Australian Law Reform Commission
Inquiry into Corporate Criminal Responsibility
Discussion Paper 87

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1. Attribution and the Challenges of Regulating Serious Corporate Misconduct

(a) Response to Proposal 8 for a Single Corporate Attribution Rule

The Discussion Paper rightly identifies (in Chapter 3) the remarkable complexity and incoherence in our statutory landscape on the issue of criminal and civil corporate liability for serious misconduct, which severely undermines the efficacy of ongoing efforts to regulate corporate wrongdoing. This complexity encompasses and undermines the swathe of statutory attribution rules that seek to ameliorate or depart from the common law rules of attribution. For this reason, I am broadly supportive of the introduction of a single attribution rule and, further, consider that the proposed model presented in Chapter 6 has some positive features. It is no doubt true that building on the 'TPA model' retains some consistency with widely-adopted statutory practices. It is also strongly arguable that the 'corporate culture' attribution provisions contained in s12.3(2) of Part 2.5 of the Criminal Code contain potentially important and innovative approaches to address embedded corporate practices that are inherently apt (and in that sense calculated or designed) to foster misconduct. The approach embedded in those provisions of taking corporate structures, processes and policies seriously for the purposes of assessing corporate conduct appears to be highly appropriate and well-adapted to the reality of modern, complex corporations. Here, the notable lack of authority on the interpretation and operation of the corporate culture provisions is likely attributable to (1) small numbers of corporate prosecutions, (2) the widespread and unexplained legislative practice of excluding these provisions from relevant statutory regimes and (3) the practical difficulties faced by plaintiffs in extracting the necessary information and evidence required to establish the internal structures, policies and processes of defendant companies. In that context, Proposal 12.2 in respect of attribution of physical elements of an offence, which couples the TPA-based deeming provision with a 'due diligence' defence that places the onus on the defendant to address such matters, deals appropriately with (2) and (3) in particular.

Turning to the 'state of mind' attribution proposal under 12.3 DP, it is notable that, as under the existing Part 2.5 of the Criminal Code, the proposed second limb of the attribution rule places the onus on the plaintiff to prove that the defendant corporation has 'permitted' or implicitly authorised conduct, and that this would again bring in considerations of the defendant's corporate culture. Before addressing the matter of onus, I submit that, as a general matter, using corporate culture-focussed provisions to identify corporate 'states of mind' aligns much more closely with the realities of modern complex corporations than the TPA and 'identification' attribution models. With some minor exceptions, the latter ultimately require identification of one human repository of the requisite knowledge or state of mind. For this reason, they are routinely confounded by the dispersed lines of authority, staff turnover, knowledge silos and fragmented task responsibility that characterise many corporate business models. Indeed, as explained further below, it is arguable that these attribution rules actually encourage corporate structures that disperse knowledge and responsibility. By contrast, the corporate culture provisions have the potential to prevent corporations from sheltering behind the veil of ignorance created by their own business models and design and promote responsible institutional designs. And as the ALRC notes, such provisions recognise corporate or organisational fault, which is appropriate where it is the corporation's culpability which is the focus or gist of the law's prohibition.

However, as mentioned earlier, placing the onus on the plaintiff to prove the defendant's corporate culture, as does the current proposal 12.3, will prove a significant hurdle to plaintiffs in practice and may push plaintiffs towards the alternate, TPA-based first limb (of attributing the state of mind of the corporation's 'associates' to the corporation). The danger is that, once again, the potential of the corporate culture approach will be lost or minimised and we will again be left, effectively, with the TPA-style attribution model.

It would be possible to take a more radical but still principled approach to the issue of corporate criminal culpability, which would also overcome the current problems of onus of proof. This is to make the corporation liable for its contravening conduct, objectively assessed, and then to place the onus on the corporation to bring evidence of its positive corporate culture by way of defence. That is, corporate liability could be prima facie strict but subject to defences, which would include a due diligence defence that incorporates corporate-culture style considerations. This is far from unknown to Australian law. Similar models of liability are found in the National Consumer Credit Protection Act 2009, for example, which stipulates many offences of strict liability counterbalanced by process- and standard- driven defences. (It is understood that, on the ALRC's approach, whether these would remain criminal offences would be a question for further review, in light of its recommendation that there be a recalibration of corporation regulation between civil and criminal offences. Whether specific, process-driven defences should be retained or replaced with a more generic due diligence defence is a further issue).

Objections that this model of liability deviates from core principles of criminal liability that require proof of a guilty mind, and that it blurs the line between criminal and civil liability, arguably have far less weight when applied to corporate defendants than natural individuals. Under the ALRC proposals, criminal liability will be restricted to the most egregious forms of misconduct, or flagrant and repeated forms of civil misconduct. Corporations are not subject to imprisonment and the proposed, broader forms of penalty (which appear appropriate and adapted to promote compliance) remain economic in nature. Finally, and most significantly, corporations do not possess natural or innate states of mind. This reality underpins the long and tortured history of the law's efforts to develop principled, artificial rules of attribution. Taking that reality seriously enables us to appreciate that corporate liability should not be human liability transferred, but corporate liability proper, developed for the reality of the corporation.

Clearly, this alternative liability method potentially requires more far-ranging changes and reform than is possible within the Commission's current time-frame. However, I set down in the following section some of the more detailed reasons that support this more radical approach. As will be appreciated from that discussion (and statutes such as the NCCPA, identified above), there are signs elsewhere in our common law, equitable and statutory landscape of a shift to an objective assessment of corporate misconduct and it would be a pity for the current proposals to operate as a brake on that development.

(b) Reasons supporting a fresh approach to corporate liability

The origins of state of mind requirements

In order to understand the scope of the problem of corporate attribution, it is worthwhile noting the route taken by courts seeking to regulate serious corporate misconduct. As my expertise lies in civil law, I use the examples of serious civil misconduct, but similar underlying patterns of development and, consequently, problems of attribution are no doubt also present in the criminal sphere, with which tort law in any event has long overlapped. As we will see, the ongoing issues with corporate attribution in the civil sphere largely arise from the rigorous criteria adopted by courts to ensure that the severe stigma and punitive consequences that historically attached to findings of civil fraud were merited as a matter of personal culpability. While no doubt even greater rigour is warranted in the criminal sphere (including in the case of corporation) due to its even greater condemnatory and retributive force, I consider that the ALRC is right to see regulation of corporate misconduct across a spectrum of seriousness, through criminal, civil and administrative tools. Indeed, as the ALRC notes, it is impossible to achieve any form of effective regulation of serious corporate misconduct without also considering the civil sphere and so it is appropriate to consider the neighbouring civil law context.

As is well-known, common law torts such as deceit, injurious falsehood, passing off, and rescission for fraudulent misrepresentation, all developed to address various manifestations of commercial fraud. Equitable fraud provided relief where common law fraud could not be proven. It comprises a wide array of doctrines including misrepresentation, unconscionable dealing, undue influence, pressure, estoppel, knowing receipt and assistance and breach of fiduciary duty. Initially, this combination of laws provided significant protection against commercial fraud, imposing major remedial and reputational costs on wrongdoers. Regrettably, they now operate to undermine efforts to regulate serious corporate misconduct, for reasons we will now outline.

The roots of these doctrines go back to the 14th-18th centuries in England. While the doctrines aimed to regulate serious commercial wrongdoing, courts were also concerned to protect natural individuals from unmerited and overly crushing personal and often criminal liability (PM Eggers, *Deceit: The Lie of the Law* (Informa Law, London 2009) Ch 1). Thus, courts demanded clear evidence of high levels of personal culpability on the part of defendants accused of fraud. As for crime, the defendant must be shown to have a guilty state of mind. Initially, this approach did not overly undermine the regulation of corporate misconduct. These were the days of rogues and one-man companies, when corporate and personal liability went hand in glove. That no longer is the case. Modern corporations are often massive, massively complex, multi- and trans-national institutions that sit within a web of related entities. Notwithstanding, Australia's laws that seek to control corporate fraud and predatory conduct continue to reflect their ancient heritage. For example, the tort of deceit requires that the defendant has made a misrepresentation knowingly or recklessly, intending to induce reliance on the part of the victim (*Magill v Magill* [2006] HCA 51, (2006) 226 CLR 551). Similar, stringent requirements of personal culpability characterise some doctrines of equitable fraud. Thus the High Court decision of *Kakavas v Crown Melbourne Limited* [2013] HCA 25, 2013) 250 CLR 392 [165] recently held that unconscionable conduct in equity requires proof of a predatory state of mind on the part of corporate defendants in

commercial transactions. Such requirements have in turn influenced the interpretation and operation of related, modern statutory prohibitions. Thus in the prohibition on 'misleading or deceptive' conduct contained in s18 ACL and parallel regimes, the 'deceptive' limb of liability points to a fraudulent state of mind, as for deceit. Likewise, under s20 of the ACL and equivalent provisions, the prohibition on unconscionable conduct expressly adopts the definition of misconduct 'within the meaning of the unwritten law' (that is, pursuant to judge-made law rather than legislation). Hence, courts have held that it bears the onerous requirements of the equitable doctrine. The statutory attempts under s21 and equivalents to avoid the limits of this 'unwritten law' are discussed below.

The development of attribution rules to address corporate wrongdoing

The traditional focus on a fraudulent or highly culpable state of mind, developed in the quite different context of protecting natural persons from crushing personal liability, has made proving fraud against corporations hugely complex, expensive and often impossible (Bant, 'Three Simple Steps to Fix Our Banks' *The Conversation* 1 October 2018). As the Discussion Paper notes, the history of statutory and general law attempts to 'attribute' individual instances of human intentions and knowledge to the artificial person, the corporation, have not been very successful. Initially, courts denied outright that a corporation, as an artificial person, could be capable of a dishonest state of mind (*Addie v Western Bank of Scotland* (1867) LR1 HL1 Sc 145). This changed in *The Citizens Life Assurance Company Limited v Brown (New South Wales)* [1904] AC 403, which accepted that the intentions and knowledge of human agents of a company could be attributed to the company. However, courts went on to adopt very restrictive rules of attribution, usually looking for the company's 'directing mind and will' (eg *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705). More recently, courts have accepted that non-directors may satisfy this rule, and that the process of attribution must reflect the substantive rules of the general law or statute and the mischief or policy they aim to address (*Meridian Global Funds Management Asia Ltd v The Securities Commission Co* [1995] UKPC 26, [1995] 2 AC 500. 91. As Beach J has recently stated in *ASIC v Westpac Banking Corp (No 2)* [2018] FCA 751, (2018) 357 ALR 240, the 'appropriate test is more one of the interpretation of the relevant rule of responsibility, liability or proscription to be applied to the corporate entity. One has to consider the context and purpose of that rule.' We return to this point below, when considering whether rules concerning statutory and general law standards of conduct should retain a 'mental' element, when concerned with regulating corporate misconduct.

Even with these evolutions in general law theories of attribution, and accompanying statutory reforms such as s84 TPA, it remains very difficult to 'connect the dots' between the states of mind of multiple associates of a company, all working on some shared task but carrying out independent actions or roles. In theory, it would be possible for the law to 'aggregate' the knowledge of associates who, individually, know of some act or practice but fail to appreciate that it forms part of broader misconduct. However, this has largely been rejected by courts (see in particular *CBA v Kojic* [2016] FCAFC 186, (2016) 249 FCR 421, [101][11]-143] (Edelman J, with whom Allsop CJ generally concurred)). Statutory attribution rules (such as s84 TPA), which were introduced to broaden the common law rules, may in some aspects have operated to narrow them and may impede development of any theory of aggregation (see discussion in *Kojic* [110]-[111] (Edelman J) but cf [65] (Allsop CJ) and [81] (Besanko J)).

The ramifications of the current state of play

In considering the way forward, it may also be helpful observe a number of practical ramifications of the current, toxic combination of the mental elements of fraud and the rules of attribution. One of the most striking is that most claims in respect of 'misleading or deceptive conduct' under the ACL and

parallel legislation focus on the 'misleading' limb of the statutory prohibitions (Bant, 'Fees for no service' *The Conversation*, 19 September 2018 and 'Three Simple Steps'). Liability under this first limb is strict: knowledge, intention or fault is irrelevant. This means that it is relatively easy to prove against corporate defendants. By contrast, Eggers (Preface, xii) reports that deceit claims in the UK rose steeply between 2001-2008, more than doubling in volume from the highest peaks over the preceding 200 years. While the causes of this divergence require further investigation, the comparison suggests that Australian regulators and victims have shifted to rely heavily on the law's prohibitions on misleading (as opposed to deceptive) conduct because of our attribution hurdles.

While this regulatory shift may appear a sensible and positive development, the loss of litigated cases of fraud (let alone criminal prosecutions, as noted in the Discussion Paper) from the Australian legal landscape must have serious consequences for deterrence. Studies into corporate responsibility suggest that traders' perceptions of the reputational risks of misconduct are key to deterring corporate misconduct (see eg C Parker and V Lehmann Nielsen, 'How Much Does It Hurt?' (2008) 32 *Melbourne University Law Review* 554). Even when fraud cannot be proven, simply commencing proceedings alleging fraud may have reputational impact on defendants. By contrast, 'misleading' conduct can be entirely innocent, accidental or even reasonable and hence offers considerable scope for excuse. Consistently, corporate officers appearing before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Commission) were quick to characterise their corporation's misconduct as involving 'mistakes', to apologise and to promise reform (Bant, 'Misleading Conduct? So What!' *Pursuit* 25 September 2018; Bant 'The Buck Stops Here: Holding Banks Responsible for Dishonest Conduct' *Pursuit*, 5 February 2019). As the Discussion Paper notes, where the reputational risk is low, corporations will continue profitable patterns of misconduct and, one might add, show contempt for regulators and the rule of law. Further, Australian courts have been loath to award significant penalties unless deceptive or highly culpable behaviour is clearly proved (JM Paterson and E Bant, 'Intuitive Synthesis and Fidelity to Purpose?: Judicial Interpretation of the Discretionary Power to award Civil Penalties under the Australian Consumer Law' in P Vines and S Donald (eds) *Statutory Interpretation in Private Law* (Federation Press, Leichhardt 2019) 154-184). Again, this has serious implications for deterrence. Finally, diffusion and displacement of responsibility are key conditions that foster organisational cheating (D Rhode, *Cheating: Ethics in Everyday Life* (Oxford University Press, Oxford 2018) 47). The current laws of fraud and attribution arguably invite corporations to adopt policies and processes that disperse knowledge and hence responsibility, sheltering them from liability behind a structured veil of ignorance and providing the perfect breeding ground for fraud. The usual regulatory response to this strategy has been to require educative programs for employees, to reduce the risk of individual fraud, or to require mandatory disclosure and self-reporting of misconduct, which implicitly demands better information sharing processes. The new BEAR regime may be another step towards combatting this in the statutory context. However, it remains unclear whether that will be effective and, in any event, currently applies in limited contexts only.

Similarly to deceit, for many years, Australian regulators have refrained from alleging statutory unconscionable conduct 'within the meaning of the unwritten law' because of the stringent requirements of personal culpability underpinning the equitable doctrines (The Senate Standing Committee on Economics, 'The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974' December 2008 [3.8]). Reinforcing these difficulties, as noted above, the High Court decision of *Kakavas* held that unconscionable conduct in equity requires proof of actual knowledge and predation of disadvantage by corporate defendants in commercial transactions. This has the potential to seriously undermine the deterrent effect both the equitable doctrine and related statutory prohibitions (R Bigwood, '*Kakavas v Crown Melbourne* - Still Curbing

Unconscionability' (2013) 37 *Melbourne University Law Review* 463) and reinforces the currently weak regulation of corporate misconduct noted above.

(c) Shifting to more objective liability models

Against this background of ineffective regulation of corporate fraud, Bigwood (2003, 501) and Paterson (JM Paterson, 'Unconscionable bargains in equity and under statute' (2015) 9 *Journal of Equity* 188, 197) have made powerful arguments that unconscionable conduct in equity is more nuanced than *Kakavas* suggests and extends to 'transactional neglect'. On their analyses, it is unconscionable for a stronger party to take the benefit of a transaction where (1) it had access to information that should have alerted it to the inability of the weaker party to protect her interests and (2) failed to take any precautions to safeguard those interests. Paterson ('Unconscionable Bargains', at 205) notes that courts have not applied the requirement of a predatory purpose to claims of statutory unconscionability, looking instead for conduct that contravenes objective standards of fair dealing. In an example of the potential 'gravitational influence' of statute on common law, she suggests that courts should be alert to these statutory principles when considering the content and operation of the equitable doctrine. With Brody (JM Paterson and G Brody, '"Safety Net" Consumer Protection' (2015) 38 *Journal of Consumer Policy* 331), Paterson has further explored a range of objectively predatory business models that have been found to be 'unconscionable' without requiring proof of actual knowledge or subjective predatory intention by the defendant. Finally, recent amendments to s21 ACL and equivalents have clarified that its prohibition on unconscionable conduct in the supply of goods or services apply to 'a system of conduct or pattern of behaviour'. While not purporting to address the specific corporate 'state of mind' and attribution issues identified in the Discussion Paper, these arguments and amendments provide guidance for developing alternative and more effective models of corporate liability, which assess the objective quality of corporate misconduct against the proscribed legislative and general law standards, rather than through the prisms of an artificial culpable or predatory corporate state of mind.

As discussed in the opening section, given the difficulties around corporate attribution, one direction for future reform might be to take seriously the original position taken by the courts, which was that as artificial entities, corporations lacked 'minds,' and instead focus on the objective quality of the conduct of corporations. This would accord with the regulatory shift in core prohibitions such as s18 ACL, which allow regulators to act where conduct is 'likely to mislead or deceive', without proof that it has had that consequence or led to any instance of actual defendant harm. It would also reflect the introduction of s21 'system of conduct' provisions into the ACL. The legitimate objective here is to regulate behaviour that has an inherently harmful tendency, in order to promote fair trading practices and consumer protection.

On this approach, offences requiring dishonesty, for example, would focus on the objective quality of the corporation's conduct. This is not without precedent. As the New South Wales Court of Appeal stated in *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266, (2014) 87 NSWLR 609 [124] (Leeming JA, Barrett and Gleeson JJA concurring): 'Dishonesty amounts to a transgression of ordinary standards of honest behaviour. It is not necessary to say anything else by way of elaboration, save to confirm that it is not necessary to demonstrate that the person thought about what those standards were.' Likewise in *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* [2018] HCA 43, Kiefel CJ, Keane and Edelman JJ stated (in the context of an equitable claim of knowing assistance in a breach of fiduciary duty) at [71]:

> [P]articipation in a dishonest and fraudulent breach of fiduciary duty includes knowingly assisting the fiduciary in the execution of a "dishonest and fraudulent design" on the part of the fiduciary to engage in the conduct that is in breach of fiduciary duty. The requisite element of

> dishonesty and fraud on the part of the fiduciary is met where the conduct which constitutes the breach transgresses ordinary standards of honest behaviour [citing *Hasler*].'

It is also consistent with the rejection by the High Court of Australia in *Peters v R* [1998] HCA 7, (1998) 192 CLR 493 of an alternative, dual test of objective and subjective dishonesty, whereby the acts in question must be dishonest according to current standards of ordinary decent people and that the accused must have realised that they were dishonest by those standards (*Gosh* [1982] EWCA Crim 2; [1982] QB 1053). It is also consistent with the amended definition of dishonest in s9 Corporations Act, by which 'dishonest means dishonest according to the standards of ordinary people'. Finally, it is reflective of the strongly objective approach to dishonesty emphasised by Commissioner Hayne as a necessary step to holding corporations accountable for serious misconduct: see eg his discussion of 'Fees for No Service', Final Report pp136-157, discussed in Bant 'The Buck Stops Here').

While dishonesty in the context of natural defendants (such as directors, through accessorial liability, for example, or in the context of defences) may well still require some mental element, for example that the conduct in question was intentional (rather than produced as a result of some psychotic episode or while sleepwalking) or that the defendant knew that relevant information was false, it is unclear that this should be necessary for corporate liability. Corporate conduct is unlikely to be unintentional in any relevant sense and it should not be necessary to attribute individuals' knowledge to the company, for the reasons discussed earlier. Rather, the focus of this form of regulation would be on the quality of conduct, not on some artificial mental state.

This approach could be coupled with a corporate due diligence defence, of the kind recommended.

(d) Returning to the corporate state of mind

Although I would favour jettisoning fictional concepts of corporate state of mind entirely, currently, such ideas underpin or inform a range of different rules and principles across corporate and commercial law, including trusts (through the advent of the trading trust, for example) and general law principles dealing both the conditions for prima facie liability, defences, potentially some principles guiding civil penalties (see Paterson and Bant, 'Intuitive Synthesis' and the proposed 'Sentencing factors', which refer, for example, to whether the corporation ceased the unlawful conduct 'voluntarily' and promptly upon its 'discovery' of the misconduct.) While these are not insurmountable barriers to adopting a more consistent, objective approach to corporate culpability, where they exist, the 'system of conduct' provisions under s21 ACL and the corporate culture provisions could be seen as providing a platform for more robust approach to ascertaining the corporate mind, through identification of its (implemented or real-life) policies, practices and processes.

Here, it is unclear whether the current proposals for corporate attribution are intended to be comprehensive across common law, equity and statutory doctrines and rules. But even if they are not, as broad-ranging expressions of core statutory principle and public policy, they may come to exert a gravitational influence on related statutory and general law doctrines: see E Bant, 'Common Law and Statute: Interaction and Influence in Light of the Principle of Coherence' (2015) 38 *University of NSW Law Journal* 362. Embedding the corporate culture provisions within the single attribution rule may, in that context, have an overall positive effect on general law evolution.

It may also be worthwhile considering more robust approaches to corporate attribution of 'state of mind', for example deeming intention subject to a corporate culture defence, so that the onus falls on the defendant corporation to establish the fact of its implemented policies, no doubt encouraging the development of a more reasoned jurisprudence on corporate state of mind through the courts.

2. Sentencing Factors

(a) Profit as a factor in setting penalties

Professor Paterson and I have engaged in detailed analysis of the civil penalties jurisprudence: see 'Intuitive Synthesis'. As will be seen, that work supports the ALRC's proposal to include the defendant's profit obtained as a result of the misconduct as a factor in setting criminal and civil penalties. This is captured by Proposals 13 and 14: 'any advantage realised by the corporation as a result of' the misconduct. Taking into account the advantage obtained from wrongdoing into account is required in order for penalties to be set at a level that is effective for both specific and general deterrence. And the traditional judicial emphasis on compensatory considerations in setting penalty levels means that explicit mention of profit may be important in guiding judicial discretion.

I assume that the proposed changes are intended to replace the new penalties regime introduced in 2019, pursuant to the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019, by which penalties are set by reference to multiples of 'advantage', among other formulae: see, eg, the new s12 GBCA ASIC Act. If correct, it would be beneficial in the final report to address the benefits to be obtained from reverting to a more discretionary model, which builds on the body of jurisprudence known as the 'French factors'. This discretionary and open-ended approach is juxtaposed to the formula-based criteria adopted in the new penalty provisions. Further explanation is particularly appropriate given that the new provisions are the result of extended enquiries and submissions on the role of penalties. Some degree of coordination between the reforms would therefore be helpful. I note, in that regard, that the new amendments require a degree of interpretation of critical concepts such as 'advantage' and causation, in which judicial discretion will have a role to play.

(b) Punishment as a consideration in setting penalties

Professor Paterson and I have previously argued for express statutory recognition of the legitimate role of punishment in setting both criminal and civil penalties. As we have explained, courts already taken into account ideas of punishment and retribution in the civil penalties context, but only as exculpatory factors (for example, through general law conceptions of proportionality, repentance, contrition and cooperation.) Consistently with this view of the necessary for and legitimacy of punitive considerations, Commissioner Hayne in his interim report emphasised the need for public denunciation and punishment of egregious wrongdoing. Here it may be observed that, as the Discussion Paper notes, civil penalties bear much of this expressive and deterrent burden.

In the civil context, however, the role of punishment may be best understood through Professor Kit Barker's novel and useful insight that it is necessary to distinguish between punitive aims and effects: K Barker, 'Punishment in Private Law: No Such Thing (Any More)?' in E Bant, W Courtney, J Goudkamp and J Paterson (eds), *Punishment and Private Law* (Hart Publishing, Oxford 2021) (forthcoming, available on request). Adopting that insight, it is clear that civil pecuniary penalties must be set at a level that hurts and cannot be subsumed as a mere cost of doing business. The penalty must feel like punishment, in order achieve the civil aim of deterrence.

In considering how to set penalties at this optimum level, and assuming the proposed discretionary model is adopted over a more formula-driven approach, it is helpful to consider the insights that might be drawn from the neighbouring general law context. Not only does this take advantage of the body of learning developed over extended periods in analogous contexts: it also helps to promote a more coherent legal system in which misconduct is treated consistently and according to well-defined principles. Here, it may be thought that civil penalties are peculiar to the statutory context, so that the common law will have little to offer. However, there is of course a well-developed exemplary damages

jurisdiction at common law and a sophisticated 'disgorgement' jurisdiction in equity, by which defendants may be required to account for and pay over the value of advantages enjoyed as a result of wrongdoing. The latter jurisdiction is of particular interest and relevance here. While equity's aim is avowedly deterrent only, it employs a number of legal strategies that have the undeniable consequence of making the deterrent remedy sting in a manner strongly reflective of the degree of defendant culpability and functionally consistent with proportionate punishment. It is possible to draw on these principles to give further guidance to the statutory criteria for civil penalties conducive to effective deterrence.

(c) Lessons from the account (and disgorgement) of profits

Causation

The High Court's most recent contribution to this jurisprudence is in *Ancient Order of Foresters*, a case involving corporate accessorial liability for 'knowing assistance'. As Kiefel CJ, Keane and Edelman JJ explained at [7], the equitable 'liability to account and to disgorge benefits encompasses "any benefit" received by the knowing participant in a breach of fiduciary duty "as a result of" that participation'. The requirement that the profit be of 'as a result of' wrongful participation raises a question of 'causation or contribution' (at [9]). Importantly, while a 'but for' cause will suffice, the plurality considered that it is also the case that (at least where dishonest conduct is involved) it will be sufficient that the misconduct was 'an inducement' (or a factor) in bringing about the profits, even if there are other factors. This 'a factor' test is more generally appropriate in profit-stripping cases than the 'but for' test, as explained in 'Intuitive Synthesis' at 167-169: see also Bant and JM Paterson, 'Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law' (2017) 24 *Torts Law Journal* 1. It removes the opportunity for wrongdoers to allege wholly speculative iterations of 'but for reasoning' that plaintiffs, here bearing the onus, must negate as a condition of recovery. A further benefit of the 'a factor' lest is that reflects the approach taken for recovery of compensation for loss or damage suffered 'because of' misleading conduct under statute (*Henville v Walker* (2001) 206 CLR 459) and for economic torts such as deceit (*Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483; *Gould v Vaggelas* (1984) 157 CLR 215, 236, 250-51). On this approach, compensatory and profit-stripping principles align.

Setting a ceiling on the award: onus and remoteness principles for profit-stripping

Causation is not the exhaustive criterion for an award of disgorgement of profits. A ceiling must be found so that the award does not stray from deterrence into disproportionate punishment. On the other hand, we have seen that the award must sting to be effective. Equity manages this delicate balance through onus and remoteness or scope of liability considerations.

As the plurality in *Lifeplan* explain (at [13]):

> While it is true that equity will not require an errant fiduciary or a participant in a breach of fiduciary duty to account for an advantage which the breach of fiduciary duty has not caused or to which it has not sufficiently contributed, where causation is sufficiently established the onus is upon the errant fiduciary or participant to show that he or she should not account for the full value of the advantage.

That is, there is a reversal of onus, onto the defendant wrongdoer, to explain why all the profit attributable to the breach should not be disgorged. This is a useful and interesting strategy, from the perspective of broader regulation of egregious corporate wrongdoing. The plurality further state (at [13]-[15]):

> That onus is not discharged by mere conjecture or supposition giving the benefit of the doubt to a proven wrongdoer. The requirement of proof conforms with the obligation of a party charged with a breach of fiduciary duty to show why the full value of an advantage obtained in a situation of conflict of duty should not be disgorged**.**
>
> There are two ways in which the wrongdoer might discharge that onus and reduce the extent of the liability to disgorge profits. The first way, which can involve notorious difficulties in attribution of costs, is by proving his or her entitlement to an allowance for costs incurred, and labour and skill employed**…**
>
> The second way, which was the focus of this appeal, is by demonstrating that the benefit or advantage is beyond the scope of the liability for which the wrongdoer should account for profits. A wrongdoer might prove that some profit or benefit is beyond the scope of liability for which he or she should account if the profit or benefit has no reasonable connection with the wrongdoing.

In determining whether the profit had 'no reasonable connection', the plurality considered that *intended* profit could not be too remote (at [16]), a view we note that is again consistent with the remoteness principles applicable in deceit, where the plaintiff may recover all intended and direct losses caused by the misconduct.

Moreover, their Honours held (at [23]) that profits could and, in that case, should extend to those *yet to be made*, citing (among others) Millett LJ in *Potton Ltd v Yorkclose Ltd* [1990] FSR 11, 15**:**

> Unrealised profits are actual profits. Profits are made when they are earned, recognised when they are brought into the accounts, and realised when they accrue, that is to say when a legal right arises to receive payment. As a matter of ordinary accounting practice, profits are seldom recognised before they accrue, but this is a matter of prudence only; in a proper case they may be recognised before they accrue. Whether or not recognised, however, they are not profits which could or should have been made or which are merely capable of being made, but profits which have actually been made though not yet realised."

Justice Gageler, agreeing in the result in a separate, reasoned judgment, emphasised that determining the amount of the profit is ultimately a normative question (a matter of evaluative judgment, not merely factual causation), achieved by reference to a range of factors:

> Factors which might bear on the judgment to be made in an individual case cannot be catalogued exhaustively in advance. They will include the relative extent to which other causes which might include the skill and industry of the defendant can be assessed as having contributed to the benefit or gain that is causally connected to the breach of fiduciary obligation. They will also include whether, and if so to what extent, the defendant's gain reflects uncompensated loss on the part of the plaintiff. And although the purpose of the remedy is not to punish, consideration of what is just in the context of the equitable obligation to be vindicated by the remedy cannot exclude consideration of the severity of the breach of the fiduciary obligation and the extent of the defendant's own involvement and culpability in it. The judgment to be made must accommodate the stringency of the equitable obligation to be vindicated to the need to ensure that the remedy is not "transformed into a vehicle for the unjust enrichment of the plaintiff.

Cf Nettle J at [179].

All of this goes to show that equitable principles designed to effect deterrence suggest that profits or 'advantage' should extend to future profits, the onus should lie on the defendant to show why the whole amount so identified as 'resulting from' the breach should not be disgorged and that this approach aligns with principles applicable across the general law, for example in deceit and breaches of intellectual property torts.

Some points to consider that arise out of this discussion, is whether the proposals should be amended to bring the cited factors closer into alignment with existing general law principles concerned with deterrence, and to include express reference to the legitimate role of proportionate punishment in effecting deterrence. However, the discussion also raises the important question of where these sorts of guiding principles are best located. This is a question of statutory design, the final issue to which I now turn.

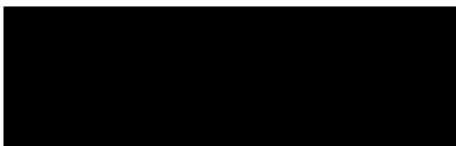
(d) Statutory design and the use of 'soft law guidelines'

The Discussion Paper has identified the clear need for simplification in the context of the current labyrinth of statutory and general law regulation of serious corporate misconduct. A key step in finding a pathway out of the current regulatory thicket arises from the evident value to all parties affected by the statutory regime of having clear and accessible guidance about its application. As Professor Paterson and I have noted elsewhere (E Bant and JM Paterson, 'Statutory interpretation and the critical role of soft law guidelines in developing a coherent law of remedies in Australia' in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU epress 2017) 30 and E Bant and JM Paterson, 'Misleading Conduct before the Federal Court of Australia: Achievements and Challenges' in P Ridge and J Stellios (eds) *The Federal Court's* Contribution *to Australian Law: Past, Present and Future* (Federation Press, Leichhardt 2018)), the recent Australian experiment of embedding detailed illustrations of the content and operation of the overarching norm against misleading conduct in a myriad of more particular provisions has not made their content more accessible or certain.

A better route may be to explore the role of soft law guidelines, expressed in plain English, located outside the body of statute. Soft law guidelines offer at least three benefits. First, they promote access to justice by enabling lay stakeholders to understand, in a broad sense, their potential rights and liabilities under the statutory scheme, without the need to resort to costly, uncertain and time-consuming litigation or dispute resolution. Secondly (and relatedly), soft law guidelines promote the 'self-execution' of key statutory schemes, allowing parties more easily to assess where they stand, encouraging compliance and in turn promoting the protective purpose of the statute. Finally, the publication of soft law guidelines would allow courts to identify, review and correct shared conceptions of the operation of key statutes, as these are enunciated in the guidelines, thereby promoting coherence in the application of the law both within and outside curial proceedings, and across jurisdictions.

This option may be relevant when considering, for example, the balance of benefits to be obtained from listing relevant sentencing factors expressly in the legislation, or outlining the more detailed kind of guidance from related fields of law such as the equitable account of profits, as discussed above. More importantly, perhaps, it may inform any recommendations for further (future) enquiries necessary to address the considerable incoherence and complexity identified in the Discussion Paper.

Best wishes,



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