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Are you aware that as of the 15th of December a new Criminal Code applies to all Commonwealth legislation – and that this code introduces the concept of a ‘corporate culture’ in regulatory compliance? This has important ramifications for business.

Greater corporate culpability

Background to the Code

The Commonwealth Criminal Code (the Code) will apply to all offences under Commonwealth legislation from 15 December 2001. The Code sets out the way in which Commonwealth offence provisions are to be interpreted by codifying a set of general principles for criminal responsibility that cover the elements of an offence, defences, ancillary liability, corporate criminal responsibility and the burden of proof. David Holme and Professor Bob Baxt review the new Code.

The Code is designed as a uniform set of general principles of criminal responsibility for Commonwealth laws to apply throughout Australia. Prior to the enactment of the Code, these principles varied significantly between jurisdictions, providing a person accused of the same Commonwealth offence in one State a better chance of being acquitted than if the conduct occurred in another State.

Application to Commonwealth offences

The intention at the time the Code was enacted was that the States and Territories would replicate this legislation to create a uniform set of general principles for criminal responsibility to apply in every jurisdiction throughout Australia. However, no State or Territory has yet replicated the Code, and therefore the principles of criminal

responsibility set out in the Code currently only apply to offences against Commonwealth legislation. Relevant offence provisions to which the Code will apply will include the consumer protection offences contained in the *Trade Practices Act 1974* (TPA), as well as the offence provisions contained in: the *Corporations Act 2001*; the Federal tax legislation, Federal environment protection legislation and the *Workplace Relations Act 1996*.

The Federal Government has conducted an 'audit' of these and other Federal offences, and enacted consequential amendments to ensure that the legislation is compliant with the principles contained in the Code, and that the application of the Code on 15 December 2001 to these offences will not have any unintended consequences.

Much of the Code is simply a codification of contemporary common law principles, and is therefore unlikely to have a dramatic impact on the interpretation of Commonwealth offence provisions. However the Code significantly extends the relevant principles as they apply to bodies corporate. In particular, it introduces the concept of a 'corporate culture' of compliance in assessing the 'fault' of a body corporate for the conduct of its employees, agents and officers.

General principles of criminal responsibility

The Code reflects the following general principles of criminal responsibility.

Offences consist of 'physical' and 'fault' elements

The Code clarifies the traditional distinction between the *actus reus* (the physical act, now referred to as the **physical element**) and the *mens rea* (the **fault element**) of an offence.

The physical elements provided in the Code are:

- (a) conduct; or
- (b) a circumstance in which conduct occurs; or
- (c) a result of conduct.

Each offence must contain at least one of these physical elements, but any combination of these physical elements may be present in an offence. The prosecution bears the onus of proving each of the physical elements.

For every physical element of an offence, the

prosecution must also prove a corresponding fault element. The Code does not prevent an offence from specifying an alternative fault element, but the Code indicates that a 'default' fault element will apply in the absence of a specified fault element. The Code establishes four default fault elements: intention, knowledge, recklessness and negligence. The Code provides that for 'conduct', the default fault element is 'intention'. For 'circumstance' or 'result', the default is 'recklessness'.

Proof of a guilty mind is generally necessary before a person can be found guilty

The Code requires a provision creating an offence to specify if no mental element is required for an offence (ie if the offence is one of strict or absolute liability). If an offence does not specify a mental element, then the default mental elements set out above will apply depending on the nature of the physical element(s) to be proved.

The requisite fault element should be subjectively held

The defendant's guilt will depend on what he or she thought or intended at the time of the offence, rather than what a reasonable person would have thought or intended in the defendant's circumstances.

Corporate criminal responsibility

Part 2.5 of the Code establishes the application of the Code to bodies corporate. It provides for express attribution of criminal liability to bodies corporate for offences created by Commonwealth legislation.

Under the Code, bodies corporate can be guilty of offences punishable by imprisonment (fines can also be imposed). The Code also provides for the attribution of both the physical and fault elements of an offence to a body corporate, as set out below.

The physical element

The physical element of an offence will be attributed to a body corporate where it is committed by an employee, agent or officer acting within the actual or apparent scope of their employment.

The fault element

The fault element may be attributed to a body corporate on the following bases:

If **intention, knowledge or recklessness** is a fault element of an offence and:

- (a) the board of directors or a 'high managerial agent' of the body corporate intentionally, knowingly or recklessly carries out the conduct, or expressly, tacitly or impliedly, authorises or permits the commission of the offence;
'High managerial agent' means an employee, agent or officer of the body corporate with duties of such responsibility that their conduct may fairly be assumed to represent the body corporate's policy;
- (b) a 'corporate culture' exists that directed, encouraged, tolerated or led to non-compliance with the relevant provision;
- (c) the body corporate *failed to create and maintain a 'corporate culture'* that required compliance with the relevant provision.
'Corporate culture' means attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the activities takes place.

If **negligence** is a fault element of an offence, through aggregation of the conduct of any number of its employees, agents or officers and/or where there is:

- (d) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers;
- (e) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Strict liability offences

The provisions of the Code relating to a body corporate's liability for strict liability offences (ie offences for which no fault element is required to prove liability, but for which the defence of reasonable mistake of fact is available) are likely to be particularly important, as many Commonwealth offences are expressed to be strict liability offences.

A body corporate will only be able to avoid liability for strict liability offences if the employee, agent or officer of the body corporate who carried out the conduct, made a reasonable mistake of fact, and the body corporate has:

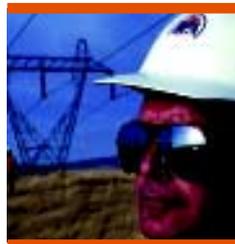
- (f) adequate corporate management, control or supervision of the conduct of its employees, agents or officers; and

- (g) adequate systems for conveying relevant information to relevant persons in the body corporate.

Corporate criminal responsibility

Essentially the Code equates the intentions of a corporation with its 'corporate culture'. This is a significant extension of the common law position, which essentially equates a corporation's intentions with those of its directors and senior management. Furthermore, the Code imposes a positive duty on bodies corporate to put in place adequate precautionary measures and supervisory mechanisms to reduce the chances of an employee, agent or officer of the body corporate engaging in contravening conduct.

Much of the code is simply a codification of contemporary law principles ... However the code significantly extends the relevant principles as they apply to bodies corporate ... It introduces the concept of a 'corporate culture' of compliance in assessing fault.



Corporate culture of compliance

Part 2.5 of the Code is likely to have a significant impact on criminal jurisprudence regarding the liability of bodies corporate for the actions of directors, employees and agents. The concept of a 'corporate culture' of compliance will supplement and elaborate on the existing provisions relating to corporate responsibility in Federal legislation (see for example, section 84 of the *Trade Practices Act 1974* (TPA), section 349 of the *Workplace Relations Act 1996*, and section 575 of the *Telecommunications Act 1997*). Following the introduction of the Code, there is likely to

be an even greater expectation on the part of courts that companies will embrace a 'corporate culture' of compliance for all its Commonwealth statutory obligations.

The significant extension of the traditional notions of corporate criminal responsibility introduced by the Code will make the development of policies, rules and systems designed to facilitate compliance with a body corporate's Commonwealth statutory obligations essential.

Implementing compliance programs

The need for an effective and up-to-date compliance program has long been recognised in the trade practices field, and courts have frequently considered the existence of a compliance program in assessing the appropriate penalty for a breach of the TPA. Indeed, in his recent decision in *ACCC v Rural Press*

Ltd (2001) FCA 1065, Justice Mansfield, in refusing to impose an Australian standard compliance program on Rural Press, emphasised the value of a tailored compliance program that is directed to the particular operations of a company.

Whilst there are as yet no precedents that comment on the existence of compliance programs in other areas of the law, the concept of a 'corporate culture' of compliance in Part 2.5 of the Code is likely to also require companies to adopt substantive compliance programs to ensure compliance with their other Commonwealth statutory obligations. It will therefore be important to ensure that such programs are properly implemented, that relevant employees receive appropriate training in the application of the program and that compliance with the program is monitored. A 'corporate culture' of compliance will require more than formal documents appearing to require compliance, it will require a serious commitment to compliance from management.

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