr. App. R. 10; "Zeebrugge Trial Failure Brings Law Reform Call" *The Times*, Oct 20, 1990, 1; *Commonwealth v. Beneficial Finance Co*, 275 NE2d 33 (1971). The *Tesco* principle also fails to reflect the concept of corporate blameworthiness. To prove fault on the part of one managerial representative of a company is not to show that the company was at fault as a company; it is to show that one representative was at fault (the fact that a director or other top-level representative was at fault may suggest the presence of fault on a more widespread organisational basis, but fault on a more widespread organisational basis is not necessary to satisfy the *Tesco* principle). The *Tesco* principle thus imposes vicarious liability for the conduct or fault of a restricted range of representatives, namely high-level managers acting in the pursuit of corporate functions. See further Andrews, "Reform in the Law of Corporate Liability" [1973] *Criminal Law Review* 91 at 93.

occur at the level of middle or lower-tier management[5] yet the *Tesco* principle requires proof of fault on the part of a top-tier manager or a delegate in the very restricted sense of a person given full discretion to act independently of instructions in relation to part of the functions of the board.[6] Perversely, the *Tesco* principle works best in the context of small companies, where fault on the part of a top manager is usually much easier to prove and where there is relatively little need to impose corporate criminal liability.[7]

The alternative of vicarious liability, although increasingly adopted under statute,[8] is also unsatisfactory as a general principle.[9] The effect of vicarious liability is to impose strict liability on a company for the mental state or conduct of a director, servant or agent acting within the scope of his employment or authority. Although vicarious liability may be justified for some less serious offences, companies and their officers and shareholders have reason to complain about injustice if the same approach is extended to serious offences. Unwillingness to accept conviction without fault is inevitable, especially where a company is heavily fined or pilloried by the news media.[10] Moreover, it is open to question whether vicarious liability is likely to be effective. In the absence of a cogent basis of liability, legislators may be reluctant to provide additional sentencing options capable of providing punishment fit for the worst forms of corporate crime.[11] Courts may refrain from imposing high fines and thereby nullify the deterrent policy of legislation.[12] Corporations may lobby against the introduction of higher fines or additional sentencing options against companies.[13] Another counter-productive possibility is that corporate personnel will rationalise the conviction of their company as unjustified, thereby bolstering an "organised culture of resistance" to enforcement agencies and the judicial process.[14]

[5] Consider eg, *Universal Telecasters (Qld) Ltd v. Guthrie* (1978) 32 FLR 361.

[6] [1972] AC 153 at 172, 174-175 per Lord Reid.

[7] SA, Criminal Law and Penal Methods Reform Committee, Fourth Report, *The Substantive Criminal Law* (1977), 366.

[8] Examples include *Trade Practices Act* 1974 (Cth), s 84; *Cash Transaction Reports Act* 1988 (Cth); *Proceeds of Crime Act* 1987 (Cth), s 85; *Taxation Administration Act* 1953 (Cth), s 8ZD. Compare *Environmental Offences and Penalties Act* 1989 (NSW) (not departing from *Tesco* principle).

[9] See *Canadian Dredge & Dock Co Ltd v. R* (1985) 19 C.C.C. (3d) 1 at 22. To argue against a general rule of vicarious liability is not necessarily to endorse just desert theories of criminal justice; the relevance of blameworthiness as a general requirement of criminal liability is recognised under utilitarian and republican theories. Compare *Encyclopedia of Crime and Justice*, 257-259, where a general rule of corporate vicarious liability for crime is supported as a matter of utility.

[10] There is an instructive account of the importance of blameworthiness as a factor in enforcement in K Hawkins, *Environment and Enforcement* (1984), 110-118, 161-171.

[11] Consider United States Sentencing Commission, *Preliminary Draft, Sentencing Guidelines for Organizational Defendants* (1989); *Discussion Materials on Organizational Sanctions* (1988); "Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations" (1988) 10 *Whittier Law Review* 7; Gruner, "To Let the Punishment Fit the Organisation: Sanctioning Corporate Offenders through Corporate Probation" (1988) 16 *American Journal of Criminal Law* 1; Coffee, Gruner, and Stone, "Standards for Organizational Probation: A Proposal to the United States Sentencing Commission" (1988) 10 *Whittier Law Review* 77; Australia, Law Reform Commission, *Discussion Paper No 30, Sentencing Penalties*, paras 283-307 (1988).

[12] See Coffee, "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386 at 405-407.

[13] See references n 11 above.

[14] See further J Braithwaite, *To Punish or Persuade* (1985), 99-101.

The deficiencies of the principles of personal and vicarious liability are well known yet few constructive solutions have been advanced. Thus, the recent proposals of the Committee on the Review of Commonwealth Criminal Law[15] are mutants of the principles of personal and vicarious liability and do not overcome their fundamental weaknesses.[16] If responsive solutions are to be found, some other direction needs to be taken.

One possibility is to derive general principles of corporate criminal liability from the basic idea of organisational blameworthiness. This leads to the proposals advanced here. Under these proposals, corporate entities are subject to liability for an offence where:

> (1) the external elements of that offence have been committed by a person for whose conduct the corporate defendant is vicariously responsible; and
> (2) where the corporation has been at fault in one or other of the following ways:
> (a) by having a policy that expressly or impliedly authorises or permits the commission of the offence or an offence of the same type;
> (b) by failing to take due precautions to prevent the commission of the offence or an offence of the same type;
> (c) by having a policy of failing to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence; or
> (d) by failing to take due precautions to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence.

This approach has three basic features. First, vicarious liability is imposed in relation to the external elements of an offence but not in relation to the mental element. Secondly, liability in relation to the mental element is not based on the *Tesco* principle but on the concept of organisational blameworthiness, as reflected by a corporate policy of non-compliance[17] or a failure to take reasonable precautions and to exercise due diligence.[18] Thirdly, liability is extended to cases of reactive corporate fault, in the sense of a corporate policy of unresponsive adjustment to having committed the external elements of an offence, or a failure to take reasonable

[15] *Interim Report, Principles of Criminal Responsibility and Other Matters* (1990), chs 24-27. See also GB, Law Commission, *Report no 177, A Criminal Code for England and Wales* (1989).

[16] For a detailed critique of the Review Committee's proposals see Fisse, "Review of Commonwealth Criminal Law: Corporate Criminal Liability" (1991) 15 *Criminal Law Journal* (forthcoming). An earlier version of the statutory model below was included in a submission to the Review Committee by the author in 1987.

[17] See further P A French, *Collective and Corporate Responsibility* (1984), ch 4; Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California Law Review* 1141 at 1190-91.

[18] Compare *Trade Practices Act* (Cth), s 85; *Videon v. Barry Burroughs Pty Ltd* (1981) 37 A.L.R. 365; *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 A.L.R. 531. See further Anonymous, "Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 *Harvard Law Review* 1227 at 1257-1258.

precautions or to exercise due diligence in light of having committed the external elements of an offence.[19]

Statutory provisions for implementing this approach under the Commonwealth *Crimes Act* are set out below together with explanatory comments. One reason for setting out the proposals in this form is to anticipate the objection that the concept of organizational blameworthiness, although commendable in theory, is irreducible to workable statutory provisions. Another is the occasion of our centenary: the statutory model below may be seen as a symbol of the commitment to applied theory that has typified much of the legal scholarship undertaken in the Faculty of Law during its first century.

A Statutory Model

(1) A provision of the law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons.

Notes

Follows *Crimes Act* (Cth), s 4B(1).

(2) Unless the contrary intention appears, a body corporate is liable for an offence where

(a) the conduct prohibited by the offence has been engaged in on behalf of the body corporate by an officer, servant or agent acting within the scope of his actual or apparent authority; and

(b) the body corporate has been at fault in the manner specified in cl (3) or cl (4).

Notes

1. Cl (2)(a) expands the scope of corporate criminal liability in relation to the external elements of offences by imposing vicarious liability for the conduct of officers, servants or agents (an approach based on *Trade Practices Act* (Cth), s 84(2)). Contrast the position under the *Tesco* principle, which requires that the external elements of an offence be committed by a company through a high-level officer. The *Tesco* principle is too restrictive and is ill-tuned to the nature of corporate behaviour. In larger companies it will rarely be the case that the conduct of top managers will have caused say a death resulting from the company's operations (top managers are typically far removed from the scene of the particular cause of death; see eg, *HM Coroner for East Kent, ex parte Spooner* (1987) 152 J.P.R. 115, (1989) 88 Cr. App. R. 10; "Zeebrugge Trial Failure Brings Law Reform Call" *The Times*, Oct 20, 1990, 1).

[19] A concept elaborated in Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California Law Review* 1141 at 1183-1213.

Where a death results from the conduct of an employee acting within the scope of authority, that death has been occasioned by the company's operations and to that extent the company is causally responsible. The rule proposed under cl (2)(a) imposes vicarious liability and hence does not require a substantial causal contribution on the part of the company in a personal capacity. This poses little danger of injustice provided that corporate criminal liability is confined to cases of corporate blameworthiness, which is the thrust of cll (2)(b), (3) and (4).

2. The other and more important aim of cl (2) is to confine the scope of corporate criminal liability to cases where there is corporate fault as opposed to merely fault on the part of a representative (cl (2)(b)). Corporate fault is defined in cll (3) and (4).

(3) A body corporate is at fault within the meaning of cl (2) if, at the time when the conduct prohibited by the offence was engaged in on behalf of the body corporate by an officer, servant or agent acting within the scope of his actual or apparent authority,

(a) the body corporate, without lawful justification or reasonable excuse, expressly or impliedly authorised or permitted the commission of the offence or an offence of the same type, provided that one or more of the persons engaged in the conduct prohibited by the offence was aware or believed that the body corporate authorised or permitted the commission of the offence or an offence of the same type;

(b) the body corporate, without lawful justification or reasonable excuse, failed to take reasonable precautions or to exercise due diligence to prevent the commission of the offence or an offence of the same type; or

(c) where the offence requires criminal negligence to be proven against a defendant who is a natural person, the body corporate, without lawful justification or reasonable excuse,

(i) failed to take reasonable precautions or to exercise due diligence to prevent the commission of the offence or an offence of the same type; and

(ii) displayed a gross departure from the standard of care reasonably expected of a body corporate engaged in an activity or enterprise comparable to that in which the defendant was engaged at the time of the offence alleged.

Notes

1. The object of cl (3) is to define concepts of corporate fault in accordance with the precept that, as a general rule, corporate criminal liability should require organisational blameworthiness as opposed to merely fault on the part of one representative. A corporation is taken to be blameworthy as an organisation where it has a policy of non-compliance with the law, where it has failed to take reasonable

precautions or to exercise due diligence against non-compliance, or where it has been criminally negligent. Corporate policy is the corporate equivalent of intention (see P A French, *Collective and Corporate Responsibility* (1984); Nonet, "The Legitimation of Purposive Decisions" (1980) 68 California Law Review 263; Canada, Law Reform Commission, *Working Paper 16, Criminal Responsibility for Group Action* (1976), and a company that conducts itself with an express or implied policy of non-compliance with a criminal prohibition exhibits corporate criminal intentionality. It is therefore false simply to assume that mens rea "has no meaning when applied to a corporate defendant, since an organization possesses no mental state" (Anonymous, "Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 Harvard Law Review 1227 at 1241; the same error is made in Review of Commonwealth Criminal Law, *Interim Report, Principles of Criminal Responsibility and Other Matters* (1990), para 26.14).

The concept of failing to take reasonable precautions or to exercise due diligence is also applicable to a corporation qua corporation, as a number of commentators have pointed out (see Andrews, "Reform in the Law of Corporate Liability" [1973] Criminal Law Review 91 at 97; Anonymous, "Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 Harvard Law Review 1227 at 1257-58). Similarly, the concepts of negligence and criminal negligence can be related to the failure of a corporation to attain the standard of care expected of an organisation.

2. Corporate criminal intentionality in the sense of a corporate policy of non-compliance is not expressed in terms of "policy" in cl (3)(a). "Policy" is a term of potentially broad meaning (eg, it might be taken to include any criterion for guiding decisions, even at the lowest level of corporate action; contrast Canada, Law Reform Commission, *Working Paper 16, Criminal Responsibility for Group Action* (1976) at 21-22). The approach adopted instead is to use the terms "authorise" and "permit" and to reflect the idea of corporate policy by defining corporate authorisation or permission in terms of the norms of compliance that formally or informally influence the conduct of employees (see cl (5) below).

The definition of corporate authorisation or permission tries to avoid what would otherwise be an impossible task of proof for the prosecution: under cl (5), a corporate policy of non-compliance can be established on the basis of the perceptions of middle- and lower-level personnel that non-compliance was expected of them. Even so, this may expect too much of the prosecution by way of proof. One alternative course would be to impose a persuasive burden of proof on corporate defendants to show an absence of authorisation

or permission (see Canada, Law Reform Commission, *Working Paper 16, Criminal Responsibility for Group Action* (1976) 22; but compare Review of Commonwealth Criminal Law, *Interim Report, Principles of Criminal Responsibility and Other Matters* (1990), para 26.18). This would be a less drastic course than subjecting corporate defendants to vicarious liability for fault on the part of servants or agents (compare *Trade Practices Act* (Cth), s 84(1)). However, it may be noted that, under cl (4) of the proposals suggested here, corporate criminal liability can be imposed not only on the basis of fault at or before the time of the external elements but also on the basis of reactive fault, and that this alternative basis of liability provides the prosecution with a useful fall-back position should it be impossible or impracticable to establish corporate authorisation or permission at or prior to the external elements charged (see cl (4) note 4).

3. The formulation "failure to take reasonable precautions or to exercise due diligence" is familiar but the concept of a corporate failure to take reasonable precautions or to exercise due diligence requires some clarification. Cll (6) and (7) below indicate what is meant by this concept. These clauses focus on organisational failure as opposed to merely the failure of a high-level manager (compare the *Tesco* principle) or a servant or agent for whose conduct a corporation is vicariously responsible. If the task of proof is thought excessive, an alternative approach would be to impose a persuasive burden of proof on corporate defendants to show reasonable precautions and due diligence (as proposed in Anonymous, "Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 Harvard Law Review 1227 at 1257-58; but compare Review of Commonwealth Criminal Law, *Interim Report, Principles of Criminal Responsibility and Other Matters* (1990), para 26.18); this would be less drastic than subjecting corporate defendants to vicarious liability for fault on the part of servants or agents. However, under cl (4), corporate criminal liability may be imposed not only on the basis of fault at or before the time when the external elements are present but also on the basis of reactive fault. This alternative basis of liability provides the prosecution with another line of attack where liability cannot be established under cl (3) (see cl (4) note 4).

4. Express provision is made under cl (3)(c) for corporate criminal negligence. The concept depends partly on lack of reasonable precautions or due diligence, in the sense in which those terms are defined in cll (6) and (7). Given the definition in terms of corporate negligence, manslaughter by corporate criminal negligence could be imposed in a situation where there is no criminal negligence on the part of any individual officer or employee and yet where the corporation has been grossly careless in failing to live up to

the standards expected of a company in its position (consider the position in situations of the kind examined in *Report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft Operated by Air New Zealand* (1981) para 393; UK, Department of Transport, mv Herald of Free Enterprise (1987) Report of Court No 8074, para 14.1). However, cl (3)(c) is of limited significance since there appear to be few offences of criminal negligence under the *Crimes Act* (Cth) (perhaps a standard of criminal negligence might be imported under eg, s 79(1)(c)(ii)) or s 83A(2)(a): cf Newman [1948] V.L.R. 61 at 67; Shields [1981] VR 717; D [1984] 3 N.S.W.L.R. 29) and other relevant Commonwealth statutes (consider eg, *Proceeds of Crime Act* 1987 (Cth), s 81: given the gravity of this offence, does the element "ought reasonably to know" require a grossly negligent failure to know?).

5. The requirement in cl (3)(a) that "one or more of the persons engaged in the conduct prohibited by the offence was aware or believed that the body corporate authorised or permitted the commission of the offence . . . " is intended to limit liability to cases where the external elements of an offence has been influenced at least partly by a corporate policy of non-compliance. This limitation is perhaps unnecessary, but it may be argued that a corporate policy of non-compliance in itself is harmless and that situations could arise where a policy of non-compliance is adopted secretly by the board and where that secret policy has nothing to do with the commission of the external elements by other representatives of the company.

6. By "offence of the same type" is meant an offence dealing with a similar protected interest and of equal or greater severity, but regardless of the identity of victim or other subject matter, or mode of commission.

(4) A body corporate is at fault within the meaning of cl (2) if, after the time when the conduct prohibited by the offence was engaged in on behalf of the body corporate by an officer, servant or agent acting within the scope of his actual or apparent authority, the body corporate, without lawful justification or reasonable excuse, failed to comply with a reactive duty to take action in response to the performance on its behalf of conduct prohibited by the offence, and

(a) the body corporate expressly or impliedly authorised or permitted the failure to comply with the reactive duty; or

(b) the body corporate failed to take reasonable precautions or to exercise due diligence to comply with the reactive duty.

Notes

1. This provision complements cl (3) by enabling corporate criminal liability on the basis of reactive corporate fault, whether in the form

of a policy of non-compliance with a reactive duty (cl 4(a)), or a failure to take due care to ensure compliance with a reactive duty (cl (4)(b)). The key concept—the concept of reactive corporate fault—is more fully discussed in Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 Southern California Law Review 1141.

2. The concept of reactive corporate fault is now relevant as a factor in sentencing corporations but has not as yet been made a basis for the imposition of corporate criminal liability. The reasons for making reactive fault a basis of liability are mainly twofold. First, corporate blameworthiness often depends not so much on a corporation's behaviour at the time of the external elements of an offence as on the adequacy or otherwise of a corporation's response to having committed the external elements (see note 3 below). Secondly, reactive fault would often be easier for enforcement agencies to prove than fault at or before the commission of the external elements (see note 4 below).

3. As regards corporate blameworthiness and the salience of reactive corporate fault, the following factors may be noted:

a. the strength of communal attitudes of resentment toward corporations that stonewall or otherwise fail to react diligently when their attention is drawn to problems of unjustified harm-causing or risk-taking (see B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983), 270-271);

b. the inevitability, at least in large or medium size organisations, of management by exception, whereby compliance is treated as a routine matter to be delegated to inferiors and handled by them unless a significant problem arises (see generally L R Bittel, *Management by Exception* (1964); H Mintzberg, *The Structuring of Organizations* (1979), ch 21); and

c. the extensive reliance on civil modes of enforcement in corporate regulation and the typical perception among enforcement agencies that criminal prosecutions against companies usually are warranted only where civil enforcement has failed (see especially K Hawkins, *Environment and Enforcement* (1984); P Grabosky and J Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986); J A Sigler and J E Murphy, *Interactive Corporate Compliance* (1988)).

4. The concept of reactive corporate fault to some extent allows fault to be proven against a corporation more easily than if fault must be established at or before the time of commission of the external elements. It is rare to find a company displaying a criminal policy at or before the time of commission of the external elements of an offence; companies usually have in place general compliance

policies proclaiming a stance of full compliance with the law, together with compliance procedures that manifest the taking of reasonable precautions. Compare the position if the time-frame of inquiry is extended so as to include a company's reactions to the commission of the external elements of an offence. What matters then is not the company's general policies of compliance, but its specific policy and programme for undertaking internal discipline or preventive reform. This means that a corporate policy of non-compliance (or a corporate failure to take due precautions) can be exposed more readily than would otherwise be the case: if a company is placed on notice that it is expected to react by creating and implementing a convincing and responsive programme of preventive action, failure to comply within a specified feasible time would usually manifest a corporate policy of non-compliance, or at least a corporate failure to exercise due diligence to ensure compliance.

5. The term "reactive duty" is defined in cl (9) below.

(5) A body corporate shall be deemed to have authorised or permitted the commission of an offence within the meaning of cl (3), or the failure to comply with a reactive duty within the meaning of cl (4), where the authority or permission was given by the board of directors or by a person exercising a managerial or supervisory function at any hierarchical level within the organisation, provided that

(a) an authority or permission given by a person exercising managerial or supervisory functions at any hierarchical level within the organisation shall not amount to a corporate authority or permission unless one or more of the persons who engaged in the conduct prohibited by the offence had reason to believe that reporting the authorisation or permission in the manner provided within the organisation for reports of suspected or anticipated non-compliance with the law would be unlikely to achieve compliance with the law, or would be likely to result in unjustified retaliatory or other discriminatory action against him; and

(b) a body corporate shall be deemed to have permitted the commission of an offence where, at the time when the conduct prohibited by the offence was performed on its behalf, the body corporate did not have in place a system or procedure calculated to ensure that warnings of the suspected or anticipated commission of the offence or an offence of the same type would promptly be communicated to the board of directors, the managing director, or to a compliance manager or group possessing the right to report any such warnings directly to the board of directors or managing director.

Notes

1. This provision seeks to define what is meant by a corporate authorisation or permission, the aim being to capture the idea of corporate criminal intentionality (ie, intentionality in the sense of

corporate policy) in legally workable terms. Under cl (5), an authorisation or permission given by the board of directors is treated as amounting to corporate policy, as is an authority or permission given by a high- or low-level manager or supervisor where the external elements is committed in an organisational culture that has a de facto corporate policy of non-compliance. This approach differs materially from the *Tesco* principle: cl (5)(a) and (b) confine liability to cases where it is plausible to say that a company had a policy of non-compliance (the same is not true under *Tesco*, as is evident from the case, as put in *Review of Commonwealth Criminal Law, Discussion Paper* No 10 (1987), para 5.29, of the managing director who acts in direct conflict with the directions of the board of directors), and liability is not restricted to cases where a high-level manager is at fault. At the same time, liability is not as sweeping as that possible under the principle of vicarious liability (compare eg, *Trade Practices Act* (Cth), s 84(1)): under cl (5) it is not sufficient that an officer, servant or agent was at fault.

2. Cl (5)(a) lays down a per se rule for the identification of an implied corporate policy of non-compliance. The provision extends corporate liability to cases where the upper echelons in a company formally display an impeccable commitment to compliance but where non-compliance is condoned as a way of life at lower levels within the organisation (consider eg, the position at General Electric in the heavy electrical conspiracy cases, as discussed in R A Smith, *Corporations in Crisis* (1963) chs 5-6). The focus is not merely on the proclamations about compliance made at the level of the board of directors or top-level management but on the perceptions of the middle- and lower-level employees by whom the external elements of corporate offences is typically committed. It seems unlikely that a per se rule of this kind would occasion injustice: a company that has in place a genuine, well-run compliance system would give an employee little or no opportunity to draw groundless inferences that the company has a policy of non-compliance. Thus, in the event of conflicting views among lower level employees as to whether the company's compliance policy really meant what it said (see *Review of Commonwealth Criminal Law, Discussion Paper* No 10 (1987), paras 5.35-5.36), a company that has assiduously projected and reinforced a policy of compliance does not have much to fear: no employee would have reasonable grounds for believing that the company's compliance policy did not mean what it said. But would cl (5)(a) impose excessive demands of proof on the prosecution? Note that the rule suggested avoids the impracticality of requiring that a manager be aware that the board of directors would not sanction illegality (compare Andrews, "Reform in the Law of Corporate Liability" [1973] Criminal Law Review 91 at 93): cl (5)(a) takes account of not only the anticipated reactions of the board of directors but also the anticipated reactions of middle-

and lower-level personnel to what will be done if they report the matter in the manner provided by the corporation.

3. Cl (5)(b) is aimed against the risk of companies protecting themselves against liability by failing to encourage middle- and lower-level employees to warn senior management about suspected illegalities. One-over-one reporting relationships have frequently been known to prevent "bad news" about offences from surfacing at the level of top management (see especially Coffee, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response" (1977) 63 Virginia Law Review 1099). This phenomenon tends to insulate companies from liability under the *Tesco* principle: if no top-level manager is aware of the risk of an offence being committed, it would usually be impossible to prove fault at the high managerial level required.

The rule proposed would interfere minimally with the internal affairs of companies. The precise nature of the "route to the top" is not prescribed but is a matter for companies to determine in good faith. Nor does cl (5)(b) require that all suspicions or warnings be referred to the board or the managing director: the way is left open for a screening procedure administered by a compliance officer or compliance unit with a direct reporting relationship to the board or managing director.

4. The term "a person exercising a managerial or supervisory function at any hierarchical level of the organisation" (cl (5)(a)) is meant to include all managers and executives other than mere functionaries. For example, the branch manager in *Tesco* would be included, as indeed would a supermarket shelf supervisor to whom the branch manager had delegated the task of checking that products on display were available at the prices advertised. Given the limitations on the scope of corporate criminal liability otherwise imposed by cl (5), injustice is unlikely to arise from adopting a broad conception of managerial or supervisory functions.

(6) A body corporate shall be deemed to have failed to have taken reasonable precautions within the meaning of cll (3)(b), (3)(c) or (4)(b) where:

(a) the body corporate has failed to have in place a policy clearly and convincingly requiring compliance with the prohibition or obligation imposed by the offence or with the obligation imposed by a reactive duty;

(b) the body corporate has failed to have in place a system or procedure reasonably calculated to promote compliance with the prohibition or obligation imposed by the offence or with the obligation imposed by a reactive duty; or

(c) the body corporate has failed to have in place a system or procedure reasonably calculated to ensure that warnings of the suspected or anticipated commission of the offence or an offence of the same type, or warnings of the suspected or anticipated non-compliance with a reactive duty, would promptly be communicated to the board of directors, the managing director, or to a compliance manager or group possessing the right to report any such warnings directly to the board of directors or the managing director.

Notes

1. This provision seeks to define what is meant by a corporate failure to take reasonable precautions and in such a way as to avoid the need to specify whose conduct within an organisation is to count as that of the corporation. Under cl (6) it is irrelevant whether or not the offence is attributable to the conduct of a person exercising managerial responsibilities or to the conduct of a blameworthy employee: what matters is whether the corporation had in place the organisational precautions prescribed. To that extent, the provision imposes a form of strict liability but it should be noted that under cll (3)(b), (3)(c) and (4)(b) a corporation is not liable where there is a lawful justification or reasonable excuse for failing to take reasonable precautions. Thus, where a company is very newly formed or reconstituted and has had no opportunity to prepare an appropriate compliance system, that company would have a reasonable excuse for not having in place the preventive arrangements reasonably expected of companies carrying on the same type of activities.

2. The approach of cl (6) is akin to that adopted in Anonymous, "Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 Harvard Law Review 1227 at 1258. In that commentary it is proposed that there should be a general affirmative defence of corporate due diligence under which it would be a defence for a corporate defendant to establish "first, that the illegal conduct had been clearly and convincingly forbidden, and second, that reasonable safeguards designed to prevent corporate crimes had been developed and implemented, including regular procedures for evaluation, detection, and remedy". This formulation incorporates the concept of due diligence as well as the concept of reasonable precautions. By contrast, cll (6) and (7) treat these concepts separately. The concept of corporate due diligence is concerned with administrative action and, unlike the concept of corporate reasonable precautions, requires some principle for determining whose administrative action within an organisation is attributable to a corporation for the purpose of deciding whether the corporation was negligent in failing to conform to the standards reasonably expected of it (see cl (7)).

3. Cl 6(b) reflects the importance attached generally in corporate regulation to the need for effective internal controls within corporations. There is now an extensive literature on corporate compliance systems and the attention paid by courts and enforcement agencies to the adequacy or otherwise of such systems is increasing (see further Fisse, "Corporate Compliance Systems: The Trade Practices Act and Beyond" (1989) 17 *Australian Business Law Review* 380).

4. Cl (6)(c) parallels cl (5)(b) and similar considerations apply. However, under cl (6)(c) the warning system or procedure must be "reasonably calculated" rather than "calculated" to achieve the object of bubbling suspected non-compliance up to senior management. This objective test is consistent with the different basis of liability (ie, corporate negligence as compared with corporate intentionality; see cll (3) and (4)). It is also consistent with the lower maxima provided under cl (10)(b) and (c) for the punishment of corporate defendants where the basis of liability is a failure to take reasonable precautions or to exercise due diligence, or criminal negligence.

(7) A body corporate shall be deemed to have failed to exercise due diligence within the meaning of cll (3)(b), (3)(c) or (4)(b) where the failure has occurred on the part of:

(a) the board of directors; or

(b) a person exercising a managerial or supervisory function at any hierarchical level of the organisation;

provided that conduct on the part of a person exercising a managerial or supervisory function shall not amount to a corporate failure to exercise due diligence where the person had reason to believe that reporting the matter to a manager or supervisor of higher authority within the organisation would be:

(c) likely to result in an effective review of the measures taken by the body corporate to achieve compliance with the law; and

(b) unlikely to result in unjustified retaliatory or other discriminatory action against him.

Notes

1. This provision defines what is required for the attribution of due diligence to a corporate entity in terms comparable to those adopted in relation to corporate intentionality under cl (5)(a). Unlike the position under the *Tesco* principle, cl (7) enables corporate liability to be imposed where a middle-level manager (eg, a manager in the position of the supermarket branch manager in *Tesco*) fails to exercise due diligence, provided that the failure reflects a failure of the corporation to provide the organisational support needed to attain the degree of care required. Unlike the position under the

principle of vicarious liability, liability cannot be imposed merely because one employee fails to exercise due diligence: there must be a failure on the part of someone exercising a managerial or supervisory function (see cl (6), note 4) and the situation must also be one where the organisation has failed to give the manager or supervisor the support needed to achieve the required standard of diligence (see cl (7)(b)). Compare also the approach suggested by Andrews, "Reform in the Law of Corporate Liability" [1973] Criminal Law Review 91 at 97. The test there suggested would allow corporate liability to be imposed where the offence is committed by one low-level employee and where that offence has been assisted by a lack of due diligence merely on the part of another low-level employee. In contrast, the relevant issue under cl (7) is not so much the number of employees who may display a lack of due diligence as the success or otherwise of the corporation in achieving a culture of compliance.

2. Like cl (5), cl (7) tries to avoid the elliptical "top-down" approach to corporate fault apparent under the *Tesco* principle. The test proposed fastens not merely on whether fault is apparent in the upper echelons of the organisation but also on whether non-compliance is condoned at lower levels. The perspective is "bottom-up" as well as "top-down" and thereby takes account of the fact that inferiors within organisations tend to act more in accordance with the anticipated reactions of superiors than in accordance with written instructions.

Reconsider *Tesco*. Assume that top management and middle management each had quite different perceptions of the company's stance towards compliance: top management was adamant that they had done everything needed whereas middle management (eg, the supermarket branch manager) was equally adamant that the company's compliance programme was completely out of touch with the role of a middle-manager in the organisation. In this situation, there may not have been a lack of due diligence on the part of the directing minds of the company (eg, from where they stood in the organisation, the directors may have been reasonably mistaken as to the efficacy of their good faith efforts), in which event there is no corporate liability under the *Tesco* principle (the directors must of course exercise due diligence by satisfying themselves that the compliance system is being observed (see [1972] AC 153 at 174 per Lord Reid, 197 per Lord Diplock) but that is consistent with the possibility of entertaining a diligently formed but nonetheless mistaken belief that the compliance system is working). By contrast, under cl (7) there would be corporate liability if the requirements under (a) and (b) could be established, as would be possible in a case such as *Tesco* if, from the perspective of the supermarket manager, the pressures imposed by the company to make profits were such as to provide reasonable grounds to believe that, when

it came to the crunch, the company valued profits first and compliance second. This extension of the scope of corporate liability is justified, it is submitted, because the perceptions of middle- and lower-level personnel provide an acid test of the efficacy of a corporate compliance system and, unless such a test is applied by the law, it is too easy for companies to acquit themselves by adopting compliance systems that look impressive on paper and appear effective if viewed from the perspective of senior management, but which do not in fact work at the organisational levels where offences are most likely to surface.

3. The approach adopted under cl (7) represents an attempt to achieve a half-way house between so called third-party defences (see generally G Williams, *Textbook of Criminal Law* (2nd ed, 1983) 983-85), and vicarious liability. Third-party defences are prone to the scapegoating of employees by corporate employers. Vicarious liability unfairly exposes companies to criminal liability for peripheral acts of deviance on the part of minions. Cl (7) tries to steer between these obstacles. It is no defence under cl (7) for a company merely to show a lack of due diligence on the part of some identifiable middle-manager or supervisor; that manager or supervisor must have had no reason to believe that slackness was expected in the organisation (see the proviso under cl (7)(c) and (d)). Nor are companies at risk of liability merely because an individual employee is at fault; the proviso under cl (7)(c) and (d) excludes liability in a case where the company has taken reasonable precautions and where the fault in substance is that of the employee.

(8) For the purpose of cl (2), the fault of a body corporate shall be assessed by reference to the corporate capacity of the body corporate and in particular

(a) where a body corporate is charged with an offence requiring the intentional, knowing, reckless or advertent commission of the conduct prohibited by the offence and, by virtue of cl (3) and cl (5), has authorised or permitted the commission of the offence or an offence of the same type, the body corporate shall be deemed to have acted with the intentional, knowing, reckless or advertent state of mind required;

(b) where a body corporate is charged with an offence requiring a failure to take reasonable precautions or to exercise due diligence, the standard of the precautions or diligence required shall be assessed by reference to the standard reasonably expected of a body corporate engaged in an activity or enterprise comparable to that in which the defendant was engaged at the time of the offence alleged;

(c) a body corporate shall not be taken to have a reasonable excuse where the excuse is unreasonable having regard to the capacity of the body corporate to comply with the prohibition or obligation in respect of which the excuse is pleaded; and

(d) a body corporate is liable for an offence under cl (2) whether or not any person concerned in the conduct prohibited by the offence is excused or exempted from individual liability but nothing in this provision shall be construed as denying a body corporate a corporate excuse or justification.

Notes

1. Cl (8) is a safeguard against corporate defendants enjoying the benefit or, as the case may be, suffering the burden, of an excessively individualistic approach to the application of criminal liability in the corporate sphere. Compare the incongruous individualistic conception of corporate fault in *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153 at 170 per Lord Reid; *HM Coroner for East Kent, ex parte Spooner* (1987) 152 J.P.R. 115, (1989) 88 Cr. App. R. 10; *City of Sault Ste Marie* (1978) 40 C.C.C.(2d) 353 at 377-378.

2. Cl (8)(a) stipulates that corporate authorisation or permission, as earlier defined (see cl (5)), is to be treated as the corporate equivalent of intention, knowledge or recklessness or other advertent states of mind where those concepts are used in the definition of an offence which attracts corporate criminal liability under cl (2).

3. Cl (8)(b) explicitly recognises the phenomenon of corporate negligence. The concept of corporate negligence does not necessarily reduce to individual negligence: corporations have corporate capacities and perform corporate roles and hence the standard of care reasonably expected of them relates to those corporate capacities and roles (see further T Donaldson, *Corporations and Morality* (1982), 125). This is explicity reflected in some recent statutory provisions, including *Ozone Protection Act* 1989 (Cth), s 65(2); *Industrial Chemicals (Notification and Assessment) Act* 1989 (Cth), s 109(2); *Hazardous Waste (Regulation of Exports and Imports) Act* 1989 (Cth), s 59(2).

4. Parallel considerations to those in note 3 apply in relation to the reasonableness of a corporate excuse, and are reflected in cl (8)(c).

5. Cl (8)(d) seeks to avoid unmerited corporate acquittals where a corporate defendant is at fault (eg, by reason of lack of reasonable precautions) and yet where individual actors happen to have an excuse (eg, insanity). It may also be noted that the wording suggested is conducive to the judicial development of *corporate* defences of excuse or justification (see further Fisse, *Howard's Criminal Law* (5th ed), 615-617. Assume for instance that a company pleads the defence of claim of right. Cl (8)(d) leaves the way open for the courts to require that a corporate claim of right be based on reasonable grounds, in recognition of the intelligence-gathering capacity of commercial organisations and the undue generosity of

the defence if centered on the fault of an individual representative rather than on the fault of the corporation: it is difficult to see why it should be a sufficient corporate defence that one representative entertained an honest claim of right where others in the organisation who should have been consulted would have advised that the claim was wrong in law.

(9) For the purpose of cl (4):

(a) a reactive duty shall be deemed to exist where, in relation to conduct prohibited by an offence, a body corporate or any person acting on its behalf has been subjected to an injunctive order pursuant to (b), or has entered into a formal agreement pursuant to (c);

(b) a court, if satisfied that conduct prohibited by an offence has been engaged in on behalf of the body corporate by an officer, servant or agent acting within the scope of his actual or apparent authority (hereinafter referred to as "the unlawful conduct"), may by order direct the body corporate and any of its officers, servants or agents (including persons designated as having primary responsibility for ensuring compliance with the order)

(i) to make inquiries as to individual or group accountability within the organisation for the unlawful conduct and, where necessary or desirable, to take disciplinary action;

(ii) to review and, where necessary or desirable, to revise any corporate compliance policies and procedures relating to the unlawful conduct; and

(iii) to prepare and submit to the court a compliance report setting out in detail the steps taken to comply with any requirements imposed under (i) or (ii);

(c) an enforcement agency, if of the view that conduct prohibited by an offence has been engaged in on behalf of the body corporate by an officer, servant or agent acting within the scope of his actual or apparent authority (hereinafter referred to as "the conduct impugned"), may enter into a formal agreement with the body corporate and any representative whereby the enforcement agency undertakes to withhold further investigation or proceedings and the body corporate and any of its officers, servants or agents (including persons designated as having primary responsibility for ensuring compliance with the agreement) undertake

(i) to make inquiries as to individual or group accountability within the organisation for the conduct impugned and, where necessary or desirable, to take disciplinary action;

(ii) to review and, where necessary or desirable, to revise any corporate compliance policies and procedures relating to the conduct impugned; and

(iii) to prepare and submit to the enforcement agency a compliance report setting out in detail the steps taken to comply with any requirements agreed under (i) or (ii).

Notes

1. This provision specifies what is meant by a reactive duty for the purpose of cl (4). The concept of reactive corporate fault is discussed above (see cl (4), notes 1-4).

2. Cl (9)(a) envisages liability on the basis of reactive corporate fault where a corporation has engaged in unlawful conduct amounting to the external elements of the offence charged, has been subjected to a mandatory injunction requiring internal discipline or organisational reform in response to those external elements, and has failed to comply with that injunction. Cl (9)(b) is to similar effect, except that the reactive duty arises from a compliance agreement. The main aim of this provision is to reflect the typical enforcement practice of using the criminal law against companies only as a last resort (see generally K Hawkins, *Environment and Enforcement* (1984); J Braithwaite, *To Punish or Persuade* (1985)), and to integrate the use of civil and criminal liability by making corporations criminally liable for the external elements of that offence where, in relation to that external elements, they have failed to comply with a civil injunctive remedy or a compliance agreement. To impose liability merely for non-compliance with an injunctive remedy or compliance agreement is insufficient because the defendant has done more than merely fail to comply with the injunction or agreement: it has also committed the external elements of an offence. By contrast, the effect of cl (9) is to enable liability to be imposed in full recognition of the fact that the defendant (a) committed the external elements of an offence, and (b) failed to react in a responsive manner notwithstanding clear notice and ample opportunity to do so.

3. The provision for compliance agreements in cl (9)(c) seeks to facilitate enforcement efforts by avoiding the need for a court-ordered injunction under (b). It is also consistent with the ideal of minimising adversarial combat before the courts and fostering a spirit of constructive co-operation on the part of corporations subject to enforcement action (see further J Braithwaite, *To Punish or Persuade* (1985), 99-101).

4. Cl (9)(b) and (c) envisage that, as a condition of an injunction or a compliance agreement, particular managers (including senior managers) will be assigned primary responsibility for ensuring compliance with the reactive duty imposed. The object of pin-pointing responsibility in this way is to promote individual accountability in the event of non-compliance (see further Geraghty, "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing" (1979) 89 Yale Law Journal 353 at 372; Canada, *Law Reform Commission, Working Paper 16, Criminal Responsibility for Group Action* (1976), 35).

5. A reactive duty under cl (9) must stem from an injunctive order issued by a court in relation to the external elements of the offence, or from a formal compliance agreement. It may be desirable to go further and create reactive duties under cl (9) on the basis of orders or notices issued administratively by an enforcement agency, at least in some contexts of corporate regulation. This step would require a detailed review of the orders and notices that can be issued administratively under Commonwealth law, and is not essential to the introduction of the concept of reactive corporate fault under the *Crimes Act* (Cth) provisions on corporate criminal liability.

6. As cl (9) stands, the reactive duties that can be imposed are limited to internal discipline and organisational reform. It may be desirable to extend the range of duties to include compensation and restitution but this does not seem a matter that requires immediate resolution. The primary concern of corporate criminal liability is to prevent the commission of offences by corporations and the paramount mechanisms for achieving corporate preventive control are internal discipline and organisational compliance procedures.

7. Compliance reports, as proposed under cl (9)(a) and (b), have been used in other contexts of corporate regulation, and seem readily adaptable to use in the setting of corporate criminal liability for reactive fault. One issue is corporate privilege against self-incrimination: the information required of a corporate defendant under cl (9)(b) or (c) may be self-incriminatory (as in relation to corporate criminal liability on the basis provided under cl (3). The view taken here is that corporate entities should not retain the privilege against self-incrimination, for the reasons which have militated against recognition of any corporate privilege against self-incrimination in the USA (see *Hale v Henkel*, 201 US 43 (1906); contrast *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] A.C. 547; *Controlled Consultants Pty Ltd* (1984) 156 C.L.R. 385; *NM Paterson and Sons Limited* (1980) C.R(.3d) 164; see further M Dan-Cohen, *Rights, Persons, and Organizations* (1986); Fiebach, "The Constitutional Rights of Associations to Assert the Privilege against Self-Incrimination" (1964) 112 University of Pennsylvania Law Review 394).

Another concern about a compliance report procedure is the risk of compliance being feigned. It is intended that false reports would attract liability under the *Crimes Act* (Cth) ss 35-36, but some reinforcement may be needed, as by enabling the appointment of an officer of the court to monitor compliance with the reactive duty (for one model, see American Bar Association, *3 Standards for Criminal Justice* (1980) Standard 18.2.8(a)(v)).

(10) Where a body corporate is convicted of an offence against cl (2) the court may impose a fine not exceeding the following amounts:

(a) here the fault required for conviction is that specified in cl (3)(a) or cl (4)(a), an amount equal to 5 times the amount of the maximum fine that could be imposed by the court on a natural person convicted of the same offence;

(b) where the fault required for conviction is that specified in cl (3)(b) or cl (4)(b), an amount equal to 3 times the amount of the maximum fine that could be imposed by the court on a natural person convicted of the same offence; and

(c) where the fault required for conviction is that specified in cl (3)(c), an amount equal to 4 times the amount of the maximum fine that could be imposed by the court on a natural person convicted of the same offence.

Note

Adapted from *Crimes Act* (Cth), s 4B(3).

This approach may require reconsideration in light of the guidelines for corporate sentences currently being formulated by the US Sentencing Commission (see United States Sentencing Commission, *Preliminary Draft, Sentencing Guidelines for Organizational Defendants* (1989); *Discussion Materials on Organizational Sanctions* (1988); "Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations" (1988) 10 *Whittier Law Review* 7).