

CORPORATE COMPLIANCE PROGRAMMES: THE TRADE PRACTICES ACT AND BEYOND

BY BRENT FISSE

Professor of Law, University of Sydney¹

INTRODUCTION: CORPORATE AND LEGAL TRENDS IN COMPLIANCE

A great deal has been done by the Trade Practices Commission and by corporations and their legal advisers to foster the use of *Trade Practices Act* compliance programmes.² The same is true of the courts when examining compliance controls in the context of defences under s. 85, and in relation to mitigation or aggravation of penalties or sentences. Given the experience gathered over the past 15 years, there is now occasion to look ahead for possible currents of change.

Compliance programmes seek to reduce a variety of major costs that may arise from unlawful conduct. The more significant forms of reducible or avoidable loss are these:

—Fines or monetary penalties;³

¹ This paper is based on one presented to the Trade Practices and Consumer Law Conference, Terrigal, 16 Sept. 1989. Thanks are due to John Braithwaite for consent to use extracts from previous jointly published work, Graeme Coss for research assistance and David Harland for comments.

² See Pengilley, W., *Advertising and the Trade Practices Act* (1981); Pengilley, W., *Collusion: Trade Practices and Risk Taking* (1978); Price, "Should Your Company or Clients Establish a Trade Practices Compliance Programme?" [1985] *Law Institute Journal* 684. For useful U.S. material see American Bar Association, *Preventive Antitrust*; Gibson, Dunn and Crutcher, *Antitrust Handbook* (1984); Jaglom, "How to Develop a Corporate Antitrust Program" (1985) 4 *Preventive Law Reporter* 59; Loughlin, "The Naughty Words of Antitrust" (1968) 54 *American Bar Association Journal* 246; Beckenstein and Gabel, "Antitrust Compliance: Results of a Survey of Legal Opinion" (1982) 51 *Antitrust Law Journal* 459.

³ See Freiberg, "Monetary Penalties under the Trade Practices Act" (1983) 11 *Australian Business Law Review* 4. Such costs cannot lawfully be indemnified: see further Corkery, J., *Directors' Duties & Powers*, 210-212; Ramsay, "Liability of Directors for Breach of Duty and the Scope of Indemnification and Insurance" (1987) 5 *Companies and Securities Law Journal* 129; *Australian Trade Practices Reporter* (1989) ¶18-185; Note, "Indemnification of the Corporate Official for Fines and Expenses Resulting from Criminal Antitrust Litigation" (1962) 50 *Georgetown Law Journal* 566; but see *T.P.C. v. Dunlop Australia Ltd* (1980) A.T.P.R. ¶40-167; *T.P.C. v. Tubemakers of Australia Ltd* (1983) A.T.P.R. ¶40-390; *T.P.C. v. General Corporation Japan (Australia) Pty Ltd* (1989) A.T.P.R. ¶40-922. Nor are penalties and fines tax deductible: *Magna Alloys & Research Pty Ltd v. F.T.C.* (1980) 80 A.T.C. 4,542; see further Krever, "The Deductibility of Fines: Considerations from Law and Policy Perspectives" (1984) 13 *Australian Tax Review* 168.

detect corporate non-compliance tend to uncover crimes or torts committed by employees against their corporation.⁵¹ It has also been maintained that overly costly controls are reduced or eliminated by challenging employees to identify controls which have proven cost-ineffective; this is a variation upon the contention system adopted by IBM. Furthermore, the control function is also said to be a vital component in monitoring the performance of personnel. Where a corporation has action plans (e.g., as to production or profits), and individuals and sub-units are evaluated according to their performance in implementing that plan, the control function is essential to provide an accurate measure of achievement. From this perspective, compliance is cost-effective because it is an integral function of routine organisational controls.

Sceptics may reject these considerations as inconclusive and contend that compliance systems are unwarranted until their worth can be shown by more rigorous cost-benefit analysis. To this two responses may be made. The first is that it is impossible to quantify the costs of non-compliance with any precision.⁵² Moreover, our legal system is not based simply on financial analysis but reflects other social preferences.⁵³ Thus price-fixing, misleading advertising and other violations are not treated merely as commodities that can be bought in free market; they are forms of behaviour that are prohibited and which cannot be reduced merely to monetary terms.⁵⁴ Given these factors, what companies decide to do depends not so much on economic calculations as on down-to-earth judgments, or "rules of action" as Bertrand Russell called them. One commendable rule of action might well be as follows: if in doubt as to the worth of introducing a compliance system, hedge bets by introducing a system and making it as efficient as possible. Another rule of action, as adopted within a number of American corporations, is "do that which you will feel comfortable explaining on television". Secondly, to the extent that cost-benefit analysis is possible and relevant, reference may be made to Pashigian's cost-benefit study of preventive law within corporate law departments in the U.S.A.⁵⁵ The study indicated that, given certain assumptions, preventive law was cost-effective for the firms studied.

Another objection is that, although extensive compliance systems are common in major American companies, the vast majority of Australian companies are small and cannot afford to emulate the

⁵¹ Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 180.

⁵² Compare Prest and Turvey, "Cost-Benefit Analysis: A Survey" (1965) 75 *Economic Journal* 683 at 726: "... one can view cost-benefit analysis as ... a waste of resources to measure the unmeasurable".

⁵³ See further Stone, "Corporate Regulation: The Place of Regulation" in Fisse, B. and French, P.A., eds., *Corrigible Corporations and Unruly Law* (1985), ch. 2.

⁵⁴ See Nozick, R., *Anarchy, State, and Utopia* (1974), ch. 2.

⁵⁵ Pashigian, "A Theory of Prevention and Legal Defense with an Application to the Legal Costs of Companies" (1982) 25 *Journal of Law and Economics* 247.

achievements of mega-corporations.⁵⁶ However, it is not proposed that small companies need to go to the same expense: the suggestion is that compliance systems be tailored to the needs of each particular company, and that relatively straight-forward compliance precautions are enough in small organisations. The following advice on this score was given 25 years ago by James Withrow, a leading American antitrust lawyer:⁵⁷

"It would be a serious mistake for management of smaller corporations to assume that although compliance programs are important, only the giants of American industry can afford them. Actually, the smaller scale program of a small company can be just as effective as the more elaborate program of a larger company. In fact, one of the key responsibilities of counsel in setting up a program is gearing the compliance program to the needs and size of the company. A review of the cases during the past decade certainly shows that the enforcement agencies have not confined their actions to large companies. Many small companies, and even small industries, have been sued in the past. It is as unrealistic for a small company to attempt to save money by having no antitrust compliance program as it would be to eliminate its accident prevention program or the audit of its books."

Nonetheless, will companies be motivated to install and maintain effective compliance systems? Consider the concerns voiced by John Sciamanda in his capacity as Chairman of the American Corporate Counsel Association:⁵⁸

"First the old cliché, 'if it ain't broke, don't fix it' comes to mind. There may be a feeling that things are going reasonably well and therefore the current system is OK and in any case we don't have time to fool with such things because we are too busy working on transactions and disputes.

Secondly, the activity involved in coping with legal problems . . . such as major transactions and disputes are both more familiar terrain for an attorney and are much more visible and thus perceived as being, and probably are in fact, more valuable and rewarded in the eyes of legal management.

Much of the activity involved in implementing a successful preventive law practice is highly invisible. For what is happening is an effort to integrate the legal considerations into the warp and

⁵⁶ Consider e.g., the concern expressed by the Swanson Committee about the original requirement of reasonable precautions under s. 85(1) and the amendment of s. 85 that ensued: Trade Practices Act Review Committee, *Report* (1976), 9.144.

⁵⁷ Withrow, "Antitrust Compliance Programs" (1964) 19 *Record of the Bar Association of the City of New York* 151 at 153.

⁵⁸ Sciamanda, "Preventive Law Leads to Corporate Goal of Zero Litigation, Zero Legal Violations" (1987) 6(1) *Preventive Law Reporter* 3 at 7. As the title suggests, the article is otherwise optimistic.

woof of the entire organisation's process. This activity requires the contribution of many departments and, in many cases, the legal contribution will blend into the woodwork."

Understandable as such concerns may be, inaction is ill-advised,⁵⁹ for several reasons:

- Flying blind, or proceeding on the basis of "creeping incrementalism",⁶⁰ is inconsistent with sound managerial theory, in particular the postulate of strategic decision-making;⁶¹
- Doing nothing may result in situations where the organisation is taken by surprise and hence placed at a disadvantage in litigation or in dealings with enforcement agencies or the news media;⁶²
- Studious non-commitment to compliance is a lightning rod for enforcement action and liability.⁶³

It is true that a compliance programme can provide a record that might not otherwise be available to enforcement agencies or plaintiffs; there is danger, for instance, in a company spelling out its perceived risks of legal liability. However, the absence of a compliance system hardly means that incriminating information will not be recorded in a company's files. On the contrary, it may be hypothesised that the less formal the control of legally sensitive information, the greater the risk of that information being used to a company's detriment.⁶⁴ Compliance systems do at least enable a measure of control over unwanted revelations whereas casual information management can easily result in a company's being caught off-guard with a "smoking gun" in its files. Documentation control procedures can be provided to close the loop opened by risk analysis or critical internal memoranda,⁶⁵ a standard practice adopted by many companies in the context of product liability. And, as discussed in a later section, inquiries

⁵⁹ Compare Becker, "Basic Considerations in Establishing Corporate Legal Compliance Programs" A.B.A., *National Institute on Organizing Corporate Compliance Efforts*, ch. 1 at 1-4.

⁶⁰ See further Goodin, R., *Political Theory and Public Policy* (1982), ch. 2.

⁶¹ See further Ansoff, *Corporate Strategy*, ch. 6. Thus Ansoff argues that project decisions are likely to be of poorer quality than in firms with strategy:

"Without focus for its efforts, the staff will lack the depth of knowledge in any particular area needed for competent analysis. Without strategy criteria, it will lack tools for recognising outstanding opportunities. As a result managers acting on such advice will be forced into extreme forms of behaviour. Conservatives will refuse to take what under better information might be reasonable risks; entrepreneurs will plunge without appreciation of potential costs and dangers." (at 102)

⁶² See e.g., Gablehouse, "The Coors Company Emphasis on Environmental Preventive Law" (1987) 6(1) *Preventive Law Reporter* 14.

⁶³ Consider e.g., *T.P.C. v. General Corporation Japan (Australia) Pty Ltd* (1989) A.T.P.R. ¶40-922.

⁶⁴ See further Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits", *supra*, n. 12.

⁶⁵ *Ibid.*

into suspected unlawful conduct can be structured in such a way as to attract the protection of legal professional privilege.⁶⁶

Ultimately the best advice is for companies to have tailor-made compliance systems in place and, from an internal point of view, explicitly to relate compliance efforts to profits.⁶⁷ Many companies stress profitability in their compliance literature. Some go further by providing financial incentives to contain liability. Thus, after the Kepone pollution affair, Allied Chemical (now Allied-Signal) introduced a new compliance bonus scheme:

“Executives were set non-financial as well as financial goals. Generally, a third of the bonuses of executives related to environmental compliance, safety, antitrust, civil rights, and other non-fiscal goals. The amount of the bonuses depended on the level of the executive (bonuses for financial and non-financial performance could be as high as the base salary). The bonus was quantified partly on the basis of objective criteria, namely incidence of violations and injuries and amount of financial loss from civil or criminal judgments and settlements (violations and losses were booked against the division responsible). More enterprisingly, account was also taken of self-perceived, self-set, non-financial goals. For example, inspection of 20 plants might be set as a goal for the year by a member of the environmental surveillance director’s task force and feedback from other personnel then used to judge the success of those missions. . . . Contrary to the conventional wisdom, Allied claimed that in practice quantifying performance under such an approach had not proven difficult.”⁶⁸

This approach, adopted in 1980 and still applied today,⁶⁹ reflected a risk management strategy recommended by Arthur D. Little when advising Allied Chemical after the Kepone affair:

“Environmental risk management is most effective when it is an integral part of the overall corporate business strategic planning and management processes. In this way corporate resources for dealing with environmental issues can be appropriately allocated and managed in the context of corporate goals, objectives and values.”

Parallel considerations apply in the context of restrictive trade practices and consumer protection.

⁶⁶ As discussed below in Section IV.

⁶⁷ See further Andrews, K.R., *The Concept of Corporate Strategy* (rev. ed., 1980), 20.

⁶⁸ Fisse and Braithwaite, “Corporate Offences: The Kepone Affair” in Weston, R., ed., *Combating Commercial Crime*, ch. 4.

⁶⁹ Kent, “Risk of ‘Smoking Gun’ Papers is Outweighed by the Benefits”, *supra*, n. 12.

CORPORATE COMPLIANCE PROGRAMMES UNDER JUDICIAL SCRUTINY: LAW AS CO-PROCESSOR IN THE ORGANISATIONAL BLACK BOX⁷⁰

Corporate compliance programmes have come under increasing scrutiny by the courts in enforcement actions under the *Trade Practices Act*.⁷¹ In *Hartnell v. Sharp Corporation of Australia Ltd*,⁷² the first major prosecution under the Act, attention centred on Sharp's "gross and wicked attempt to swindle the public of Australia".⁷³ By contrast, in *Universal Telecasters Ltd v. Guthrie*,⁷⁴ decided three years later, the defence raised under s. 85 obliged the Court to focus on the compliance precautions taken by Universal Telecasters. Compliance programmes have since fallen under the spotlight in a string of cases, including *T.P.C. v. Malleys Ltd*,⁷⁵ *Videon v. Beneficial Finance Corporation*,⁷⁶ *T.P.C. v. Dunlop Australia Ltd*,⁷⁷ *T.P.C. v. I.C.I. Australian Petrochemicals Ltd*,⁷⁸ *T.P.C. v. Massey Ferguson (Australia) Ltd*,⁷⁹ *T.P.C. v. Tubemakers of Australia Ltd*,⁸⁰ *Brown v. Riverstone Meat Co. Pty Ltd*,⁸¹ *T.P.C. v. B.P. Australia Ltd*,⁸² *Wilkinson v. Katies Fashions (Australia) Pty Ltd*,⁸³ *T.P.C. v. Annand and Thompson Ltd*,⁸⁴ *T.P.C. v. Australian Autoglass Pty Ltd*,⁸⁵ *Gardam v. George Wills & Co. Ltd (No. 1)*,⁸⁶ and *T.P.C. v. General Corporation Japan (Australia) Pty Ltd*.⁸⁷ The stress usually placed on compliance precautions⁸⁸ is starting to expose several weaknesses in the present law. The first is the difficulty that can arise in determining the factual basis upon which penalties or sentences may be imposed,

⁷⁰ Compare Stone, C., *Where the Law Ends: The Social Control of Corporate Behavior* (1975) 121.

⁷¹ Compare 18 U.S.C. s. 3572(a)(4) which provides that, when imposing a fine on a corporation, a court is to consider "any measures taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such offense". See further Coffee and Whitbread, "The Convicted Corporation: An Outline of the New Federal Remedies" in Obermaier, O.G., ed., *Corporate Criminal Liability* (1986) 318.

⁷² (1975) A.T.P.R. ¶40-003.

⁷³ (1975) A.T.P.R. ¶40-003 at 17,110. Compare Nagel, *The Fine as a Sanction against Corporations* (1979), 87-88.

⁷⁴ (1978) A.T.P.R. ¶40-062.

⁷⁵ (1979) A.T.P.R. ¶40-118.

⁷⁶ (1981) A.T.P.R. ¶40-246.

⁷⁷ (1980) A.T.P.R. ¶40-167.

⁷⁸ (1983) A.T.P.R. ¶40-364.

⁷⁹ (1983) A.T.P.R. ¶40-369.

⁸⁰ (1983) A.T.P.R. ¶40-390.

⁸¹ (1985) A.T.P.R. ¶40-576.

⁸² (1986) A.T.P.R. ¶40-652.

⁸³ (1986) A.T.P.R. ¶40-721.

⁸⁴ (1987) A.T.P.R. ¶40-772.

⁸⁵ (1988) A.T.P.R. ¶40-881.

⁸⁶ (1988) A.T.P.R. ¶40-884.

⁸⁷ (1989) A.T.P.R. ¶40-922.

⁸⁸ Compare *T.P.C. v. Queensland Aggregates Pty Ltd* (1982) A.T.P.R. ¶40-317, where the focus was not D's defective compliance system but what the directors would have done if, given an adequate compliance system, they would have been alerted to non-compliance by employees.

especially against companies who may have been slack in their responses to having contravened the law. Secondly, s. 85(1), as amended, appears to create a major loophole because insufficient effort has been made to capture the "corporateness" of corporate defences. Thirdly, there seems insufficient assurance that corporate defendants, having been held liable, will respond by taking disciplinary action against personnel accountable for the contravention. Similarly, corporate defendants are not necessarily required to rectify defective policies or procedures that contributed to contravention.

Factual basis of penalty or sentence

The trial process cannot be expected to generate all the pertinent facts needed for sentencing or assessment of penalty; whether a company held liable has undertaken internal discipline or reform of defective operating procedures has little or nothing to do with the issue of liability. Fact-finding may thus be necessary at the stage of imposition of penalty or sentence, but the mechanisms now available are not entirely satisfactory.⁸⁹

Consider the basis of the penalty imposed in *Trade Practices Commission v. Pye Industries Sales Pty Ltd*,⁹⁰ a decision of the Federal Court of Australia in 1978. Pye was found to have committed resale price maintenance, and the court adjourned the matter before imposing penalty. At the penalty hearing the court was able to conclude that, at the time of violation, "there was an almost total lack of supervision or interest by the board of directors in the conduct of their management and executives in relation to resale price maintenance". However, the court was uninformed as to the nature of the company's disciplinary and other responses to the violation. The company itself had not come forward with relevant evidence, and the evidence that had emerged from the trial related to the issue whether a violation had been committed. The court, after describing the violation as "ruthless", and without being able to determine the exact nature of the company's disciplinary reactions, imposed a penalty of \$120,000 and subjected the company to an injunction. If the company had in fact been intransigent it is conceivable that a much higher penalty would have been warranted.

It is possible for the prosecution to address on penalty or sentence. It is also possible for the prosecution to assist the court on matters of fact or opinion, as by compelling the attendance of witnesses and examining them.⁹¹ In practice, however, little time is spent unearthing

⁸⁹ Consider *T.P.C. v. Dunlop Australia Ltd* (1980) A.T.P.R. ¶40-167.

⁹⁰ (1978) A.T.P.R. ¶40-089. See also *T.P.C. v. Malley's Ltd* op. cit. at 18,291.

⁹¹ See *D.P.P. v. Casey* (1986) 20 A.Crim.R. 191; *Tait* (1979) 24 A.L.R. 473; *Beresford* (1972) 2 S.A.S.R. 446; Fox and Freiberg, *Sentencing* (1985), 39-42; Fox and Freiberg, "Silence is Not Golden: The function of Prosecutors at sentencing in Victoria" [1987] *Law Institute Journal* (June) 554; Temby, "The Role of the Prosecutor in the Sentencing Process" (1986) 10 *Criminal Law Journal* 199.

the nature of a company's response. A company may plead its efforts toward compliance in mitigation of penalty or sentence. If it does so, the court usually looks for a credible account of what has been done rather than for detailed proof. If a company fails to plead compliance efforts in mitigation, then an assumption may be made about what the company has or has not done. Alternatively, the factor of effort toward compliance may be disregarded.

Where a defendant is convicted of an offence under Part V of the *Trade Practices Act*, the orthodox common law principle is that the factual basis of sentencing must be established beyond a reasonable doubt.⁹² It is open to question whether this principle is too demanding, especially in the context of internal corporate actions where the facts are not readily accessible to outsiders. In *O'Connor v. Stevenson*,⁹³ a recent case where D was convicted on charges under s. 53(bb) and (c) and s. 64(2A) of the *Trade Practices Act*, Einfeld J. endorsed the principle that a reasonable doubt as to sentencing facts should be resolved in favour of a defendant. However, he then relaxed that principle by imposing sentence on the basis that it was "very likely" that D was personally responsible for the misleading practices of his salespeople. Even if the common law principle is watered down as in *O'Connor v. Stevenson*, and even if the *Briginshaw*⁹⁴ standard is adopted (the approach taken by the Victorian Full Court in *Chamberlain*⁹⁵), there seems to be a discontinuity between casting a persuasive burden of proof on the prosecution in relation to the factual basis of sentence and imposing a persuasive burden of proof on D for the purpose of defences under s. 85.⁹⁶

In light of these difficulties, consideration might well be given to introducing a rebuttable statutory presumption. It could be provided that, where a corporate defendant subject to imposition of penalty or sentence for a violation of Part IV or Part V of the *Trade Practices Act* has been given the opportunity to come forward within a specified period and show what it has done to achieve internal discipline and organisational revision, and where it has refused to avail itself of that opportunity, it shall be presumed to have done nothing. Additionally, unsatisfactory corporate responses to contravention might be made a basis of liability; the kernel of this approach is the concept of reactive corporate fault, elaborated elsewhere.⁹⁷

⁹² *O'Neill* [1979] 2 N.S.W.L.R. 582; *Stehbens* (1976) 14 S.A.S.R. 240; *Weaver v. Samuels* [1971] S.A.S.R. 116; *Law v. Deed* [1970] S.A.S.R. 374. But see *Chamberlain* [1983] 2 V.R. 511. See further Fox and O'Brien, "Fact Finding for Sentencers" (1975) 10 *Melbourne University Law Review* 163. Compare *Criminal Law (Sentencing) Act* 1988 (S.A.), s. 10 (court to have regard to such matters specified in the section "as are relevant and known to the court").

⁹³ (1989) A.T.P.R. ¶40-944.

⁹⁴ (1938) 60 C.L.R. 336.

⁹⁵ [1983] 2 V.R. 511. *Chamberlain* is not referred to in *O'Connor v. Stevenson*.

⁹⁶ See *Brown v. Riverstone Meat Co. Pty Ltd*, supra, n. 81.

⁹⁷ See Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California Law Review* 1141.

Corporate reasonable precautions and defences under s. 85(1)

Section 85(1) of the *Trade Practices Act* provides a trio of defences, namely reasonable mistake, reasonable reliance on information supplied by another, and act or default of another in circumstances where D took reasonable precautions and exercised due diligence to avoid the contravention. Unlike the previous version of the provision, the requirement of reasonable precautions and due diligence is confined to the third defence. The reason behind this change was the concern expressed by the Swanson Committee about the uncertain meaning of "reasonable precautions" and the risk of imposing an excessive burden on companies by insisting, in every case of mistake or reliance on information supplied by another, that reasonable compliance precautions had also been taken.⁹⁸ However, as emerges from the recent decision in *Adams v. Eta Foods Ltd*,⁹⁹ it is difficult to see how corporate defences of reasonable mistake or reasonable reliance make sense unless qualified by a requirement of reasonable corporate precautions. Moreover, to recognise the need for a requirement of reasonable precautions is also to foreshadow the end of peripheral concepts such as mistaken belief.

In *Adams v. Eta Foods Ltd*¹⁰⁰ Gummow J. analysed s. 85(1) limb by limb and came to the conclusion, *inter alia*, that it is not necessarily fatal to a defence of reasonable mistake or reasonable reliance that D is unable to show that it took reasonable precautions and exercised due diligence to avoid the contravention; each defence has its own operation although in a given situation D may be able to establish all three defences. One possible implication of this analysis is that it opens the way for a company to obtain an acquittal by showing that a contravention was due to a reasonable mistake on the part of one employee despite the fact that the company has not taken reasonable precautions to avoid contravention.

Under s. 85(1)(a) it is a defence that the contravention was due to reasonable mistake. If one employee commits the *actus reus* of the offence as a result of making a reasonable mistake, plainly the contravention is due to a reasonable mistake. By virtue of s. 84(1), the company can establish the state of mind required by s. 85(1)(a)—reasonable mistake—by showing that the one employee engaged in the prohibited conduct with that state of mind. Since nothing else needs to be established to make out the elements of the defence as defined under s. 85(1)(a), it seems immaterial whether or not the company has taken adequate compliance precautions. It might be argued that the requirement that the mistake be "reasonable" embodies not a state of mind but a standard of care,¹⁰¹ and that the standard of care relates to the

⁹⁸ Trade Practices Act Review Committee, *Report* (1976), 9.144.

⁹⁹ (1987) A.T.P.R. ¶40-831.

¹⁰⁰ *Ibid.* See also *Gardam v. George Wills & Co. Ltd (No. 1)*, *supra*, n. 86.

¹⁰¹ Compare *He Kaw Teh v. R.* (1985) 157 C.L.R. 523 at 579 per Brennan J., 592 per Dawson J.

defendant, not the servant or agent who made the mistake. On this reading of the provision, a corporate defendant would not be acquitted unless the mistake made by the servant or agent was reasonable in the sense that the company had taken reasonable precautions to avoid the contravention.¹⁰² However, apart from being contrived, such an interpretation seems inconsistent with *Eta Foods* and irreconcilable with the views of the Swanson Committee that led to s. 85(1) in its present form. The upshot, it appears, is a serious loophole. If so, where has the law gone astray?

Reconsider the conceptual basis of corporate defences. The application of common law defences to corporations in the past has depended heavily on individualistic concepts of culpability. Corporate criminal liability has been based on a concept of representation, namely that the conduct of an individual representative counts as the conduct of the company. Thus, where a representative is exculpated from criminal liability the company is not criminally liable for that representative's conduct.¹⁰³ Logically seductive as this approach may be, it obscures the fundamental issue. Where a corporation pleads a defence the issue is whether the corporation deserves exculpation. The fact that there is no blameworthy individual representative does not necessarily mean that the company merits acquittal.

Brambles Holdings Limited v. Carey,¹⁰⁴ a decision of the Full Court of the Supreme Court of South Australia, is instructive. D appealed against a conviction for being the owner of an excessively laden vehicle, partly on the ground that it had acted under a reasonable mistake of fact. M1, D's heavy haulage supervisor, had entertained a belief that the vehicle would be laden in accordance with detailed instructions that he had given to M2, D's operations manager, but M2 had not transmitted these instructions to the relief driver who had loaded the vehicle. It was held that D could not successfully plead the *Proudman v. Dayman* defence of reasonable mistake of fact. While M1 may have entertained a reasonable belief that the company would not be the owner of an excessively laden vehicle, the defendant was not M1 but the company, D. D could not exculpate itself merely by showing that one manager had made a reasonable mistake; account had to be taken of the combined beliefs of the company's managers. M2, the other manager involved, had not entertained a reasonable mistaken belief and the absence of such a belief on his part was attributable to D.

The decision in *Brambles* turned on whether the beliefs of the managerial representatives added up to a reasonable belief on behalf of the company that the vehicle would be correctly laden. This goes

¹⁰² See *Videon v. Beneficial Finance Corporation*, supra, n. 76, at 43,228.

¹⁰³ See *Tesco Supermarkets Ltd v. Natrass* [1972] A.C. 153; *McKenzie v. G.J. Coles & Co. Ltd* [1986] W.A.R. 224.

¹⁰⁴ (1976) 15 S.A.S.R. 270. See also *G.J. Coles & Coy Limited v. Goldsworthy* [1985] W.A.R. 183 at 193-194 per Smith J.; *Woolworths Ltd v. Luff* (1988) 33 A.Crim.R. 144 at 146 per Miles C.J.

some distance toward recognition of the factor of corporateness, where a defence is pleaded by a company. However, *Brambles* proceeds on the basis that a company is represented by individuals and that corporate criminal liability depends on the conduct or mental states of representatives. Assume that each of the managerial representatives of the company had entertained a reasonable mistaken belief that the vehicle would be correctly laden. It would not necessarily follow that the company was blameless; the company might have failed to achieve the standard of communication reasonably expected of an organisation in its position.

It is thus evident that defences may require special adaptation if they are to work sensibly in relation to corporate defendants. The defence of reasonable mistake is a clear example. There is little point in focusing on the concept of mistaken belief where corporate defendants are concerned. Two considerations stand out. First, mistaken belief on the part of an individual representative has no necessary bearing on the blameworthiness of a corporation; an unreasonable mistaken belief on the part of an individual is an unreasonable mistaken belief on the part of an individual. Secondly, a defence of mistake is useless to companies where their operations make it inevitable that the actus reus of an offence will occur notwithstanding that all reasonable precautions are taken; it is usually impossible for a supplier of thousands of items in commerce to entertain a reasonable belief that every item supplied complies with the statutory requirements.¹⁰⁵ These problems have been avoided at common law in Canada and New Zealand where the courts have moved beyond the *Proudman v. Dayman* defence by developing a defence of reasonable care which dispenses with the quirkish concept of mistaken belief.¹⁰⁶ For corporate defendants this means that a defence is available if, and only if, reasonable precautions have been taken to minimise the risk of contravention.

The defences under s. 85(1)(a) and (b) thus lack a coherent foundation: in trying to eliminate the concept of reasonable precautions, the architects appear to have lost sight of the core concept of corporate blameworthiness. A preferable approach, it is submitted, would be an amendment echoing the common law defence of reasonable care that has been developed in Canada and New Zealand. Such a defence is imprecisely defined and does concentrate on corporate compliance systems but it is doubtful whether the considerations that troubled the Swanson Committee 13 years ago are nearly as weighty today. Much

¹⁰⁵ See *G.J. Coles & Coy Limited v. Goldsworthy* [1985] W.A.R. 183 at 189 per Burt C.J., 191 per Brinsden J.; Fisse, "Probability and the Proudman v. Dayman Defence of Reasonable Mistaken Belief" (1974) 9 *Melbourne University Law Review* 477 at 482-484, 511-512. For other examples see *Boucher v. G.J. Coles and Co. Ltd* (1974) 9 S.A.S.R. 495; *Geraldton Fishermen's Co-operative Ltd* [1963] W.A.R. 129; *Munro v. Lombardo* [1964] W.A.R. 63; *Smedleys Ltd v. Breed* [1974] A.C. 839; *Dean Rubber Manufacturing Co.*, 356 F. 2d 161 (1966).

¹⁰⁶ *City of Sault Ste Marie* (1978) 40 C.C.C. (2d) 353; *Millar v. Ministry of Transport* [1986] 1 N.Z.L.R. 660.

more is known about compliance systems now and the courts have a good deal of experience in assessing them. To the extent that doubts remain, the commendable solution is to refine the operation of the law on a case-by-case basis and thereby to clarify what is meant by a corporate failure to take reasonable precautions or to exercise due diligence to guard against contravention.

Internal discipline¹⁰⁷ and organisational reform

The importance attached to disciplinary action and organisational revision as factors in mitigation or aggravation of penalty or sentence provokes one to ask whether the law should go further. Should corporate defendants be required to report what exactly they have done in response to contravention? In the event of an unsatisfactory response, why not compel them to take further measures?

Internal discipline is relevant to mitigation of penalty or sentence under the *Trade Practices Act*¹⁰⁸ but that does not mean that a corporate defendant is obliged to do anything. Thus, in *Trade Practices Commission v. Pye Industries Sales Pty Ltd*¹⁰⁹ there was no evidence that disciplinary action had been taken. An injunction was ordered, but not to take disciplinary action.¹¹⁰ It may also be noted that the courts in the past have tended to focus on whether persons knowingly implicated in the offence have been disciplined.¹¹¹ Such a focus seems too narrow because other employees, including senior personnel, may be accountable to the company for negligence or lack of excellence in failing to prevent a contravention: an aim of corporate liability, it may be argued, is to catalyse internal discipline against all persons who have contributed significantly to the breakdown in compliance.

While companies may respond to enforcement action by taking internal disciplinary action,¹¹² there may be powerful incentives not

¹⁰⁷ Quintessential Marquis de Sade.

¹⁰⁸ See *T.P.C. v. Stahl Chain Saws (Aust.) Pty Ltd* (1978) A.T.P.R. ¶40-091; *T.P.C. v. Dunlop Australia Ltd* supra, n. 77; *T.P.C. v. General Corporation Japan (Australia) Pty Ltd* supra, n. 87; *T.P.C. v. Commodore Business Machines Pty Ltd*, No. G 977 of 1988; Freiberg, "Monetary Penalties under the Trade Practices Act 1974 (Cth)" (1983) 11 *Australian Business Law Review* 4 at 13. The defence under s. 85(1)(c) requires reasonable precautions and due diligence to avoid a contravention, but does not also insist upon adequate disciplinary or other steps in light of contravention. (1978) A.T.P.R. ¶40-089.

¹⁰⁹ Likewise in *T.P.C. v. Commodore Business Machines Pty Ltd*, supra, n. 108.

¹¹⁰ See e.g., *T.P.C. v. Mallesys Ltd*, supra, n. 75, at 18,291.

¹¹² See e.g., *T.P.C. v. Tubemakers of Australia Ltd*, supra, n. 80. For an empirical study of the responses of companies embroiled in publicity scandals see Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 60-61, 121, 154-55, 166-67, 172, 192-94, 209, 224, 234. Occasionally the responses become well-known and a source of scandal. For instance, the prosecution of E.F. Hutton for fraud led the company to make an internal investigation, conducted by Griffin Bell, former U.S. Attorney General. The subsequent report found 15 individuals accountable, and recommended fines of between \$25,000 and \$50,000 for six branch managers, as well as periods of probation. Hutton adopted the report and released

- Civil damages;
- Adverse publicity;⁴
- Disruption and loss of morale as a result of involvement in litigation or a publicity crisis;⁵
- Legal costs in defending claims or prosecutions;⁶
- Expenses of restitution or other corrective action;
- Increases in insurance premiums.

The aim is to minimise exposure to liability for violations, either by avoiding contravention or, in the event of contraventions against Pt.V, by laying the groundwork for a defence under s. 85. Even if legal liability is incurred, compliance efforts are useful in mitigating the extent of liability: the extent to which compliance has been attempted by a company is a major factor in assessment of penalty under Pt.IV or sentence under Pt.V.⁷ Ignorance or mistake of law is no excuse,⁸

-
- ⁴ Both informally via news media (see generally Fisse, B. and Braithwaite, J., *The Impact of Publicity on Corporate Offenders* (1983)), and formally via corrective advertising (ss 80, 80A; *H.C.F. Australia Ltd v. Switzerland Australia Health Fund Pty Ltd* (1988) A.T.P.R. ¶40-846; *Janssen Pharmaceuticals Pty Ltd v. Pfizer Pty Ltd* (1986) A.T.P.R. ¶40-654; *Mundine v. Layton Taylor Promotions Pty Ltd* (1981) A.T.P.R. ¶40-211). A relevant factor here is the apparent hardening of public attitudes toward corporate crime; see further Australia, Institute of Criminology, "Corporate Crime in Australia" (1987) 5 *Trends and Issues*; Grabosky, Braithwaite, and Wilson, "The Myth of Community Tolerance Toward White-Collar Crime" (1987) 20 *Australia and New Zealand Journal of Criminology* 33; Cullen, F.T., Maakestad, W.J., and Cavender, G., *Corporate Crime under Attack: The Ford Pinto Case and Beyond* (1987) chs. 1-2.
- ⁵ Consider e.g., the immense time and resources incurred by E.F. Hutton in fielding the Hutton banking fraud case; see U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E.F. Hutton Mail and Wire Fraud Case, Report*, 99th Cong., 2nd Sess., 1986; Carpenter, D. S., *The Fall of the House of Hutton* (1989).
- ⁶ Consider e.g., *T.P.C. v. T.N.T. Management Pty Ltd* (1985) A.T.P.R. ¶40-512.
- ⁷ See *T.P.C. v. Malloys Ltd* (1979) A.T.P.R. ¶40-118; *T.P.C. v. Dunlop Australia Ltd* (1980) A.T.P.R. ¶40-167; *T.P.C. v. I.C.I. Australian Petrochemicals Ltd* (1983) A.T.P.R. ¶40-364; *T.P.C. v. Massey Ferguson (Australia) Ltd* (1983) A.T.P.R. ¶40-369; *T.P.C. v. B.P. Australia Ltd* (1986) A.T.P.R. ¶40-652; *T.P.C. v. Annand and Thompson Ltd* (1987) A.T.P.R. ¶40-772; *T.P.C. v. General Corporation Japan (Australia) Pty Ltd* (1989) A.T.P.R. ¶40-922; *T.P.C. v. Commodore Business Machines Pty Ltd*, No. G 977 of 1988. See further Freiberg, "Monetary Penalties under the Trade Practices Act" (1983) 11 *Australian Business Law Review* 4; Haarer, "Avalanche of Compliance Problems Means More 'Hats' for House Counsel" (1987) 6(3) *Preventive Law Reporter* 3 at 6. The application of penalties or fines is an inexact process where the criteria are loosely defined and where the weight to be attached to them is obscure; see e.g., *T.P.C. v. Annand and Thompson Ltd* (1987) A.T.P.R. ¶40-772; *T.P.C. v. General Corporation Japan (Australia) Pty Ltd* (1989) A.T.P.R. ¶40-922; *T.P.C. v. Commodore Business Machines Pty Ltd*, No. G 977 of 1988; Hurley, "Section 76 of the Trade Practices Act" (1985) (LLM Honours paper, University of Sydney); Nagel, T., *The Fine as a Sanction against Corporations* (1979) (LLB Honours thesis, University of Adelaide), ch. 3 (detailed proposal for a systematic approach to the assessment of penalties and fines under the Act; goals and constraints are specified, and arranged and weighted according to explicit order of priority); cf. Eilon, "Goals and Constraints in Decision-Making" (1972) 23 *Operations Research Quarterly* 3.
- ⁸ *T.P.C. v. Madad Pty Ltd* (1979) A.T.P.R. ¶40-105. But consider, re auxiliary liability, s. 85(6) (relief under Pt IV where D "ought fairly to be excused").

but may mitigate in some circumstances, such as reasonable reliance on incorrect legal advice.⁹

The future of corporate prophylaxis is a matter of intrigue. At least four significant trends seem to be emerging. First, it is increasingly recognised that compliance programmes are best developed from the perspective of risk management rather than from the narrower standpoint of legal advice and legal "auditing". Secondly, compliance policies and procedures are coming under sharper judicial scrutiny, a development that is starting to reveal cracks in the law. Thirdly, legal professional privilege is likely to become more widely exploited by companies as a means of protecting the results of sensitive internal inquiries. Fourthly, there are signs that s. 229(2) of the *Companies Code* may be interpreted as imposing liability upon a director or other corporate officer who fails to take steps to help ensure that an effective compliance system is in place within his or her corporation. Trends such as these may reflect a shift in the way corporations are viewed in modern society. The traditional liberal concept of corporations as mere conduits of individualism is vulnerable to displacement by more corporate-oriented visions of social control.

COMPLIANCE PROGRAMMES IN PERSPECTIVE: RISK MANAGEMENT

The old-fashioned view is that corporate compliance programmes revolve around the provision of legal services, whether by way of advice on particular transactions, education of personnel as to legal requirements, or periodic review of contractual and other documentation. This view is still prevalent in the U.S.A.¹⁰ and locally.¹¹ However, a different approach has emerged, especially from the work on compliance systems that major companies have undertaken over the past decade or so.¹² According to this approach, the platform on which compliance programmes should be built is not merely provision of legal services but management of risk of exposure to liability and related losses.¹³

⁹ Compare *T.P.C. v. Commodore Business Machines Pty Ltd*, No. G 977 of 1988.

¹⁰ See American Bar Association, *Management for In-House Counsel: Techniques, Tools, Approaches* (1985).

¹¹ See e.g., Business Law Education Center, *Trade Practices Compliance for Business* (1989). Compare Pengilly, W., *Advertising and the Trade Practices Act* (1981).

¹² Especially the experience of Allied Chemical (now Allied Signal): Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits" (1987) 6(3) *Preventive Law Reporter* 12; Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, ch. 6. See further Sigler, J.A. and Murphy, J.E., *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* (1988); Beckenstein and Gabel, "Antitrust Compliance: Results of a Survey of Legal Opinion" (1982) 51 *Antitrust Law Journal* 459; Anderson, "Antitrust Compliance in Action" (1975) 20 *Antitrust Bulletin* 731; Withrow, "Antitrust Compliance Programs" (1964) 19 *Record of the Bar Association of the City of New York* 151.

¹³ See generally Bannister, J.E. and Bawcutt, P.A., *Practical Risk Management* (1981); Hertz, D., and Thomas, H., *Practical Risk Analysis* (1984); Rescher, N., *Risk* (1983); The Royal Society, *Risk Assessment: A Study Group Report* (1983).

This perspective reorients the idea of compliance programmes and, it is submitted, should be heeded when advising corporate clients: outmoded legalistic conceptions may be misleading, possibly to the extent of fermenting actions for professional negligence.

Key elements of compliance from a risk management perspective

The standard elements of risk-managing compliance programmes are these:¹⁴

- Clearly-stated compliance policies that are reinforced by top as well as middle-level management;¹⁵
- Systematic identification and management of risks created by the company's operations;¹⁶
- Clear allocation of responsibility for compliance functions to specified personnel;¹⁷
- Segregation and rostering of functions in high-risk areas so as to restrict opportunities for non-compliance;¹⁸

¹⁴ See especially Braithwaite, J., *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985); Braithwaite, "Taking Responsibility Seriously: Corporate Compliance Systems" in Fisse, B. and French, P.A., eds., *Corrigible Corporations and Unruly Law* (1985), ch. 3.

¹⁵ See e.g., Arkin, S., *Business Crime* (1985), 6A-7, App. 6A-A; Witherell, C., *How to Avoid Products Liability Lawsuits and Damages* (1985), 142-48, 232-39; Braithwaite and Fisse, "Preventive Law and Managerial Auditing" (1988) 3(1) *Managerial Auditing Journal* 17; Dinnie, "Corporate Crime: Prevention is Better than Cure" in *Policing Corporate Crime* (1987) 74 *Proceedings of the Institute of Criminology, University of Sydney* 46 at 48; Bruns, "Corporate Preventive Law Programs" (1985) 4 *Preventive Law Reporter* 30, at 31; Rea, "A Written Program for Preventive Law Activity" (1984) 2 *Preventive Law Reporter* 177; Murphy, "How to Communicate Antitrust Philosophy to Corporate Personnel" (1975) 44 *Antitrust Law Journal* 260. The problem of giving compliance staff sufficient "clout" is a recurring theme in the literature. Where compliance staff have power over vital resources (e.g., approvals and licences) this problem may not arise, but it is often impossible to structure staff-line relationships in such a way. In these circumstances, it is important for senior management to communicate the message that in any dispute over compliance controls it is likely to stand behind its compliance staff. This may require the backing of a formal procedure. For example, the power of quality control directors in many pharmaceutical companies is reinforced by formal requirements that their decisions can only be overruled by a written directive of the chief executive.

¹⁶ See Coad, "Development of Compliance Awareness Strategies: The Trade Practices Commission View" in B.R. & S. Seminar, *Averting the Threat of Mega-Liability: How to Adopt Preventive Strategies & Systems* (1987); Pengilly, W., *Collusion: Trade Practices and Risk Taking* (1978); Walter and Richard, "Corporate Counsel's Role in Risk Minimization: Lessons from Bhopal" (1986) 4 *Preventive Law Reporter* 139; Dinnie, "Corporate Crime: Prevention is Better than Cure", supra, n. 15. This task includes watching pressures for non-compliance, as discussed in Braithwaite and Fisse, "Preventive Law and Managerial Auditing" (1988) 3(1) *Managerial Auditing Journal* 17.

¹⁷ Braithwaite, *To Punish or Persuade*, 32-34, 65-66; Braithwaite and Fisse, "Preventive Law and Managerial Auditing" (1988) 3(1) *Managerial Auditing Journal* 17; Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits" supra, n. 12.

¹⁸ Dinnie, "Corporate Crime: Prevention is Better than Cure", supra, n. 15, at 48.

- Readable compliance manuals setting out relevant standards (legal, corporate, and industry self-regulating), operating procedures for particular units in the organisation, and concrete examples;¹⁹
- Routine controls for monitoring and enforcing compliance together with safeguards for ensuring command of compliance problems by senior management;²⁰
- Standard procedures for avoiding the creation or retention of unnecessarily damaging or incriminating documentation;²¹
- Investigative and reporting procedures structured so as to maximise the protection possible from legal professional privilege;²²
- Action plans in the event of discovery of illegality and for resolution of complaints received from employees, members of the public or enforcement agencies;²³
- Education and training of personnel;²⁴
- Interaction with enforcement agencies, as by submitting compliance materials for preview.²⁵

¹⁹ See e.g., C.S.R., *Trade Practices Act: A Guide* (1980); Allied Signal, *Antitrust: Competition & Compliance* (1987). For a useful detailed account of operating procedures in the context of advertising see Pengilly, W., *Advertising and the Trade Practices Act* (1981), Pt. III.

²⁰ See further *Universal Telecasters Qld Ltd v. Guthrie* (1977) 18 A.L.R. 531; *Videon v. Beneficial Finance Corporation* (1981) A.T.P.R. ¶40-246; Hardy, "Establishing Legal Audits and Drafting Compliance Programs" (1984) 2 *Preventive Law Reporter* 118.

²¹ See further Perry, "Product Liability Loss Control—Medical Devices and Pharmaceutical Manufacturers" (1984) 3 *Preventive Law Reporter* 3 at 10; Fedders and Guttenplan, "Document Retention and Destruction: Practical, Legal and Ethical Considerations" (1980) 56 *Notre Dame Law Review* 5; Kolb and Ross, *Product Safety and Liability*, 89; Dewis, Hutchins and Madge, *Product Liability*, 212-213; Curtis, "Establishing and Implementing a Document Retention Program" in A.B.A., *Organizing Corporate Compliance Efforts* (1983), ch. 11; Trower, "Records Retention: An Important Subject Often Gets a Low Priority" (1987) 6(3) *Preventive Law Reporter* 28; Note, "Legal Ethics and the Destruction of Evidence" (1979) 88 *Yale Law Journal* 1665; Bass, "A Guide to Product Liability Prevention (Part Five)" (1985) 3 *Preventive Law Reporter* 171; Witherell, C., *How to Avoid Products Liability Lawsuits and Damages* (1985), 220; Walter and Richard, "Corporate Counsel's Role in Risk Minimization: Lessons from Bhopal", supra, n. 1; Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits", supra, n. 12.

²² See discussion and references in "Proactive Information Management: Exploitation of Legal Professional Privilege", below, n. 145ff.

²³ See e.g., Dinnie, "Corporate Crime: Prevention is Better than Cure" in Policing Corporate Crime, supra, n. 15; Bass, "A Guide to Product Liability Prevention" (1984) 3 *Preventive Law Reporter* 171. As regards product notification and recall systems see Bass, "A Guide to Product Liability Prevention (Part Five)" (1985) 3 *Preventive Law Reporter* 171).

²⁴ See e.g., Gibson, Dunn and Crutcher, *Antitrust Handbook* (1984) VI:7-VI:9; Holtz, "Company Education Programs must Motivate Employees to Listen" (1987) 6(3) *Preventive Law Reporter* 26. A wide range of T.P.C. leaflets and other information is available: see (1989) 48 *Trade Practices Commission Bulletin* 39-40; T.P.C., *Annual Report 1987-88*, ch. 4.

²⁵ See further Sigler, J.A. and Murphy, J.E., *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* (1988).

These elements are found in full-fledged compliance systems. Their relative weight depends on various factors, most notably organisational structure,²⁶ the quality and number of personnel, the ability of top management to instil a culture of compliance without laying down detailed rules, and the extent to which achieving compliance can be integrated as a line rather than staff function.²⁷ As Richard Duesenberg of the Monsanto Company has put it:

“What [the suitable form of compliance] is, is not identifiable and fixed for all corporations. It would be incorrect to contend either that a specific compliance activity level should be engaged in by all corporations, or that the organization for compliance should be the same, without regard to the particular needs of a given corporate entity.”

While agreeing with Duesenberg that there is no invariable formula for corporate compliance, all the basic elements listed above are relevant as a starting point when designing a compliance system appropriate to the needs of a particular company.²⁸ To take a recurrent source of concern, compliance policies and procedures are not enough in themselves to prevent contraventions.²⁹ The point has repeatedly been made in the context of the *Trade Practices Act* that the duty to take reasonable care requires not only the adoption of sound policies and procedures

²⁶ See further Braithwaite and Fisse, “Varieties of Responsibility and Organizational Crime” (1985) 7 *Law and Policy* 315.

²⁷ There is no standard recipe to be followed. For instance, in the area of monitoring compliance with safety standards it has been shown in the coal mining industry that there is no necessary correlation between the number of safety inspectors and the achievement of a good safety record: Braithwaite, *To Punish or Persuade*, 63; as the director of safety at Bethlehem Steel put it, “You can’t cookbook safety”. See also Becker, “Basic Considerations in Establishing Corporate Legal Compliance Programs” in A.B.A., *National Institute on Organizing Corporate Compliance Efforts* (1983), 1-3.

²⁸ If the ideal organisational structure is the free-floating ad hoc model advocated in Mintzberg, H., *The Structuring of Organizations* (1979), compliance responsibilities would need to be allocated on a more dynamic, flexible basis. Compliance systems need not be rigid; on the contrary, they may be adapted to suit changes in organisational structure.

²⁹ See further Haarer, “Avalanche of Compliance Problems Means More ‘Hats’ for House Counsel”, *supra*, n. 7, at 6:

“Sad but true is the fact that many companies believe that publishing a policy provides absolution from future lawsuits or criminal convictions. Dissuading management from the illusion that policies can be ‘winked at’ after they are published is a key responsibility of house counsel.

Similarly, counsel must educate management that merely promulgating a written policy to the employee population will not excuse civil or possible criminal consequences if an employee fails to adhere to the policy.

Management must understand that the power of its authority requires a corresponding duty to control employee activity and that delegation by management to subordinates will rarely excuse the corporation or its top management from liability if continuing efforts at legal compliance are not consciously and consistently administered.”

but also the supervision and enforcement of them.³⁰ Thus, in *Videon v. Beneficial Finance Corporation*³¹ a defence of reasonable precautions under s. 85 failed because inadequate steps were taken to implement the company's compliance policy. More recently, in *T.P.C. v. General Corporation Japan (Australia) Pty Ltd*,³² General was penalised \$130,000 largely as a reflection of the "totally inadequate" steps taken to impress upon employees and senior management the need to adhere to a compliance policy established by the board of directors.

There are many respects in which a risk management approach transcends legal advice and legal auditing:³³

- Compliance systems justify their existence not on the quality or intensity of legal or other input by staff experts but on the contribution made to the company's profitability and reputation;³⁴
- Management attitudes toward compliance tend to carry more weight than the views of discrete compliance staff or outside professional advisers;³⁵
- Compliance depends greatly on the day-to-day accountability of line managers and supervisors for operations under their command;³⁶

³⁰ As in *Universal Telecasters Qld Ltd v. Guthrie* (1977) 18 A.L.R. 531; *Videon v. Beneficial Finance Corporation* (1981) A.T.P.R. ¶40-246. See also *In re Holland Furnace Company* 341 F.2d 548 (1965). How frequent and how extensive the checks and reviews should be varies from context to context. If a company has a bad record of resale price maintenance, weekly or even daily reviews of control procedures by an executive director may be warranted. On the other hand, if a company has a clean record it may be sufficient for the board to act on the basis of an annual compliance report prepared by the personnel in charge of compliance. In the event of a major catastrophe, it may be necessary for the board itself to take an active role in resolving what should be done to revise existing compliance procedures. A task force approach has been adopted in response to some major corporate episodes of non-compliance, with board representation on the task force. This was e.g., Ford's response to the emissions fraud case, and Allied Chemical's response to the Kepone pollution case; see Fisse, B. and Braithwaite, J., *The Impact of Publicity on Corporate Offenders* (1983), chs. 5, 6.

³¹ (1981) A.T.P.R. ¶40-246.

³² (1989) A.T.P.R. ¶40-922. See also *T.P.C. v. B.P. Australia Ltd* (1986) A.T.P.R. ¶40-652.

³³ Note Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits", *supra*, n. 12, at 13:

"It may come as a mild shock to the lawyer reader of this article, but the real secret to compliance in this area is not the lawyer—he or she is merely one cog in the compliance wheel. Rather, the secret lies in the active involvement by a sufficient number of competent multi-disciplined environmental professionals. These folks should be primarily at the plant level, but with a sufficient number of staff to develop, implement and monitor the various environmental programs."

³⁴ Many companies (e.g., Exxon and Allied) stress the financial costs of non-compliance.

³⁵ E.g., the lawyers at G.E. were ineffectual in controlling price-fixing in the heavy electrical equipment conspiracies.

³⁶ See further Braithwaite, "Taking Responsibility Seriously: Corporate Compliance Systems", *supra*, n. 14, ch. 3.

- Legal auditing requires that compliance be monitored and the monitoring function is best undertaken as a line as well as staff responsibility;³⁷
- Suspected non-compliance is more likely to be reported upwards in an organisation through managers and supervisors than through specialised legal staff;³⁸
- Unrealistic performance targets are a common source of non-compliance within organisations, and setting more realistic targets is a matter of corporate financial strategy;³⁹
- Self-protective documentation programmes require not only legal auditing but also procedures which are ingrained down the line;⁴⁰
- Responding to complaints about non-compliance from employees, members of the public, or enforcement agencies is not simply a defensive legal function, but also a feedback mechanism for managerial learning;⁴¹
- Education and training are more obviously achievable through routine operational procedures than by reliance merely on periodic lectures and seminars conducted by compliance staff or solicitors from law firms.⁴²

None of this is to deny the importance of the role of legal advisers in liability control.⁴³ The point is that legal services fall within the broader and more fundamental framework of risk management.

³⁷ See further Fisse, B. and Braithwaite, J., *The Impact of Publicity on Corporate Offenders* (1983), chs. 15, 17. For a narrower conception of monitoring compliance see Hardy, "Establishing Corporate Legal Audits and Drafting Compliance Programs" (1984) *2 Preventive Law Reporter* 118.

³⁸ The classic example is the information blockage at G.E. which led to its implication in the heavy electrical price-fixing conspiracies of the late 1950s and early 1960s.

³⁹ The mentality of "Do what you have to do but don't tell me how you do it" is not uncommon. Some companies have a policy of ensuring that targets are attainable by legal means. Accordingly, sales quotas are adjusted downwards when times are bad.

⁴⁰ See e.g., Walter and Richard, "Corporate Counsel's Role in Risk Minimization: Lessons from Bhopal", *supra*, n. 16; Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits", *supra*, n. 12.

⁴¹ See e.g., Witherell, C., *How to Avoid Products Liability Lawsuits and Damages* (1985), 255-259; Bass, "A Guide to Product Liability Prevention (Part Five)", *supra*, n. 21.

⁴² Thus, the thrust of safety education and training at Allied is the pervasive learning process achieved by having standard operating procedures designed to manage risk as a matter of everyday routine.

⁴³ Consider e.g., the implications of *Queensland Wire Industries Pty Ltd v. The Broken Hill Proprietary Company Limited* (1989) A.T.P.R. ¶40-925, as discussed in Pengilly, "The High Court Decision in Queensland Wire: Who Now Has to Supply What and on What Terms?" [1989] *Australian Corporate Lawyer* (June) 5. For other examples see Pengilly, "What Do You Have to Do to End Arrangements in Breach of the Trade Practices Act?" [1988] *Australian Corporate Lawyer* (June) 8; Gibson, Dunn and Crutcher, *Antitrust Handbook* (1984).

Preventive intelligence and communication channels

The significance of a risk management perspective may be illustrated by the role of intelligence and communication channels in controlling exposure to liability. Preventive intelligence and effective channels of communication within an organisation are essential to the task of avoiding violations or minimising the loss flowing from them.⁴⁴

Cases have often arisen where even widespread illegality at the level of middle management has passed unnoticed by top management.⁴⁵ A notorious example is General Electric's experience during the heavy electrical equipment conspiracies of the late 1950s and early 1960s. Systematic price-fixing by sales executives took place for years without being detected by top management. General Electric was fined \$437,500 for its part in the conspiracies and many middle managers were convicted. The company had a firmly-worded compliance policy on antitrust but its reporting and monitoring procedures had failed. Although much effort had been expended on advice and compliance auditing by the legal staff, the outbreak of price-fixing had passed undetected. In the light of this and other similar episodes, numerous companies have revised their reporting systems so as to "bubble up" news of suspected illegality to senior management.

The solution adopted by many American companies (e.g., General Electric, Allied-Signal, Dow Chemical, IBM, Exxon and United Airlines) has been to supplement traditional one-over-one reporting relationships with extra reporting channels through which the concerns of personnel about possible areas of non-compliance can readily be communicated to top management. Expanding upon this practice, John Braithwaite has made these suggestions:⁴⁶

"Make sure that routine formal reporting relationships are designed well enough, and appropriately enough to the unique environment of the company, to ensure that most recurrent problems of non-compliance are reported to those with the power to correct them.

Make sure there is a free route to the top, by-passing line reporting relationships, to reduce the likely success of conspiratorial blocking of bad news.

Create a corporate culture with a climate of concern for compliance problems which are not an employee's own responsibility, an organization "full of antennas" in which there is a commitment to being alert to noticing and reporting how others, as well as oneself, can solve compliance problems."

IBM is a good example of a company "full of antennas". Each year the local controller at IBM sends up an "early warning system report"

⁴⁴ See e.g., *Brambles Holdings Ltd v. Carey* (1976) 15 S.A.S.R. 270.

⁴⁵ E.g., Exxon in relation to allegations of the payment of bribes by its Italian subsidiary in the mid-1970s.

⁴⁶ Braithwaite, "Taking Responsibility Seriously: Corporate Compliance Systems", *supra*, n. 14, 46-47.

to the divisional controller and the report is then sent on up to the corporate controller. The early warning report is intended to identify any business control problem which may be emerging. This is one way of dealing with the problem of the executive who says, "I would have reported it up, but first I wanted to be sure that something was wrong". Consider also the network of antennas provided by IBM's contention system:⁴⁷

"To ensure compliance with its corporate policies . . . IBM relies heavily on its so-called 'contention system'. The contention system sets up a friendly adversariness between staff and line. If the general-counsel of a subsidiary objects to the subsidiary chief over a marketing practice perceived as contravening company policy, and if that objection is overruled, she must report this to division counsel. If the latter agrees with the local counsel, the objection is taken up with the division chief executive to whom the local chief answers. Should the division chief executive support the local chief while the division counsel supports the local counsel, the contention will move up to a higher level of the organisation. Ultimately, it might be decided in a discussion between the Chairman and the General-Counsel, in which the Chairman will have the final say. Such a formalised contention system between line and staff reporting relationships increases the probability that problems will be flushed out into the open."

Costs of compliance systems: the bottom line

The basic elements of trade practices compliance systems are far from mysterious and much practical guidance about them is available. But what about the costs?

Although compliance systems are hardly costless, their object and reputed achievement is to reduce the incidence of expensive legal and related losses and thereby to lower overall costs.⁴⁸ It has often been said that the benefits of a comprehensive compliance system outweigh the disadvantages,⁴⁹ a position reflected by the commitment to compliance manifested by many leading companies. That commitment rests partly on the view, as expressed by senior executives at Exxon and IBM, that the costs of the control function are paid for by savings generated in rooting out inefficiency and in maintaining a reliable system for monitoring the performance of personnel.⁵⁰ Thus, programmes to

⁴⁷ Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 209.

⁴⁸ It has also been claimed that compliance programmes help to promote morale and loyalty to an organisation, and foster an ethical image which is likely to appeal to investors and potential recruits; see e.g., Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits", *supra*, n. 12.

⁴⁹ See e.g., Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits", *supra*, n. 12; Arkin, S., *Business Crime*, 6A-5-6A-6; Murphy, "It's Necessary, But Preventive Law has Real Costs and Serious Risks" (1988) 7(3) *Preventive Law Reporter* 3.

⁵⁰ See Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, chs. 15, 17; Pengilley, W., *Advertising and the Trade Practices Act* (1981), 92.

to do so. Disciplinary action may be disruptive,¹¹³ embarrassing for those exercising managerial control,¹¹⁴ encouraging for whistle-blowers,¹¹⁵ or a fertile source of litigation against the company or its officers.¹¹⁶

Similar considerations apply where there is a need for a corporate defendant to rectify defective operating procedures or compliance policies that have contributed to violation. Andrew Hopkins made an empirical study in 1978 of 19 companies convicted and fined for misleading advertising offences under the *Trade Practices Act*.¹¹⁷ Hopkins investigated whether the commission of offences was attributable to inadequate standard operating procedures, and if so, whether the inadequacy was corrected after conviction. The offences committed by 15 of the 19 companies were attributed largely to defective checking and communications procedures. Of these 15 companies, nine rectified their defective procedures. Of the remaining six companies, two made minor changes which were not entirely satisfactory, two made no changes whatsoever, and two weren't telling.

The emphasis attached to likelihood of repetition in cases stemming from defective compliance procedures varies widely. In *Brown v. Riverstone Meat Co. Pty Ltd*¹¹⁸ a full examination was made of this issue, as it was in *T.P.C. v. Annand and Thompson Ltd*.¹¹⁹ By contrast, in *T.P.C. v. Malleys Ltd*¹²⁰ the court was left up in the air as to what exactly Malleys had done to guard against repetition (no evidence was adduced as to any improved compliance controls). The court accepted an undertaking that the company would not engage in resale price maintenance in relation to "Whirlpool" appliances, but that undertaking fell well short of assurance that adequate compliance controls

¹¹² *Contd.*

it publicly, thereby obliging two top officials immediately to resign. The Bell Report was subsequently criticised as a biased exercise in "damage control"; see U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E.F. Hutton Mail and Wire Fraud Case, Report*, 99th Congress, 2d Sess., 1986, 156-158. This report also berated E.F. Hutton for failing to respond adequately to the extensive fraud committed on its behalf; *ibid.* at 150-155, 159.

¹¹³ Consider e.g., the internal disciplinary inquiry described in McCloy, J.J., *The Great Oil Spill* (1976).

¹¹⁴ See e.g., *Nation*, 18 Feb. 1961, 129 (editorial criticism of General Electric's top management after the company undertook disciplinary action against employees involved in the electrical equipment conspiracies).

¹¹⁵ Coffee, "Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions" (1980) 17 *American Criminal Law Review* 419 at 459; Braithwaite, J., *Corporate Crime in the Pharmaceutical Industry* (1984), 402.

¹¹⁶ Sometimes these incentives may be veiled by the claim that the problem has been sufficiently investigated and resolved by public enforcement action; such a claim was made by Westinghouse when it refused to take disciplinary action in the wake of the heavy electrical equipment price-fixing conspiracies; see Coffee, "Corporate Crime and Punishment" 458-59.

¹¹⁷ Hopkins, A., *The Impact of Prosecutions Under the Trade Practices Act* (1978).

¹¹⁸ *Supra*, n. 81.

¹¹⁹ *Supra*, n. 84.

¹²⁰ *Supra*, n. 75.

were put in place. One explanation¹²¹ for this variation in approach is the difficulty in ascertaining the relevant facts if, as is not uncommon, a corporate defendant declines the opportunity to provide information about the compliance efforts it has or has not taken.

An alternative approach would be to require a corporate defendant, if held liable for a contravention, to prepare and submit a report setting out exactly what disciplinary and other steps have been taken in response to contravention and, where necessary, to require the defendant to take further measures. This approach could now be achieved by means of probationary conditions under s. 19B of the *Crimes Act* (Cth) (in relation to contraventions of Part V).¹²² Another method, available under s. 80 of the *Trade Practices Act*, as amended, would be to issue a suitably cast mandatory injunction (in relation to contraventions of Part IV or Part V).¹²³ It is true that, to date, corporations in Australia have rarely been subjected to probationary conditions or mandatory injunctions. However, in the U.S.A. the use of probation and mandatory injunctive relief against corporate defendants has been quite common,¹²⁴ and proposals to extend the use of corporate probation have recently been put to the U.S. Sentencing Commission.¹²⁵

¹²¹ Another relevant factor is the absence under s. 76 or s. 79 of any clear statutory requirement that consideration be given to the extent to which a corporate defendant has undertaken internal discipline or organisation revision of defective procedures. Compare 18 U.S.C. s. 3572(a)(4) which provides that, when imposing a fine on a corporation, a court is to consider "any measures taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such offense". See further Coffee and Whitbread, "The Convicted Corporation: An Outline of the New Federal Remedies" in Obermaier, O.G., ed., *Corporate Criminal Liability* (1986) 318.

¹²² Corporate probation can be ordered under s. 19B; see *John C. Morish Pty Ltd v. Luckman* (1977) 30 F.L.R. 89; *Sheen v. George Cornish Pty Ltd* (1978) 34 F.L.R. 466; *Lanham v. Brambles-Ruys Pty Ltd* (1984) 55 A.L.R. 138. Compare *Probation and Parole Act* 1983 (N.S.W.), ss 5-16 (wording appears to preclude probation orders against companies).

¹²³ See generally *Australian Trade Practices Reporter* (1989) ¶18-395; Spry, I.C.F., *The Principles of Equitable Remedies* (4th ed.), 503-528. An injunction may be granted in addition to a pecuniary penalty: *T.P.C. v. Commodore Business Machines Pty Ltd*, supra, n. 108; *T.P.C. v. Australian Autoglass Pty Ltd*, supra, n. 85; *T.P.C. v. Mobil Oil Australia Ltd* (1985) A.T.P.R. ¶40-503; *T.P.C. v. Bamix Australia Pty Ltd* (1985) A.T.P.R. ¶40-534; *T.P.C. v. Stahl Chain Saws (Aust.) Pty Ltd*, supra, n. 108. Compare *Thomson Australian Holdings Pty Ltd v. T.P.C.* (1981) A.T.P.R. ¶40-234 (limitation on incidental conditions under s. 80 prior to amendment).

¹²⁴ See especially Gruner, "To Let the Punishment Fit the Organisation: Sanctioning Corporate Offenders through Corporate Probation" (1989) 16 *American Journal of Criminal Law* 1. See further American Bar Association, 3 *Standards for Criminal Justice* (1980) 18.162-163, 18.179-184; Fisse, "Responsibility, Prevention, and Corporate Crime" (1973) 5 *New Zealand Universities Law Review* 250; Stone, "A Slap on the Wrist for the Kepone Mob" (1977) 22 *Business and Society Review* 4; Geraghty, "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing" (1979) 89 *Yale Law Journal* 353; Solomon and Nowak, "Managerial Restructuring: Prospects for a New Regulatory Tool" (1980) 56 *Notre Dame Lawyer* 120.

¹²⁵ U.S., Sentencing Commission, *Discussion Materials on Organizational Sanctions* (1988).

Several factors herald the development of a more interventionist approach in relation to corporate internal discipline:

- Much value is attached to individual accountability as a means of social control;¹²⁶
- The T.P.C. or the D.P.P. can hardly be expected to bring successful actions against all the individuals who may be implicated in events attracting corporate liability;¹²⁷
- The aim of corporate liability is partly to catalyse internal discipline where organisational secrecy, numbers of suspects and other considerations make it difficult or impossible to impose individual liability;¹²⁸
- A regime of enforced self-control in which the private justice systems of corporate defendants are activated and monitored¹²⁹ might well be a relatively efficient way of achieving individual accountability;¹³⁰

¹²⁶ See further French, P.A., ed., *Individual and Collective Responsibility: The Massacre at My Lai* (1972); Lewis, J.R., *Uncertain Judgment: A Bibliography of War Crimes Trials* (1979), 185-89; Komarow, "Individual Responsibility under International Law: The Nuremberg Principles in Domestic Legal Systems" (1980) 29 *International and Comparative Law Quarterly* 21. But see Clark, R., *The Japanese Company* (1979), 130: "in the West decision-making is presented as individualistic until adversity proves it collective".

¹²⁷ See further Grabosky, P. and Braithwaite, J., *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986). The T.P.C. often proceeds against not only the company concerned but also one or more senior personnel: see e.g., (1989) 48 *Trade Practices Commission Bulletin* 6-8. On some occasions proceedings against personnel have been dropped after the corporate defendant withdraws a defence; see e.g., *T.P.C. v. Kensington Hiring Co. Pty Ltd* (1981) A.T.P.R. ¶40-256.

¹²⁸ See Elzinga, K. and Breit, W., *The Antitrust Penalties* (1976) at 132-138; Posner, R.A., *Antitrust Law: An Economic Perspective* (1976) at 225-28; Posner, "An Economic Theory of the Criminal Law" (1985) 85 *Columbia Law Review* 1193 at 1227-1229; Kraakman, "Corporate Liability Strategies and the Costs of Legal Controls" (1984) 93 *Yale Law Journal* 857; Fisse, "The Social Policy of Corporate Criminal Responsibility" (1978) 6 *Adelaide Law Review* 361 at 382-86.

¹²⁹ See Canada, Law Reform Commission, *Criminal Responsibility for Group Action* (1976), 31; South Australia, Criminal Law and Penal Methods Reform Committee, *Fourth Report, The Substantive Criminal Law* (1977), 361-362; Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 *Michigan Law Review* 1466; Fisse and Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney Law Review* 469. For historical background see Fisse, "The Social Policy of Corporate Criminal Responsibility" at 382-386.

¹³⁰ See Canada, Law Reform Commission, *Criminal Responsibility for Group Action* (1976), 31:

"In a society moving increasingly toward group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialize through the conduct of people within the organization.

(continued overleaf)

—The extent to which individual accountability for corporate violations is imposed is uneven because so much depends on the vicissitudes of prosecutors' discretion and the vagaries of corporate incentives not to take disciplinary action.

The possibility of companies paying a fine or penalty without remedying the defective procedures or practices that brought about violation has prompted the related proposal that use be made of probationary conditions or mandatory injunctions.¹³¹ The American Bar Association's *Standards for Criminal Justice*,¹³² formulated in 1980, have been influential in the development of corporate probation in the U.S.A. Standard 18.2.8(a)(v) provides as follows:

“Continuing judicial oversight. Although courts lack the competence or capacity to manage organizations, the preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organization. Such oversight is best implemented through the use of recognized reporting, record-keeping, and auditing controls designed to increase internal accountability—for example, audit committees, improved staff systems for the board of directors, or the use of special counsel—but it should not extend to judicial review of the legitimate ‘business judgment’ decisions of the organization’s management or its stockholders or delay such decisions. Use of such a special remedy should also be limited by the following principles:

- (A) As a precondition, the court should find either (1) that the criminal behaviour was serious, repetitive, and facilitated by inadequate internal accounting or monitoring controls or (2) that a clear and present danger exists to the public health or safety;
- (B) The duration of such oversight should not exceed the five and two-year limits specified in standard 18.2.3 for probation conditions generally; and
- (C) Judicial oversight should not be misused as a means for the disguised imposition of penalties or affirmative duties in excess of those authorized by the legislature.”

¹³⁰ *Contd.*

Rather than having the state monitor the activities of each person within the corporation, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level.”

¹³¹ The classic work being Stone, C.D., *Where the Law Ends* (1975).

¹³² American Bar Association, 3 *Standards for Criminal Justice* at 18.162-163, 18.179-184.

Proposals of this kind are anathema in some quarters.¹³³ One objection is that probation and other like forms of intervention are allegedly costly to administer and less efficient than fines or monetary penalties.¹³⁴ Another is the complaint that corporations should be free to manage their internal affairs with minimal detractions from freedom of choice and privacy of operation.¹³⁵ There is also concern about the danger of scapegoating¹³⁶ and the need for protection of individual rights within private systems of justice.¹³⁷ These concerns are now well-known and are subject to wide debate.

In assessing objections to corporate probation and other comparable measures it is possible to exaggerate the degree of intervention envisaged. There is no suggestion that corporate defendants be subjected to any crippling yoke of socialism. Rather, the strategy commended is enforced self-regulation with the state playing a circumspect role.¹³⁸ Corporate defendants would be given the opportunity to indicate before imposition of penalty or sentence what disciplinary and other steps they propose to take in response to being held liable.¹³⁹ As is evident from the A.B.A. proposals, other limitations are conceivable, including

-
- ¹³³ Problems other than those noted below include (1) checking compliance effectively (note the A.B.A. proposal for use of special court-appointed officers whose costs are payable by the defendant) (2) court work-load in supervising probationary and other similar controls; (3) recognition of varieties of responsibility within corporate internal accountability systems (see further Braithwaite and Fisse, "Varieties of Responsibility and Organizational Crime" (1985) 7 *Law & Policy* 315); (4) efficiency and fairness in the co-ordination of public and private systems of justice (consider e.g., Freiberg, " 'Civilising' Crime: Parallel Proceedings and the Civil Remedies Function of the Commonwealth Director of Public Prosecutions" (1988) 21 *Australia and New Zealand Journal of Criminology* 129).
- ¹³⁴ A highly controversial assumption: see Round, "Does the Punishment Fit the Crime?: An Analysis of Antitrust Penalties in Australia", paper at Trade Practices Workshop, Centre for Commercial Law and Applied Legal Research, 28-30 June 1985; Coffee, "Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions" (1980) 17 *American Criminal Law Review* 419. Consider also the possible merit of some element of redundancy or overlap in systems control: Landau, "Redundancy, Rationality, and the Problem of Duplication and Overlap" (1969) 29 *Public Administration Review* 346.
- ¹³⁵ See generally Nozick, R., *Anarchy, State, and Utopia* (1974); Bardach, E., and Kagan, R., *Going by the Book: The Problem of Regulatory Unreasonableness* (1983).
- ¹³⁶ For an instructive reaction to the internal disciplinary report prepared by Griffin Bell for E.F. Hutton see (1987) 1(21) *Corporate Crime Reporter* 5 at 9. See also U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E.F. Hutton Mail and Wire Fraud Case, Report*, 99th Congress, 2d Sess., 1986, 156-158.
- ¹³⁷ See generally Westin, A.F. and Salisbury, S., eds., *Individual Rights in the Corporation* (1980).
- ¹³⁸ See further Braithwaite, "Enforced Self-Regulation" (1982) 80 *Michigan Law Review* 1466; Page, "Self-Regulation: The Constitutional Dimension" (1986) 49 *Modern Law Review* 141; Shearing, C. and Stenning, P., eds., *Private Policing* (1987); N.C.S.C., *A Review of the Licensing Provisions of the Securities Industry Act and Codes* (1985).
- ¹³⁹ Compare the circumspect approach adopted in *Wilkinson v. Katies Fashions (Australia) Pty Ltd* (1986) A.T.P.R. ¶40-721 re organisational revision.

per se rules designed to prevent over-zealous or brutish courts from using probation as a form of quasi-receivership.

Mention may also be made of the view that probation and mandatory injunctions are not severe enough to cope with the worst possible instances of violation¹⁴⁰ and that punitive injunctions should be made available by statute.¹⁴¹ The punitive injunction is essentially a penal variant of the civil mandatory injunction. If made available, a punitive injunction could be used not only to require a corporate defendant to revamp its internal controls but also to do so in some punitively demanding way. Instead of requiring a defendant merely to remedy the situation by introducing state-of-the-art compliance procedures, it would be possible to insist on the development of innovative techniques.¹⁴² The punitive injunction could thus serve as both punishment and super-remedy. Although the idea of punitive mandatory injunctions may seem novel, the oddity is that the criminal law has yet to develop such an option. As Coffee has observed in the context of probation, "It is a curious paradox that the civil law is better equipped at present than the criminal law to authorise [disciplinary or structural] intervention. Corporate probation could fill this gap and at last, offer a punishment that fits the corporation."¹⁴³

PROACTIVE INFORMATION MANAGEMENT: EXPLOITATION OF LEGAL PROFESSIONAL PRIVILEGE¹⁴⁴

Risk-managing compliance programmes lend themselves to the control of documentation that might otherwise prove incriminating or

¹⁴⁰ The limitations imposed under A.B.A. Standard 18.2.8(a)(v)(A)(2), and (C) make the sentence of continuing judicial supervision remedial in nature and hence much akin to the civil injunctions which the SEC and other agencies have used to make corporations improve their compliance systems. This does not go far enough. Probation and continuing judicial oversight are rather benign sanctions. Certainly probation has usually been regarded as a soft sentencing option because it is more in the nature of a rehabilitative remedy than a deterrent or retributive punishment. Serious cases, it may be argued, call for a more potent sanction (e.g., a punitive injunction, as discussed below) which can impose punishment as well as spur internal compliance. As to the distinction between punishment and remedy see *H.C.F. Australia Ltd v. Switzerland Australia Health Fund Pty Ltd* (1988) A.T.P.R. ¶40-846.

¹⁴¹ See further Fisse, "Reconstructing Corporate Criminal Law" at 1156-1157, 1164-1165, 1223-1224. Compare Fiss, O., *The Civil Rights Injunction* (1978).

¹⁴² E.g., expert computer-based systems for achieving compliance. See further Walter and Richard, "Corporate Counsel's Role in Risk Minimization: Lessons from Bhopal" (1986) 4 *Preventive Law Reporter* 139.

¹⁴³ Coffee, "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386 at 459.

¹⁴⁴ See generally *Grant v. Downs* (1976) 135 C.L.R. 674; *Baker v. Campbell* (1983) 153 C.L.R. 52; *Commissioner of Taxation v. Citibank Limited*, Full Federal Court,

damaging.¹⁴⁵ Moreover, there is an increasing expectation, certainly in North America, that lawyers advising or defending corporate clients will be skilled in the management of information. Consider Kenneth Mann's observation of the techniques developed in New York at the defence bar:

"[O]ne of the primary goals of the defense attorney is containment of the client. The defense attorney becomes a manager of information sources; he is as much a specialist in the management in the organization of information as he is a legal technician. Controlling information means first manipulating the setting of information: educating the client in how to identify types of information, and then how best to store it. In the background is the attorney's knowledge of legal boundaries and the legal instruments available to prevent government access. Once information is properly analysed and organized the defense attorney can guide the client through the process of concealing and disclosing."¹⁴⁶

The legal medium may thus be the message and, as discussed below, the message may be legally privileged.

¹⁴⁴ *Contd.*

No. G1244 of 1988; *Vardas v. South British Insurance Co. Ltd* [1984] 2 N.S.W.L.R. 652; *National Employers' Mutual General Insurance Association Ltd v. Waind* (1979) 141 C.L.R. 648; *Attorney-General for the Northern Territory v. Kearney* (1985) 59 A.L.J.R. 749; *A.M. & S. Europe Ltd v. Commission of the European Communities* [1983] 3 W.L.R. 17; *Upjohn v. U.S.* 449 U.S. 383 (1981); Williams, D., *Investigations by Administrative Agencies* (1987), ch. 3; Disney, Basten, Redmond, and Ross, *Lawyers* (2nd ed.), 660 ff.; Aronson, Hunter and Weinberg, *Litigation* (4th ed.), 246-273; Boniface, "Professionalism, Privilege and Public Policy: Legal Professional Privilege" (1989) 27(1) *Law Society Journal* 66; Nath, "Upjohn: A New Prescription for the Attorney-Client Privilege" (1981) 30 *Buffalo Law Review* 11; Eagles, "Legal Professional Privilege and the Corporate Client" (1987) 12 *New Zealand Universities Law Review* 297.

¹⁴⁵ See generally Fedders and Guttenplan, "Document Retention and Destruction: Practical, Legal and Ethical Considerations" (1980) 56 *Noire Dame Law Review* 5; Note, "Legal Ethics and the Destruction of Evidence" (1979) 88 *Yale Law Journal* 1665. Cover-up, as by shredding hot files or forging memoranda, is dangerous, for several reasons:

(1) if litigation is underway or expected, destroying relevant evidence creates a real risk of criminal liability (e.g. for contempt of court or for attempting to pervert the course of justice), civil liability for fraud, or aggravation of penalty; (2) if files relevant to a contested issue are inexplicably missing, an adverse inference can readily be drawn and this may be critical to the outcome of the case; (3) unsuccessful attempts to cover-up a problem, especially one involving human safety or welfare, usually spark a public relations disaster (see e.g., Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, ch. 18 (Air New Zealand and Mt. Erebus disaster); (4) hot files have a habit of being copied by employees, and subsequently falling into the hands of the media.

¹⁴⁶ Mann, K., *Defending White-Collar Crime: A Field Study of Defense Attorneys at Work* (1985), 183.

Sensitive inquiries: a dilemma

An organisation sensing that it has a problem of non-compliance with the law faces a dilemma. The first horn of the dilemma is pressure to find out what has occurred. Apart from the possible risk of liability for negligence, it is good business practice to avert governmental investigation or adverse publicity by nipping it in the bud.¹⁴⁷ Accordingly, companies often find themselves obliged to make thorough internal investigations.¹⁴⁸ The other horn of the dilemma is the danger that effective internal investigations will dramatically increase the risk of exposure to liability.¹⁴⁹ Taking statements from employees and preparing a detailed investigative report creates a high risk of providing ready-made evidence for enforcement agencies¹⁵⁰ and plaintiffs.

Legal professional privilege can be used to help resolve the dilemma.¹⁵¹ It should be remembered, however, that legal professional privilege provides only a partial shield against liability. Facts cannot be concealed merely by communicating them to a lawyer; enforcement agencies and plaintiffs are still free to get evidence by other means, including questions put to the company requiring it to disclose the

¹⁴⁷ See further Mathews, "Internal Corporate Investigations" (1984) 45 *Ohio State Law Journal* 655 at 671-672:

"... an internal self-investigation is less painful than a government investigation. I have articulated over the years a set of fourteen "Rules of Thumb in Defending SEC Investigations". My Second Rule is:

Rule Two: Take control of the investigation—get the SEC out as quickly as possible.

a. Obviously, neither defence counsel nor his clients should engage in sharp tactics that smack of obstruction of justice, but within acceptable legal and ethical bounds, counsel should influence as much as possible the speed and scope of the investigation.

b. If necessary, have the client offer to investigate itself, or to have an independent special counsel conduct the investigation. The goal is to have a nonprosecutorial person, rather than a government enforcement agency, conduct whatever investigation is required.

I do concede, however, that the self-investigation may, in the short run, be more costly to the corporation in terms of legal fees than allowing the government to expend its resources in the investigation.

... major investigations by outside counsel and independent accounting firms are expensive. Consequently, in some cases in which I have represented smaller, financially insecure companies, I have advised them not to conduct an internal investigation and instead to let the SEC expend its budget in developing the facts."

¹⁴⁸ See further Mathews, "Internal Corporate Investigations" (1984) 45 *Ohio State Law Journal* 655; Morvillo, "Voluntary Corporate In-House Investigations—Benefits and Pitfalls" (1981) 36 *Business Lawyer* 1871.

¹⁴⁹ See Block and Barton, "Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel" (1979) 35 *Business Lawyer* 5 at 6.

¹⁵⁰ See especially *Trade Practices Act* 1974, s. 155.

¹⁵¹ Arkin, S. *Business Crime*, 6.02, 6-3.

facts as known to its employees.¹⁵² The investigative powers under s. 155 are particularly significant in this regard. Nonetheless, the importance of shielding internal interview notes is plain given that the information contained in such notes may be far more incriminating than briefer responses sufficient to satisfy civil discovery, or what is necessary to satisfy a demand for information under s. 155. Moreover, enforcement agencies and private litigants often begin their inquiries months or even years after the event, by which time recollections tend to fade without leaving scarlet trace.¹⁵³

Section 155 and legal professional privilege

A question at the outset is whether the Commission's powers of investigation under s. 155 are subject to the application of the common law doctrine of legal professional privilege.¹⁵⁴ In the *Australian Trade Practices Reporter* the view is expressed that, if the matter were tested before the High Court, s. 155 would probably be interpreted as overriding the privilege by necessary implication.¹⁵⁵ However, there are reasons to believe quite the contrary.

First, in the absence of express exclusion, the courts are reluctant to interpret statutory provisions as overriding the privilege. In *Baker v. Campbell*¹⁵⁶ it was held by a 4-3 majority of the High Court that legal professional privilege is not confined to protecting evidence from disclosure in judicial or quasi-judicial proceedings but applies generally unless the terms of a particular statute either expressly or by necessary implication remove the protection. Deane J. stressed the unlikelihood of finding an intent to exclude the privilege by implication:

"It is a settled rule of construction that general provisions of a statute should only be read as abrogating common law principles or rights to the extent made necessary by the express words or necessary intentment . . . Both logic and authority support the present day acceptance of the preservation of that confidentiality as a fundamental and general principle of the common law. It is to be presumed that if the Parliament intended to authorise the impairment or destruction of the confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms."

¹⁵² See Bray, *The Principles and Practice of Discovery*, 138-142, 364-365. For a useful assessment of the advantages and limitations of legal professional privilege as a tool of risk management see Sigler, J.A. and Murphy, J.E., *Interactive Corporate Compliance* (1988), 74-76.

¹⁵³ See generally Nath, "Upjohn: A New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations" (1981) 30 *Buffalo Law Review* 11.

¹⁵⁴ Compare *Arnotts Ltd v. T.P.C.* (1989) A.T.P.R. ¶18-315 (re effect of s. 157 on legal professional privilege).

¹⁵⁵ A.T.P.R. ¶18-315.

¹⁵⁶ (1983) 153 C.L.R. 674, following *Commr. of I.R. v. West-Walker* [1954] N.Z.L.R. 191.

The majority went on to decide that the privilege was not excluded by the search warrant provisions of s. 10 of the *Crimes Act* 1901 (Cth), either expressly or by necessary implication. Section 155 makes no express reference to communications between a person and his legal advisers. By contrast, explicit reference is made to the privilege against self-incrimination, which is expressly abrogated.¹⁵⁷ It is therefore difficult to discern a legislative intention to modify the common law doctrine.

Secondly, in *Commissioner of Taxation v. Citibank Limited*,¹⁵⁸ the Full Federal Court held that the terms of s. 263 of the *Income Tax Assessment Act* 1936 (Cth) did not displace legal professional privilege. Section 263 is couched in mandatory terms comparable to those used in s. 155 and, while the wording of s. 155 is different, it falls well short of express and unambiguous exclusion of legal professional privilege.

Requirements of legal professional privilege

Legal professional privilege is limited in a number of important respects:

- The communication between lawyer and client, or between lawyer or client and a third party, must be for the sole purpose of securing legal advice or assisting existing or anticipated litigation;¹⁵⁹
- The communication must be confidential;
- The communication must not be in furtherance of a crime or fraud¹⁶⁰ or for colourable evasion of the law;¹⁶¹
- The privilege is subject to waiver by the client;¹⁶²
- There is an onus on the party putting forward a claim of legal professional privilege to establish that all the requirements in law are satisfied;
- Communications in respect of which privilege is claimed are subject to judicial scrutiny for the purpose of establishing that the requirements in law are satisfied;¹⁶³

¹⁵⁷ Sec. 155(7). See further *Pyneboard Proprietary Limited v. T.P.C.* (1983) 152 C.L.R. 328.

¹⁵⁸ Full Federal Court, No. G1244 of 1988. See also No. G970 of 1988.

¹⁵⁹ *Grant v. Downs*, supra, n. 144. See further Australia, Law Reform Commission, *Report No. 26 Interim, I Evidence*, 250-252. Compare *T.P.C. v. Sterling* (1978) 36 F.L.R. 244.

¹⁶⁰ *Cox* (1884) 14 Q.B.D. 153; Note, "The Future Crime or Tort Exception to Communications Privileges" (1963) 77 *Harvard Law Review* 730.

¹⁶¹ *Attorney-General for the Northern Territory v. Kearney* (1985) 59 A.L.J.R. 749.

¹⁶² A possible hazard for employees where they have been interviewed by their employer's lawyer and where the employer later decides to waive privilege. As regards conflicts of interest and the provision of legal advice in this context see Leary, "Suggestions for an Effective Compliance Program" (1978) 46 *Antitrust Law Journal* 490.

¹⁶³ *Waugh v. British Railways Board* [1980] A.C. 521; *Grant v. Downs*, supra, n. 144.

—It is immaterial that the legal representative is employed as a staff solicitor by the corporate client,¹⁶⁴ provided that he or she is acting in the capacity of a legal representative¹⁶⁵ and holds a current practising certificate,¹⁶⁶ but the privilege does not extend to investigative inquiries conducted by a lawyer appointed by a court for that purpose.¹⁶⁷

One major stumbling block is the requirement that the communication be for the sole purpose¹⁶⁸ of obtaining legal advice or for assisting litigation. Organisations have often fallen into the trap of conducting multi-purpose inquiries into episodes of suspected non-compliance rather than dividing up the task and channelling the most legally sensitive matters through the company's legal advisers. This trap has defeated claims of legal professional privilege in several reported decisions,¹⁶⁹ including *Grant v. Downs*,¹⁷⁰ a decision of the High Court of Australia.¹⁷¹

¹⁶⁴ *Waterford v. The Commonwealth* (1987) 61 A.L.J.R. 350; *Alfred Crompton Amusement Machines Ltd v. Customs and Excise Commissioners (No. 2)* [1972] 2 Q.B. 102; *Re Kearney; Ex parte Attorney-General for the Northern Territory* (1984) 55 A.L.R. 545; *Attorney-General for the Northern Territory v. Kearney* (1985) 61 A.L.R. 56 at 60 per Gibbs C.J.; *Austin v. Deputy Secretary, Attorney-General's Department* (1986) 67 A.L.R. 585. But see *A.M. & S. Europe Ltd v. Commission of the European Communities* [1983] 3 W.L.R. 17. In *Attorney-General for the Northern Territory v. Kearney* at 60 per Gibbs C.J., the view is expressed that the legal adviser must be admitted to practice and be subject to the duty to observe professional standards and the liability to professional discipline. See further Abadee, "The In-House Lawyer and Production of Documents" (1985) Corporate Lawyers Association of N.S.W. paper. In *Waterford v. The Commonwealth*, reservations about the application of the privilege to salaried lawyers in private enterprise were expressed (see especially at 356 per Brennan J.) but the majority refrained from suggesting that the application of the privilege is confined to independent legal advisers and salaried lawyers employed in the public service.

¹⁶⁵ *Attorney-General for the Northern Territory v. Kearney*, supra, n. 164, at 60 per Gibbs C.J.; *Re Kearney; Ex parte Attorney-General for the Northern Territory*, supra, n. 164.

¹⁶⁶ See further Boniface, "Professionalism, Privilege and Public Policy: Legal Professional Privilege" (1989) 27(1) *Law Society Journal* 66.

¹⁶⁷ *Osternak Industries, Inc.*, 82 F.R.D. 81 (1979); *SEC v. Canadian Javelin Ltd*, 451 F. Supp. 594 (1978). The same is not true of voluntary internal investigations: *Diversified Industries Inc. v. Meredith* 572 F.2d 596 at 610; *Upjohn v. U.S.* 449 U.S. 383 (1981). See further Friedman, *Securities and Commodities Enforcement*, 56-61.

¹⁶⁸ *Grant v. Downs*, supra, n. 144. Contrast the dominant purpose rule under N.Z. and English law: *Waugh v. British Railways Board*, supra, n. 163; *Stuart v. Guardian Royal Exchange of New Zealand Ltd* [1985] 1 N.Z.L.R. 597. The appreciable purpose test (see e.g., *Konia v. Morley* [1976] 1 N.Z.L.R. 455) no longer applies

¹⁶⁹ A rare exception is *Waterford v. The Commonwealth*, supra, n. 164.

¹⁷⁰ (1976) 135 C.L.R. 674. Cf. *Waugh v. British Railways Board*, supra, n. 163.

¹⁷¹ In *Grant v. Downs*, an action was brought for negligence in the care and supervision of the deceased who had died from exposure after escaping from a psychiatric centre. Discovery was sought of certain official reports into the death but this was resisted on the basis that the documents were protected by legal professional privilege. The claim of privilege rested mainly on an affidavit of a senior officer of the N.S.W.

(continued overleaf)

The sole purpose test under *Grant v. Downs* can be satisfied provided that corporate communications are carefully structured in advance. The basic strategy required is to divide sensitive inquiries into two or more clearly separated channels.¹⁷² Directed through the first channel is a preliminary routine inquiry to advise management briefly of the circumstances surrounding the problem.¹⁷³ A second channel is then used for a fuller confidential investigation conducted by the company's legal representatives for the sole purpose of providing the company with legal advice or of assisting it in litigation.¹⁷⁴

Several steps are probably necessary to guard against the risk of a court treating second-channel reports as routine reports which the corporation would have been expected to create to inform itself adequately for administrative purposes.¹⁷⁵ The non-routine nature of

¹⁷¹ *Contd.*

Health Commission. The affidavit set out the administrative reasons for making routine official reports in the event of death or injury to mental patients. The reports had three basic purposes: to promote internal disciplinary action, to facilitate revision of security and preventive procedures, and to equip the Department of Health's legal representatives with a contemporaneous detailed report on which they could found their advice to the Department or represent it in legal proceedings. The High Court of Australia held that the reports in question were not covered by legal professional privilege. In the opinion of the majority (Stephen, Mason, and Murphy JJ.), legal professional privilege did not cover documents prepared for legal advisers unless the sole purpose is submission for legal advice or use in legal proceedings. This test plainly had not been satisfied because the reports were for administrative as well as legal purposes:

"[T]he documents have about them a flavour of routine reports such as would be made by any institution or corporation relating to an occurrence of the kind that took place so as to inform itself of the circumstances in which the death of the patient occurred and with a view to disciplinary action and the reform of any procedures that might be found to be defective." ((1976) 135 C.L.R. 674 at 690)

¹⁷² Compare *In Re Grand Jury Subpoena (Doe)*, 599 F. 2d 504 (1979); Kent, "Risk of 'Smoking Gun' Papers is Outweighed by the Benefits" (1987), *supra*, n. 12. The strategy discussed in the text relies on two channels of inquiry. In some contexts a third channel of inquiry may be necessary, as for the purpose of insurance. Consider the implications of *National Employers' Mutual General Insurance Association Ltd v. Waing* (1979) 141 C.L.R. 648; *Leader Westernport Printing Pty Ltd v. I.P.D. Instant & Duplicating Pty Ltd* (1988) 5 A.N.Z.Ins.Cas. 60-856. On the downside is the need to use a lawyer to conduct sensitive inquiries among personnel who may clam up if confronted by a lawyer rather than by a managerial colleague. However, this downside might well be eliminated where the lawyer is also an active member of the managerial team and respected as such. Satisfying the sole purpose test under *Grant v. Downs* does not require that the lawyer conducting the inquiry be perceived solely as a lawyer by the personnel interviewed: it is sufficient that the inquiry be conducted for the sole purpose of giving or obtaining legal advice.

¹⁷³ See Block and Barton, "Internal Corporate Investigations" 9.

¹⁷⁴ It is immaterial that the resulting document, if prepared for the sole purpose of legal advice or use in litigation, contains some material which relates to matters of policy or administration: *Waterford v. The Commonwealth*, *supra*, n. 164.

¹⁷⁵ See *Grant v. Downs*, *supra*, n. 144 at 688 per Stephen, Murphy, and Mason JJ.: a document is not protected by the privilege if it "would have been brought into existence . . . in any event" for some purpose other than legal advice or for use in litigation.

the investigative inquiry should be spelt out in the instructions to the legal representatives, and reference made to the need for legal advice and for recourse to professional skills not possessed by management. In particular, mention should be made of the legal issues about which management is apprehensive and the need for a full inquiry to be made by a lawyer in order to ascertain exactly what the risks of liability are, and to provide advice as to legal solutions which might be adopted.¹⁷⁶ There should also be an instruction to the effect that the purpose of seeking legal advice is to enable management to handle questions of liability for past conduct and that questions of internal discipline and organisational revision would be the subject of a separate inquiry directed specifically to administrative implications for the future.¹⁷⁷

A possible limitation upon legal professional privilege is the rule requiring existing or anticipated litigation before communications between lawyer or client and third parties can be privileged.¹⁷⁸ It has been held in several cases that communications with a third party are not privileged unless made for the purpose of conducting or aiding the conduct of existing or anticipated litigation.¹⁷⁹ The status of this rule is unclear, but even if it were upheld it would have little bearing on sensitive inquiries conducted before litigation is anticipated. There

¹⁷⁶ See Block and Barton, "Internal Corporate Investigations" 9, 11.

¹⁷⁷ Reflecting *Waugh v. British Railways Board* [1980] A.C. 521 at 537 per Lord Simon. As applied in *Re Australian Bank Employees' Union*, No. 3 of 1987 (Fed. Ct).

¹⁷⁸ *Wheeler v. Le Marchant* (1881) 17 Ch. D. 675; *Nickmar Pty v. Preservatrice Skandia Insurance Ltd* [1985] 3 N.S.W.L.R. 44; *Macedonia Pty Ltd v. F.T.C.* (1987) A.T.C. 4565; Eagles, "Legal Professional Privilege and the Corporate Client" (1987) 12 *New Zealand Universities Law Review* 297. But see *Weir v. Greening* [1957] V.R. 296 at 300-301 per Sholl J. If such a limitation were adopted, the application of the privilege to corporate entities in cases where litigation is not a real prospect would require some test to determine which personnel are to be taken as representing the corporate client in any communications with the company's legal representative. Compare the "control group" test (restricting legal professional privilege to communications with "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given"), rejected by the U.S. Supreme Court in *Upjohn v. U.S.* 449 U.S. 383 (1981). The broader "subject matter" test adopted in *Upjohn* treats as privileged a communication with the legal representative by any agent or employee of the corporate client when made to the legal representative who was acting at the direction of corporate superiors. In the opinion of Burger C.J.:

"[I]n my view the Court should make clear now that as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorised by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct."

See further Eagles, "Legal Professional Privilege and the Corporate Client" (1987) 12 *New Zealand Universities Law Review* 297 at 303-307.

is solid authority for the proposition that the rule does not apply to communications with third parties who are employees of the client.¹⁸⁰ The road is thus open for a corporate client to use legal professional privilege to help protect internal interviews with employees even if at that stage there is no reasonable anticipation of litigation.

A further potential source of difficulty is the need for confidentiality in cases where accountants, economists or other advisers are employed to assist inquiries spearheaded by a company's legal representatives.¹⁸¹ The privilege can be maintained although accountants or economists are present during interviews with employees but care is necessary to ensure that the role of the accountant or economist is subservient to that of the lawyer and that the function of the accountant or economist is to assist the lawyer on a matter where accounting or economic expertise is essential for the due performance by the lawyer of an inquiry into questions of legal liability.¹⁸² It should also be remembered that inquiries mounted by a team of lawyers and accountants or economists for the concurrent purposes of obtaining legal advice and financial or market analysis will not pass the sole purpose test under *Grant v. Downs*.

Legal professional privilege can be waived by the client and a waiver can be either express or implied from conduct inconsistent with maintenance of the privilege.¹⁸³ The main dangers of losing legal professional privilege through waiver are these:

- Uncontrolled copying or circulation of privileged documents;¹⁸⁴
- Allowing enforcement agencies to inspect privileged documents during negotiations for the settlement of a case where non-compliance with the law has been alleged;¹⁸⁵
- Permitting enforcement agencies to inspect privileged documents in order to settle a dispute over whether a claim of legal professional privilege is justified;¹⁸⁶

¹⁸⁰ *Nickmar Pty v. Preservatrice Skandia Insurance Ltd* [1985] 3 N.S.W.L.R. 44.

¹⁸¹ There is no equivalent of legal professional privilege for advice by a member of the accountancy profession; see *Chantrey Martin & Co. v. Martin* [1953] 2 Q.B. 286 at 294.

¹⁸² See *Grant v. Downs*, supra, n. 144 at 687-688; *In re John Doe Corp.* 675 F.2d 482; Williams, D., *Investigations by Administrative Agencies* (1987), 70.

¹⁸³ See generally *Attorney-General for the Northern Territory v. Maurice* (1986) 61 A.L.J.R. 92.

¹⁸⁴ See further Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 *Modern Law Review* 601. Where the circulation amounts to actionable breach of confidence injunctive relief is available to protect the privilege: *S.G.I.C. v. Paneros* (1988) 5 A.N.Z.Ins.Cas. 60-857.

¹⁸⁵ *In re Weiss*, 596 F.2d 1185 (1979). However, production of a statement of defence or other response to an allegation will not necessarily amount to waiver of privilege in the source materials to which that statement is related: *Attorney-General for the Northern Territory v. Maurice* (1986) 61 A.L.J.R. 92.

¹⁸⁶ See further *A.M. & S. Europe Ltd v. Commission of the European Communities* [1983] 3 W.L.R. 17; *Armo v. Forsyth* (1986) 65 A.L.R. 125.

- Granting access to privileged documents to potential co-defendants¹⁸⁷ in circumstances where there is not a common interest in the matter.¹⁸⁸

These and other pitfalls can be side-stepped by those who anticipate them, and are unlikely to discourage adroit management from developing a compliance programme which includes procedures devised specifically to exploit legal professional privilege.

The future of legal professional privilege as a medium of sensitive information management

Is this medium of self-protection likely to remain available? As discussed earlier, corporations might be compelled to conduct an extensive inquiry into suspected incidents of non-compliance and to disclose what disciplinary action has been taken.¹⁸⁹ Such an approach seems open to the courts under s. 19B of the *Crimes Act* (Cth), or under s. 80 of the *Trade Practices Act*. To make this approach work, full disclosure of the results of the internal inquiry would be necessary, and presumably a company would not be allowed to shield the results by using legal professional privilege in the manner discussed earlier.¹⁹⁰

The main public interest considerations which compete with the value of legal professional privilege in this context may be summarised as follows:

- Companies are better placed than enforcement agencies to discover the source of illegality within their ranks;
- Enforcement agencies typically lack the resources to investigate more than a small number of incidents of suspected non-compliance;¹⁹¹
- Contemporaneous inquiries into suspected episodes of illegality usually provide the best evidence available, and such inquiries are more likely to be made by internal investigation units than by enforcement agencies;¹⁹²
- Notwithstanding the sole purpose test for legal professional privilege, it is possible for corporations to satisfy such a test and

¹⁸⁷ See generally Note, "The Attorney-Client Privilege in Multiple Party Situations" (1972) 8 *Columbia Journal of Law and Social Problems* 179.

¹⁸⁸ See *Buttes Gas & Oil Co. v. Hammer (No 3)* [1980] 3 All E.R. 475 at 483 per Lord Denning M.R.

¹⁸⁹ See further Orland, L., and Tyler, H., *Corporate Crime Law Enforcement in America* (1987), 383-402; Fisse and Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney Law Review* 468 at 511-513.

¹⁹⁰ See *Osternak Industries, Inc.*, 82 F.R.D. 81 (1979); *SEC v. Canadian Javelin Ltd.*, 451 F. Supp. 594 (1978).

¹⁹¹ See e.g., Braithwaite, "Challenging Just Deserts: Punishing White-Collar Criminals" (1982) 73 *Journal of Criminal Law and Criminology* 723.

¹⁹² See *Waugh v. British Railways Board* [1980] A.C. 521.

to use the privilege to create a substantial "zone of silence" around activities which may impinge on the well-being of many members of the public;

- Unless much of the burden of enforcement is transferred to corporations by requiring them to investigate suspected illegality, public enforcement efforts will be highly selective, to the detriment of equality before the law,¹⁹³ and to the neglect of individual accountability for wrongdoing.¹⁹⁴

Meanwhile, however, corporations have much room to exploit the degree of self-protection which legal professional privilege can provide. Extensive exploitation seems inevitable. Managers in the past have often conducted sensitive inquiries without first taking legal advice as to the optimal way to proceed. A very different future beckons as more and more companies have in-house counsel to advise managers on a day-to-day basis. Account should also be taken of computer programs that equip companies with the capacity to manage their affairs in a legally informed way. That development, well underway,¹⁹⁵ will make techniques such as the use of legal professional privilege available as a matter of organisational routine.

LIABILITY OF CORPORATE OFFICERS FOR FAILING TO INITIATE OR SUPERVISE COMPLIANCE PROGRAMMES

There is widespread agreement that effective compliance programmes depend on the involvement of top-level management not only in formulating company compliance policies but also in seeing that those policies are implemented.¹⁹⁶ It has been suggested that what matters most for effective compliance is top management commitment to back up the judgement of compliance staff against line managers, to impose clearly defined accountability for compliance on line managers (as opposed to compliance staff), to take a personal interest in monitoring compliance performance, to ensure unblocked communication channels for reporting suspected non-compliance, and to insist on training with respect to compliance.¹⁹⁷

For all that, the liability of officers under the *Trade Practices Act* is limited to ancillary forms of liability (complicity or being knowingly

¹⁹³ See e.g., Braithwaite, "Paradoxes of Class Bias in Criminal Justice" in Pepinsky, H., ed., *Rethinking Criminology* (1982), 61-84.

¹⁹⁴ See generally Shearing, C.D. and Stenning, P.C., eds., *Private Policing* (1987).

¹⁹⁵ Mea culpa: "Infosave", an IBM PC compatible program under development.

¹⁹⁶ See e.g., Bruns, "Corporate Preventive Law Programs" (1985) 4 *Preventive Law Reporter* 30, at 31; Arkin, S., *Business Crime*, 6A-7. See generally Clinard, M., *Corporate Ethics and Crime: The Role of Middle Management* (1983).

¹⁹⁷ Braithwaite, "Taking Responsibility Seriously: Corporate Compliance Systems", *supra*, n. 14, ch. 3.

concerned in a violation, conspiracy, attempt) that require subjective blameworthiness;¹⁹⁸ negligence or lack of due diligence is insufficient. Nonetheless, it is conceivable that corporate officers may be held civilly or criminally liable under s. 229(2) of the *Companies Code* if a suitable compliance system is not in place in his or her company.¹⁹⁹ Section 229(2) requires reasonable care and diligence by officers in the exercise of their powers and in the discharge of their duties.²⁰⁰ Failure to comply with s. 229(2) is an offence, and attracts a variety of civil remedies.²⁰¹

Assume that the board of directors of a leading wholesaler delegates all tasks of trade practices compliance to a compliance manager and then exercises no supervisory role over his or her compliance activities.²⁰² Assume further that the compliance manager takes an unduly optimistic or casual view of the compliance function delegated and that the company's financial health is jeopardised by a number of middle managers who have engaged in systematic resale price maintenance. In supposing that the compliance officer would prepare adequate compliance procedures, and in refraining from demanding any assurances of adequacy, have the members of the board violated s. 229(2) by failing to use reasonable care and diligence in monitoring the company's compliance efforts? Should they have insisted on at least quarterly or half-yearly reports by the compliance officer as to the nature and extent of the company's compliance system?

It may be argued that, in the absence of any particular reason to suspect that the compliance officer would not properly discharge the function delegated, there is no liability. Certainly there is some support in the case law for this position.²⁰³ On the other hand, it may be argued that, since resale price maintenance is a practice of such prevalence among wholesalers in general, and since the potential costs of violation are heavy, failure to monitor compliance by requiring periodic reports and assurances may amount to lack of reasonable care by the directors

¹⁹⁸ See *Giorgianni v. The Queen* (1985) 156 C.L.R. 473; *Yorke v. Lucas* (1985) 158 C.L.R. 661; *Wood v. Apple Introductions (Brisbane) Pty Ltd* (1988) A.T.P.R. ¶46-043. As regards the liability of D, an officer, where the liability of D Ltd. is based on D's conduct or mental state, see *Hamilton v. Whitehead* (1989) A.T.P.R. ¶40-293.

¹⁹⁹ There is also the possibility of civil liability for the tort of negligence.

²⁰⁰ There are other provisions requiring the exercise of reasonable care or due diligence; e.g., *Building and Construction Industry Long Service Payments Act* 1986 (N.S.W.), s. 63(1); *Employment Protection Act* 1982 (N.S.W.); *Occupational Health and Safety Act* 1983 (N.S.W.), s. 50(1); *Life Insurance Act* 1945 (Cth), s. 148.

²⁰¹ The maximum penalty is a fine of \$5000. The remedies available include injunctions and damages under s. 574 of the *Code*. It may also be noted that, unlike the tort of negligence or statutory offences of failing to exercise due diligence to prevent a contravention, liability under s. 229(2) is not conditional upon the causing of damage or the failure to try to prevent a contravention which has actually occurred.

²⁰² Any resemblance to the facts in *T.P.C. v. General Corporation Japan (Australia) Pty Ltd* (1989) A.T.P.R. ¶40-922 is entirely coincidental.

²⁰³ *Re City and Equitable Fire Insurance Co. Ltd* [1925] Ch. 407 at 429 per Romer J.; *Graham v. Allis Chalmers*, 188 A.2d 125 (1963). See further Corkery, J., *Directors'* (continued overleaf)

in exercising their power to manage the business of the company.²⁰⁴ This is especially so given that the risk of loss from non-compliance may easily be more significant than some of the traditional items of business on the agenda of board meetings.²⁰⁵

There is another reason for doubting that the duty under s. 229(2) is confined to the areas of fiscal command expected of directors in the past. Much is known today about how organisations can malfunction and many of the likely causes of malfunction are relatively easy to remedy. Take for instance the need to have early warning systems for alerting top managers to possible illegality lower in the organisation.²⁰⁶ Since this need is well-known and easily remedied by adding additional reporting channels, corporate officers who ignore it may run the gauntlet of s. 229(2).

A number of other developments are pertinent when assessing the conceivable relevance of s. 229(2) in the context of neglect of compliance by corporate officers. These include the following:

- An emerging change in approach in the U.S.A., where some decisions have supported corporate officer liability for negligent failure to ensure adequate compliance controls;²⁰⁷

²⁰³ *Contd.*

Powers & Duties (1987), 137-139. Reasonable care in delegation requires more than blind faith; consider Perkins, "Avoiding Directors' Liability" [1986] *Harvard Business Review* 8 at 12:

"A necessary underpinning of the right of reliance is that you must know who is being relied on for what. If you can identify the people responsible to the board for the performance of the various corporate functions and if you have a basis for believing that they are capable of performing those functions, you have an effective shield against liability.

Let's first consider the director's oversight functions. One example of this responsibility lies in compliance with antitrust laws. Is this a responsibility of the general counsel and the regional assistance counsel, or is it the responsibility of the vice presidents in charge of each division? Has anyone been clearly assigned the function? Suppose, for example, that you are on the board of a trust company. Do you know which of the top officers is responsible for the procedures designed to ensure that the vault contains the stock and bond certificates it is supposed to contain? Or suppose you are on the board of a chemical company. Can you say which top officer is responsible for the oversight of the public safety aspects of waste disposal?

Shifting to the director's decision-making function, let us suppose you are on the board of a company about to make a major acquisition. Has anyone identified the officers responsible for overseeing the financial and legal due diligence work? What document are you relying on as the report of that work?"

²⁰⁴ Compare *Gould v. Mount Oxide Mines Ltd* (1916) 22 C.L.R. 490 at 530; Perkins, "Avoiding Directors' Liability" [1986] *Harvard Business Review* 8 at 12.

²⁰⁵ E.g., review of fringe benefits tax implications of corporate dining facilities, the financial ramifications of which may pale into insignificance when compared with a major scandal involving price fixing or resale price maintenance.

²⁰⁶ See further Coffee, "Beyond the Shut-Eyed Sentry" (1977) 63 *Virginia Law Review* 1099; Braithwaite, "Taking Responsibility Seriously: Corporate Compliance Systems", *supra*, n. 14, ch. 3.

²⁰⁷ See especially *Francis v. United Jersey Bank*, 432 A.2d 814 (981); *Smith v. Van Gorkom*, 488 A.2d 858 (1985). These decisions are inconsistent with *Graham v.*

- The emphasis on internal compliance controls in response to the foreign bribery cases²⁰⁸ and under recent reforms of U.S. insider trading legislation;²⁰⁹
- The emerging relevance of probation as a sentence against corporations, and the use of probationary conditions to require the adoption of effective internal controls;²¹⁰
- The corporate governance movement,²¹¹ one of the planks of which is that company boards of directors should be required by law to oversee compliance efforts;
- The growing political influence of the paradigm of enforced self-regulation²¹² under which companies are obliged by law to have compliance controls in place and to report upon their operation at regular intervals.

A number of lobby groups have recently made submissions to the Standing Committee on Constitutional and Legal Affairs that company law should be decriminalised, a proposal that presumably would mean the removal of criminal liability under a provision such as s. 229 of the *Companies Code*. Even if this proposal were to be adopted, it would not affect the risk of civil liability, which is serious in itself.

²⁰⁷ *Contd.*

Allis Chalmers, 188 A.2d 125 (1963) (held (1) that the directors acted reasonably in relying upon reports and summaries of operations which they had no reason to believe unreliable; and (2) directors had no responsibility to establish and maintain an antitrust compliance program given that the board had no suspicion of wrongdoing). See further James Cox, "Changing Perceptions into Reality: Fiduciary Standards to Match the American Directors' Monitoring Function" (1989) paper presented to the Merchant Bankers' Association in April; Emerson, "The Director as Legal Monitor" (1985) 15 *Seton Hall Law Review* 593; Simmons, "Informed Decisionmaking by Directors" (1985) 55 *Mississippi Law Review* 571; Samet and Sherman, "The Audit Committee in Search of a Purpose" (1984) 7 *Corporation Law Review* 42.

²⁰⁸ See e.g., Ferrara, "Corporate Board Responsibility under the Foreign Corrupt Practices Act of 1977" (1980) 18 *American Business Law Journal* 259.

²⁰⁹ See *Insider Trading and Securities Fraud Enforcement Act of 1988* (1988) 1304 CCH Federal Securities Law Reports 1, esp. at 20-22.

²¹⁰ See Stone, *Where the Law Ends*, ch. 16; American Bar Association, 3 *Standards for Criminal Justice*, 18.162-163, 18.179-184; Coffee, "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386; Geraghty, "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing" (1979) 89 *Yale Law Journal* 353; Fisse, "Responsibility, Prevention, and Corporate Crime" (1973) 5 *New Zealand Universities Law Review* 250.

²¹¹ See generally American Law Institute, *Principles of Corporate Governance and Structure: Restatement and Recommendations, Tentative Draft No. 1*; Hopt and Teubner, eds., *Corporate Governance and Directors' Liabilities* (1986). A research project on corporate governance was initiated in 1987 by the Law Council of Australia under the direction of Robert Baxt, then of Monash Law School.

²¹² See further Braithwaite, "Enforced Self-Regulation" (1982) 80 *Michigan Law Review* 1466; Shearing, C., and Stenning, P., eds., *Private Policing* (1987); N.C.S.C., *A Review of the Licensing Provisions of the Securities Industry Act and Codes* (1985); Page, "Self-Regulation: The Constitutional Dimension" (1986) 49 *Modern Law Review* 141.

It is most unlikely, however, that the decriminalisation lobby will succeed. First, there are opinion surveys indicating widespread community resentment of corporate crime²¹³ and in light of this popular opinion it might well be dangerous for any political party to exempt corporate officers from criminal liability. Secondly, the difficulty of drawing the line between exercising reasonable care in compliance and failing to do so should not be exaggerated. The task is similar to that which arises in the context of statutory defences of reasonable precautions;²¹⁴ such defences have proliferated over a wide range of corporate regulation. The task is also much the same as that of deciding whether a company or a corporate officer has made a reasonable mistake of fact for the purpose of the common law defence of reasonable mistake of fact,²¹⁵ a defence that applies to many statutory offences. Thirdly, while the drafting of s. 229(2) may leave much to be desired, the solution is not to throw out the baby with the bathwater but to re-draft the section. The main trouble with the offence under s. 229(2) is that it is defined in terms of negligence rather than in terms of subjective blameworthiness. Generally speaking, the approach adopted in our system of criminal justice is to require proof of guilty intention, knowledge or recklessness, especially where the offence carries the possibility of a jail sentence.²¹⁶ The sensible course, in my opinion, would be to re-define the offence under s. 229(2) accordingly. Thus, criminal liability for breaches of s. 229(2) could be confined to situations where a corporate officer knows or is aware of the likelihood that his or her conduct falls short of the standard of care expected. This approach would make the offence narrower in scope than the present s. 229(2) and yet broader than complicity or the offence of being knowingly concerned in a violation.

The criticism has been put to the Standing Committee that s. 229(2) is an aberration because people in other walks of life (such as departmental heads, politicians, lawyers, accountants) are not subject to any parallel statutory responsibility. This complaint seems ill-founded. One of the main reasons for having a provision such as s. 229(2) is that in our legal system trust is reposed in private enterprise to regulate its own affairs in an adequate manner.²¹⁷ The price of freedom from extensive legal intervention in the internal affairs of companies is the imposition of responsibility on corporate officers if a company violates the trust reposed. Moreover, the profit motive in

²¹³ See e.g., Australia, Institute of Criminology, "Corporate Crime in Australia" (1987) 5 *Trends and Issues*.

²¹⁴ Consider e.g., *Videon v. Beneficial Finance Corporation* (1981) A.T.P.R. ¶40-246.

²¹⁵ See e.g., *Brambles Holdings Limited v. Carey* (1976) 15 S.A.S.R. 270; *G.J. Coles & Coy Limited v. Goldsworthy* [1985] W.A.R. 183; *Woolworths Ltd v. Luff* (1988) 33 A.Crim.R. 144.

²¹⁶ See further *He Kaw Teh v. R.* (1985) 157 C.L.R. 523; *Cameron v. Holt* (1980) 142 C.L.R. 342.

²¹⁷ See further Shapiro, "Policing Trust" in Shearing and Stenning, eds., *Private Policing*, 194.

the private sector is generally much stronger than in the public, and there is no doubt that pressure to make profits has often led to white-collar crime. It is thus unsurprising that corporate officers should be under duties of care and supervision that have no exact counterpart in the public sector.²¹⁸ Finally, it may well be that statutory requirements along the lines of s. 229(2) should be adopted in other areas where a comparable need arises. It would be fallacious to suppose that s. 229(2) should be abrogated merely because the statutory duty has been limited rather than extended to the limit of its potential utility.

CONCLUSION: INDIVIDUAL, STATE, AND CORPORATION

The corporation was once seen as "an ingenious device for the maximisation of profit and the minimisation of responsibility".²¹⁹ That proposition has hardly been inverted by the *Trade Practices Act* or by trade practices compliance programmes, but the perception of corporations is changing. Their image as artificial tools for the pursuit of individual interests is yielding to recognition of corporateness as the loom for much of our social fabric.²²⁰ The trends discussed above may be seen as reflections of this process.

The traditional liberal model of social organisation radiates from the individual: the model is often called "individualism". According to the doctrine of individualism, corporations (including the state) are treated as conduits or ciphers for maximising the interests of their human members. The state is given extensive power to define and preserve the peace because the peace is a matter of "public" concern and needs to be "publicly" maintained.²²¹ Private corporations are not seen as communities with social control mechanisms of their own; they are artificial legal entities or useful machines.²²²

By contrast, pluralistic models of social organisation focus on the institutional arrangements that govern the human condition. Corporations (including the state), are seen as centres of power with goals, procedures, and practices that serve the interests of their constituency.²²³ Within a pluralistic framework, private corporations are communities with social control mechanisms of their own; they

²¹⁸ See generally Stone, "Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?" (1982) 130 *University of Pennsylvania Law Review* 1441.

²¹⁹ Bierce, A., *The Devil's Dictionary* (1958); note also the Bierce definition of "responsibility": "a detachable burden easily shifted to the shoulders of God, Fate, Fortune, Luck or one's neighbour".

²²⁰ See generally Coleman, J.S., *The Asymmetric Society* (1982); Hacker, A., ed., *The Corporation Takeover* (1964).

²²¹ Shearing and Stenning, eds., *Private Policing*, 11-12.

²²² See Dan-Cohen, M., *Rights, Persons, and Organizations* (1986).

²²³ Shearing and Stenning, eds., *Private Policing*, 13-14; Dan-Cohen, *Rights, Persons, and Organizations*, ch. 8. Taken to an extreme, as under fascist interpretations, the state is idealised as a transcendent, superior being.

are self-governing groups. As self-governing groups, private corporations have extensive power to define and preserve their own peace, the role of the state being to police or regulate spheres of activity beyond the interest or competence of private governments.

Between the extremes of individualism and corporate pluralism lies a black hole of possibilities. These possibilities remain uncharted partly because jurisprudence has failed to provide any cogent theory of law and organisations. As Richard Stewart has explained, the task of filling that gap is daunting.²²⁴ Nonetheless, it is at least possible to see some of the limitations of individualism in relation to our present topic, corporate compliance.

One serious weakness of individualism is its failure to account for what happens within the "black box" of organisations. The assumption is made that a corporation is a unitary rational actor akin to Stanley Jevons' "economic man".²²⁵ This assumption is unrealistic, as John Byrne and Steven Hoffman have indicated:

"The most apparent difficulty in using this modified nineteenth-century model to describe contemporary corporate criminal decision-making is that it was constructed to stand for the thought patterns and behavior of an individual, not the twentieth-century corporation composed of many individuals, many products, many decisions, many values, and many goals."²²⁶

The rational actor model partly explains why the law has failed to develop cogent solutions to many of the problems that arise in applying the law to organisations. Thus, it is the image of organisation as unitary rational actor that underlies the approach that the law has taken to the factual basis of corporate sentencing, the definition of corporate defences under s. 85(1)(a) and (b), and the supervision of internal disciplinary action or organisational revision by corporate defendants.²²⁷ If the law is to be more responsive to the implications of corporateness it is difficult to see what alternative there is but to dispense with the rational actor model and to look more realistically at corporate policies, procedures and practices.

Another major limitation of individualism is its failure to recognise the existence of private systems of justice within corporations. As Clifford Shearing and Phillip Stenning have explained:²²⁸

"What [the liberal frame of individualism] does is construct and juxtapose two ideal entities: the state and the individual. The category 'individual' has taken on a residual character in that if a political legal entity is not part of the state it is then conceived of as an

²²⁴ "Organizational Jurisprudence" (1987) 101 *Harvard Law Review* 371.

²²⁵ Jevons, W.S., *The Theory of Political Economy* (1871).

²²⁶ Byrne and Hoffman, "Efficient Corporate Harm" in Fisse and French, eds., *Corrigible Corporations and Unruly Law*, ch. 6.

²²⁷ See Section III above.

²²⁸ *Private Policing*, 14.

individual. This analytic strategy has made possible the political-legal sleight of hand through which corporations are treated, for certain important purposes, as 'individuals' even though they are empirically very different from flesh and blood individuals and, indeed, very often are more similar to states. Although this piece of conjuring has maintained the liberal frame it has not been useful in facilitating an understanding of critical aspects of private policing. Most important, it has obscured the similarity between the state and large corporations as political-legal entities. The latter's stature as authorities with the resources and power to rival the influence of the state *and* with jurisdiction over substantial territories and communities has not been adequately explored. This has been particularly detrimental to our understanding of the role of corporations in defining and maintaining social order."

Ironically, individualism has tended to inhibit our understanding of individual responsibility: it has concealed rather than revealed the capacity of corporate liability to achieve individual accountability at the level of internal discipline.²²⁹

To conclude, the *Trade Practices Act* has unfathomed the role of corporations in many ways during its existence and has sailed us into the ocean of corporate compliance systems. The ultimate challenge ahead is whether it can lead us through law's Bermuda triangle—the triangle of individual, state, and corporation.

²²⁹ See further Fisse and Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney Law Review* 469.