

Crimes, penalties and personal liability in the C to E suites.

Stepping stones: corporate fault to director/officer liability?

1. Recent decisions, amongst them *Fortescue Metals Group, Citrofresh [No2]*, the *James Hardie* litigation, demonstrate that corporate contravention of the *Corporations Act (Cth)*, lays a foundation, a '**stepping stone**', toward proof of breach by a director or officer of the s.180 statutory duty of diligence and care; the premise of which is negligence which exposed the company to risk of criminal prosecution for *Corporations Act* default, civil liability and/or reputational damage. Section 180 is a **civil penalty** provision, declaration of contravention of which (s.1317E) attracts pecuniary penalties (s.1317G), compensation orders (s.1317H) and power to disqualify (s.206C). Negligence, not intentional or accessorial conduct imputes '**quasi criminal liability**' to penalties under the mandatory and continuous disclosure regime of the *Corporations Act*, but the stepping stone analogy has application elsewhere.
2. Earlier decisions, (*Maxwell; Warrenmang*), have established corporate fault as a stepping stone to director/officer breach of ss.181 (good faith) and 182 (improper use of position). Each is a civil penalty provision. In *ASIC v Preston* the directors breach of ss.180, 181 and 182 was; "in causing or permitting [*sic the Co*] to engage in the conduct and in not taking reasonable steps to prevent it from doing so".
3. Breach by a corporation of s.1041H *Corporations Act* proscribing misleading/deceptive conduct in respect of a financial product or financial service is a stepping stone toward proof of contravention by the company of s.674(2) of the Act (listed entity obligation of continuous disclosure of price sensitive information not generally available) and of director/officer breach of statutory duty in relation thereto. Section 674(2A) is a civil penalty provision contravention of which may also attract criminal liability (ss.1308A,1311 and s678), under the general principles of Chapter 2 of the *Criminal Code (Cth)*.
4. Civil penalties have been described as a '**hybrid between criminal and civil law**'. The prevalence of civil penalties as sanction has been attributed to a paradox that reforms made in the name of the free market have resulted in an increase in state power, reflected in and constituted by increasingly hybrid systems of regulation. Like the imposition of derivative liability, civil penalties are founded on the notion of punishing and preventing public harm. Hybrid systems of regulation which meld criminal law with tort, contractual and equitable doctrine supplemented with principles of a public law nature are expressed in the regulation of domestic Occupational Health and Safety, Environmental and Consumer and Competition laws. In the criminal and transnational sphere, the emphasis on corporate culture and corporate self-governance expresses similar principles and compliance imperatives.
5. The *Corporations Act* civil penalty regime embraces *inter alia* listing rule mandatory disclosure, financial reporting, corporate actions requiring shareholder approval, disclosure in respect of takeovers and compulsory acquisitions, prospectus and other disclosure documents relating to the offer and issue of securities, product disclosure statements re interests in listed managed investment schemes, market misconduct/insider trading, insolvent trading, The warning by Brereton J in *ASIC v Maxwell* that ss180,181 and 182 are not a 'backdoor method' for making directors and officers liable as accessories for corporate contravention reflects one tension in corporate regulation. There are others. The unfinished business of the *Personal Liability for Corporate Fault Reform Act 2012* in reducing the complexity of state,

federal and territory director/officer liability laws and contested notions of governance and board responsibility arising in the *James Hardie* litigation and *Centro*, are examples.

6. The decision of the High Court in *Shafron* (an action arising in the James Hardie litigation) has been read as widening the class of persons below board level who are exposed to civil penalty liability for breach of the 'officers' s.180 duty of care, (non-executive directors and employees who fall within the s.9(b) *Corporations Act* definition of 'officers'). There is no bright line test in s.9(b) by which to identify who is an 'officer'. Thus potential civil penalty or criminal liability extends to the E suites as may civil action under s.1324(10) and s.1041I of the Act for loss and damage for contravention of s.1041H *Corporations Act*.

Penalty privilege: available to individuals but not corporations

7. The privilege against exposure to penalties (most relevantly pecuniary 'fines' and disqualification) bears some similarity with the privilege against incrimination but unlike incrimination privilege is not a substantive rule of law. Penalty privilege is a procedural rule applying in curial proceedings to require proof of the case without assistance from non-corporate defendants. Absent statutory abrogation, civil procedure must accommodate and defer to penalty privilege claims whether or not the Plaintiff is a regulator seeking declarations of contravention or a private litigant agitating purely civil causes but which expose the defendant to incrimination or penalty. A stay of civil proceedings may be ordered where criminal prosecution in respect of the same conduct impugned in civil proceedings is, "on the cards" (AWB (No 1), or otherwise by reason of s.1317N *Corporations Act*.

Criminal liability: Classification differences and overlap with civil and civil penalty liability

8. The provisions of the Commonwealth *Criminal Code* apply to **offences** created under Commonwealth legislation subject to express statutory exclusion or modification (see for example s.678 *Corporations Act* which applies the Code to offences under ss. 674(2), 674(5) and 675(2) and compare s.769A *Corporations Act* which provides that Part 2.5 of the Code (corporate criminal responsibility) does not apply to Chapter 7 matters. It is necessary in every statutory context involving a question of possible criminal liability to have close regard to whether "offences" comprise **fault** and **physical** elements and if so what "elements"; whether offences involve absolute, strict or derivative liability; whether a statutory defence applies; by what proofs might a corporation be made directly liable for the misdeeds of employees, agents or officers; whether and by what proofs an employee or officer attracts direct or accessorial liability. It ought be noticed that there is considerable interplay and overlap in the foundations of civil, criminal and statutory accessorial liability *and* in the principles concerning **attribution** to a body corporate of individual employee or officer misconduct. However, the *Criminal Code* expressly constitutes **corporate culture** as part of a new equation giving rise to **corporate criminal responsibility** (see s.12.3). *Corporate culture* means an attitude, policy, rule, course of conduct or practice existing within a body corporate generally or in the part of the body corporate in which the relevant activities take place. Thus if **intention, knowledge or recklessness** is a fault element in relation to a physical element of an offence, that fault element *must be attributed* to a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of the offence. The means by which authorization or permission may be established include; proving a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance (See Code, s.12.3).

HAYDN CARMICHAEL

Owen Dixon Chambers West

4 August 2014.

This Note is compiled to highlight and illustrate current Corporations law issues. It is not legal advice.

