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Reactive Corporate Fault

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I. Reactive Corporate Fault Revisited – Overview

Corporate liability for unlawful conduct traditionally has depended on proof of responsibility for causally relevant acts or omissions at or before the time the unlawful conduct occurred. Corporate criminal responsibility traditionally has depended on proof that the corporate defendant performed causally relevant acts or omissions intentionally (or knowingly or recklessly). Those approaches are based on a narrow time-frame. From another perspective, the time-frame should be extended to enable liability to be imposed on a corporation for failing to take adequate preventive or corrective action as a responsive reaction to having committed unlawful acts or omissions.[1]

This is but one of many respects in which the present law on corporate liability for wrongdoing is open to question and improvement. Two recent works highlight a wide range of concerns and advance constructive solutions to help resolve them: the Australian Law Reform Commission's *Corporate Criminal Responsibility: Final Report*[2] and John C Coffee Jr's *Corporate Crime and Punishment: The Crisis of Underenforcement*.[3] Particular mention should also be made of John Braithwaite's 'Maximal Accountability with Minimally Sufficient Punishment', a fundamental contemporary perspective on the social control of lawbreaking in modern corporate society.[4]

This chapter revisits the proposal that corporate penal responsibility be assessed on the basis of reactive corporate fault, as an additional and alternative basis of responsibility.[5]

* Thanks are due especially to John Braithwaite for his inspiration and fund of ideas on corporate crime and regulation over more than four decades. The usual disclaimers apply.

[1] On the need to reflect the corporateness of corporate action and avoid narrow legalistic conceptions of corporate responsibility, see N Lacey, 'Philosophical Foundations of the Common Law: Social Not Metaphysical' in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford, Oxford University Press, 2000) 17.

[2] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020) (ALRC Final Report).

[3] JC Coffee, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Oakland, CA, Berrett-Koehler Publishers, 2020).

[4] J Braithwaite, 'Maximal Accountability with Minimally Sufficient Punishment' (2021–22) 47 *Journal of Corporation Law* (forthcoming).

[5] B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1145, 1195–213.

Broadly, reactive corporate fault is an unreasonable failure by a corporation to take satisfactory preventive or corrective measures in response to the performance by the corporation of the physical elements of an offence or a civil violation.

The concept of reactive corporate fault seeks to address the following major known limitations of the present law in its attempt to prevent corporate lawbreaking:

- The prime goal of prevention of corporate lawbreaking implies the relevance of a reactive time-frame as well as a proactive time-frame for assessing whether or not adequate steps have been taken by a corporation to guard against repetition of unlawful conduct. The present law on the attribution of fault to corporations and the assessment of sentence or penalty does not reflect that basic implication with sufficient clarity or emphasis.
- The present law does not adequately meet the everyday expectation that a corporation that has caused a bad or harmful outcome should be held to account for failing to take action to prevent repetition of that outcome.
- Individual accountability for past corporate lawbreaking is the exception rather than the rule.[6] This is inconsistent with the commonplace understanding that individual accountability is an essential means of preventing corporate wrongdoing.
- Corporate accountability for failing to take reasonable precautions to prevent unlawful conduct almost always is limited to organisational precautions taken beforehand.[7] That is far too narrow an approach.
- Corporations typically rely on management by exception.[8] When the commission of an offence or other breach of the law emerges later as an exception to be managed, it is often easy for a corporation to deny prior fault. Excuses such as 'we were taken by surprise' or 'we delegated responsibility in good faith' are easily made and can be difficult to refute.
- Corporations can and do act intentionally in carrying out corporate policies.[9] However, in practice, the predominant form of corporate fault is more likely to be corporate negligence than corporate intention.[10] Where corporate intentionality or corporate negligence cannot be proved to exist at or before the unlawful conduct, the further question is whether or not the corporate response to that unlawful conduct is at fault.
- Enforceable undertakings, deferred prosecution agreements (DPAs) and mitigation of sentence or penalty embody reactive corporate fault implicitly. However, these forms of reactive corporate fault are embryonic, not fully developed.

[6] See B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993).

[7] See, eg, Criminal Code Act 1995 (Cth), s 12.3(3) ('Criminal Code'); Anti-Money Laundering and Counter-Terrorism Act 2006 (Cth), s 236.

[8] LR Bittel, *Management by Exception: Systematizing and Simplifying the Managerial Job* (New York, McGraw-Hill, 1964); H Mintzberg, *The Structuring of Organizations: A Synthesis of the Research* (Englewood Cliffs, NJ, Prentice Hall, 1979) ch 21.

[9] See Fisse and Braithwaite (n 6) 26–29.

[10] ibid 29.

The limitations of the present law indicated above are discussed in more detail in section II.A of this chapter.

Reactive corporate fault is not a substitute for proactive corporate fault.[11] Lack of reactive corporate fault is not a basis for denying liability where there has been proactive corporate fault. Nor is there any suggestion that the concept of proactive corporate fault be replaced by that of reactive corporate fault.

Statutory models of corporate fault and reactive corporate fault are considered in section III, in the context of the Criminal Code Act 1995 (Cth) (Criminal Code). The options discussed are:

(1) make the absence of reactive corporate fault an explicit mitigating factor in determining a sentence for a corporate offender; and
(2) abstain from making reactive corporate fault a basis for attributing the fault element of an offence to a corporation, as under the ALRC Final Report recommendations on corporate fault; or
(3) amend section 12 of the Criminal Code by extending Option 1 and Option 2 in Recommendation 7 of the ALRC Final Report to cover reactive corporate fault.

Option (3) is commended, in combination with Option (1).

Reactive corporate fault should also be a factor to be taken into account when assessing a penalty against a corporation, as recommended in Recommendation 11 of the ALRC Final Report.

The statutory model of reactive corporate fault proposed would address the limitations of the present law outlined above and discussed further in section II.A. Statutory reform would also avoid leaving the development of the law to glacial melting at common law. A key-point summary is given in section IV.A of how Option (3) plus Option (1) would address the stated limitations of the present law.

Section IV concludes by also considering possible concerns, including the hazards of corporate dissembling, obstruction and other attempted manipulations of the administration of justice.

II. The Concept of Reactive Corporate Fault

A. Reactive Corporate Fault

Reactive corporate fault may be defined as the purposive or unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the performance of the physical elements of an offence, or a breach of a civil prohibition, by personnel acting on behalf of the organisation.[12]

[11] It has sometimes been contended that reactive corporate fault is unsatisfactory because it is an inappropriate substitute for proactive corporate fault; see, eg, Department of Justice Canada, *Corporate Criminal Liability* (Discussion Paper, March 2002) at www.justice.gc.ca/eng/rp-pr/other-autre/jhr-jdp/dp-dt/iss-ques.html. That contention is spurious because it misrepresents the concept of reactive corporate fault: reactive corporate fault is a complement, not a substitute.

[12] Fisse (n 5) 1210.

The concept of reactive corporate fault is to be contrasted with 'proactive corporate fault', which is fault accompanying or actuating the performance of the physical elements of an offence, or a breach of a civil prohibition, by personnel acting on behalf of the organisation.[13]

A cogent system of corporate penal liability will include liability based on proactive corporate fault and liability based on reactive corporate fault. Proactive corporate fault and reactive corporate fault are complements, not substitutes.[14]

The concept of reactive corporate fault seeks to address the following major limitations of the present law on corporate fault.

First, the goal of preventing corporate lawbreaking implies the relevance of a reactive time-frame as well as a proactive time-frame for assessing whether or not adequate steps have been taken by a corporation to guard against repetition of unlawful conduct. How a corporation reacts to and learns from discovering that it has engaged in lawbreaking may be no less important than what it did proactively to prevent that lawbreaking.[15] Sensible assessment of what needs to be done is not limited to what has been done or not done at the time of the unlawful conduct but extends to what is going to be done thereafter to prevent that conduct from recurring. Yet the present law on corporate liability generally locks itself onto a proactive time-frame.

Second, public responses to corporate wrongdoing typically are concerned with what a corporation does to account for the wrongdoing after the event, as well as with what it did beforehand or at the time.[16] Commonly, there is an expectation of 'responsive adjustment' by a corporation that has caused a bad or harmful outcome out of a concern that the untoward outcome not be repeated.[17] Yet the present law on corporate liability is preoccupied with the earlier time-frame and neglects the latter.[18] The expectation of responsive action is not stated explicitly as a principle of liability or sentencing or penalty assessment. There is a discontinuity between what happens in the case-by-case application of the law, on the one hand, and the focus on preventive steps that is so apparent in numerous royal commissions and coronial and other public inquiries into corporate harm causing.

Third, individual accountability for past corporate lawbreaking is far more the exception than the rule.[19] That violates the commonplace understanding that individual

[13] ME Diamantis and WS Laufer, 'Prosecution and Punishment of Corporate Criminality' (2019) 15 *Annual Review of Law and Social Science* 453, 456.

[14] See n 11.

[15] There are many examples. One is the interest shown in the response of Distillers Limited to discovering that thalidomide was causing serious deformities in babies; see M Magazanik, *Silent Shock* (Melbourne, Text Publishing, 2015). A recent example is the interest shown in the ability or otherwise of Crown Resorts, in each of Sydney, Melbourne and Perth, to resurrect itself from being unfit to hold a casino licence to being fit to do so.

[16] See, eg, the case studies in B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany, NY, State University of New York Press, 1983).

[17] See PA French, *Collective and Corporate Responsibility* (New York, Columbia University Press, 1984) ch 11.

[18] For one recent study see P Gottschalk and ML Benson, 'The Evolution of Corporate Accounts of Scandals from Exposure to Investigation' (2020) 60 *British Journal of Criminology* 949. Importance generally is attached by corporations to managing public relations swiftly and effectively in the event of a crisis; see S Fink, *Crisis Management: Planning for the Inevitable*, rev edn (Bloomington, IN, iUniverse, 2000); R Campbell, *Crisis Control: Preventing and Managing Corporate Crises* (Sydney, Prentice Hall, 1999).

[19] Fisse and Braithwaite (n 6) ch 1; ALRC Final Report (n 2) ch 9; J Eisenger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (New York, Simon & Schuster, 2017).

accountability is an essential means of achieving the effective social control of corporate wrongdoing. Moreover, imposing individual accountability for past corporate lawbreaking is too narrow by itself. One reason is that those accountable may no longer be in a position of control in the same area. Another is that preventing future corporate lawbreaking depends on identifying who is responsible in the future for seeing that preventive measures are taken.[20]

Fourth, limiting corporate accountability to organisational precautions before the unlawful conduct is too narrow.[21] A frequent criticism made of the legal regulation of business is that precedent and backward-looking assessments of liability project a static model of corporate behaviour, whereas innovation and change within corporations require a more dynamic and forward-looking approach. Corporations operate in a dynamic environment. They are expected to learn from failure and to come up with a better approach for the future.

Fifth, corporations typically rely on management by exception.[22] Compliance with the law is treated as a routine matter to be delegated to and handled by employees at lower levels in corporate hierarchies unless a significant problem arises. When the commission of an offence or other breach of the law emerges later, it is easy for a corporation to deny prior fault.

Sixth, finding a genuinely corporate yet workable concept of corporate intentionality is intractable.[23] Corporations can and do act intentionally in carrying out corporate policies. One manifestation of corporate intentionality is 'systems intentionality', as proposed by Elise Bant.[24] However, in practice, the predominant form of corporate fault is more likely to be corporate negligence than corporate intention.[25] Moreover, where corporate intentionality or corporate negligence cannot be proved to exist at or before the unlawful conduct, the further question to be addressed is whether or not the corporate response to that unlawful conduct shows reactive corporate fault.

Seventh, the enforcement of corporate crime often makes criminal liability a fallback means of social control and relies heavily on enforceable undertakings, DPAs, and mitigation of sentence by reason of preventive or other steps taken in response to prosecution.[26] Enforceable undertakings, DPAs and mitigation of sentence embody

[20] Fisse and Braithwaite (n 6) 212.

[21] ibid 211.

[22] See Bittel (n 8); Mintzberg (n 8) ch 21.

[23] Fisse (n 5) 1195–213; B Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40 *Adelaide Law Review* 285, 287–92; WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago, IL, University of Chicago Press, 2006) ch 3; E Bant, 'Culpable Corporate Minds' (2021) 48 *University of Western Australia Law Review* 352; Diamantis and Laufer (n 13) 4–5; M Diamantis, 'Clockwork Corporations: A Character Theory of Corporate Punishment' (2018) 103 *Iowa Law Review* 507.

[24] Bant, ch 9 of this volume; and Bant, ch 11 of this volume.

[25] Fisse and Braithwaite (n 6) 29.

[26] See further I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York, Oxford University Press, 1992); C Hodges and R Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (London, Bloomsbury, 2017); K Hawkins, *Law as Last Resort* (Oxford, Oxford University Press, 2002); K Hawkins, *Environment and Enforcement* (Oxford, Clarendon Press, 1984); P Grabosky and J Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford, Oxford University Press, 1986); JA Sigler and JE Murphy, *Interactive Corporate Compliance* (New York, Quorum Books, 1988).

reactive corporate fault implicitly. However, these forms of reactive corporate fault are embryonic, not fully developed. A useful construct for their development, as well as for locating reactive corporate fault in the enforcement scheme of things, is the pyramid of enforcement built by Ian Ayres and Braithwaite in *Responsive Regulation*.[27]

The limitations of the present law outlined above stem from the unduly narrow time-frame adopted for assessing corporate lawbreaking and determining what conduct is to be made subject to liability. The traditional time-frame adopted at common law for determining criminal or civil liability is the time when the physical elements of the offence or breach were committed, or in some circumstances when they were initiated.[28] Confining liability to conduct within that limited time-frame is arbitrary[29] and, given the practical significance of reactive corporate fault, unjustified.

B. Lineage of Reactive Corporate Fault

The common law on corporate fault has yet to live up to its general reputation for fertility. Liability as an accessory after the fact perhaps contains some trace of reactive fault DNA but is very limited in scope, as well as being designed with human offenders in mind. Contempt of court for breach of an injunction is more akin to liability based on reactive fault.[30]

The concept of reactive corporate fault is canvassed in the literature on corporate crime and corporate regulation.[31] Two signposts:

- 'Reconstructing Corporate Criminal Law' in 1983[32] set out a critique of the concepts of personal corporate fault (as under *Tesco Supermarkets Ltd v Nattrass*),[33] vicarious corporate fault and aggregated corporate fault, and advanced proposals for adopting

[27] Ayres and Braithwaite (n 26) ch 2.

[28] S Bronitt and B McSherry, *Principles of Criminal Law*, 3rd edn (Sydney, Lawbook Co, 2010) 231–34; J Horder, *Ashworth's Principles of Criminal Law*, 9th edn (Oxford, Oxford University Press, 2019) 178–80.

[29] M Kelman, 'lnterpretive Construction in the Substantive Criminal Law' (1981) 33 *Stanford Law Review* 591, 593–95, 600–16.

[30] D Hanna, 'Corporate Criminal Liability' (1989) 31 *Criminal Law Quarterly* 452, 473–74.

[31] Fisse (n 5) 1195–213; B Fisse and PA French, 'Corporate Responses to Errant Behavior: Time's Arrow, Law's Target' in B Fisse and PA French (eds), *Corrigible Corporations and Unruly Law* (San Antonio, TX, Trinity University Press, 1985) 187; B Fisse, 'Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Oxford, Hart Publishing, 2015) ch 10; J Braithwaite, 'Intention Versus Reactive Fault' in N Naffine, R Owens and J Williams (eds), *Intention in Law and Philosophy* (Dartmouth, Ashgate Publishing, 2001) 345; GR Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 *Cambridge Law Journal* 515. Reactive fault may be linked to enforced self-regulation, restorative justice and management-based regulation, as to which see especially Ayers and Braithwaite (n 26) ch 4; J Braithwaite, *Restorative Justice and Responsive Regulation* (New York, Oxford University Press, 2002); C Coglianese and J Nash (eds), *Leveraging the Private Sector: Management-Based Strategies for Improving Environmental Performance* (Washington, DC, Resources for the Future Press, 2006).

[32] See n 5.

[33] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL) (*Tesco*). The relaxation of the *Tesco* directing mind principle by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) is ill-defined and ill-related to the concept of corporate fault: see CMV Clarkson, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59 *Modern Law Review* 557, 565–69; J Clough and C Mulhern, *The Prosecution of Corporations* (Oxford, Oxford University Press, 2002) 99–104.

and applying the concept of reactive corporate fault. The main proposal was that corporations be subject to liability for an offence where:

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

Under this model, vicarious liability is imposed in relation to the physical elements of an offence but not in relation to the fault element. The fault elements are not based on the *Tesco* principle or the populist notion of 'corporate culture'[34] but on the concept of organisational fault, in the form of a corporate policy of non-compliance or a failure to take reasonable precautions and to exercise due diligence. Liability is extended to cases of reactive corporate fault, in the form of a corporate policy of unresponsive adjustment to having committed the physical elements of an offence, or a failure to take reasonable precautions or to exercise due diligence in order to prevent repetition of that conduct.

- The Accountability Model in *Corporations, Crime and Accountability* (1993)[35] is based on 20 desiderata, one of which (Desideratum 18) is a strategy based on the concept of reactive corporate fault: '*A strategy for allocating responsibility should operate with a conception of fault that is not time-bound, but copes with the dynamic nature of corporate action.*' One reason behind this strategy is to enable the law to keep pace with dynamic corporate change:

> There is … more to the concept of reactive fault than its ability to reflect the phenomenon of corporate blameworthiness at the post-offence stage of corporate behaviour. Reactive fault also provides the key to structuring legal liability in a way that can handle dynamic changes in the corporate environment. A frequent criticism made of the legal regulation of business is that precedent and backward-looking assessments of liability project a static

[34] The concept of 'corporate culture' is problematic as a basis of liability or accountability; see C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge, Cambridge University Press, 2011) 232; J Colvin and J Argent, 'Corporate and Personal Liability for "Culture" in Corporations?' (2016) 34 *Companies and Securities Law Journal* 30; S Bronitt, 'Rethinking Corporate Prosecution: Reviving the Soul of the Modern Corporation' (2018) 42 *Criminal Law Journal* 205; ALRC Final Report (n 2) 4.79; S Crompvoets, *Bloodlust, Trust & Blame* (Melbourne, Monash University Publishing, 2021). Contrast V Comino, '"Corporate Culture" is the "New Black" – Its Possibilities and Limits as a Regulatory Tool for Corporations and Financial Institutions?' (2021) 44 *University of New South Wales Law Journal* 295; J Hill, *Legal Personhood and Liability for Flawed Corporate Cultures* (Research Paper No 19/03, Faculty of Law, The University of Sydney, February 2019) at https://ecgi.global/sites/default/files/working_papers/ documents/finalhill3.pdf.

[35] Fisse and Braithwaite (n 6).

> model of corporate behaviour, whereas innovation and change within corporations require a more dynamic and forward-looking approach. As explained below, the reactive fault element built into the Accountability Model allows the law to move in pace with changes that occur within a corporate defendant's organisation, and to insist on higher standards on a case-by-case basis, without injustice.[36]

Reactive corporate fault has yet to be adopted legislatively as a general basis for attributing fault to a corporation.[37] For instance, the concept was not adopted in part 2.5 of the Criminal Code.[38] However, statutory injunctive powers are widespread and liability for contempt where a statutory injunction is breached is in effect liability for reactive fault in the form of intentional non-compliance with a court order.

Some Commonwealth legislation imposes criminal and civil liability on executive officers of a corporation on the basis of reactive fault but, oddly, liability is limited to executive officers and does not extend to their corporate employers.[39] An example is the Environment Protection and Biodiversity Conservation Act 1999 (Cth), under sections 494–496. Section 496(1) (headed 'Did an executive officer take reasonable steps to prevent contravention?') imposes both a proactive duty and a reactive duty on an executive officer:

> (1) For the purposes of sections 494 and 495, in determining whether an executive officer of a body corporate failed to take all reasonable steps to prevent the contravention, a court is to have regard to:
>
> (a) what action (if any) the officer took directed towards ensuring the following (to the extent that the action is relevant to the contravention):
>
> (i) that the body arranges regular professional assessments of the body's compliance with this Act and the regulations;
>
> (ii) that the body implements any appropriate recommendations arising from such an assessment;
>
> (iii) that the body has an appropriate system established for managing the effects of the body's activities on the environment;
>
> (iv) that the body's employees, agents and contractors have a reasonable knowledge and understanding of the requirements to comply with this Act and the regulations, in so far as those requirements affect the employees, agents or contractors concerned; and

[36] ibid 211.

[37] The history includes the proposal by Senator Kefauver on 13 July 1961 in response to the heavy electrical equipment cases. Under that proposal: (i) the possession of knowledge or reasonable cause to believe that a corporation is engaged in or is about to engage in any violation of the penal provisions of the antitrust laws; (ii) the possession of express or implied authority vested by such corporation to stop or prevent such violation or to report such violation to a director, officer or agent empowered by such corporation to stop or prevent such violation; and (iii) the failure to exercise that authority, would constitute ratification: see AM Dershowitz, 'Increasing Community Control over Corporate Crime: A Problem in the Law of Sanctions' (1961) 71 *Yale Law Journal* 280, 303, fn 73.

[38] The background is traced in MR Goode, *Corporate Criminal Liability* (Hobart, Environmental Crime Conference, 1–3 September 1993) at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.198.2292&rep=rep1&type=pdf.

[39] The prohibitions under ss 494–495 are defined in terms of the liability of an 'executive officer', not a 'person', and hence s 498B (attribution of the conduct or fault of a director, employee or agent to a corporation) does not apply.

(b) what action (if any) the officer took when he or she became aware that the body was contravening:

(i) this Act; or
(ii) the regulations; or
(iii) if the body contravened Part 3 or section 142 or 142A – any action management plan that was prepared by the body, and approved by the Minister, as required by a condition attached to an approval under Part 9 for the purposes of a provision of Part 3 of the body's taking of an action.

Reactive corporate fault is an implicit part of the structure of enforceable undertakings and DPAs.

Enforceable undertakings under section 87B of the Competition and Consumer Act 2010 (Cth) ('Competition and Consumer Act') and similar provisions in other legislation are very common. Enforceable undertakings usually require the corporation giving the undertaking to take responsive action, including the revision of compliance programmes and independent review of compliance with the undertaking.[40] Failure to take the action required is subject to the imposition of a range of possible court orders.[41]

Deferred prosecution agreements have become very common in the USA and are also used increasingly in the United Kingdom and other jurisdictions.[42] A questionable model has been proposed in Australia for a limited range of offences under Commonwealth law.[43]

Reactive corporate fault is part of the structure of DPAs.[44] Simon Bronitt has explained the connection:

> [T]he reactive fault model would prioritise the preventive purpose of DPA schemes. The model of reactive fault has profound implications for responses to alleged corporate wrongdoing. There is no need to establish that the corporate conduct was accompanied by any fault element – the corporation only need acknowledge its 'responsibility' for the prohibited acts or omissions. Consistent with the reorientation towards prevention, prosecutors need not believe there is a reasonable prospect of conviction, or, further, that the corporation must admit its guilt as a precondition of being eligible to engage in a DPA. Since this process is entirely administrative, the usual civil standard of proof on the 'balance of probabilities' would apply. Under this model, once aware of the harm caused, the corporation has a duty to take reasonable steps to engage in restorative action, but also to prevent future harms. If the corporation breaches either duty, then prosecution may be instituted in the ordinary way. At that stage, guilt is determined by assessing corporate blameworthiness before and during the alleged offences. The extent to which a corporate defendant manifested reactive fault after the alleged offence occurred would be relevant only to sentencing; for example,

[40] See, eg, the undertaking entered into by Mosaic Brands Limited: Australian Competition and Consumer Commission, 'Mosaic Brands Limited' (26 May 2021) at www.accc.gov.au/public-registers/undertakings-registers/mosaic-brands-limited.

[41] Competition and Consumer Act 2010, s 87B(4).

[42] See BL Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge, Belknap Press, 2014); AS Barkow and RE Barkow (eds), *Prosecutors in the Boardroom* (New York, New York University Press, 2011); C King and N Lord, *Negotiated Justice and Corporate Crime* (London, Palgrave, 2018).

[43] Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth). See further ALRC Final Report (n 2) 494–505; L Campbell, 'Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales' (2021) 43 *Sydney Law Review* 187.

[44] F Mazzacuva, 'Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice' (2014) 78 *Journal of Criminal Law* 249, 262.

> proof that it took steps to prevent future harm, compensate victims and cooperate with authorities may mitigate the sentence imposed in accordance with the ordinary principles of sentencing law.[45]

The main arenas where reactive corporate fault have been relevant as a factor in mitigation of sentence or penalty are civil penalties under section 76 of the Competition and Consumer Act and comparable provisions in other legislation. The statutory factors under section 76 and similar provisions have been expanded by judicial factors. Those factors include the 'French Factors',[46] the 'Heerey Factors'[47] and now the 'Beach Factors'.[48] Factor (f) in the Beach Factors relates directly to reactive corporate fault:

> The fixing of a pecuniary penalty involves the identification and balancing of all the factors relevant to the contravention and the circumstances of the defendant, and the making of a value judgment as to what is the appropriate penalty in light of the purposes and objects of a pecuniary penalty that I have just explained. Relevant factors include the following:
>
> (a) the extent to which the contravention was the result of deliberate or reckless conduct by the corporation, as opposed to negligence or carelessness;
> (b) the number of contraventions, the length of the period over which the contraventions occurred, and whether the contraventions comprised isolated conduct or were systematic;
> (c) the seniority of officers responsible for the contravention;
> (d) the capacity of the defendant to pay, but only in the sense that whilst the size of a corporation does not of itself justify a higher penalty than might otherwise be imposed, it may be relevant in determining the size of the pecuniary penalty that would operate as an effective specific deterrent;
> (e) the existence within the corporation of compliance systems, including provisions for and evidence of education and internal enforcement of such systems;
> (f) remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention;
> (g) whether the directors of the corporation were aware of the relevant facts and, if not, what processes were in place at the time or put in place after the contravention to ensure their awareness of such facts in the future;
> (h) any change in the composition of the board or senior managers since the contravention;
> (i) the degree of the corporation's cooperation with the regulator, including any admission of an actual or attempted contravention;
> (j) the impact or consequences of the contravention on the market or innocent third parties;
> (k) the extent of any profit or benefit derived as a result of the contravention; and
> (l) whether the corporation has been found to have engaged in similar conduct in the past.[49]

[45] S Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements' in T Tulich et al (eds), *Regulating Preventive Justice* (Oxfordshire, Routledge, 2017) ch 12, 224–25.

[46] *Trade Practices Commission v CSR Ltd* [1990] FCA 521, (1991) ATPR 41-076 [42].

[47] *Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd* [1996] FCA 670, (1996) ATPR 41–515, 42, 444–45.

[48] *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538 [58].

[49] Credit has been given in relation to evidence that the company has instituted a compliance programme or reviewed its existing programme after a contravention has come to light: see, eg, *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] FCA 1065, (2001) ATPR 41–833, 43,296 [49]; *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* [2002] FCA 559,

III. Statutory Reform of Corporate Fault and Reactive Corporate Fault

A. Options for Adoption of the Concept of Reactive Corporate Fault

What statutory model, if any, would be suitable for adopting the concept of reactive corporate fault?

In the context of the Criminal Code, the main possible options appear to be:

(1) make the absence of reactive corporate fault an explicit mitigating factor in determining a sentence for a corporate offender; and
(2) abstain from making reactive corporate fault a basis for attributing the fault element of an offence to a corporation, as under the ALRC Final Report recommendations on corporate fault; or
(3) amend section 12 of the Criminal Code by extending Option 1 and Option 2 in Recommendation 7 of the ALRC Final Report to cover reactive corporate fault.

Option (3) is commended, in combination with Option (1).

Options (1), (2) and (3) are discussed in sections III.B to III.D following. Section III.E discusses the role of reactive corporate fault in the context of civil penalty prohibitions (for example, the civil cartel prohibitions in the Competition and Consumer Act).

B. Option (1) – Make the Absence of Reactive Corporate Fault an Explicit Mitigating Factor in Determining a Sentence for a Corporate Offender

The absence of reactive corporate fault is an explicit mitigating factor in determination of sentence for a corporate offender under Recommendation 10 in the ALRC Final Report:

> **Recommendation 10**
>
> The *Crimes Act 1914* (Cth) should be amended to require the court to consider the following factors when sentencing a corporation, to the extent they are relevant and known to the court:
>
> a) the type, size, and financial circumstances of the corporation;
> b) whether the corporation had a corporate culture conducive to compliance at the time of the offence;
> c) the extent to which the offence or its consequences ought to have been foreseen by the corporation;
> d) the involvement in, or tolerance of, the criminal activity by management;
> e) whether the unlawful conduct was voluntarily self-reported by the corporation;

(2002) 190 ALR 169, 183 [50]; *Schneider Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 2, (2003) 127 FCR 170, 182 [51]; *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2002] FCA 619, (2002) ATPR 41–880, 45,061 [23]; *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* [2001] FCA 383, (2001) ATPR 41–815, 42,939 [25].

f) any advantage realised by the corporation as a result of the offence;
g) the extent of any efforts by the corporation to compensate victims and repair harm;
h) the effect of the sentence on third parties; and
i) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent offence, including:
    i. internal investigations into the causes of the offence;
    ii. internal disciplinary action; and
    iii. measures to implement or improve a compliance program.

This list should be non-exhaustive and should supplement, rather than replace, the general sentencing factors, principles, and purposes when implemented in accordance with Recommendation 9.

Recommendation 10 represents an advance on the present law. However, like the Beach Factors, it takes a shopping-list approach. The factors specified should be prioritised, with much greater priority given to Factor i) than relegation to the grade of being one amongst many.

Pre-sentence reports are needed to make Recommendation 10 work. Recommendation 16 of the ALRC Final Report so recommends.[50]

C. Option (2) – Abstain from Making Reactive Corporate Fault a Basis for Attributing the Fault Element of an Offence to a Corporation

Consider the alternative recommendations on corporate fault made in the ALRC Final Report:

Recommendation 7

Option 1

Section 12.3 of the schedule to the *Criminal Code Act 1995* (Cth) should be amended to:

a) replace 'commission of the offence' with 'relevant physical element';
b) replace 'high managerial agent' with 'officer, employee, or agent of the body corporate, acting within actual or apparent authority' (with consequential amendments to s 12.3(4));
c) replace 'due diligence' with 'reasonable precautions' (with consequential amendments to s 12.5);
d) pluralise the terms 'attitude', 'policy', and 'rule' in the definition of 'corporate culture' and replace 'takes' with 'take'; and
e) repeal s 12.3(2)(d).

[50] ALRC Final Report (n 2) Recommendation 16. See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) Recommendation 14–2; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders* (Report 102, 2003) Recommendation 22. See also Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974* (Report No 68, 1994) [10.40].

Option 2

Section 12.3 of the schedule to the *Criminal Code Act 1995* (Cth) should be replaced with a provision to the effect that if it is necessary to establish a state of mind, other than negligence, of a body corporate in relation to a physical element of an offence, it is sufficient to show that:

a) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, engaged in the relevant conduct, and had the relevant state of mind; or

b) one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, directed, agreed to or consented to the relevant conduct, and had the relevant state of mind.

It is a defence, if the body corporate proves that it took reasonable precautions to prevent the commission of the offence.

Neither Option 1 nor Option 2 in Recommendation 7 includes the concept of reactive corporate fault. That seems unsatisfactory. For the reasons outlined in section II of this chapter, limiting corporate liability to situations where there is proactive corporate fault is unduly narrow.

The proposed scheme for deferred prosecutions under Commonwealth law now on the table is questionable in major respects.[51] Fundamental redesign, including incorporation of reactive corporate fault as a core building block, has been urged.[52]

D. Option (3) – Amend Section 12 of the Criminal Code by Extending Option 1 and Option 2 in Recommendation 7 of the ALRC Final Report to Cover Reactive Corporate Fault

Option 1 or Option 2 in Recommendation 7 of the ALRC Final Report could well be amended to cover reactive corporate fault, as indicated below.[53]

ALRC Option 1

Extend the amendments proposed in Option 1 in the following ways:

- Amend the wording in s 12.3(3) to read: 'to prevent, and to prevent the recurrence of, the conduct, or the authorisation or permission'. This wording is intended to make it clear that the defence of reasonable precautions requires the taking of reactive precautions as well as proactive precautions.

[51] Campbell (n 43); M Lewis, 'Deterring Corporate Crime Through the Use of Deferred Prosecution Agreements: An Analysis of the Proposed Australian Deferred Prosecution Agreement Regime' (2018) 42 *Criminal Law Journal* 76.

[52] See Bronitt (n 45); S Bronitt, *Submission on Deferred Prosecution Agreement (DPA) Scheme Code of Practice* (Consultation Draft, 15 July 2018) at www.ag.gov.au/sites/default/files/2020-05/DPA-Code-Consultation-Simon%20Bronitt-Submission.PDF and the other submissions authored or co-authored by Bronitt referred to therein; B Fisse, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme* (Public Consultation Paper Submission, 1 May 2017) at www.ag.gov.au/integrity/publications/submissions-received-proposed-model-deferred-prosecution-agreement-scheme-australia-consultation.

[53] Compare the more complex provisions in B Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277. That approach preceded the Criminal Code (n 7), with which a model proposed today needs to be aligned.

- Add a provision to s 12.3(6) along these lines: '*Reasonable precautions* include remedial and disciplinary steps taken before or after the conduct, or the authorisation or permission, and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the conduct, or the authorisation or permission'. This wording is based on that used to express the concept of reactive corporate fault in Factor (f) of the Beach Factors.[54]

ALRC Option 2

Extend Option 2 in the following ways:

- Make it a defence if the body corporate proves that it took reasonable precautions to prevent the commission of the offence and to prevent the commission of the offence in future. It needs to be made clear that the defence of reasonable precautions requires the taking of reactive precautions as well as proactive precautions.
- Add a provision to s 12.3(6) along these lines: '*Reasonable precautions* include remedial and disciplinary steps taken before or after the commission of the offence, and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the commission of the offence.' This suggested wording adapts that used to express the concept of reactive corporate fault in Factor (f) of the Beach Factors.[55]

Section 12.5(2) of the Criminal Code ('Mistake of fact (strict liability)') should be amended to follow the definition of 'reasonable precautions' proposed above.

E. Reactive Corporate Fault and Civil Penalty Prohibitions

In the context of civil liability for penalties, corporate reactive fault could be provided for explicitly in the provisions governing injunctions (as under section 80 of the Competition and Consumer Act), enforceable undertakings (as under section 87B of the Competition and Consumer Act) and corporate probation orders (as under section 86C of the Competition and Consumer Act).[56]

Reactive corporate fault should be a factor to be taken into account when assessing a penalty against a corporation. Reactive fault is now covered explicitly by Factor (f) of the Beach Factors. Better still, the coverage should be statutory, as recommended in Recommendation 11 of the ALRC Final Report:

Recommendation 11

To maintain principled coherence and consistency in the assessment of penalties for corporations, a statutory provision should be enacted requiring the court to consider the following factors when making a civil penalty order in respect of a corporation, to the extent they are relevant and known to the court, in addition to any other matters:

a) the nature and circumstances of the contravention;
b) the deterrent effect that any order under consideration may have on the corporation or other corporations;
c) any injury, loss, or damage resulting from the contravention;

[54] *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538 [58].

[55] ibid.

[56] See Beaton-Wells and Fisse (n 34) 250–53.

d) any advantage realised by the corporation as a result of the contravention;
e) the personal circumstances of any victim of the contravention;
f) the type, size, and financial circumstances of the corporation;
g) whether the corporation has previously been found to have engaged in any related or similar conduct;
h) whether the corporation had a corporate culture conducive to compliance at the time of the offence;
i) the extent to which the contravention or its consequences ought to have been foreseen by the corporation;
j) the involvement in, or tolerance of, the contravening conduct by management;
k) the degree of voluntary cooperation with the authorities, including whether the contravention was self-reported;
l) whether the corporation admitted liability for the contravention;
m) the extent of any efforts by the corporation to compensate victims and repair harm;
n) the effect of the penalty on third parties; and
o) any measures that the corporation has taken to reduce the likelihood of its committing a subsequent contravention, including:

   i. any internal investigation into the causes of the contravention;
   ii. internal disciplinary action; and
   iii. measures to implement or improve a compliance program.

See especially Factor o) above.

Like the Beach Factors, Recommendation 11 takes a shopping-list approach. The factors specified should be prioritised, with much greater priority given to Factor i) than relegation to the grade of being one amongst many.

Pre-order reports for civil penalties are needed to make Recommendation 11 work.[57] There is no recommendation in the ALRC Final Report parallel to Recommendation 16. However, an earlier report of the ALRC, *Compliance with the Trade Practices Act 1974*, recommended amending the Act so that

> the court may require a corporation that has contravened the Act to provide to the court, prior to the court assessing the need for or the amount or nature of a penalty, a report detailing what steps have been taken by the corporation since the contravention to improve the corporation's internal controls and to discipline the persons implicated in the contravention.[58]

IV. Conclusion: Advantages of Proposed Statutory Adoption of Reactive Corporate Fault and Possible Concerns

A. Advantages of Proposed Statutory Adoption of Reactive Corporate Fault

The prime advantage of the statutory adoption of the concept of reactive corporate fault would be to heed and address the limitations of the present law that stem from

[57] See further B Fisse, 'Redress Facilitation Orders as a Sanction Against Corporations' (2018) 37 *University of Queensland Law Journal* 85, 104–05.
[58] ALRC, *Compliance with the Trade Practices Act 1974* (n 50).

undue preoccupation with proactive corporate fault (see section II). Option (3) and Option (1), as set out in sections III.B, III.C and III.D, would do so basically as follows:

- The goal of prevention of corporate lawbreaking is taken to require a reactive time-frame as well as a proactive time-frame for assessing whether or not adequate steps have been taken by a corporation to guard against repetition of unlawful conduct. Option (3) explicitly adopts a reactive as well as a proactive time-frame. Option (1) makes reactive fault an explicit factor to be considered in determining sentence.
- By explicitly making reactive corporate fault relevant to liability and determination of sentence, Option (3) and Option (1) reflect the everyday expectation that a corporation that has caused a bad or harmful outcome should be held to account for failing to take action to prevent repetition of that outcome.
- Individual accountability for past corporate lawbreaking is promoted by making internal disciplinary action relevant to liability under Option (3) and to determination of sentence under Option (1). That upholds the commonplace understanding that individual accountability is an essential means of achieving the effective social control of corporate wrongdoing.
- Corporate accountability to take reasonable organisational precautions applies not only to precautions before the unlawful conduct, but also to precautions that need to be taken after the unlawful conduct to guard against repetition. The liability rules under Option (3) so provide. The sentencing factors under Option (1) include the taking or not taking of organisational precautions in response to having engaged in unlawful conduct.
- Where corporate unlawful conduct stems from management by exception, Option (3) and Option (1) make that unlawful conduct an exception that has to be managed by the corporation in a responsive way. Denial of prior fault does not get the corporation off the hook.
- A boilerplate compliance policy or adroit camouflage may enable a corporation to raise a reasonable doubt that the directors or senior managers of the corporation acted intentionally in not complying with the law. However, under Option (3) the threshold requirement is that an employee acting within his or her actual or apparent authority has acted intentionally. The corporation is then put to proving that it took reasonably proactive precautions and reasonable reactive precautions to comply with the law.
- Reactive corporate fault is made an explicit statutory sentencing factor under Option (1).

An approach parallel to Option (1) is proposed for the determination of civil penalties (see section III.E). There is also work to be done to make reactive corporate fault an explicit part of the structure of injunctions, enforceable undertakings and corporate probation orders.

B. Possible Concerns

Perhaps the main possible concern is that making reactive corporate fault relevant to liability and to sentencing and determination of penalty is a recipe for corporate cheating and evasion. Corporations typically have the resources, skills and tactical ability to have in place compliance programmes or preventive systems that look impressive on paper but have little or no substance.[59] They are also adept at advancing defences that portray them as victims of rogue activity by employees or that create other smokescreens.[60] These challenges can be met to some extent. The concept of reactive corporate fault makes it more difficult to evade responsibility, because denial of prior fault is not enough to avoid liability. Perjury and other offences relating to the administration of justice can be used to uphold the law. A pyramid of enforcement enables the enforcement response to be escalated progressively in the event of subterfuge, defiance, recalcitrance or other attempts to undermine the compliance process.[61]

Australian courts have been increasingly critical of attempts to mitigate penalty in civil penalty proceedings on the basis that the corporation had a compliance programme. There are numerous examples where compliance programmes have been examined sceptically and where it is unlikely in the extreme that the defendant could show that reasonable precautions had been taken.[62] A rightly celebrated example is *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)*.[63] In this case, senior management and the founder of the business were implicated in a price-fixing and market-sharing scheme. Visy sought to mitigate the penalty to be imposed by arguing that it had a trade practices compliance programme. That plea was rejected and ridiculed by Heerey J:

> 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.

[59] See Laufer (n 23) chs 4–6. See further Beaton-Wells and Fisse (n 34) ch 12; B van Rooij and D Sokol (eds), *Cambridge Handbook of Compliance* (Cambridge, Cambridge University Press, 2021).

[60] See further I Schoultz and J Flyghed, 'From "We Didn't Do It" to "We've Learned Our Lesson": Development of a Typology of Neutralizations of Corporate Crime' (2020) 28 *Critical Criminology* 739.

[61] Ayres and Braithwaite (n 26) ch 2.

[62] *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 4)* [2006] FCA 21, (2006) ATPR 42–101, 44,830-1 [62]–[67]; *Australian Competition and Consumer Commission v George Weston Foods Ltd* [2000] FCA 690, (2000) ATPR 41-763, 40,988 [48]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 2)* [2005] FCA 254, (2005) 215 ALR 281, 285 [12], 293 [51]; *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617, (2007) 244 ALR 673, 711 [319] (*Visy Industries*). See also *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936, (2006) 234 ALR 511.

[63] *Visy Industries* (n 62).

> The document includes the stem 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.[64]

A second concern is that the law may be interpreted and applied in too lenient a way. Consider the concern expressed by Richard Gruner that a defence of corporate due diligence could refocus the test of liability and thereby lead to unjustified acquittals:

> The punitive rationale for rejecting a due diligence defense to corporate criminal liability is that when a corporate employee commits an offense within the scope of his employment, his firm deserves punishment regardless of the surrounding efforts of firm managers to prevent that offense. A standard that immunizes firms from criminal liability based on the sufficiency of managerial efforts to control employee crimes effectively elevates the character of those preventive efforts over the quality of conduct by operating employees as the key factor determining corporate liability … a standard limited by a due diligence defense would shift the focus of liability determinations in many cases to the merit of preventive efforts by corporate managers. The result might be that firms would escape punishment despite highly culpable conduct by operating employees that had devastating consequences.[65]

However, courts can counter this possible bias by focusing on the standard of care expected of a corporation as a baseline[66] against which to assess attempts by corporate defendants to feign virtuous compliance.

Third, part of the focus of reactive corporate fault is on internal disciplinary action as a means of increasing the extent to which individual accountability is imposed for corporate lawbreaking. This raises concerns about the risk of scapegoating and the adequacy or otherwise of protection of the rights of employees subject to internal investigations and disciplinary action. Those concerns are discussed in *Corporations, Crime and Accountability*.[67] They can and should be managed.

Fourth, objection has been raised to the placing of a persuasive burden of proof on a corporate defendant that pleads the defence precautions. The arguments and counter-arguments have been made many times. They are reviewed in the ALRC Final Report.[68] On balance, the ALRC concluded that imposing a persuasive burden of proof on corporations to establish a defence of reasonable precautions to necessary to make the law effective.

[64] ibid 711 [319].
[65] RS Gruner, *Corporate Criminal Liability and Prevention* (New York, Law Journal Press, 2008) 6–11.
[66] See Beaton-Wells and Fisse (n 34) 235.
[67] Fisse and Braithwaite (n 6) 182–87, 169–77.
[68] ALRC Final Report (n 2) 156–59, 262–65.

There is no last word on the subject of what best to do to control corporate lawbreaking. However, it is worth heeding this advice by Coffee:

> The basic default rule should be that the corporation must show us who was guilty if it itself wants to escape guilt. It is too much to argue that no one is guilty simply because the compliance plan was adequate. …
>
> The best defense against incomplete or self-serving internal investigations is a judicial power to reject them as inadequate.[69]

[69] Coffee (n 3) 152.