



White Paper

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Corporate Responsibility: The duties and liabilities of the corporation

Abstract

The recent QANTAS Airways Limited's case involving price fixing comes soon after the Visy Group of companies' case in the Federal Court of Australia. The Visy Group's case concerned cartel conduct involving price fixing, market sharing and other anti-market agreements among business rivals. The QANTAS case concerned price fixing on cargo shipments and the matter was filed in the United States District Court for the District of Columbia. QANTAS pleaded guilty and agreed to pay a fine.

These cases involve trade practices law. They give insights into distinguishing the duties and responsibilities of corporate officers and the corporation. They also show the trend to involve corporate officers as well as the corporation where the corporation breaches the law.

Corporations are not only subject to civil penalties and emerging criminal sanctions under trade practice law in Australia and overseas and to workplace safety laws. Managers of a corporation irrespective of its size must ensure that their corporations comply with all law and demonstrate compliance using compliance mechanisms that can be reported on in the corporation's annual report to members. Legal compliance is not confined to Australia but extends to places where the corporation operates its business.

Corporate responsibility is not confined to legal compliance. It involves upholding the corporation's reputation in the community in which it operates. The actions of corporations are being influenced by social responsibilities that include managing dangerous substances and materials, limiting contamination of the environment and controlling pollution and other substances to lower the corporation's impact on climate change. Corporate responsibility for corporate reputation is not limited to preventative measures but includes proactive measures to act positively in the community and the broader environment.

Corporate responsibility involves vigilance in the performance of duties to avoid liabilities using effective risk management. Risk management should not be confined to preventing liability but to extend the range of the corporation's activities to be active and positive contributors not only to the economy but also the broader environment. Market measures such as carbon trading will assist corporations to be proactive in reducing the impact on climate change. Over time more market measures and mechanisms will evolve to provide incentives for better performance of corporations.

Corporations and its officers can be made liable in relation to their responsibilities. This paper shows how corporations are made liable by the knowledge and acts of its officers.

Overview

The study of corporate responsibility requires an understanding of the nature of corporate responsibility and recognition that the term can be used in a variety of ways. This paper will explore the ways in which the notion of corporate responsibility is used and looks at corporate responsibility in the law.

Corporate responsibility is dealt with differently at law due to differing principles being used by the courts to deal with wrongful actions by corporations and their officers. It is for this reason that this paper examines the common law themes drawing together the various principles and rules that are used by the courts and the statutory law interpretation of the general law principles for specific purposes to make corporations liable. In addition, directors and other corporate officers are being made liable for wrongful acts and for criminal activities. The latter cases involve strict liability imposed by statutory laws imposing criminal penalties. The former cases involve the application of rules to attribute the acts of natural persons to the corporation. The liability of a corporation can arise from the acts of employees as well as acts of senior managers. Also, directors and other officers can be personally liable or liable as joint tortfeasors.

The common law development of corporate responsibility has seen the development of tests and rules to establish principles to deal with matters of tort and criminal law activities committed by the corporation. A parallel issue is the responsibility of directors and other officers. The development of joint tortfeasors for civil wrongs with notions of primary and secondary liabilities has appeared to complicate the legal principles as applying to corporate responsibility. The paper will focus on corporate responsibility and the liability of the corporation and identify the liability of directors and other officers in the context of corporate responsibility. But a brief overview of principles making directors liable with the corporation is useful to see how that scenario is possible at law.

Identification principle

The identification of a natural person as the corporation or as its agent has been a principle of law to ascribe to the corporation the person's knowledge and actions. This has caused concern where persons have escaped liability where the act has been taken as the act of the corporation. Legal commentators claim that this outcome results "from a misunderstanding of the identification doctrine, and cannot be sustained."¹

The English law has moved on from this principle to include the notion of agency in a larger principle of attribution which is taken to be the relevant principle to attribute the knowledge and actions of a natural person to the corporation². A consequence of this development is that a corporation's hierarchy of officers (the directing mind and will of the corporation) is no longer relevant to a corporation's liability. Instead, an individual's performance of functions has been brought into focus. This means that the actions of low level employees could be attributed to the corporation. Consequently, the "criterion for attribution, focusing upon those who had responsibility for the matter with which the rule is concerned, is not predicated upon the individual's ability to control or influence the overall conduct of the company, only the matter with which the rule is concerned. In particular, it now seems far more likely that the actions of branch managers, section heads and those...with operational autonomy, will be attributed to the company."³

Direct or procure test

The "direct or procure" test has emerged to apply liability to officers of a corporation where they have not committed the tortious acts⁴. They are committed by junior employees of the corporation. The senior corporate officer is made secondarily liable for the acts of the individual who is primarily liable and whose acts make the corporation vicariously liable. This test is inherent in the joint tortfeasor notion where a director or senior officer is made secondarily liable to the corporation that is primarily liable to the claimant⁵.

¹ Campbell N & Armour J, "Demystifying the Civil Liability of Corporate Agents", 62 *Cambridge Law Journal* 290 at 292.

² Grantham R, "Corporate Knowledge: Identification or Attribution?", 59 *MLR* 732.

³ Grantham R, "Corporate Knowledge: Identification or Attribution?", 59 *MLR* 732 at 734.

⁴ Campbell N & Armour J, "Demystifying the Civil Liability of Corporate Agents", 62 *Cambridge Law Journal* 290 at 298.

⁵ Campbell N & Armour J, "Demystifying the Civil Liability of Corporate Agents", 62 *Cambridge Law Journal* 290 at 298; *Root Quality PtyLtd v Root Control Technologies Pty Ltd* (2000) 177 *ALR* 231 at 259; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] *AC* 1013.

Australian law on corporate responsibility

The High Court of Australia has not accepted the attribution principle adopted by the Privy Council⁶. It has not overruled it either. The High Court may be adopting a “wait and see” attitude before considering the English law principle. Nonetheless, the principle has been used in lower courts in Australia.

The law as found by the High Court is based on the “directing mind and will” principle where an individual is or individuals are the embodiment of the corporation. The latest leading law⁷ in Australia is *Krakovski v Eurolynx Properties Ltd* (1995) 183 CLR 563. This law is that a corporation is responsible based on the knowledge of corporate officers who are responsible in their respective division of functions for different aspects of a transaction. This law is expounded by other Australian courts and the relevant principles are discovered for each particular case. In a broad sense, the law is explained by Bryson JA in *North Sydney Council v Roman*⁸ as:

“Corporations can only have knowledge and they can only function through persons within their organisations: legislation...which treats a corporation as having actual knowledge can only be understood as attributing to the corporation the actual knowledge of the person within its organisation who relevantly functions as the corporation.”

Bryson JA also said in *Nationwide News Pty Ltd v Naidu*; *ISS Security Pty Ltd v Naidu*⁹ that finding the person who is the directing mind and will of the corporation is a factual matter:

“In *Arthur Guinness, Son & Company (Dublin) Ltd v The Freshfield (Owners) and Ors: (The Lady Gwendolen)* [1965] P 294 Willmer LJ explained at 343 that it was necessary to look closely at the organisation of the company in order to ascertain ‘of what individual it can fairly be said that his act or omission is that of the company itself’. His Lordship referred to the passage in the speech of Viscount Haldane to which I have just referred. The inquiry is initially a factual matter: see *Lennard’s Carrying Company Limited v Asiatic Petroleum Company Limited* per Dunedin LJ at 715.”

A further reference was made by Bryson JA to the English cases in relation to identifying the person:

“Willmer LJ also referred to the statement of Denning LJ in *Bolton (HL) Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172-173 where his Lordship, after drawing a distinction between those in a company who would be servants and agents who did the work, and of those who were directors and managers who represented the mind and will of the company, stated that whether the intention of such directors or managers was the company’s intention, ‘depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case’.”

After referring to Lord Reid’s statement in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, Bryson JA says:

“These authorities have been consistently applied in Australia. It is sufficient to refer to *Hamilton v Whitehead* [1988] HCA 65; (1988) 166 CLR 121; *Director General, Department of Education and Training v MT* [2006] NSWCA 270; (2006) 67 NSWLR 237; and *North Sydney Council v Roman* [2007] NSWCA 27; (2007) 150 LGERA 419.”

A final reference is to Callaway JA in *Director of Public Prosecutions Ref No 1 of 1996*¹⁰:

“Sometimes only the board of directors acting as such or a person near the top of the corporation’s organisation will be identified with the corporation itself. On other occasions someone lower, and perhaps much lower, in the hierarchy will suffice.”

⁶ The discussion of the development in English law of principles attributing the knowledge and actions of individuals to the corporation can occur on an academic level. This discussion can be seen in references given in the paper. An alternative discussion is the case study approach where the words of the cases speak to show the development of the law. The academic comment enlightens this discussion. This latter approach is taken in the paper.

⁷ The High Court of Australia has considered the English law principles in other cases such as *Hamilton v Whitehead* (1988) 166 CLR 121 which is discussed in the paper.

⁸ [2007] NSWCA 377. Bryson JA referred to the direct liability of a corporation as distinct from vicarious liability in *Nationwide News Pty Ltd v Naidu*; *ISS Security Pty Ltd v Naidu* [2007] NSWCA 377 which was explained by Viscount Haldane LC in *Lennard’s Carrying Company Limited v Asiatic Petroleum Company Limited* [1915] AC 705 at 713 where it was said: “a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.”

⁹ [2007] NSWCA 377.

¹⁰ [1998] 3 VR 352.

By not adopting outright the rules of attribution as applying in English law the law in Australia is not binding the courts to applying a formula of specified rules or principles to the varying array of torts and criminal sanctions involving corporations. This approach is not inhibiting Australian courts in adopting the English law principles and rules of attribution such as *North Sydney Council v Roman* and *Nationwide News Pty Ltd v Naidu*; *ISS Security Pty Ltd v Naidu* in the case of New South Wales courts.

The relevant tort as well as the particular facts of a matter or the policy of legislation imposing criminal penalties can be determined accordingly and not necessarily be placed in a straight-jacket to arrive at some preconceived set of rules. The English law principle of attribution does not apply in every case but it may be used provided they are appropriate for the circumstances of the case and used in a manner of a framework. The risk that matters of wrongdoing may be channeled into a result that may not be appropriate for the particular set of circumstances should be avoided. However, where the rules of attribution are used they should be consistent with sound legal principles (*Citizens' Life Assurance Company, Limited v Brown*¹¹).

Statutory corporate responsibility

In addition to the common law, statutory law deals with the notion of corporate responsibility. This can be seen, for example, in *Trade Practices Act 1974* (Cth), s 84 extracted (with commentary) in the Annexure. Statutory provisions tend to make a corporation liable but fail to provide for the acts of individuals being attributed to the corporation. Hence, the development of the identification principle or a special rule of attribution¹².

Concept of corporate responsibility generally

The concept of corporate responsibility is used in relation to a corporation's social and environmental responsibilities as well as its economic responsibilities. The concept of shareholder value is no longer the only focus for corporate responsibility. Increasingly, stakeholder interests are being recognised as an important part of corporate responsibility.

Corporate responsibility

Much is said about corporate social responsibility and triple-bottom-line reporting. The recent report of the Parliamentary Joint Committee on Corporations and Financial Services, *Corporate responsibility: Managing risk and creating value* (June 2006), says:

"Corporate responsibility is emerging as an issue of critical importance in Australia's business community. This inquiry has provided the committee with the opportunity to closely examine this increasingly important aspect of the corporate governance of Australian companies."

An important observation made in the report says:

"Corporate responsibility is usually described in terms of a company or organisation considering, managing and balancing the economic, social and environmental impacts of its activities. During the course of the inquiry the committee received a great deal of evidence of the way many Australian companies are employing responsible corporate approaches to manage risk and to create corporate value, in areas beyond a company's traditional core business. Some Australian companies are leading the push towards greater sustainability, and have been key contributors to global developments in the establishment of sound mechanisms to report on sustainability."

Corporate responsibility is not a legally defined term. Its description and meaning varies with the context in which it is discussed¹³. The term incorporates corporate social responsibility together with the corporation's main economic activities to make profits and provide dividends and other returns to shareholders and investors.

The notion of corporate responsibility is economic as corporations seek to maximise returns by limiting risk such as regulatory risk. This risk management process is fundamental to the corporation's operations. The Parliamentary Joint Committee's report observes:

"Evidence received suggests that those companies already undertaking responsible corporate behaviour are being driven by factors that are clearly in the interests of the company. Maintaining and improving company reputation was cited as an important factor by companies, many of whom recognise that when corporate reputation suffers there can be significant business costs. Evidence also strongly suggested that an 'enlightened self-interest approach' assists companies in their efforts to recruit and retain high quality staff, particularly in the current tight labour market."

¹¹ [1904] AC 42 at 426.

¹² Campbell N & Armour J, "Demystifying the Civil Liability of Corporate Agents", 62 *Cambridge Law Journal* 290 at 292.

¹³ See discussion in Nolan J, "Corporate responsibility in Australia: rhetoric or reality?", 2007 UNSWLRS 47 (10 August 2007).

In relation to managing the risk of regulation, the report says:

“Also reflecting an enlightened self-interest approach and driving corporate responsibility was the desire of companies to avoid regulation. Many companies recognise that by taking voluntary action to improve responsible corporate performance, corporations may forestall regulatory measures to control their conduct. It was also evident that for many companies, acting in a responsible corporate manner was in the interests of the company because such behaviour attracted investment from ethical investment funds, a sector of increasing importance in Australia. Mainstream institutional investors, such as superannuation funds, are also becoming a strong driver towards corporate responsibility, as they increasingly recognise the importance of how companies manage their non-financial risks to overall financial performance.”

The concept of corporate responsibility described in the Parliamentary Joint Committee’s report differs from the concept as developed in the general law which concerns attributing responsibility to the corporation by the acts of authorised persons. However, developments in the general law will come to merge the concepts of corporate responsibility as issues are clarified in the courts. In recent times corporate responsibility has been coming under scrutiny.

How corporations are made responsible

A corporation is responsible for its own actions. It is a separate legal entity from its directors and other company officers and staff. Since *Saloman v Saloman Co Ltd*¹⁴ corporations have been recognised as separate legal entities. The corporation, its directors and employees, and shareholders are separate legal entities.

However, corporate responsibility is intrinsically linked with the responsibilities of directors and other senior managers¹⁵. A discussion of corporate responsibility must involve the responsibilities (or duties) of directors and managers¹⁶. In *The Queen v Goodall*¹⁷, Bray CJ expressed the view “that the logical consequence of Salomon’s Case...is that 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 that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done.” Bray CJ referred this situation as a “sort of metaphysical bifurcation or duplication of one act by one man so that it is in law both the act of the company and the separate act of himself as an individual.” The High Court of Australia agreed with this view in *Hamilton v Whitehead*¹⁸. Also, *Houghton v Arms*¹⁹ referred to the reasoning of Bray CJ saying:

“recognition of the distinct legal identity of a corporation had the consequence that in law the act of an individual might be both a corporate act and the separate act of the actor as an individual.”

The ability of directors and managers to manage the corporation is critical to the reputation of the corporation and hence upholding corporate responsibility. The discussion in this paper does not examine directors’ duties but it emphasises the necessity for directors to oversee the management of the corporation to avoid them being made accountable for the actions of others who do acts that binds the corporation in its corporate responsibility role. The paper examines the responsibility of the corporation that clearly relies on directors and other company officers performing their duties for the benefit of the corporation as a whole. The corporation as a whole depends on this performance by managers as it affects corporate responsibility, the effectiveness of corporate governance and constant monitoring of performance. The separation of the corporation from its directors and managers present a problem for determining who is liable in tort and for purposes of statutory provisions making certain acts criminal. The acts of the board and managers (and for shareholders in general meeting) would be seen as those of the corporation and not those of the individuals. They are exercising powers and functions of the corporation and not in their own capacities. This is expressed in *Trevor Ivory Ltd v Anderson*²⁰:

“in appropriate circumstances they [the directors] are to be identified with the company itself, so that their acts are in truth the company’s acts. Indeed I consider that the nature of corporate personality requires that this identification normally be the basic premise and that clear evidence be needed to

¹⁴ [1897] AC 22.

¹⁵ The High Court in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 agreed with Bright J in *Brambles Holdings Ltd. v. Carey* (1976) 15 SASR 270 at 279: “Always, when beliefs or opinions or states of mind are attributed to a company it is necessary to specify some person or persons so closely and relevantly connected with the company that the state of mind of that person or those persons can be treated as being identified with the company so that their state of mind can be treated as being the state of mind of the company.”

¹⁶ A distinction may be made between the corporation and its officers where there is fraud as shown in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 and *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] UKHL 43.

¹⁷ (1975) 11 SASR 94 at 101.

¹⁸ (1988) 166 CLR 121.

¹⁹ [2006] HCA 59.

²⁰ [1992] 2 NZLR 57 at 527.

displace it with a finding that a director is acting not as the company but as the company's agent or servant in a way that render him personally liable." (per Cooke P)

The general rule according to *Trevor Ivory Ltd v Anderson* is that directors and senior managers would tend to not be personally liable where the acts are those of the corporation. Only the corporation is responsible for the acts. A director's acts are only attributed to the corporation and not concurrently to the director as well²¹. However, the law in England has reversed this view. Lord Hoffmann of the House of Lords said about the acts of Mr Mehra, director of Oakprime Limited:

"My Lords, I come next to the question of whether Mr Mehra was liable for his deceit. To put the question in this way may seem tendentious but I do not think that it is unfair. Mr Mehra says, and the Court of Appeal accepted, that he committed no deceit because he made the representation on behalf of Oakprime and it was relied upon as a representation by Oakprime. That is true but seems to me irrelevant. Mr Mehra made a fraudulent misrepresentation intending SCB [Standard Chartered Bank] to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representation and his knowledge. He was the only human being involved in making the representation to SCB (apart from administrative assistance like someone to type the letter and carry the papers round to the bank). It is true that SCB relied upon Mr Mehra's representation being attributable to Oakprime because it was the beneficiary under the credit. But they also relied upon it being Mr Mehra's representation, because otherwise there could have been no representation and no attribution."

Recognising the acts of the individual as well as the acts of the corporation in tort is important to give the claimant proper recompense for the wrongs committed by those responsible. Redlich J in *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd*²² says:

"Both in Australia and in England a director is in no different position to an agent who, whilst binding their principal may also be liable for their tortious acts."

Redlich J also said:

"This does not mean that directors become personally liable merely because they are directors. Unless they procure or direct the tortious conduct the law does not impose upon them liability for the acts of other agents or employees, whether they are directors of large corporations or what is described as 'one man' companies."

As Atkin LJ said in *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd*²³:

"Prima Facie a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered or procured the acts to be done."

Lord Salmon confirmed this view in *Wah Tat Bank Ltd v Chan Cheng Kum*²⁴ but added an important factor:

"A tort may be committed through an officer or servant of a company without the chairman or managing director being in any way implicated. There are many such cases reported in the books. If, however, the chairman or managing director procures or directs the commission of the tort he may be personally liable for the tort and the damage flowing from it: *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1924] 1 KB 1, 14, 15 per Atkin LJ. Each case depends upon its own particular facts."

For a director or senior manager to procure or direct the acts, they must know or have known or they were indifferent about the legality of the acts or they were indifferent to the loss or damage that would be caused by the acts²⁵. The direct and procure test is considered to be sound and "it remains the standard for determination of a director's liability."²⁶ The elements for this determination are²⁷:

²¹ *Standard Chartered Bank v Pakistan National Shipping Corp. (No. 2)* [2000] 1 Lloyd's Rep 218. This decision has been reversed by the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corp* [2002] UKHL 43; [2003] 1 All ER 173; [2002] CLC 1330; [2003] 1 LLR 227; [2002] BCC 846; [2002] 3 WLR 1547; [2003] 1 AC 959; [2002] 2 All ER (Comm) 931; [2003] 1 BCLC 244; [2003] 1 Lloyd's Rep 227.

²² (2003) 9 VR 171; [2003] VSC 291.

²³ [1924] 1 KB 1 at 14.

²⁴ [1975] AC 50 at 514-515.

²⁵ *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171; [2003] VSC291.

²⁶ *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171; [2003] VSC291.

- the director's level of involvement
- the degree of the director's control exercised.

Knowing these elements and taking careful precautions, a director or other corporate officer would avoid liability by establishing a suitable defence. These officers need to ensure that they exercise due care and diligence in the performance of their duties.

The important factor to note as the one referred to by Lord Salmon is that each case depends on its particular circumstances. It is the director as a person who is subjected to an inquiry of the requisite elements of the wrong committed by them. It does not matter that the director is an agent of the corporation. Campbell and Armour express the issue in terms of:

"when the civil liability of a corporate agent is called into question, the only relevant enquiry is whether the elements of the civil wrong are proved against the agent."²⁸

Also, as a general principle, Campbell and Armour express the following²⁹:

"As a matter of principle, there is no convincing reason why the company being liable should exclude or immunise the agent from being liable."

Nonetheless a balancing of the legal principles is needed to ascertain the liability of directors and the liability of the corporation. Batt J of the Victorian Supreme Court said in *Private Parking Services (Vic) Pty Ltd v Huggard*³⁰ that he was "conscious that the law has not readily embraced tort liability of a director" and that he was also conscious "of the consequences in logic of the organic theory."³¹ However, "the cases show there is a balancing required between that theory and making directors answerable". Leaving the circumstances where the courts find that a director or senior manager may be held personally liable for tortious acts, the attention of this paper is to explore the nature of the corporation requiring the acts of individuals in order for the corporation to be responsible for its acts at law.

Nature of a corporation needing further capabilities to be responsible

As a corporation is a "legal fiction"³² it relies on the capabilities and activities that are attributed to it by the law. This is explained in *Northside Developments Pty Ltd v Registrar-General* where Brennan J said³³:

"The acts and omissions attributed to a company are perforce the acts and omissions of natural persons. A company is bound by an act done when the person who does it purports thereby to bind the company and that person is authorized to do so or the doing of the act is subsequently ratified... Authority for the purpose is derived either directly from the constitution of the company or from some antecedent act (typically, a resolution of the governing body) which is itself binding on the company."

A corporation has also been described as an abstraction³⁴. Viscount Haldane LC said³⁵ in *Lennard's Carry Company Ltd v Asiatic Petroleum Co Ltd* said about the corporate abstraction:

"It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."

²⁷ *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171; [2003] VSC291. See also *W.E.A. International Inc v Hanimex Corporation Ltd* (1987) FCR 274 at 283. Determining the liability of the director in this way avoids other consequences where it might be maintained that the *Corporations Act 2001* has preeminence over other laws such as tort law. This argument is discussed by the authors. They refer to the argument by Grantham and Rickett in "Directors' Tortious Liability: Contract, Tort, or Company Law" (1999) 62 MLR 133 where it is said that directors receive special treatment for tortious acts as they are those of the corporation and not those of the directors. Additional requirements found by the courts to make directors liable such as directing and procuring, made the tort their own or assumption of personal liability, has the effect of affording "directors a considerable privilege." Grantham and Rickett also say: "Unless the director has positively abandoned the shield of the company's separate personality, personal liability does not arise even where the director has physically committed the tortious act."

²⁸ Campbell N & Armour J, "Demystifying the Civil Liability of Corporate Agents", 62 *Cambridge Law Journal* 290 at 300.

²⁹ Campbell N & Armour J, "Demystifying the Civil Liability of Corporate Agents", 62 *Cambridge Law Journal* 290 at 295-296. (1996) Aust Torts Reports ¶181-397 at 63,542.

³⁰ (1996) Aust Torts Reports ¶181-397 at 63,542.

³¹ The organic theory is the view that the director is the corporation. This is shown for example in *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 57.

³² This term was used by Brennan J in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146.

³³ *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 per Brennan J.

³⁴ *Lennard's Carry Company Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

³⁵ At 713.

This description of the corporate abstraction was interpreted later to mean a “general metaphysic of companies”³⁶ where, for example, Denning LJ in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd*³⁷ “likened a company to a human body”³⁸ when he said:

“It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre.”

This description of the corporation has come under attack in later cases. However, it seems to capture the notion of the corporation as a separate entity, being a legal fiction that has responsibility much like the responsibility of a natural person. At law the corporation is not so much an abstraction but is actually a person, albeit a statutory person. It has responsibilities which must be taken seriously and competently otherwise it is likely to become liable to a claimant for wrongs committed. Lord Denning’s description of the corporation helps to explain the nature of the corporation and its responsibilities as identified by the knowledge and actions of persons who are its directing mind and will.

The Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* said³⁹ about this metaphysic:

“But this anthropomorphism, by the very power of the image, distracts attention from the purpose for which Viscount Haldane L.C. said, at p. 713, he was using the notion of directing mind and will, namely to apply the attribution rule derived from section 502 to the particular defendant in the case:

‘For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself *within the meaning of section 502.*’ (emphasis supplied.)”

Lord Diplock of the House of Lords went further in *Tesco Supermarkets Ltd v Nattras*⁴⁰ by saying that Lord Denning’s description of the corporation as used in subsequent cases was wrong⁴¹:

“There has been in recent years a tendency to extract from Denning L.J.’s judgment in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159, 172, 173 his vivid metaphor about the ‘brains and nerve centre’ of a company as contrasted with its hands, and to treat this dichotomy, and not the articles of association, as laying down the test of whether or not a particular person is to be regarded in law as being the company itself when performing duties which a statute imposes on the company.

In the case in which this metaphor was first used Denning L.J. was dealing with acts and intentions of directors of the company in whom the powers of the company were vested under its articles of association. The decision in that case is not authority for extending the class of persons whose acts are to

³⁶ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 509.

³⁷ [1957] 1 QB 159 at 172.

³⁸ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 509.

³⁹ [1995] 2 AC 500 at 509-510. Reference to the legislation is section 502 of the *Merchant Shipping Act 1894*.

⁴⁰ [1972] AC 153 at 200.

⁴¹ The issues and facts of *Tesco Supermarkets Ltd v Nattras* [1972] AC 153 involved the *Trade Descriptions Act 1968*, in particular provisions imposing strict liability for offences involving natural persons and corporations. The provisions provide for a defence of due diligence to avoid the commission of an offence under the provisions. These provisions raised common law issues in conjunction with the statutory prescriptions making a corporation liable. Lord Diplock said that the law of agency does not distinguish between a principal being a natural person or “a mere abstraction in ascribing the agent’s physical acts and state of mind to the principal. In relation to criminal offences, Lord Diplock made the point: ‘But there are some civil liabilities imposed by statute which, exceptionally, exclude the concept of vicarious liability of a principal for the physical acts and state of mind of his agent; and the concept has no general application in the field of criminal law. To constitute a criminal offence, a physical act done by a person must generally be done by him in some reprehensible state of mind. Save in cases of strict liability where a criminal statute, exceptionally, makes the doing of an act a crime irrespective of the state of mind in which it is done, criminal law regards a person as responsible for his own crimes only. It does not recognise the liability of a principal for the criminal acts of his agent: because it does not ascribe him his agent’s mind. Qui peccat per alium peccat per se is not a maxim of criminal law.’”

On the issue of the defence of due diligence it is interesting to note what Lord Diplock said: “Due diligence is in law the converse of negligence and negligence connotes a reprehensible state of mind---a lack of care or the consequences of his physical acts on the part of the person doing them.” In particular reference to the requirements of the relevant provision under the *Trade Descriptions Act 1968* to establish a defence of due diligence, Lord Diplock said “a principal need only show that he personally acted without negligence. Accordingly, where the principal who relies on this defence is a corporation a question to be answered is: What natural person or persons are to be treated as being the corporation itself, and not merely its agents, for the purpose of taking precautions and exercising due diligence?” See Lord Diplock’s judgment at p. 203 about due diligence in order to succeed as a defence in relation to the terms of the statutory provisions imposing strict liability.

be regarded in law as the personal acts of the company itself, beyond those who by, or by action taken under, its articles of association are entitled to exercise the powers of the company. In so far as there are dicta to the contrary in *The Lady Gwendolen* [1965] P. 294 they were not necessary and, in my view, they were wrong.”

According to Lord Diplock a corporation “owes its corporate personality and its powers to its constitution”⁴². This is the “obvious and the only place to look to discover by what natural persons its powers are exercisable”. Consequently, it was Lord Diplock’s view that the question of “what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise [of] due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.”⁴³

This appears to be a sound course to take in legal reasoning to ascertain the acts of a corporation by identifying those who are for the purposes, the corporation. However, it does not assist in explaining why the reference to the vivid metaphor of the corporation in terms of “brains and nerve centre” receives attention. Perhaps the general law principles of agency are not enough to explain how a corporation can be held responsible apart from its officers irrespective of their seniority of office in the corporation. The judgment of Lord Reid in *Tesco Supermarkets Ltd v Nattras*⁴⁴ helps us to see that the agency principles are perhaps not sufficient and that something more is needed in the law to attribute corporate responsibility. Lord Reid started his analysis by considering “the nature of the personality which by a fiction the law attributes to a corporation.” This is Lord Reid’s reasoning:

“A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it 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 act 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, one could say, he hears and speaks through the persona of the company, within 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.”

The personality of the corporation appears to be better described in this view. Also, the issue of corporate criminal liability is well described as a balance between the strict liability imposed on a corporation under statute and the criminal liability of natural persons employed by the corporation. This reasoning accords with “sound legal principles” as found by Viscount Haldane LC⁴⁵ in *Lennard’s Carry Company Ltd v Asiatic Petroleum Co Ltd*.

The validity of the reasoning used in *Tesco Supermarkets Ltd v Nattras* is recognised in *Hamilton v Whitehead*⁴⁶ where the High Court of Australia used the reasoning of Lord Reid explaining the reasoning used by Viscount Haldane LC in *Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd*. Lord Reid’s reasoning is quoted above.

The High Court also referred to the statement of Denning LJ in *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.* (1957) 1 QB 159 at p 172.

Tesco Supermarkets Ltd v Nattras and *Hamilton v Whitehead* were referred to in the High Court decision, *Houghton v Arms*⁴⁷ and the concept of an embodiment is used.⁴⁸

⁴² [1972] AC 153 at 199.

⁴³ [1972] AC 153 at 199-200. Lord Diplock said that “This test is in conformity with the classic statement of Viscount Haldane L.C. in *Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705.

⁴⁴ [1972] AC 153 at 170.

⁴⁵ [1915] A.C. 705 at 713. See also Lord Lindley’s views about sound legal principles in *Citizens’ Life Assurance Company, Limited v Brown* [1904] AC 423 at 427-428 referred to later in this paper.

⁴⁶ (1988) 166 CLR 121.

⁴⁷ [2006] HCA 59.

⁴⁸ Other High Court of Australia cases referring to *Tesco Supermarkets Ltd v Nattras* are *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74; (1993) 178 CLR 477; *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* [1982] HCA 8; (1982) 150 CLR 355; *Smorgan v Australian and New Zealand Banking Group Ltd* [1976] HCA 53; (1976) 134 CLR 475.

A corporation's metaphysical subtleties

The metaphysical subtleties of corporations were commented on by the Privy Council in *Citizens' Life Assurance Company, Limited v Brown*⁴⁹. Lord Lindley said:

"To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious."

Instead, Lord Lindley preferred that the company in that case was liable "on ordinary principles of agency."⁵⁰ Lord Lindley's judgment is also interesting to the debate of whether a corporation could be capable of malice or motive to maintain an action for malicious prosecution and more generally be liable for frauds. His Lordship said:

"If it is once granted that corporations are for civil purposes to be regarded as persons i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals."

On a policy level, Lord Lindley said⁵¹:

"These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles." (emphasis added)

⁴⁹ [1904] AC 42 at 426.

⁵⁰ [1904] AC 42 at 426.

⁵¹ The application of the policy to specific issues of fact can be seen in Lord Lindley's judgment:

Issues of fact identified by the Privy Council in *Citizens' Life Assurance Company, Limited v Brown* [1904] AC 423 at 427-428 on the liability of the company for malicious libel published by its servant, Mr Fitzpatrick, acting in the course of his employment: Mr Fitzpatrick was:

- engaged by a written agreement
- a superintendent
- to act under instructions given to him by properly authorized officers and in accordance with the rules and regulations of the company
- to devote his whole time to furthering the company's business
- to receive and pay money, keep proper accounts, and to supervise various agencies under him
- to be paid a salary of 5l. a week and a commission on policies procured by him.

The written agreement did not state more precisely what his duties were.

Evidence obtained from witnesses about Mr Fitzpatrick's duties (and hence his authority):

- to communicate to the company the concerns of policy-holders about statements made against the company
- to appoint and look after agents
- to stand as an intermediate between the assured and the office
- to secure business and save business
- to visit policy-holders whose policies have lapsed or are likely to lapse.

Analysis of Mr Fitzpatrick's authority:

- in the district there is no one above him
- scope of authority and employment was wide and by no means clearly defined
- no actual authority, express or implied, to write libels nor to do anything legally wrong 'but it is not necessary that he should have had any such authority in order to render the company liable for his acts.'

A jury (tribunal of fact) is entitled to:

- act on their own knowledge of the company's business and habits in considering the scope of Fitzpatrick's authority and employment
- consider the necessities of the case arising from the size and nature of the district placed under Fitzpatrick's supervision
- consider what would naturally be done in the Colony [of New South Wales] by a person in Fitzpatrick's position.

An application of the policy to the facts of a case can be seen in *Entwells Pty Lt v National and General Insurance Co Ltd* [1991] 5 ACSR 424 where Ipp J examines the authority of the company's directors/shareholders where the company "was a traditional type of small family company" that did not hold formal meetings of directors and where the directors discussed matters "over the family dinner table."

The basis in sound legal principles is essential for proper legal reasoning which on occasions is evaded by courts when they resort to phrases that confuse or cause legal reasoning to appear convoluted, where sound ordinary principles are sufficient. In this case Lord Lindley referred to the leading case of *Barwick v English Joint Stock Bank*⁵² in saying that “all doubt on this question was removed by the decision of the Court of Exchequer”. According to the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*⁵³ the phrase, “directing mind and will” of the corporation used by Viscount Haldane in *Lennards’s Carrying Co Ltd v Asiatic Petroleum Co Ltd*⁵⁴ had been misunderstood. Lord Hoffmann said “there has been some misunderstanding of the true principle upon which that case was decided” Lord Hoffmann then began to state the nature of the problem and then examine the true principle as stated by Lord Haldane.

On rejecting the notion that the anthropomorphism approach was the only one to attribute the knowledge of natural persons to the corporation, the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* refers to the notion of attribution rules to attribute responsibility to the corporation⁵⁵. The Privy Council said about rules of attribution⁵⁶:

“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.”⁵⁷

The question is then asked: how is a rule like the one applying to natural persons to be applied to a corporation? The possible answers were identified by Lord Hoffmann as⁵⁸:

- the rule was not intended to apply to corporations (where the penalty is community service)
- a law could apply to a corporation only on the basis of its rules of attribution (by a board resolution or unanimous agreement by shareholders).

Lord Hoffmann then said that in many cases neither of these solutions is satisfactory. In these cases, “the court must fashion a special rule of attribution for the particular substantive rule.” Lord Hoffmann then said that a special rule of attribution “is a matter of interpretation or construction of the relevant substantive rule”⁵⁹. The relevant substantive rule depends on the facts of the case and the relevant statutory law. This can be seen in contrast in the two examples given by the Privy Council: *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 and *In re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456.⁶⁰ In fashioning a special rule of attribution for the particular substantive rule that is intended to apply to a corporation, the questions to be asked by a court, according to Lord Hoffmann, are:

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 corporation?

The answers are found “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.”⁶¹

⁵² L. R. 2 Ex. 29. This judgment was subsequently “distinctly approved by Lord Selborne in the House of Lords in *Houldsworth v. City of Glasgow Bank* [(1880) 5 App. Cas. At 326], and has been followed in numerous other cases.”

⁵³ [1995] 2 AC 500 at 506.

⁵⁴ [1915] AC 705 at 713.

⁵⁵ Grantham R, “Attributing Responsibility to Corporate Entities: A Doctrinal Approach”, 19 CSLJ 168.

⁵⁶ [1995] 2 AC 500 at 507.

⁵⁷ These rules are described as primary and general rules of attribution. Primary rules of attribution are the acts of the directors and members acting unanimously being attributed to the corporation. General rules of attribution such as agency principles apply to natural persons as well as to corporations. (Austin RP & Ramsay IM, *Ford’s Principles of Corporations Law*, 13th ed, Reed International Books Australia Pty Ltd t/as LexisNexis Butterworths, 2007 at p 846)

⁵⁸ [1995] 2 AC 50 at 507.

⁵⁹ [1995] 2 AC 500 at 507.

⁶⁰ An Australian case applying the special rule of attribution is *AAPT Ltd v Cable & Wireless Optus Ltd* (1999) 3 ACSR 63 according to Austin RP & Ramsay IM, *Ford’s Principles of Corporations Law*, 13th ed, Reed International Books Australia Pty Ltd t/as LexisNexis Butterworths, 2007 at p 847.

⁶¹ [1995] 2 AC 50 at 507.

A legal commentator⁶² has said that the primary rules of attribution “reflect or recognise an organic approach. That is, a decision of the board or of the shareholders in general meeting is *ipso facto* an act of the company itself and binds the company, not through the notions of authority which underpin agency, but by virtue of the decision in question being, in the eyes of the law, the company’s own act or decision.”

The combination of the primary rules of attribution with supplemented secondary rules applying to natural persons such as the law of agency and equitable principles (e.g. estoppel) are needed as a consequence of the rules of attribution. However, the circumstances of individual cases could raise legal principles that avoid the rules of attribution. Lord Hoffmann of the Privy Council gives us an example where “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.”

Grantham views Lord Hoffmann’s statement as saying about such cases:

“if it is decided the substantive rule is nevertheless to apply to companies, the court must fashion a special rule of attribution to determine ‘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’.”⁶³

In *AAPT Ltd v Cable & Wireless Optus Limited*⁶⁴, Austin J said:

“The knowledge of a corporate officer may be attributed to the company for the purpose of applying statutory provisions, if the policy underlying those provisions makes it appropriate to do so: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. Thus, an investment officer’s knowledge about a securities transaction may be attributed to his employer even though its managing director and board were unaware of the transaction, for the purpose of determining whether the company has failed to comply with a statutory obligation to disclose a substantial shareholding, because the policy of the substantial shareholding provisions is to compel immediate disclosure. That is a case where, to use Lord Hoffmann’s words, neither the company’s ‘primary rules of attribution’ nor the general principles of the law of agency would be adequate to identify the individuals whose knowledge should be attributed to the company, and so a special rule of attribution is needed.”

The special rule of attribution was needed in that case “for the purpose of identifying the corporate officers whose intentions are capable of being attributed to their company for the purposes of” the legislative provision. Austin J also said:

“In my opinion, the intentions of those corporate officers who are responsible for planning an acquisition or the integration of the acquired entity may be attributed to their company for the purpose of establishing the offeror’s intentions which must be disclosed under clause 20 [clause 20 of Part A of s 750 of the Corporations Law], having regard to the policy underlying that clause, which is to put shareholders in possession of the information required to enable them to make an informed and critical assessment of the offer and an informed decision as to whether to accept it: *Samic*, 60 SASR at 303 per King CJ.”

The special rule of attribution based on the substantive provision, in this case clause 20 of Part A of section 750 of the Corporations Law, was established by Austin J in the following manner:

“I cannot agree with the defendants that the disclosure requirement of clause 20 is confined to the intentions adopted by the board, either expressly or by virtue of their implied assent to board papers written by management. If the submission were correct, the offeror’s management could emasculate clause 20 by strictly limiting the amount of information about planning which they presented to the board. On the other hand, it cannot be right that the Part A statement must disclose a statement of intention expressed by an officer of the offeror whenever the officer has corporate authority to make the statement - for example, I would not think it necessary in normal circumstances to disclose in the Part A statement representations about the offeror’s intention made by its Public Relations Department.”

The reasoning used by Austin J is reflective of the reasoning used in *Citizens’ Life Assurance Company v Brown*⁶⁵. It would appear that the reasoning is consistent with sound legal principles.

⁶² Grantham R, “Attributing Responsibility to Corporate Entities A Doctrinal Approach”, 19 CSLJ 168 at 175.

⁶³ Grantham R, “Corporate Knowledge: Identification or Attribution?”, 59 MLR 732 at 734.

⁶⁴ (1999) 32 ACSR 63.

⁶⁵ [1904] AC 423. See the earlier reference for the facts extracted from this case.

The New South Wales Court of Appeal used the rules of attribution in *North Sydney Council v Roman*⁶⁶. McColl JA expressed the rules of attribution as:

“When it is necessary to determine whether conduct or knowledge or the mental state of an individual employee or agent should be attributed to a corporation, an organic approach has been developed, which requires the identification, in the specific statutory context, of ‘rules of attribution’: *Director General, Department of Education and Training v MT* [2006] NSWCA 270 at [16] – [17] per Spigelman CJ (Ipp JA and Hunt AJA agreeing), referring with approval, to Lord Hoffmann’s speech in delivering the judgment of the Privy Council in *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500 at 506.”

McColl JA referred to Lord Hoffmann’s comment about attributing knowledge of an officer to the corporation and saying, “the Privy Council’s decision should not be understood to mean that ‘whenever a servant of a company had authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company [and] it is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.’” McColl JA also referred to the statement by Spigelman CJ in *Director General, Department of Education and Training v MT*⁶⁷:

“Subsequent development of the case law has emphasised particular features of the legislative scheme under consideration, e.g. the protective nature of the statutory regulation. (See e.g. in the case of occupational health and safety legislation, *Linework Limited v Department of Labour* [2001] 2 NZLR 639; *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181 and, in the case of a child protection statute, *ABC Developmental Learning Centres Pty Ltd v Wallace* [2006] VSC 171.) Each statutory regime must be considered separately, although the case law that has developed, particularly after *Meridian Global Funds Management*, will prove instructive about the kinds of indicators that point one way or another.”

The attribution rules seem to be a kind of indicator for the courts. Spigelman CJ refers to a statement by Callaway JA (with whom Phillips CJ and Tadgell JA agreed) in *Director of Public Prosecutions Reference No 1 of 1996*⁶⁸ referring to Lord Hoffmann’s analysis in *Meridian Global Funds Management* with approval and said that “it does not tell us the rule of attribution ... *It merely provides a framework for analysis and dispels the notion that, for all offences, the person with whom a corporation is identified must be its directing mind and will.*” (emphasis in comment by Spigelman CJ’s quote) Spigelman CJ also pointed to “a number of principles which are inherent in Lord Hoffmann’s judgment” identified by Callaway JA, excluding those that related specifically to the case in the Victorian Court of Appeal.

The rules of attribution are a framework to analyse the circumstances of the matter and the policy underlying statutory provisions. McColl JA refers to the views of Spigelman CJ:

“Spigelman CJ pointed out (at [19]) that the relevant rule of attribution ‘will not be the same when a court is considering vicarious liability for a tort committed by a person associated with a corporation, as the rule that establishes criminal liability of a corporation for the conduct of a person [and] [t]he policy issues that must be considered in every such context differ considerably.’”

McColl JA also referred to a case of the Victorian Court of Appeal, *R v Commercial Industrial Construction Group*⁶⁹ where it was said, “[r]ules of attribution are of particular importance where the statutory provision imposing liability, or creating a defence, turns on a state of mind.”

UK law rules of attribution

According to the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* the primary rules of attribution are generally found in the corporation’s constitution where clauses express requirements or conditions for appointing persons to offices and the making of decisions. Also, the primary rules may be implied by company law. In relation to the primary rules of attribution, the Privy Council said⁷⁰:

“These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon

⁶⁶ [2007] NSWCA 27 at para 28.

⁶⁷ [2006] NSWCA 270.

⁶⁸ [1998] 3 VR 352 at 355 lines 35-40.

⁶⁹ [2006] VSCA 181 at [32].

⁷⁰ [1995] 2 AC 500 at 506.

the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency.”

The use of the rules of attribution are helpful as shown by Austin J’s reasoning in *AAPT Ltd v Cable & Wireless Optus Limited* but there are risks in relying on them as a sort of template to decide on the facts of a case where acts are to be attributed to a corporation. The basic premise is to look to the corporation’s constitution to identify the persons who are its directing mind and will and then look to other persons who may have done the acts or possess the relevant knowledge that can be attributed to the corporation. This will depend on the circumstances of each case. Also, the liability of the person personally or as a joint tortfeasor would need to be determined. The use of rules of attribution could deter an exploration of the facts where the issues seek to make the corporation liable in the circumstances. The courts need to be free of templates or other forms of stepping principles to determine the outcome of cases involving corporate responsibility. This may be a reason why the rules of attribution approach have not been expressly adopted by the High Court of Australia⁷¹.

The rules of attribution seem to be intended to cover the field by absorbing earlier principles such as the identification doctrine. The problem for the law can be seen in this commentary:

“The identification doctrine served a useful purpose, plugging an attribution gap. However, the doctrine was articulated in problematic terms. It asked whether the agent was acting ‘as the company’, implying that it was possible for a person to ‘identify with’ a corporate personality, gave rise to a metaphysical notion in which an agent identified with the company was seen as *embodying* the company”.⁷²

Campbell and Armour refer to *Trevor Ivory Ltd v Anderson*⁷³ where Cooke P said that a “person may be identified with a corporation so as to be its embodiment or directing mind and will, not merely its servant, representative, agent or delegate.” This notion of embodiment is not helpful as it can cause lower corporate officers to avoid liability and, as the corporation is found liable, the acts cannot be simultaneous with the agent⁷⁴. The rules of attribution⁷⁵ also have a problem as it can cause misdirections based on misunderstandings of who is responsible for the wrongful act. This can be seen in the case of *ABC Developmental Learning Centres Pty Ltd v Wallace*⁷⁶ where the Victorian Court of Appeal said:

In our view, on the proper construction of s 27 of the [Children’s Services Act 1996] no rules of attribution are called for. In *R v Commercial Industrial Construction Group Pty Ltd* (“CICG”), this Court explained why no rules of attribution (of acts of an employee to the employer company) were called for where the employer was alleged to have breached its statutory duty to ensure a safe working environment for employees. In our opinion, the duty of a proprietor of a children’s service to ensure adequate supervision of children is a duty of the same kind.⁷⁷

The Court of Appeal then said:

“The same duty is now imposed by s 21(1) of the Occupational Health and Safety Act 2004. Breach of that general safety duty does not depend on proof of mens rea. There is no defence of honest and reasonable mistake, so the liability is properly to be regarded as absolute. Because of the practicability qualification, the obligation is not absolute but the liability for breach is absolute nevertheless. Unlike the position in *Tesco Supermarkets Ltd v Natrass*, there is no ‘due diligence’ defence, nor is it a defence to show that the breach was ‘due to the act or default of another person.’”

⁷¹ The Australian Law Reform Commission said: “The principles of attribution developed in *Meridian* have not been expressly adopted by the Australian High Court but have been considered in recent cases by the Federal Court.” (ALRC Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 18 December 2002. However, the ALRC report states in footnotes: “In substance, however, the *Meridian* principle of attribution does not appear to significantly differ from the method used by the High Court to attribute ‘knowledge’ of the officers of the corporation to the corporation in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563”.

⁷² Campbell N & Armour J, “Demystifying the Civil Liability of Corporate Agents”, 62 *Cambridge Law Journal* 290 at 293.

⁷³ [1992] 2 NZLR 57 at 520.

⁷⁴ Campbell N & Armour J, “Demystifying the Civil Liability of Corporate Agents”, 62 *Cambridge Law Journal* 290 at 293 were the authors refer to this scenario as the “disattribution” heresy.

⁷⁵ In particular the special rule of attribution.

⁷⁶ [2007] VSCA 138.

⁷⁷ The Magistrate in first instance and Bell J on appeal used *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500 “as the appropriate framework for analysis”. The Court of Appeal referred to Bell J’s statement where it is said: “According to Lord Hoffmann, there is no one answer to the question whether the criminal actions of employees (or directors or contractors) of a company can be counted as the actions of the company. In some cases it is necessary to fashion a special rule of attribution. Depending on the scope of the rule, the actions of the employees may or may not be attributed to the company. The scope of the rule will depend upon the court’s interpretation of the terms of the offence and the policy of the enabling statute.”

Reference was made in this case to Professor Sir John Smith, "Health and Safety at Work" [1995] Crim LR 654, 655⁷⁸ (emphasis added):

"Where a statutory duty to do something is imposed on a particular person (here, an 'employer') and he does not do it, he commits the *actus reus* of an offence. It may be that he has failed to fulfil his duty because his employee or agent has failed to carry out his duties properly but this is not a case of vicarious liability. If the employer is held liable, it is because he, personally, has failed to do what the law requires him to do and he is personally, not vicariously, liable. *There is no need to find someone – in the case of a company, the 'brains' and not merely the 'hands' – for whose acts the person with the duty can be held liable. The duty on the company in this case was 'to ensure' – ie to make certain – that persons are not exposed to risk. They did not make certain. It does not matter how; they were in breach of their statutory duty and, in the absence of any requirement of mens rea, that is the end of the matter.*"

The use of the rules of attribution must be handled carefully.

Australian law position

The Australian law position is primarily based on the "directing mind and will" principle where natural persons can be the embodiment of the corporation. This can be seen in the line of High Court cases referring to or using the reasoning of Lord Reid in *Tesco Supermarkets Ltd v Nattras*. Also, the reasoning of Viscount Haldane LC in *Lennards's Carrying Co Ltd v Asiatic Petroleum Co Ltd* is also referred to by the High Court in conjunction with Lord Reid's reasoning as a sort of explanation for Viscount Haldane's reasoning. The High Court decision in *Hollis v Vabu Pty Ltd*⁷⁹ said generally that "under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise."

The decision of the High Court in *Krakovski v Eurolynx Properties Ltd*⁸⁰ is taken to be the latest Australian law in relation to corporate responsibility. It is used by other courts as the law governing the outcome of cases involving corporate responsibility where it has been further explained.

On appeal in the Federal Court of Australia in *J McPhee & Son (Aust) Pty Ltd v ACCC*⁸¹ the application of the law in *Krakovski v Eurolynx Properties Ltd* by the primary judge was accepted:

"In reasoning in this way his Honour correctly applied the principles set out in *Krakovski v Eurolynx Properties Ltd* at 582-583 and *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500 at 506-507. In particular the principles set out in *Krakovski v Eurolynx Properties Ltd* apply to ascertaining corporate intention. The case involved a claim of fraudulent misrepresentation and a majority of the High Court (Brennan, Deane, Gaudron and McHugh JJ) held that the state of mind of Eurolynx could be established from the state of mind of several persons including its agent and officers."

Despite the mention of *Meridian Global Funds Management Asia Limited v Securities Commission*, the appeal judges preferred the decision in *Krakovski v Eurolynx Properties Ltd* as the guiding principle for corporate responsibility.

In *Brescia v QBE*⁸², Hammerschlag J of the New South Wales Supreme Court referred to authorities that are binding on him, saying:

"in order to attribute a state of mind to a company, the collective states of mind of officers of the company relevantly connected with it are treated as being the state of mind of the company. A division of function amongst officers of company does not relieve it from responsibility determined by reference to the knowledge possessed by each of them: *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270 at 279; *Krakovski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 582-583; *VACC Insurance Ltd v BP Australia Ltd* (1999) 47 NSWLR 716 at 726; *Entwells Pty Ltd v National and General Insurance Co Ltd* (1991) 5 ACSR 424 at 427 and following."

A reconciliation of sorts between *Krakovski v Eurolynx Properties Ltd* and *Meridian Global Funds Management Asia Limited v Securities Commission* may be seen in *Bray v F. Hoffman-La Roche Ltd*⁸³:

⁷⁸ The Court of Appeal also said: "This commentary was quoted by the English Court of Appeal in *Attorney-General's Reference (No.2 of 1999)* [2000] QB 796, 812."

⁷⁹ [1002] HCA 44; (2001) 207 CLR 21.

⁸⁰ (1995) 183 CLR 563.

⁸¹ [2000] FCA 365; [2000] 172 ALR 532 at 570.

⁸² [2007] NSWSC 598.

⁸³ [2002] FCA 243; [2002] 190 ALR 1 at 42.

"In a different context, in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 ('*Krakowski*') at 583 Brennan, Deane, Gaudron and McHugh JJ pointed out that a division of function amongst officers within a corporation responsible for different aspects of the one transaction does not relieve the corporation from responsibility determined by reference to the knowledge of each of them. Their Honours cited *Dunlop v Woollahra Municipal Council* (1975) 2 NSWLR 446 at 485 where Wootten J observed:

'Corporations must be held responsible through those who act on their behalf, whether an act is performed by one person or by a number. Doubtless there may be problems of mixed motives as between individuals, as indeed there often are within an individual, but it is better for the courts to grapple with the true facts, however difficult this may be, than to shut out the realities of corporate action by arbitrary rules of evidence.'"

In *Krakowski* their Honours also cited *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170 where Lord Reid stated that as a company must act through living persons, although not always one or the same person, "[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 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507 Lord Hoffman, delivering the advice of the Privy Council, stated that, in a statutory context, the question of whose act is that of the company is one of interpretation. He said the question arises as to "[w]hose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company".

Justice Owen of the Western Australian Supreme Court said in *The Bell Group Ltd (In Liquidation) v Westpac Banking Corporation*⁸⁴:

"As I have already said, the circumstances in which knowledge of an individual is to be imputed to a corporate entity and in which reliance on that knowledge to sheet home liability to the corporate entity are issues about which the parties are in dispute. This is particularly so in relation to the aggregation of the knowledge of several individuals. I have not yet heard argument on them. But for present purposes I am content to assume that the position is as stated in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 (approving *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270). I take those principles to be as follows:

1. If mental states like knowledge or belief are to be attributed to a notional and metaphysical entity like a corporation, this can only be done by attributing to it the knowledge or belief actually possessed by some one or more of its officers or employees.
2. Very difficult questions can arise in this connection. But it is a fallacy to say that any state of mind to be attributed to a corporation must always be the state of mind of one particular officer or employee alone and that the corporation can never know or believe more than that one person knows or believes.
3. It is the company's belief that is important. The belief of any officer or employee is relevant only insofar as that belief may be imputed to the company.
4. When beliefs or opinions or states of mind are attributed to a company it is necessary to specify some person or persons so closely and relevantly connected with the company that the state of mind of that person or those persons can be treated as being identified with the company so that their state of mind can be treated as being the state of mind of the company.
5. Thus, a division of functions among officers or employees of a company responsible for different aspects of a transaction does not relieve the company from responsibility determined by reference to the knowledge possessed by each of them."

The responsibility of the corporation is bound up in the authority of the natural person to bind the corporation. So a corporation is "bound by an act purporting to bind it not only when the person who does the act has the company's authority to bind it by that act but also when that person is held out by the company as having that authority and the party dealing with the company relies on that person's ostensible authority."⁸⁵

⁸⁴ [2004] WASC 273 at para 48.

⁸⁵ *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 per Brennan J.

Ostensible authority

The notion of ostensible authority is described in *Freeman and Lockyer v Buckhurst Park Properties (Managal) Ltd*⁸⁶ by Diplock LJ as an apparent authority being “a legal relationship between the principal and the contractor by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract.”

The significance of this apparent authority is that the principal is bound by the actions of the agent. The agent must purport to make the agreement as the principal. The principal is however estopped from asserting that the principal is not bound by an agreement entered into by the principal’s agent. These principles “apply mutatis mutandis to authority to bind a company by other acts done purportedly on behalf of a company”⁸⁷. A corporation is bound in this manner. A corporation is not bound where “the person who does the act has neither actual nor ostensible authority to bind the company by doing the act which the other party asserts to be binding the company.”⁸⁸

According to Diplock LJ two further characteristics are required of the corporation in applying the ostensible authority principles:

1. the corporation’s constitution limits the corporation’s capacity
2. the corporation’s acts relies on the acts of the agent.

The corporation’s constitution permits the corporation to perform certain acts. Where these constitutional acts are performed by the agent, they are taken by the law to be done by the corporation. Also, the corporation performs an act by conferring authority on the agent. The acts of the agent may be those of directors or managers (used in the broad sense) of the corporation.

This is referred to in the cases as “indoor management” and the principles concerning dealings with a corporation carrying the presumption of the authority of agents to act for the corporation have been labeled the “indoor management rule”. The indoor management rule needs the authority of the corporation’s constitution under which the acts of the agents are performed in order to bind the corporation. The rule is not discussed⁸⁹ except to the extent that it shows how the responsibility of corporations generally arises in Australian law in particular.

Corporate responsibility arises from its constitution. Consequently, actions done by authorised persons under the corporation’s constitution can be taken to be actions of the corporation; hence corporate responsibility. The connection between corporate responsibility evidenced by the actions of authorised persons is described by Brennan J:

“When the indoor management rule applies, it covers each of the links between the constitution of the company and the particular act (or omission) done (or omitted) by a purported officer or agent of the company in the transaction. It covers the due making of appointments of the original directors, of subsequent directors, of other officers and of agents; it covers the conferring of authority on officers and agents; and it covers the satisfaction of conditions governing their exercise of authority in the instant case.”

The authority issue is important in establishing if the corporation can be bound by its officers’ actions. Despite this apparently clear expression of the law there will be cases where the extent of the authority will be questioned. A statutory provision cannot properly cover all possible circumstances in which a corporation would be held responsible at law. The common law must be allowed to mould the concept of corporate responsibility taking account of changing circumstances and to determine the circumstances in which the notion of corporate responsibility will apply.

The evolution of the law needs to develop the defences available to corporations to protect corporate interests. The views of the Parliamentary Committee to leave corporate responsibility to the common law are equally applicable to the common law notion of corporate responsibility. Connected to the developing law in Australia on corporate responsibility and corporate liability is the issue of the responsibility of persons personally for the

⁸⁶ (1964) 2 QB 480 at 503. The principles were approved by the High Court of Australia in *Cabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd* (1975) 133 CLR 72 at 78.

⁸⁷ *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 per Brennan J.

⁸⁸ *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 per Brennan J.

⁸⁹ For an overview of the indoor management rule see Austin RP & Ramsay IM, *Ford’s Principles of Corporations Law*, 13th ed, Reed International Books Australia Pty Ltd t/as LexisNexis Butterworths, 2007 at Chs 13 and 14.

breach of the law by their corporations. This issue was discussed by the Corporations and Markets Advisory Committee (CAMAC) in its Report, *Personal Liability for Corporate Fault*, (September 2006). CAMAC identified two areas of concern that needed addressing:

- 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.

These issues need to be resolved in conjunction with the development of the law of corporate responsibility. Distinguishing the dividing line is essential to apportioning responsibility and hence liability to the right person. The *Corporations Act 2001* attempts to apportion responsibility but its provisions can be limiting.

General law concepts for corporate responsibility in the Corporations Act

Corporate responsibility can be found throughout the *Corporations Act 2001* which provides for the many aspects of a corporation's existence and operation. It has powers and functions given under the Corporations Act to function as a person at law.

The general law concepts for corporate responsibility as derived under the indoor management rule are incorporated to some extent in the Corporations Act. In particular, *Corporations Act 2001*, ss 128-129 express the general law rule. While the purpose of these statutory provisions as expressed in section 128(1) to entitle a person to make assumptions (expressed in section 129) about dealings with a company, they show that the company is held responsible for its acts and not the directors and other officers.

It should be noted that *Corporations Act 2001*, ss 128-129, only applies to companies and not to other types or forms of corporations⁹⁰. Consequently, the general law rule applies despite *Corporations Act 2001*, ss 128-129.

The corporation can act to execute documents by applying appropriate measures as required under its constitution and by doing things that may be required under other laws for the proper execution of the document. In relation to companies *Corporations Act 2001*, s 127, provides for the execution of documents by a company using its common seal or by the signatures of officeholders as described.

Corporate responsibility in other legislation

The recognition of corporate responsibility is being recognised and expressed in legislation. The obvious insertion of corporate responsibility and defining how this occurs can be seen in *Trade Practices Act 1974* (Cth), s 84.⁹¹ This provision is extracted (with commentary) in the Annexure. This provision facilitates "proof of corporate responsibility beyond the position which would otherwise obtain at common law."⁹²

Looking at the liability of corporate officers for corporate misconduct, the Corporations and Markets Advisory Committee (CAMAC) said in its Report, *Personal Liability for Corporate Fault*, (September 2006):

"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."

In relation to environmental laws, for example, CAMAC viewed 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. These provisions cause a person involved in the corporation to be guilty of an offence where the corporation contravenes the provisions. For a commentary on other corporate offences

⁹⁰ See discussion in Austin RP & Ramsay IM, *Ford's Principles of Corporations Law*, 13th ed, Reed International Books Australia Pty Ltd t/as LexisNexis Butterworths, 2007 at 13.340.

⁹¹ See also *Corporations Act 2001*, s 769B for a similar provision as applied in relation to financial markets and services.

⁹² *Australian Competition & Consumer Commission v The Maritime Union of Australia* [2001] FCA 1549; *Walplan Pty Ltd v Wallace* [1985] FCA 479; (1985) 8 FCR 27 at 36-38.

of environmental concernsee Baird, "Liability of Directors and Managers for Corporate Environmental Offences – Recent Prosecutions"⁹³.

CAMAC also expressed concern about the array of laws applying across Australia and the manner in which corporate officers may be treated under these various laws. The Report says:

"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 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."

CAMAC's general view is that "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 expected laws to regulate corporate activity in relation to climate change have begun with the introduction of the *National Greenhouse and Energy Reporting Act 2007* (Cth). Corporations are required from 1 July 2008 to register and report where they emit greenhouse gases, produce or consume energy at or above specified quantities (i.e. emit 25 kilotonnes or more of greenhouse gas (CO₂ equivalent), or produce or consume 100 terajoules or more of energy). The object of the Act is to:

"introduce a single national reporting framework for the reporting and dissemination of information related to greenhouse gas emissions, greenhouse gas projects, energy consumption and energy production of corporations to:

- (a) underpin the introduction of an emissions trading scheme in the future; and
- (b) inform government policy formulation and the Australian public; and
- (c) meet Australia's international reporting obligations; and
- (d) assist Commonwealth, State and Territory government programs and activities; and
- (e) avoid the duplication of similar reporting requirements in the States and Territories."

Penalty orders may be made against a corporation for not complying with the Act and for other factors associated with the reporting requirement such as the keeping of information for use in the reporting process. As more information becomes available on climate change matters further legislation is likely in order to establish the emissions trading scheme and other compliance requirements to manage climate change factors.

Minimising risk of liability for corporation

Directors and senior managers of corporations need to manage the risk of liability for the corporation. There needs to be effective corporate governance measures in place with effective mechanisms to oversee the performance of employees, contractors and others engaged by the corporation. Employees need to be given regular and proper training to understand and apply corporate policies and to be diligent in reporting irregularities and illegal practices to responsible corporate officers within an approved procedure. Measures are needed for whistleblowers to encourage reporting without appearing to be "ratting" on their mates. Whistleblowers need to be protected to ensure their evidence does not become subject to tampering or other deterrence.

As we have seen from past corporate activities, good corporate governance does not guarantee that a corporation will avoid liability in the exercise of its responsibilities. Recent developments involving price fixing arrangements have identified the wrongdoings of two corporations in Australia. Case studies of these corporations are detailed below.

⁹³ 16 EPLJ 192.

The case studies highlight the cultural problems of corporations and the difficulty for directors to maintain a hold of the structures and systems to ensure information and monitoring produce a culture of compliance and lawful activities. Directors need to ensure that their knowledge is the best that can be generated within the corporation so that if they know of an unlawful act they do something about the situation. They need to avoid an air of arrogance to the possible problems and not go on with wishful optimism about the corporation's performance. They must not be ignorant or display a selective approach to information based on past performance and outmoded perceptions of the corporation's management and operations.

Directors need to ensure that adequate information comes to the board. They must not be overloaded with irrelevant information that hide important signals in relation to performance and compliance. They need to watch for the making of strategic decisions by management or others within operational groups and ensure proper monitoring mechanisms are in place to readily identify improper practices and activities. The directors must be ready to take action when improper or unlawful activities are identified and deal with those responsible for them. Well meaning policies without action are meaningless. Staff training is essential but monitoring for compliance is critical to send the message that management is resolute and determined to run the corporation in a lawful manner.

Recent developments for corporate responsibility

The recent cases involving QANTAS Airways Limited and the Visy Group concerning price fixing under relevant trade practices laws in the United States of America and Australia (as well as a number of other cases in both jurisdictions) raise issues for corporate responsibility. These particular cases identify issues that assist in separating the responsibility of corporations and the responsibilities of directors and other officers. In particular, they show that the ability of directors and managers to manage the corporation's operations and its employees is critical for corporate responsibility. Having proper corporate governance arrangements in place is essential for management to know what its employees are doing and for employees to know what is expected of them. Both groups need to be accountable and transparent mechanisms should be clearly expressed and in place.

The following case studies help to appreciate issues for corporate responsibility and the rise of proposed legislation to introduce criminal penalties for serious corporate breaches of the law such as for serious cartel conduct⁹⁴ and *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*⁹⁵. Good corporate governance alone is not sufficient. A corporation requires a culture of compliance and accountability. Effective monitoring is critical for good corporate governance to keep corporate culture in check. This is a board responsibility to ensure that corporate responsibility is not undone by illegal and improper actions by employees for which the corporation is held responsible.

1. The QANTAS case

The Information⁹⁶ in *United States of America v QANTAS Airways Limited* filed in the U.S. District Court for the District of Columbia on November 27, 2007, says:

"6. From at least as early as January 1, 2000 and continuing until at least February 14, 2006, the exact dates being unknown to the United States, Defendant and its co-conspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the cargo rates charged to customers in the United States and elsewhere for international air shipments. The combination and conspiracy engaged in by Defendant and its co-conspirators was an unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1)."

According to a media release⁹⁷ by the Department of Justice QANTAS Airways Limited "agreed to plead guilty and pay a \$61 million criminal fine for its role in a conspiracy to fix rates for international air cargo shipments." QANTAS' co-conspirators, British Airways Plc and Korean Air Lines Co Ltd also pleaded guilty. They were sentenced to pay separate criminal fines of \$300 million. Their larger fine was due to the fixing of prices of passenger and cargo flights.

⁹⁴ See Discussion Paper, *Criminal penalties for serious cartel conduct*, available on www.treasury.gov.au (at highlights on right) and *Media Release No.002*, "Jail terms for serious cartel conduct", of Assistant Treasurer and Minister for Competition Policy & Consumer Affairs.

⁹⁵ Exposure draft also available on Department of Treasury website.

⁹⁶ At <http://www.usdoj.gov/atr/cases/qantas.htm>.

⁹⁷ Department of Justice, 07-943, Tuesday, November 27, 2007 at http://www.usdoj.gov/opa/pr/2007/November/07_at_943.html.

The ABC Corporation's news report says that QANTAS has more legal problems flowing from the US case:

"This is not the end of the matter for Qantas. It is still facing a class action in the Federal Court from the angry companies who had to pay the hiked up cargo rates.

Those companies are being represented by Kim Parker from Maurice Blackburn Cashman.

"We estimate their losses across the market to being the order of \$200 million," he said."

The charge of conspiracy to suppress and eliminate competition by fixing prices is serious for QANTAS. The Chief Executive Officer of QANTAS said in a news release⁹⁸:

"Mr Dixon said the illegal conduct involved fuel surcharges in the international air cargo market between 2000 and 2006.

"Similar investigations to those being carried out by the United States Department of Justice (DOJ) are being undertaken by antitrust regulators in other countries, including Australia.

"We understand more than 30 other airlines are included in these investigations," he said.

Mr Dixon said upon being advised of the allegations, in May 2006, Qantas had cooperated fully with investigations by the DOJ and other antitrust regulators."

The Chief Executive Officer made interesting comments about his company's legal compliance:

"Qantas takes its obligations to comply with the law very seriously. We have a comprehensive competition compliance program in place, and expect all of our employees to comply with these requirements at all times," he said.

"In this case, Qantas did not meet this expectation. The conduct was wrong and we apologise unreservedly for this."

While the Chief Executive Officer says that the company does not believe that financial penalties "will materially affect future operating results", his comments about legal compliance and the apology show that there are apparent concerns about the company's reputation in the market place.

From a corporate governance perspective it seems clear that Qantas needs to improve its "comprehensive competition compliance program" to make sure to senior managers that all employees understand the program and comply with it. The Qantas board should make the issue a policy matter to oversee the operation of the program by the company's executive. On-going reports with evidence of implementation should be demanded by the board.

So let's see what Qantas has been doing about these corporate governance concerns raised by the price fixing conspiracy. The company's *2007 Corporate Governance Statement*⁹⁹ says that the board is responsible for:

"ensuring compliance with laws, tax obligations, regulations, appropriate accounting standards and corporate policies (including the Qantas Code of Conduct and Ethics)".

The Corporate Governance Statement also says:

"The Board Recognises and Manages Risk

The businesses operated by Qantas are complex and involve a range of strategic, operational, financial and legal risks. Recognising this, the Board has established a sound system of risk oversight and management and internal control designed to identify, assess, monitor and manage risk. The Audit Committee is primarily responsible for monitoring business risks whilst the Safety Environment and Security Committee is primarily responsible for monitoring operational risks. Both Board Committees are responsible for monitoring compliance with legal and regulatory obligations."

The company's board has policies in accordance with its recognition of risk and its management. Also, a Risk Review Group assists the board's committee, Safety and Risk Leadership, to monitor identification of material risks, action plans, and review and update of risk infrastructure.

The Qantas Policy Manual has the "Qantas Code of Conduct & Ethics"¹⁰⁰ that says at paragraph 2.1:

⁹⁸ "Qantas Enters Plea Agreement with US Government", Sydney, 28 November 2007 at <http://www.qantas.com.au/regions/dyn/au/publicaffairs/details?ArticleID=2007/nov07/Q3696>.

⁹⁹ At <http://www.qantas.com.au/infodetail/about/corporateGovernance/CorpGov.pdf>.

¹⁰⁰ At <http://www.qantas.com.au/infodetail/about/corporateGovernance/CodeofConduct.pdf>.

“Qantas, its subsidiaries and associated entities (Qantas), Directors, employees, consultants and all other people when they directly or indirectly represent Qantas must comply, at all times, with all laws governing its Australian and international operations. They must also conduct Qantas’ operations in keeping with the highest legal, moral and ethical standards.”

In the performance of duties by directors and employees, the Code says:

“2.2 All Directors and employees of Qantas, its subsidiaries and associated entities (Qantas Employees) must conduct the business of Qantas with the highest level of ethics and integrity. This obligation applies particularly to dealings with shareholders, customers, suppliers, competitors, governments, regulators, other Qantas Employees and all others stakeholders.

2.3 Qantas Employees must, at all times, act:

- i. ethically, honestly, responsibly and diligently;
- ii. in full compliance with the letter and spirit of the law and this Code; and
- iii. in the best interest of Qantas.”

Compliance with the Code is essential for all employees and there is a requirement at paragraph 2.7 to report non-compliance:

“All Qantas Employees must report immediately any circumstances which may involve deviation from this Code to an appropriate General Manager, Group General Manager, Executive General Manager, the General Counsel, the Chief Financial Officer, the Chief Executive Officer or the Chairman.

Any Qantas Employee concerned about possible repercussions should make their report under the Qantas Protected Disclosures Policy.

The internal and external auditors of Qantas are responsible for reviewing the operations of Qantas. Part of this review will be to report to the Board any breaches of this Code which they detect.”

The Code also says that the directors will “include reference to compliance with this Code in the Qantas Annual Report.” This statement does not express what is meant by “reference to compliance” with the Code. However, an examination should be made of annual reports over the period since 2000 to see what has been said about legal compliance. There may be evidence of misleading statements by express comments or by way of omissions. Omissions may be evidence of the absence of vigilance by the board to detect price fixing activities. At least a question should be raised of directors about their monitoring role that appeared to fail to detect the breach of the law.

There are some more statements in the Code that are worth viewing:

“4.1 The operations of Qantas **must, at all times** be conducted in compliance with all laws and regulations applicable in Australia **and** in the jurisdiction in which operations and activities are being undertaken.” (emphasis included)

4.2 Compliance with the law means observing the letter and spirit of the law as well as managing the business of Qantas so that Qantas and Qantas Employees are recognised as “good corporate citizens” at all times.”

Employees can seek legal advice internally where they are uncertain about laws. Paragraph 4.3 says:

“It is recognised that, in some cases, there may be uncertainty about which laws and regulations are applicable and there may be difficulties in interpretation. In such circumstances, Qantas Employees must seek advice from the Qantas Legal Department to ensure compliance.”

In view of the length of time of the price fixing issue, this paragraph raises issues about what the Qantas Legal Department knew of the practices. It could be reasonably suggested that it would have been possible that someone might have raised concerns and sought legal clarification. If not, then the Legal Department should be concerned about processes and procedures that did not encourage reports by employees raising concerns about the legality of certain actions by other employees. Similar issues were present in the case of AWB Limited where deficiencies of corporate governance injured the corporation¹⁰¹.

The quantity and quality of documents about corporate governance held by Qantas indicates that there is an established culture of “doing the right thing” at least in principle. But this must raise doubts about the ability of

¹⁰¹ See, Tunstall I, “The rise of severe punishment for corporate wrongdoing”, *White Paper* at www.iantunstall.com (publications).

management to know about the company's operations and the performance of employees. Also, given the board's monitoring role the directors missed the breach of the law in the United States and possibly elsewhere.

The scenario reflects similar concerns raised in relation to the National Australia Bank¹⁰² in relation to foreign exchange trading as identified in PriceWaterhouseCoopers report, *Investigation into foreign exchange losses at the National Australia Bank* (12 March 2004) that identified critical weaknesses in the integrity of the people, risk and control framework, governance and culture. The report stated:

"ultimately the Board and CEO are responsible for the culture in the organisation. The Board and CEO must accept responsibility for the 'tone at the top', and for the environment in which management did not report openly on issues in the business."

The culture in the organisation is directly linked to the corporation's responsibilities. The Qantas board has independent directors. However, the value given by these directors to make investigative inquiries of the company's performance should be questioned as it raises concerns about corporate responsibility. While the Qantas case does not point to the ability of management, the comments by the HIH Royal Commission (*The failure of HIH Insurance Vol I* at 112) should be noted:

"The board of HIH had several 'independent' directors but this provided little protection against the folly of management."

Independent directors must be diligent even in circumstances where management folly is not present. In the Qantas case the "folly" occurred with some employees that may not have involved management. However, it does raise concerns about the ability of management to know what employees are doing and to check performance. In the case of Qantas, the questions are still: who was managing the relevant employees involved in the price fixing?; what mechanisms are in place to monitor performance and did they work?

The HIH Royal Commission report, *The failure of HIH Insurance Vol I* at 118-119, raises important issues for directors in the performance of their duties to make inquiries and not be satisfied until these clarify actions:

"The effectiveness of interaction between the board, in particular the non-executive directors, and management is central to good governance. The chair's own relationship with the chief executive should set the tone for this. In a healthy company relations will be straightforward and open, with the board supportive of management's efforts where it can. But this all presupposes trust and confidence in the information and advice that is provided and in management's responsiveness to requests for information or explanation. Where trust breaks down, change is likely to be called for.

Directors have a responsibility to request more information where necessary to fulfil their duties. They cannot simply rely upon the information presented by management.

Moreover, by taking an active responsibility for the agenda, the chair can ensure that management brings forward on a regular or periodic basis reports or other information on material aspects of the company's business and performance."

The proper performance of duties in a diligent manner by directors and other officers is critical for corporate responsibility. The Qantas case shows that the corporation is held responsible for the actions of relevant employees. It would be interesting to test the Qantas matter in accordance with the common law principle discussed earlier in attributing the actions of its employees involved in the price fixing conduct to the corporation. Who would be found responsible and hence liable for the illegal actions.

The Qantas case raises concerns for the corporation's responsibility to ensure it not only complies with the law but that it remains a good corporate citizen. The corporation's reputation has been injured by the actions of employees and its financial resources will be affected by the costs of penalties and other compensation payouts. From an economic perspective Qantas is dominant in its industry. The absence of comparable airline corporations in the Australia airline industry implies that the loss to Qantas and its reputation is likely to be minimal. The tone of the Qantas media release¹⁰³, "Qantas Enters Plea Agreement with US Government", seems to support this contention. This dominance is a critical issue in allowing arrogance and contempt to be present in large corporations in Australia¹⁰⁴. These factors are evident in the manner corporations operate by the lack of effective monitoring and dealing with recalcitrant persons.

¹⁰² For a discussion of the National Australia Bank matter see Tunstall I, "Managing corporate insolvency", *White Paper* at www.iantunstall.com (publications).

¹⁰³ Media release Issued by Qantas Corporate Communication (3696) can be viewed at <http://www.qantas.com.au/regions/dyn/au/publicaffairs/details?ArticleID=2007/nov07/3696>.

¹⁰⁴ See also *Telstra Corporation Limited v The Commonwealth* [2008] HCA 7.

2. *Visy Group case*

The price fixing matter involving the Visy Group of companies was considered in *ACCC v Visy Industries Holdings Pty Limited (No 3)*¹⁰⁵. Broadly stated, the Visy Group of companies undertook pricing fixing with Amcor Limited for a period of almost five years. According to the judgment, “Visy and Amcor were the major participants in the market for the supply of corrugated fibreboard packaging (CFP) products in Australia. Between them they held over 90 per cent of that market.”

Detection of the price fixing arrangement “occurred purely by chance when Amcor’s solicitors, in the course of quite unrelated litigation, stumbled across incriminating material.” The judgment goes on to say:

“Even the present resolution may not have been reached were it not for two additional factors. First, the Commission’s immunity policy and, secondly, the fact that there were not only witnesses prepared to give evidence, but also tape recordings of damning conversations”

The connection between the corporation and its officers involved in relation to the price fixing arrangement was stated by Heerey J:

“Critical to any anti-cartel regime is the level of penalty for individual contravenors. We tend to overlook the fact that corporations are constructs of the law; they only exist and possess rights and liabilities as a consequence of the law. Heavy penalties are indeed appropriate for corporations, but it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets.”

The *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* is an outcome of the discussion by Heerey J about the appropriate penalties for corporate officers involved in breaches of the law involving contraventions of the Trade Practices Act.

The information available on the websites of the Visy corporation¹⁰⁶ and the Amcor corporation¹⁰⁷ is sketchy. However, Amcor’s Chief Executive Officer says in a news release of 16 October, 2007¹⁰⁸: “Visy and its executives have reached agreement with the ACCC in relation to the prosecution in the Federal Court”:

“The prosecution was brought after an investigation by the ACCC, initiated on the basis of information provided by Amcor. Amcor was subsequently granted immunity from prosecution and cooperated fully with the ACCC investigation.

Amcor’s Managing Director and CEO, Mr Ken MacKenzie, said: ‘Amcor did the right thing in unconditionally alerting the ACCC three years ago and then cooperating with the ACCC throughout its investigation.

‘The former Amcor executives, who were the subject of the investigations, were replaced three years ago.

‘Since then Amcor has been implementing an extensive cultural change program and undertaking, open and honest dialogue with our customers.’”

This statement summarises the situation for Amcor. However, Visy’s conduct was brought into light in *ACCC v Visy Industries Holdings Pty Limited (No 3)*. The cartel under which the price fixing arrangements occurred was, according to Heerey J, “run from the highest level in Visy, a very substantial company. It was carefully and deliberately concealed. It was operated by men who were fully aware of its seriously unlawful nature.”

Heerey J made the following comments about Visy’s corporate culture in relation to compliance with the Trade Practices Act:

“The corporate culture of Visy in relation to its obligations under the Trade Practices Act was non-existent. None of the most senior people hesitated for a moment before embarking on obviously unlawful conduct. There was in evidence a Visy document entitled “Trade Practices Compliance Manual” dated February 1998. It was signed by Mr Pratt. It bears a distribution list, signed by Mr Debney, with the names of 50 or so personnel covering every State and Head Office. On the front cover it is said:

This is an important document. It is essential that it be read and understood by you.
Visy Industries requires strict compliance with its policy on the Trade Practices Act.

¹⁰⁵ [2007] FCA 1617.

¹⁰⁶ <http://www.visy.com.au/>

¹⁰⁷ <http://www.amcor.com/>

¹⁰⁸ http://www.amcor.com/about_us/media_centre/news/pr_07_10_3.html.

The document includes the stern warning that price fixing and market sharing are “strictly prohibited” and that readers of the document “must never make (such) arrangements with a competitor”. Further, it is said Visy personnel

should avoid all contact with competitors or their employees other than contact approved by senior management or Visy Industries’ Legal Counsel. All necessary contact with competitors should be conducted in formal settings.

I doubt that Westerfolds Park and the Cherry Hill Tavern could be regarded as formal settings. The Visy Trade Practices Compliance Manual might have been written in Sanskrit for all the notice anybody took of it.”

The role of Visy’s Legal Counsel should be questioned in the light of the requirements for contact with competitors over a long period of time (almost five years). What did the Legal Counsel know or should have known in the circumstances. Visy has a document on its website called, “Improper Conduct Control & Complaints Handling: Policy & Procedure”, Ref: 203415394 of October 2007¹⁰⁹. It says that Visy is committed to conducting its business “in a professional lawful and ethical matter”. There seems to be a typographical error here. The statement also says:

“As a general rule, any employee that engages in improper conduct and, in particular, fraud or corruption in the course of his/her normal duties is likely to be summarily dismissed.

The purpose of this Policy is to encourage the reporting of improper conduct (including potentially fraudulent and corrupt conduct) by employees, suppliers, customers and other third parties.”

The policy statement is thin on information and very succinct. It is written in the English language. The policy says that it will be “regularly reviewed by the Legal Department and the Head of Internal Audit & Risk Management.” It is also interesting to note the lack of employee training anticipated by changes to the policy. The statement says that “where changes occur, a formal communication will be issued to all employees advising of the changes.” It says nothing further about this communication or what will occur in relation to new employees. The culture referred to by Heerey J seems little changed.

In relation to Mr Pratt’s conduct, Heerey J says:

“While Mr Pratt’s conduct, as revealed in the statement of agreed facts, was limited to the one meeting with the Amcor CEO at the All Nations Hotel, that was of major importance to the operation of the cartel. It would not be expected that somebody in his position would get involved in the day to day running of the cartel, like Mr Debney or, to a greater extent, Mr Carroll. Yet he gave his personal sanction to this obviously unlawful arrangement and an assurance of its continued operation. It would not have continued without his approval.

In a public statement which went out to Visy staff and customers over Mr Pratt’s name as Chairman of the Visy Group on 8 October, and after it had become public knowledge that the respondents would admit liability, it was said:

Visy takes its obligations under the TPA very seriously. The company deeply regrets what happened and its poor appreciation of the complexities and application of the various provisions.

Later in the statement it is said:

Visy’s actions were motivated by a desire to take advantage of our competitor.

This appears to be an attempt to revive Visy’s defence which, for the reasons already stated, I think to be quite without merit. In any case, the statement is hardly consistent with a frank admission of wrongdoing.”

Looking at the policy statement and this assessment by Heerey J about Visy’s culture and the conduct of Mr Pratt in avoiding a direct expression of wrongdoing, it seems that Visy has not put in place a proper risk management strategy to avoid future wrongdoing and criminal activity. The lack of transparency displayed by Visy to publish policies seems to support this view.

¹⁰⁹ http://www.visy.com.au/uploads/Improper_Conduct_Control_&_Complaints_Handling.pdf.

Trade Practices Act 1974

Section 84

Conduct by directors, servants or agents

- (1) Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 46 or 46A or Part IVA, IVB, V, VB or VC applies, 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;
 - (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.
- (5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.

What the courts have said:

"s 84(2) requires that the conduct in question be engaged in 'on behalf of' the corporation. It requires as well that the conduct be engaged in by a director, servant or agent of the corporation or by any other person at the direction or with the consent or agreement of a director, servant or agent of the corporation, within the scope of their authority, actual or apparent. Perhaps what seems a double requirement of agency ensures that there is emphasised that the conduct be undertaken by someone who is able to and does undertake it on behalf of the corporation. The opening words are, as counsel for the ACCC suggests, the touchstone for determining the reach of the deeming provision and the words 'director, servant or agent' signify persons who represent the body corporate: *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 at 739-740. The purpose of the section is to attribute liability to a body corporate for the acts of others. It is intended to facilitate proof of corporate responsibility beyond the position which would otherwise obtain at common law: *Walplan Pty Ltd v Wallace* [1985] FCA 479; (1985) 8 FCR 27 at 36-38. [see also comments in *Houghton v Arms* [2006] HCA 59]

...

in the context, the reference to 'agent' in s 84(2) is not a reference to a person who, contractually, has power to bind the corporation. It is a reference to a person who acts on behalf of the corporation and in so doing is clothed with actual or apparent authority. The word "agent" is used in the law in a variety of ways: see *Nottingham v Aldridge* [1971] 2 QB 739 at 751."

Australian Competition & Consumer Commission v The Maritime Union of Australia [2001] FCA 1549 (5 November 2001)



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