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Criminal Liability of Organisations

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CRIMINAL LIABILITY OF ORGANISATIONS

Introduction:

This paper looks at the criminal liability of organisations from the perspective of the Commonwealth of Australia criminal law and its enforcement.

Under the Australian federal system, Commonwealth legislative powers are set out in the Constitution of Australia. These powers cover matters of national importance such as defence, taxation, postal and telephone services, fisheries in Australian waters beyond State boundaries, banking, external affairs, immigration and trade and commerce with other countries. Anything that is not within Commonwealth powers is the responsibility of States.

This division of responsibilities flows through to criminal laws. The Commonwealth has responsibility for offences such as the importation of drugs, money laundering, taxation fraud, social security fraud and fraud on other Commonwealth Government programs, people trafficking, immigration offences, fisheries offences in Australian waters and corporation or company offences.

The States have responsibility for all other crime occurring within their boundaries. This includes matters such as murder, assault, traffic offences and street crimes and general fraud and theft offences.

Both the Commonwealth and States have set up independent prosecuting agencies to be responsible for prosecutions within their jurisdiction.

The Commonwealth Director of Public Prosecutions is responsible for all prosecutions under Commonwealth law. The CDPP prosecutes matters referred to it by investigative agencies. In the Commonwealth sphere the main referring agencies include the Australian Federal Police, the Australian Crime Commission, and the Australian Securities and Investments Commission. However, the CDPP also receives referrals from more than 30 other Commonwealth agencies. These range from agencies such as the Australian Taxation Office, Australian Customs Service,

Civil Aviation Safety Authority and the Australian Fisheries Management Authority through to agencies such as Comcare (responsible for occupational health and safety in Commonwealth Government Business Enterprises), the National Parks and Wildlife Service, the Great Barrier Marine Park Authority and the Australian Maritime Safety Authority. It is from these regulatory type referrals that most of the prosecutions of corporations arise. Examples of such prosecutions extracted from past annual reports are compiled in the appendix 2 to this paper.

Corporate criminal responsibility at common law

At common law it is accepted in Australia that corporations can be held liable for criminal acts or omissions. Generally acts committed by those who constitute the directing mind and will of a corporation will be directly attributed to the acts of the corporation. The difficulty has been in determining whose acts constitute the "mind and will" of the corporation. The test laid down by the House of Lords in *Tesco Supermarkets Ltd v. Natrass*[1] was followed in Australia. The High Court of Australia approved of the approach in *Hamilton v. Whitehead*[2]. In that case a company not qualified to offer "prescribed interests" to the public was convicted as a principle for doing so. The offers were made by its managing director. The managing director's conduct was attributed to the company. The High Court also held that the managing director could be convicted as a secondary participant despite being instrument through which the company committed the offence. Later developments such as those set out by the Privy Council in *Meridian Global Funds Management Asia Limited v. Securities Commission*[3] were also followed in Australia.

The Criminal Code

Along with the common law principles there are also provisions contained in a range of statutes dealing with the liability of corporations in relation to prosecutions bought under those statutes. Examples include section 55 of the *Therapeutic Goods Act 1989* and section 84 of the *Trade Practices Act 1974*. They generally extend the

[1] [1972] A.C. 153
[2] (1988) 166 CLR 121
[3] [1995] A.C. 500

corporate liability test to any conduct engaged in on behalf of a body corporate that was engaged in by a director, servant or an agent of the body corporate within the scope of the persons actual or apparent authority and also any conduct by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate acting within authority. In some but not all instances there is a due diligence defence for the body corporate.

A major change in Commonwealth criminal law occurred with the introduction of the Criminal Code, which is a schedule to the *Criminal Code Act 1995*. The Criminal Code is fundamental to the operation of Commonwealth criminal law. It was designed to achieve consistency and equity in the operation of the Commonwealth criminal law throughout Australia. The background to the Code was that in 1987 the then Commonwealth Attorney-General established a committee to review Commonwealth criminal law. Its chair was the former Chief Justice of the High Court of Australia, Sir Harry Gibbs. It became known as "the Gibbs Committee". The Gibbs Committee recommended that the principles of criminal responsibility for Commonwealth offences be codified in its 1990 report entitled "*Principles of Criminal Responsibility and Other Matters*"[4].

In 1990, the Standing Committee of Attorneys-General (SCAG) agreed to put the question of the development of a uniform Criminal Code on its agenda. A Committee of officers known as the Criminal Law Officers Committee was established to develop a model Criminal Code (later known as the Model Criminal Code Officers Committee (MCCOC)).

Ultimately the Commonwealth passed the Criminal Code Act 1995. Chapter 2 of the Code sets out the general principles of criminal responsibility in relation to breaches of Commonwealth laws. These general principles apply to all Commonwealth offences as from 15 December 2001. Unfortunately to date none of the States have adopted the Criminal Code. Two Australian Territories are currently implementing the Criminal Code in stages.

[4] Review of Commonwealth Criminal Law. Interim Report. Principles of Criminal Responsibility and Other Matters. July 1990.

Lofty words were employed in the explanatory memorandum for the original Bill:

> *"It is hoped that the 1994 Bill will not only be the beginning of a new era of the Commonwealth criminal law, by ensuring that those who are accused of Federal offences are subject to the same principles in all parts of Australia, but for the criminal law of Australia generally. It is the beginning of one of the most ambitious legal simplification programs ever attempted in Australia."*[5]

General principles of criminal responsibility

The stated purpose of Chapter 2 of the Criminal Code is to codify the general principles of criminal responsibility under the laws of the Commonwealth. An offence is defined by the Criminal Code to consist of physical elements and fault elements. Physical elements refer to the external elements of the crime, previously known as the actus reus. Fault elements refer to the state of mind or fault of the accused which must be proven for guilt to attach, previously known as mens rea.

These are the basic building blocks of the criminal liability under the Criminal Code. In order for a person to be found guilty of committing an offence it must be established that he or she committed all the relevant physical elements with the accompanying fault element attached to each of those physical elements.

The physical elements are:

- Conduct – defined as an act or omission to perform an act or a state of affairs (eg being in possession of something);

- A circumstance in which conduct occurs (eg where an assault case occurs in circumstances where the person harmed is a Commonwealth public official); or

- A result of conduct (eg the assault results in causing harm).

[5] The Parliament of the Commonwealth of Australia. Senate. Explanatory Memorandum to the Criminal Code Bill, 1994 p. 1

The fault elements are:

- Intention;
- Knowledge;
- Recklessness;
- Negligence; or
- Another fault element specified by particular legislation.

An example of how the Code works is shown by looking at an offence such as obtaining financial advantage from the Commonwealth.

Section 135.2(1) of the Code provides that:

> (1) A person is guilty of an offence if:
> (a) The person engaged in conduct; and
> (aa) as a result of that conduct the person obtains a financial advantage for himself or herself from another person; and
> (ab) the person knows or believes that he or she is not eligible to receive that financial advantage; and
> (b) the other person is a Commonwealth entity.
>
> (1A) Absolute liability applies to paragraph (1)(b) element of the offence.

If this offence occurred by the lodgement of a false document then the element breakdown of the offence would be as follows:

(a) D lodges a document (conduct). The fault element is intention.
(b) D obtains a financial advantage (result). The fault element is knowing or believing that he or she is not eligible to receive that financial advantage.
(c) The person from whom the final advantage is obtained is a Commonwealth entity (circumstance). The fault element is absolute liability as is stated to be such in the offence.

Corporate criminal responsibility

Part 2.5 of the Criminal Code sets out principles relating to “corporate criminal responsibility”. Both the Gibbs Committee and the Criminal Law Officers Committee responsible for the Code considered that the common law dealt with corporate criminality inadequately particularly where large corporations were concerned. In its

"Final Report on General Principles of Criminal Responsibility"[6] the Criminal Law Officers Committee referred to major disasters such as the Bhopal disaster in India, the Chernobyl explosion in the then-USSR and the Exxon Valdez oil spill in Alaska in support of arguments to reform the rules of corporate criminal responsibility. At page 107 of that Report, the Committee stated:

> *The Committee's objective was to develop a scheme of corporate criminal responsibility which is nearly as possible adapted personal criminal responsibility to fit the modern corporation. The Committee believes that the concept of "corporate culture" – as defined in s.501.2.2 – supplies the key analogy although the term corporate culture would strike some as to diffuse it is both fair and practical to hold companies liable for the policies and practices adopted as their method of operation. There is a close analogy here to the key concept in personal responsibility – intent. Furthermore, the concept of "corporate culture" casts a much more realistic net of responsibility over corporations than the unrealistically narrow Tesco Test.*

The general approach in the Code is to equate corporate liability with individual liability. Section 12.1 provides that the Code applies to bodies corporate in the same way it applies to individuals with such modifications as set out in Part 2.5 or such other modifications as may be necessary to deal with the fact that it is a body corporate rather than an individual being prosecuted.

The Commonwealth produced a guide for practitioners in 2002 prepared by Mr Ian Leader-Elliott who was instrumental in the development of the Criminal Code. In dealing with section 12.1 that guide refers to the "need to fashion concepts developed for determining individual responsibility to the contours of corporate wrong-doing"[7]. It goes on to suggest that it is a "clear legislative imputation to courts to use a measure of creativity in the exercise of their interpretive powers"[8]. It may be regarded as a somewhat novel proposition to invite courts to be "creative" in making modifications or filling in gaps to shape the Criminal Code to fit the concept of corporations where a strict application of Code provisions may not fit squarely with the concept of corporations.

Section 12.1(2) makes it clear that body corporate can be prosecuted for an offence carrying a term of imprisonment. Section 4B of the *Crimes Act 1914* provides that a sentence for a Commonwealth offence punishable only by imprisonment can be converted to a pecuniary penalty expressed as a number of penalty units. The formula is the term of imprisonment expressed in months multiplied by five. A

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[6] Model Criminal code Officers Committee, "General Principles of Criminal Responsibility". Final Report December 1992, p.105

[7] Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code, A Guide for Practitioners,* 2002, p 297

[8] Ibid p 297

penalty unit is currently $AU110. Using this formula a term of imprisonment of one year, ie 12 months, would convert to 60 pecuniary penalty units which is a maximum fine of $6,600. In the case of a body corporate, Section 4B(3)of the *Crimes Act* 1914 provides that the maximum penalty is five times that that could be imposed on a natural person. In this case a term of imprisonment for one year would convert to a pecuniary penalty of $33,000 for a corporation.

Physical elements of the offence

The physical element of an offence can be attributed to the corporation if it is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment or authority – section 12.2 of the *Criminal Code*. It has been noted that this section does not extend to conduct performed by other persons at the direction of an employee, officer or an agent as is the case under a number of other pieces of Australian legislation[9]. It is also suggested that it does not allow for the aggregation of conduct.[10]

Interestingly, the guide for practitioners states that section 12.2 is not exhaustive in attributing the physical elements of an offence to a corporation. It is said that the conduct elements can be attributed directly as acts or omissions of the corporation itself. An example is given of a corporation causing pollution.

In these instances it is not necessary to discover some particular individual or set of individuals whose actions or inaction might have resulted in pollution before attributing the conduct of causing pollution to the corporation. Liability may indeed arise from corporate omission to appoint some individual whose responsibility it was to ensure that the pollutant did not escape. Nor is direct attribution of conduct elements of an offence to a corporation limited to omissions. In some instances, the corporation is the active agent, as in offences of "sale" or "trading" in prohibited goods.[11]

This approach requires that the Code is not exclusive as to the manner in which the physical elements of an offence can be attributed to a corporation but there will be some conduct which is so clearly performed by the corporation that it is not necessary to look to the conduct of an individual employee, agent or officer. This approach would allow a form of aggregation in relation to the physical elements where the conduct is clearly carried out by a range of people but no one person can be said to be responsible for the whole process. This would presumably include such things as the manufacture of a defective motor vehicle or the sale of

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[9] Jonathan Clough and Carmel Mulhern *The Prosecution of Corporations* Oxford University Press, Melbourne, 2002 p 139

[10] Ibid p 139

[11] Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code, A Guide for Practitioners,*p 303

contaminated goods, where it can be said that a particular corporation has carried out these functions but where it can't be said that any particular person has carried out all the physical acts that make up the activity. This would seem to be a sensible approach but one may have greater comfort it if was an approach that is specifically acknowledged in the Code itself. It is also difficult to see how remaining provisions of corporate criminal responsibility in the Code could apply to physical conduct said to be carried out by a corporation in this manner. The rest of the code is based on attributing individual conduct to the corporate entity rather than some notion of overall corporate responsibility.

Fault elements of corporate criminal responsibility

To establish the commission of an offence, the Code requires that each of the physical elements must be carried out with the accompanying fault element.

Fault Elements of Intention, Knowledge or Recklessness.

The main fault elements adopted by the Code are intention, knowledge, recklessness and negligence. Section 12.3 deals with the fault elements of intention, knowledge or recklessness. Section 12.3(1) provides:

> (1) *If intention, knowledge or recklessness is a fault element in relation to a physical element of offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence*.

Therefore if the corporation authorised or permitted the commission of an offence by the individual then the fault elements of intention, knowledge or recklessness must be attributed to that corporation.

Section 12.3(2) then sets out the means by which such an authorisation or permission may be established. The first two paragraphs cover the more traditional means by which fault may be attributed to a corporation. These are by proving that the board of directors or that a high managerial agent intentionally, knowingly or recklessly carried out the relevant conduct, or expressly tacitly or impliedly authorised or permitted the commission of the offence. The corporation has a defence in the case of a high managerial agent if it can prove that it exercised due diligence to prevent the conduct or the authorisation or permission. Naturally this defence does not apply to conduct or authorisation or permission given by the body corporate's board of directors.

An extension of the Tesco type form of attribution occurs in paragraphs (c) and (d) of section 12.3(2) which provide that it may be proved that the body corporate

expressly, tacitly or impliedly authorised or permitted the commission of the offence by;

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

The rationale for these provisions is set out in the Explanatory Memorandum to the Bill by reference to the following quotation:

> *"… The policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision-making process recognised as authoritative within the corporation. (see Field and Jorge, "Corporate Manslaughter and Liability: Should we be going Dutch?" [1991] Crim LR 156 at 159).*[12]

The Explanatory Memorandum goes on to give examples of where unwritten rules may be seen as tacitly authorising non-compliance despite formal documentation to the contrary. One example is where "employees who know that if they do not break the law to meet production schedules (eg by removing safety guards on equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation."[13]

Corporate culture is defined as meaning "an 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 relevant activities take place."[14] Therefore it is possible to segment the company into the different parts in which activities take place for the purposes of establishing corporate culture.

Further assistance is given in establishing the corporate culture by nominating other relevant factors. These include whether authority to commit an offence of the same or a similar character had been given by a higher managerial agent of the body corporate.[15] This would seem to indicate that tendency evidence showing authorisation of the conduct on other occasions may be used to establish that such authorisation existed on the particular occasion now before the court. A further

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[12] The Parliament of the Commonwealth of Australia. Senate. Explanatory Memorandum to the Criminal Code Bill, 1994, p 44

[13] Ibid p 44

[14] Section 12.3(6)

[15] Section 12.3(4)(a)

factor said to be relevant is whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds or entertained a reasonable expectation that a higher managerial agent of the body corporate would have authorised or permitted the commission of the offence.[16] This would seem to be aimed at the situation where it was common knowledge that management would encourage or turn a blind eye to the conduct even though it was ostensibly prohibited by corporate policy. The requirement is that the employee or other officer believes on reasonable grounds so that there is a subjective and objective test.

These provisions have been described in at least one text as the first "… in the world to base corporate criminal liability on a model of true corporate blameworthiness"[17]. However, as that text goes on to note, there are a number of difficulties with the provisions. A prosecutor may describe the provisions as innovative in theory but very difficult to establish in practice.

The first thing to note is that even though the provision talks about establishing a general corporate culture that led to the particular non-compliance, because of the structure of the Code it is still necessary to establish proof of intention, knowledge or recklessness on the part of some human individual, if fault is to be attributed to the corporation. This is because section 12.3 requires that the fault is attributed to the corporation when it gives authorisation or permission for the commission of the offence by the agent. In the absence of an offence committed by an individual, the provision gives no basis for the attribution of fault to a corporation.

This requirement to point to an offence by an individual which can then be attributed to the corporation would seem to confirm the great difficulty in establishing an offence on the basis of some form of general corporate activity referred to earlier in this paper. The examples of allowing a pollutant to escape or the manufacture of a defective motor vehicle or the sale of contaminated goods referred at page 8 are based on not needing to show an individual responsibility for all the physical acts.

It would also be very difficult to establish proof beyond reasonable doubt in establishing any particular corporate culture existed within an entity. There are likely to be many diverse cultures within any corporation. Furthermore great credence is likely given to any written rules, policies or practices as they can be objectively established. It is very unlikely that such documentation would disclose anything other than a requirement to properly comply with relevant provisions.

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[16] Section 12.3(4)(b)

[17] Jonathan Clough and Carmel Mulhern *The Prosecution of Corporations* Oxford University Press, Melbourne, 2002, p 143

The larger the corporation, the more difficult it is likely to be to establish some homogenous corporate culture. Conversely the smaller the corporation, the easier it may be to establish corporate culture but in those situations it is more likely that the other provisions in section 12.3 dealing with the board of directors or high managerial agent would apply.

In some ways the establishment of corporate culture may be seen as the absence of due diligence by the body corporate to prevent the conduct. In other words the issue is whether the company has taken all reasonable steps to prevent the conduct or the authorisation or permission. However, in the case of due diligence the onus is on the body corporate to prove on the balance of probabilities that it exercised due diligence. In the case of corporate culture the onus is on the prosecution to prove the requisite corporate culture beyond reasonable doubt.

Perhaps the most likely way of proving corporate culture in relation to any particular conduct would be through the employee, agent or officer who carried out the conduct by showing that he or she believed on reasonable grounds or had a reasonable expectation that a high managerial agent condoned the non-compliance which amounted to an offence. At least there would be a witness who could to his or her personal experience leading to the non-compliance.

These corporate culture provisions have been described as displaying "more academic purity than practical utility" and that they may "remain largely of academic interest through lack of use"[18]. Unfortunately a prosecutor faced with the difficulty of proving this concept may well come to the same view.

Fault Element of Negligence

Section 12.4 deals with the fault element of negligence. The test is the same for a body corporate as an individual. That involves conduct falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment for the offence. In the case of negligence, 12.4(2) makes it clear that it is possible to aggregate the conduct of a number of employees, agents or officers to establish the fault element if no individual employee, agent or officer has the requisite fault element individually. Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management or control or supervision of the conduct for one or more of its employees, agents or officers, or

[18] Jonathan Clough and Carmel Mulhern *The Prosecution of Corporations* Oxford University Press, Melbourne, 2002, p 148.

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

In relation to strict liability offences a body corporate can only rely on mistake of fact if the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about the facts and the body corporate proves that it exercised due diligence to prevent the conduct. A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct to one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Examples of prosecutions of corporations

The explanatory memorandum to the Criminal Code Bill makes it clear that Part 2.5 dealing with the corporate criminal responsibility is not intended to be an exclusive basis for corporate liability for Commonwealth offences. It refers to areas such as environment protection where it may be open to the legislature to employ reverse onus provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate. An example given is the section 65 of the *Ozone Protection Act 1989*. Many other sections dealing with corporate criminal responsibility continue to exist and be applied in other Commonwealth criminal legislation.

Appendix 2 to this paper sets out a sample of case reports taken from past CDPP Annual Reports. These cases are not indicative of the higher-end prosecutions carried out by the CDPP where the vast majority of large and complex cases across all ranges, including corporations law, involve prosecutions of individuals. The cases demonstrate that the majority of prosecutions of body corporates occur in relation to regulatory-type offences. Examples of the legislation dealt with in these cases include:

Fisheries Management Act 1991;
Therapeutic Goods Act 1989;
Occupational Health and Safety (Marine Industry) Act 1993;
Occupational Health and Safety (Commonwealth Employment) Act 1991;
Protection of the Sea (Prevention of Pollution from Ships) Act 1983;
Sydney Airports Curfew Act 1995
Trade Practices Act 1974;
Export Control Act 1982;

Ozone Protection Act 1989;
Meat Inspection Act 1983;
Crimes Act 1914

Criminal Code

Part 2.5—Corporate criminal responsibility

Division 12

12.1 General principles

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an 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 relevant activities takes place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.5 Mistake of fact (strict liability)

(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

(a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

(b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

DPP Annual Report : 2006-2007

Delmark Holdings Pty Ltd
The penalty in this matter was the highest ever imposed by a Court for an offence under the *Fisheries Management Act 1991*. The defendant was charged with breaching a condition of its fishing permits under sections 95(1)(d) and 95(5) of the *Fisheries Management Act 1991*.

The defendant reached its 2004 quota of gummy shark on 3 February 2004. The Australian Fisheries Management Authority sent correspondence to the defendant which advised the defendant that it had reached its quota of gummy shark for the 2004 calendar year and stated that it must not fish any additional gummy shark for that period. The defendant continued to fish gummy shark. The defendant caught 18,561 kilograms of gummy shark above its quota for the 2004 calendar year. The proceeds of the sale of the gummy shark was alleged to be $151,904.

The defendant entered a plea of guilty to the charges. On 16 March 2007 in the Magistrates Court of Victoria, Delmark Holdings Pty Ltd was sentenced to a fine of $165,000. The sentencing Magistrate also ordered the defendant to make forfeiture to the Commonwealth of Australia in the sum of $151,904, being the proceeds of the sale of the 18,561 kilograms of gummy shark.

DPP Annual Report : 2005-2006

Pan Pharmaceuticals Ltd and Shyama Jain
The prosecution of Pan Pharmaceuticals Ltd and Shyama Jain was the result of the largest investigation into the pharmaceutical industry in Australian history. This matter also involved the largest recall of pharmaceutical products in Australian history. It is the first time that charges have been laid for injuries suffered by consumers of counterfeit therapeutic goods, and the prosecution resulted in the first term of imprisonment being handed down to a defendant prosecuted under the *Therapeutic Goods Act 1989*.

In January 2003, reports of adverse reactions from consumers who had taken the travel sickness medication Travacalm were received by the Therapeutic Goods Administration (TGA). The adverse reactions ranged from mild to extremely severe. In some cases, people were admitted to hospital suffering from symptoms similar to those of stroke, as well as hallucinations, visual disturbances, altered behaviour patterns and other physical reactions. The TGA and the sponsor of Travacalm, Key Pharmaceuticals, ran independent tests of retention samples of the product which failed uniformity of content testing. It was found that the active ingredient, hyoscine hydrobromide, ranged between 0 to 707% of the amount stated on the label. The Travacalm products were urgently recalled at consumer level. A further, general consumer level recall of all pharmaceutical products manufactured by Pan Pharmaceuticals followed shortly after.

Travacalm was manufactured by Pan Pharmaceuticals Ltd, a contract manufacturer of pharmaceutical products. The TGA audited Pan Pharmaceuticals' laboratory. The results of the audit indicated that there had been manipulation of test results, and the TGA began a criminal investigation. The analyst responsible for the manipulation of test data was identified as Shyama Jain.

Pan Pharmaceuticals Ltd was charged with 19 counts relating to the manufacture of counterfeit therapeutic goods, being Travacalm and another seven products, contrary to section 42E of the *Therapeutic Goods Act 1989*. Pan Pharmaceuticals Ltd was also charged with 23 counts of inflicting grievous bodily harm by a negligent act contrary to the *Crimes Act 1900* (New South Wales). Jain was charged with 19 counts of aiding and abetting Pan Pharmaceuticals Ltd in the manufacture of counterfeit therapeutic goods, and 23 counts of inflicting grievous bodily harm by a negligent act contrary to the *Crimes Act 1900* (New South Wales).

Jain pleaded guilty to the 19 Therapeutic Goods Act offences and five of the Crimes Act offences with the remaining 18 charges taken into account on a schedule on sentence. He was sentenced on 2 September 2005 in the District Court of New South Wales in Sydney. On the first charge, he received a sentence of 18 months' imprisonment, to be released after serving 12 months. On the second charge, he received a sentence of 18 months' imprisonment, to be released after serving 12 months. The sentence for the second charge was partly cumulative on the sentence for the first charge. Jain received terms of imprisonment, to be served concurrently, on the remaining charges. All sentences were to be served by way of periodic detention.

Pan Pharmaceuticals Ltd pleaded guilty to the 19 Therapeutic Goods Act offences and five of the Crimes Act offences, with the remaining 18 charges taken into account on a schedule on sentence. The company was sentenced on 12 December 2005 to total fines of $3 million, being $2,500,000 for the Therapeutic Goods Act offences and $500,000 for the Crimes Act offences. Pan Pharmaceuticals Ltd was in liquidation at the time of the proceedings, and the Sentencing Judge remarked that the gross negligence of the company had been motivated by cost cutting. However, the Judge noted that general deterrence was an extremely important consideration in sentencing, and that breaches of duty under this important legislation would not be accepted.

Queensland Cement Limited

In early 2003, the defendant company acquired a ship called the MV *Alcem Calaca*. In the course of making the ship ready for work in Australian waters, the defendant became aware of the presence of asbestos in various parts of the ship. It commissioned the removal or containment of that asbestos, but during that process and for a period of three months between April and July 2003, it failed to notify employees and contractors working on the ship of the presence of asbestos. It also failed to label the areas in which asbestos was present, did not keep an asbestos register or appoint a designated officer, did not have an asbestos management plan in place, did not supply protective clothing and provided no education or information sessions regarding the correct procedures to be followed.

Exposure to asbestos is potentially lethal, and the development of mesothelioma (the form of lung cancer associated with asbestos exposure) can often take many years to manifest itself.

The defendant company was charged with two offences contrary to the *Occupational Health & Safety (Maritime Industry) Act 1993*. Section 11(1) of that Act requires that an operator of certain types of ships must take all reasonable steps to protect the health and safety of employees. Section 13 of that Act applies the same obligations with respect to contractors.

The defendant entered a plea of guilty to the two charges in the Queensland Magistrates' Court. On 14 July 2006, it was convicted and fined $180,000. The significant amount of the fine reflects the serious nature of the offences.

DPP Annual Report : 2004-2005

ADI Limited
This was a matter in which ADI Ltd was charged with one count of supplying an unsafe plant for use by employees in contravention of section 19(1)(a) of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. Essentially, ADI Ltd was contracted to provide maintenance services for the Australian Navy vessel, *HMAS Westralia*.

On 5 May 1998, four sailors died when a fire broke out in the engine room of the Westralia. Fifty-six flexible fuel hoses had been fitted on behalf of ADI Ltd a short time before, to replace the existing fixed metal pipes in an effort to resolve a problem with fuel leaks. The hoses had failed after only 35 to 40 hours of operation. This failure caused the fire.

After a seven day summary hearing in the Perth Magistrates Court, the Magistrate found that ADI Ltd had failed to take all reasonably practicable steps to ensure that the flexible fuel hoses were safe. The Magistrate found that it was obvious that the task of replacing 56 fixed metal lines, which conveyed fuel in a hot engine room, was important and dangerous. The Magistrate further found that none of the actions required of the defendant to avert the risk were costly, time consuming or difficult.

The maximum penalty for a breach of section 19 at the time of the offence was a fine of $100,000. The Magistrate fined ADI Ltd $75,000, and ordered the company to pay costs of the proceedings in the sum of $23,000.

Matrim Marine Inc
On 25 December 2002, a pilot observed an extensive oil spill in the area of the Whitsunday Islands. The main band of the spill was 62 kilometres in length and had spread quickly to be about 1.5-2.5 kilometres wide. Later estimates indicated that approximately 9,300 litres of oil had been spilt. The AFP with the assistance of the Australian Maritime Safety Authority, the Great Barrier Reef Marine Park Authority and State agencies commenced an immediate investigation. Six ships were identified as having been in the area at the time. Arrangements were made for samples to be obtained from the spill and each of the six ships. The spill itself caused no identifiable long term damage as it dispersed naturally because of favourable weather conditions.

The *Pacific Quest* had used the inner shipping route of the Great Barrier Reef on the day in question and was *en route* to New Zealand. With the cooperation of New Zealand authorities, samples were obtained from the ship when it docked. A specialist environmental analyst was engaged and compared the bunker fuel oil sample located at the spill site with samples from the sludge tank on the *Pacific Quest.* The analyst concluded that this ship had been the source of the spill. Investigators had failed to detect any malfunction with equipment. There was no physical evidence of pumping oil by illegal means, and the captain of the ship denied any illegal activity.

The owner Matrim Marine Inc, a Liberian company, was charged with a breach the strict liability provision section 9(1B) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. After four days of a committal in Brisbane, the company indicated that a plea would be entered to charges on an *ex officio* indictment. On 2 June 2005, in the District Court of Queensland, the company pleaded guilty and was fined $180,000. The maximum penalty for the offence was $275,000. The company had also paid clean-up costs totalling $34,277.84. The Sentencing Judge recognised the fact that the company had taken all steps to identify the culprit, and that its procedures in relation to pollution measures were exemplary, but balanced those factors with the need for general deterrence.

DPP Annual Report : 2001-2002

Lauda Air
This case involved an offence against section 7(2) of the Sydney Airport Curfew Act. It was only the second prosecution that has been brought under that Act. It was alleged that, in June 2000, Lauda Air knowingly allowed an aircraft to takeoff from Sydney Airport during a curfew period. On 20 June 2002 Lauda Air was convicted of the offence and fined $10,000.

The curfew period at Sydney Airport starts at 11.00 pm and ends at 6.00 am on the following day. Lauda Air sought a dispensation from the curfew to allow an aircraft to leave after 11.00 pm on the basis that the flight had been delayed to fix a faulty generator in the aircraft. Dispensation was refused on the grounds that the reason given by Lauda Air did not meet the grounds for dispensation specified in the relevant guidelines.

At 11.00 pm air traffic control officers advised Lauda Air that the curfew was in operation and that penalties could apply if the plane departed. The pilot advised the Sydney Air Traffic Control Tower that he would like to take off and that Lauda Air would pay any fine that may be imposed. At approximately 11.03 pm the Lauda pilot requested taxi clearance, which was granted. The flight was cleared for take off at approximately 11.29 pm.

DPP Annual Report : 2000-2001

Dimmeys Stores Pty Ltd
This case involved a prosecution under the Trade Practices Act 1984 for seven offences relating to the sale of children's nightwear which did not comply with approved product safety standards. The nightwear was not correctly labelled with fire safety labels. Six of the charges related to the sale of garments from the Dimmeys store in Townsville and the seventh related to the sale of garments from the Dimmeys store in Melbourne.

The nightwear was initially on sale in the Dimmeys store in Townsville in July 2000. After intervention by the Australian Competition and Consumer Commission, the garments were removed from sale. The Managing Director of Dimmeys undertook to the ACCC that the garments would not be sold from Dimmeys outlets again. Five months later, similar garments were on sale in the Dimmeys store in Melbourne. Dimmeys had been previously prosecuted under the Trade Practices Act for supplying bicycles which did not comply with the relevant standards.

The charges were dealt with before the Federal Court in Brisbane. The company pleaded guilty to seven offences against sections 65C and 79 of the Trade Practices Act. The company was fined $10 000 each in relation to each of the first six offences and $100 000 in relation to the seventh. The court also issued an injunction directing the company not to sell any product to which product safety standards apply unless the product complies with those standards. The company was also ordered to enter into a compliance program approved by the ACCC.

The $100 000 fine for the Melbourne offence is the highest criminal fine yet imposed for offences against sections 65C and 79 of the Trade Practices Act.

DPP Annual Report : 1997-1998

ADI Limited
This case involved the first prosecution in NSW for breaches of Commonwealth legislation dealing with the occupational health and safety of people employed by government business enterprises. The defendant, which was formerly known as Australian Defence Industries, was charged under section 16(1) of the *Occupational Health and Safety (Commonwealth Employment) Act* 1985 for failing to take all reasonably practicable steps to protect the health and safety of its employees.

ADI Limited operates a munitions factory in Julwala, NSW. The factory produces high explosives and ammunition for the defence forces. It also has employees tasked with the destruction of waste materials of a dangerous and volatile nature. Those persons are known as burning ground operators and the place where materials are destroyed is known as the burning pad. In March 1993, a burning ground operator was killed and a second employee severely injured when an explosion occurred during the process of placing explosive materials onto the burning pad.

The prosecution alleged a number of failures on the part of ADI, including failure to ensure that there was appropriate testing of materials, a failure to ensure that the order for destruction of the materials was implemented in a systematic fashion, a failure to ensure that the burning ground operators were properly trained, and a failure to provide appropriate supervision to ensure adherence to the correct methods.

ADI Limited pleaded guilty to the charges. The company was fined $75 000.

DPP Annual Report : 1996-1997

Nationwide News Pty Limited
In July 1994 the defendant, which operated a newspaper, entered into an arrangement with another company to run a promotion in the newspaper. The promotion offered readers the opportunity to get a mobile telephone for “free”. It turned out that any reader who took up the offer would have to enter an agreement with the second company under which they would have to pay a connection fee of $65, a delivery charge of $19.95, a security deposit of $260 and $130 per month in advance for a minimum 15 months.

The defendant was charged under section 79 of the *Trade Practices Act 1974* for making false or misleading representations in relation to the mobile phones. The second company was charged with aiding and abetting some of those offences.

The defendant was convicted of six offences against section 79 and fined $120 000. The trial judge found that the emphasis on the word free in the advertisements would convey the impression that there would be no conditions relating to charges or payment. The defendant appealed unsuccessfully against conviction and penalty.

The judge dismissed the charges against the second company. That was because the first company was not convicted of the offences which the second company was alleged to have aided and abetted.

Australian National Railways Commission
In October 1993 an employee of the ANRC died in a shunting accident at Pt Pirie in South Australia. The man was employed as a rail operator and suffered fatal inquiries when he was run over by a loose shunted rail wagon that he had been directed to stop. ANRC was charged with offences against the *Occupational Health and Safety (Commonwealth Employment) Act 1991* which places an obligation on employers to secure the health, safety and welfare of Commonwealth employees.

In August 1996 ANRC was convicted of three summary offences against section 16(1) of the Occupational Health and Safety Act. ANRC defended the charges and the trial ran for six weeks. However, the magistrate found that ANRC had exposed the dead worker to some unnecessary risks. ANRC was fined $50 000 and ordered to pay costs of $101 596. This was the second prosecution of this kind brought in Australia, and was the first successful prosecution.

DPP Annual Report : 1995-1996

Cue Design Pty Ltd and Cue and Co Pty Ltd
These companies were jointly charged with 30 breaches of section 53(e) of the *Trade Practices Act 1974*.

One company designed and manufactured women's apparel and the other sold them. They organised for garments to be displayed for sale at various Cue stores throughout Australia in December 1994. The garments all bore tags on which a higher price was struck out and a lower price written in below it. The manner in which the tags were marked would have led a reasonable person to believe that each garment had previously been offered for sale at the higher price marked on the tag and was now being offered for sale at the lower price. All the representations are misleading in that the various garments had never been offered for sale at the higher price.

The judge viewed the conduct by the defendants as serious breaches of the TPA nothing that it preyed upon the gullibility of the public. The companies were each ordered to pay a fine of $37 500.

Vale Wine Co, Von Berg & Curtis
The company, which ran a winery in South Australia's McLaren Vale district, was charged under the Trade Practices Act with 11 counts of false representation. Two former directors of the company were charged with aiding and abetting the company.

It was alleged that the company represented that blended wines were of a particular vintage or variety when they did not contain a high enough percentage of wine of that kind to allow the blend to be described in that way. One of the company's former wine makers was given an indemnity against prosecution and became a principal witness in the case.

The company was placed in liquidation prior to the trial commencing and was not represented at trial. Both former directors pleaded not guilty.

Following a five week trial the Federal Court found the company guilty on four counts and not guilty on seven and found the directors each guilty on one count and not guilty on three. The defendants have not yet been sentenced. Both former directors have appealed against conviction.

South Australian Seedgrowers Cooperative Limited
This defendant was charged with six offences of applying a false trade description to export goods contrary to section 15 of the *Export Control Act 1982*. The prosecution arose out of the export of lucerne seed to Morocco. The approximate weight of the consignment was 21 200 kilograms and the value of the consignment was US$45,000.

The goods were described in various ways in different notices, certificates, tags and on the sacks in which they were exported. However, all descriptions gave the impression that the lucerne was of cultivar, or species, Moapa. The prosecution argued that the descriptions were false because the consignment did not contain lucerne seed that was of the cultivar Moapa but was a blend of various cultivars of South Australian lucerne seeds none of which included the cultivar Moapa.

The defendant admitted that the lucerne seeds were not of the cultivar Moapa but argued that the descriptions were not false because the seed was uncertified seed and the importers knew that it was not Moapa. The defendant argued that it was necessary to describe the seed as Moapa in order to comply with import restrictions in Morocco and with the letter of credit that was provided as payment of the consignment. The defendant also argued that the term 'Moapa' was synonymous in Morocco with lucerne seed that was winter-active and that the seeds it supplied were predominantly winter-active.

The court did not accept the defendant's explanation, particularly having regard to evidence that other seed producers in South Australia had declined invitations to export lucerne described as Moapa to Morocco and had complained to the Department of Primary Industries that the defendant was doing so. The Department had approached the defendant prior to the export of the subject consignment warning that it may be in breach of the Trade Practices Act to describe the seeds of Moapa.

The defendant was convicted and fined $14 400.

DPP Annual Report : 1994-1995

Fortuna Fishing

Fortuna Fishing Pty Ltd and Donald Mill were both charged with offences against the *Fisheries Management Act 1991* of taking black cod, a protected species of fish, and offences against the National Parks and Wildlife Regulations of commercial fishing in a marine national park.

Mills, who was the captain of the fishing boat, directed the crew to fillet the fish at sea and dispose of the carcass overboard so that if they were boarded by fisheries inspectors it would be impossible for them to identify the fish.

On the return journey a dispute broke out between Mills and some of the crew about payment for the trip. The crew members threatened to report Mills to the authorities. Mills proceeded to dump all the fillets in the cold room over the side of the vessel. However, some fillets had been kept by the crew to eat during the trip. When the boat returned to port one of the crew took the fillets from the crew galley and delivered them to fisheries authorities. The fillets were sent to the University of New South Wales where a scientific test known as electrophoresis was carried out. The test confirmed that the fillets were black cod.

The company was fined $15 000 for the offence against the Fisheries Act and $7000 costs for the offence against the National Parks and Wildlife Regulations. Mills was fined $3000 for the fisheries offence and $1400 for the national parks offence.

Campbell's Cash & Carry

The defendant company carried on business as a wholesale grocery retailer. In the course of the business, the defendant sent advertising brochures to members of the Campbell's Cash & Carry organisation which included advertisements for brands of cigarettes and details of their wholesale price.

The company was charged with offences against section 5(1)(b) of the *Smoking and Tobacco Advertisements Act 1989* and the *Tobacco Advertising Prohibition Act 1992*. A magistrate found the charge under the 1989 Act proven and the other charges were dismissed on the grounds that the members of the Campbell's Cash and Carry organisation were not members of the public for the purpose of the legislation.

The Director appealed against the decision to dismiss the charges under the 1992 Act. On appeal, the Supreme Court judge found that members of the Campbell's Cash & Carry organisation were members of the public and that they had been exposed to cigarette advertising. The matter was remitted back to the Magistrates Court.

The defendant has appealed against the Supreme Court's ruling. No hearing date has yet been set for the appeal.

Semal Pty Ltd
The defendant, a chemical company, pleaded guilty before the Melbourne Magistrates Court on 8 June 1995 to seven counts of importing Stage 1 chlorofluorocarbons without a licence contrary to the *Ozone Protection Act 1989*.

The company was discharged without conviction upon entering into a good behaviour bond. One condition of the bond was that the company pay $168 000 to the Cooperative Research Centre for Southern Hemisphere Meteorology. This money is to be used for research into the ozone layer.

Doube and Morex Meat
Morex Meat Australia Pty Limited operated an abattoir at Grantham near Toowoomba. Doube was the managing director of Morex. Morex was charged with seven offences of applying false trade descriptions to meat intended for export contrary to the *Export Control Act 1982*. The company was also charged with an offence of possessing an official marking device, which is also an offence under that Act. Doube was charged with being knowingly concerned in those offences and with an offence of attempting to pervert the course of justice.

Five of the offences related to the application of false trade descriptions to meat bound for Korea. Both the company and Doube were acquitted on those charges.

The other two offences arose out of the re-packaging of a large quantity of beef also bound for Korea. There was evidence that a group of employees were surreptitiously assembled at the meat works on a weekend and entered a cold room that had been sealed with official Department of Primary Industry seals. The employees then re-packaged a large quantity of beef to make it appear that it had been slaughtered on 12 March 1992 when, in fact, it had been slaughtered on dates in February 1992.

An official Australian Quarantine and Inspection Service stamp was used without authority to create labels bearing the false slaughter date to make it appear the re-packaged beef had been officially inspected. The re-packaging operation was discovered by an inspector of the Australian Quarantine and Inspection Service.

The charge of attempting to pervert the course of justice related to his conduct during the investigation of the above offences. In the early stages of the investigation two senior employees at the meat works took full responsibility for the relevant events. Later the employees revealed to investigators that they had acted at the behest of Doube and had claimed responsibility to protect him. They also revealed that after the offences had been discovered Doube had attempted to influence them by sending them on overseas trips and offering them money.

In February 1994 both the employees pleaded guilty to offences under the Export Control Act. They agreed to give evidence against the company and Doube. In October 1994 the company and Doube were tried in the District Court at Toowoomba.

Both Morex and Doube were convicted of the offences relating to re-packaging the beef. Doube was also convicted of attempting to pervert the course of justice. Morex was fined a total of $75 000. Doube was fined a total of $10 000 for the Export Control Act offences. He was also sentenced to three years and two months imprisonment with an order that he not be

eligible for parole until he had served one month on the charge of attempting to pervert the course of justice.

Both Morex and Doube appealed against their convictions and sentences and the DPP appealed against the sentence imposed on Doube. The Court of Appeal dismissed the appeals by the company and Doube but allowed the appeal by the DPP. Doube was re-sentenced to two years imprisonment on each of the Export Control Act offences. The sentence for attempting to pervert the course of justice was not disturbed but the period he was required to serve before being eligible for parole was increased from one month to nine months.

The company and Doube both applied for special leave to appeal to the High Court. Both applications were refused.

DPP Annual Report : 1993-1994

Pacific Dunlop
This company was charged with two offences against the *Trade Practices Act 1974*, involving the misdescription of socks. It was alleged that the company labelled some socks as 'made in Australia' when they had been made in China, and labelled other socks as 'pure cotton' when they were only 80 per cent cotton. Each charge was based on a representative sample of transactions over a six-month period and involved a substantial number of socks under a range of different brand names.

The mislabelling occurred despite a warning to a senior officer of the company to seek clarification of the term 'pure cotton' before applying the description to the socks.

The company pleaded guilty to both charges. It was fined $10 000 in relation to the misdescription of the country of origin and $25 000 in relation to the misdescription of the composition of the socks.

Calderton Corporation and Zarew
Calderton Corporation, a company trading as Stereo Warehouse, was charged with two offences of the *Trade Practices Act 1974*; one against section 79 of offering prizes in a promotional contest without intending to provide the prizes, and one against section 155 of failing to comply with a notice under the Act. Peter Zarew, a director of the company was charged with being knowingly concerned in the first offence.

The charges arose out of complaints received by the Trade Practices Commission in relation to a contest run by the company between June and September 1991. The company offered prizes to the ten contestants who spent most money at the store during the contest period. In fact the company created fictitious contestants and ensured that they filled the first ten positions and hence 'won' the competition.

Both defendants pleaded guilty to the charges against them. The company was fined a total of $6 500. Zarew was fined $4 500.

DPP Annual Report : 1992-1993

Advance Bank and Sun Alliance
This case related to advertisements placed by Advance Bank Australia Limited in major Sunday newspapers promoting a home mortgage insurance package called 'Safety Net' insurance. The ads asserted in banner headlines that home mortgage insurance was available for $2 per week.

Five charges were laid against the Bank under section 79(1)(a) and 53(e) of the *Trade Practices Act 1974* alleging that the advertisements were misleading as they could lead the reader to conclude that $2 per week, for a mortgage of approximately $60 000, would buy insurance cover both for unemployment and for sickness or disability. In fact $2 per week would only buy cover for unemployment.

The Bank pleaded guilty to the charges and was fined $4 000 in respect of each matter, a total of $20 000.

Sun Alliance Australia Ltd, which issued the insurance policies, was also charged in respect of the advertisements and with offences relating to the wording of the insurance policy documents.

Sun Alliance pleaded guilty to the charges relating to the policy documents. Penalty has not yet been imposed.

Sun Alliance pleaded not guilty to the charges relating to the advertisements. The matter was heard before the Federal Court in June 1993. The Court has reserved its decision.

DPP Annual Report : 1991-1992

Cowra Abbatoir Ltd
This matter arose after the Commonwealth withdrew the services of meat inspectors from Cowra Abbatoir on the basis that it had not been paid the full amount due in respect of the services of those inspectors. The abbatoir proceeded to slaughter approximately 2 500 sheep and cattle which had not been inspected as required under the provisions of the *Meat Inspection Act 1983*.

The defendant company was charged with one offence of slaughtering animals which had not been inspected. It pleaded not guilty.

The defence to the charge was, in essence, that the Commonwealth had improperly increased meat inspection fees, that the new fees were therefore invalid and that the Commonwealth had no right to withdraw meat inspectors from the abbatoir. The defendant alleged that the Commonwealth had failed to comply with the terms of a 1983 agreement between the Commonwealth and NSW which required consultation with the industry before any change was made to meat inspection charges.

As the argument raised a potential Constitutional issue, concerning the status of the 1983 agreement, notice of the case was served on the Commonwealth and NSW Attorneys-General under section 78B of the Judiciary Act. In the event, the NSW Attorney-General intervened in the proceedings but argued that there was no Constitutional issue.

The charge was heard by a magistrate, who ruled that the 1983 agreement had no statutory force. The defendant was convicted and fined $1 000.

Caltex Tanker Company (Australia) Pty Ltd and Hickey
This matter arose from a discharge of oil off the Victorian coast by the oil tanker *MT Arthur Philip*. It is alleged that the discharge caused the death of at least 270 fairy penguins and numerous other wildlife. The owners of the vessel and the ship's master were charged with offences under the *Protection of the Sea (Prevention of Pollution by ships) Act 1983*.

In June 1992 the owners pleaded guilty to one count of discharging oil. The master pleaded guilty to one count of discharging oil and one count of failing to report the discharge.

At the time of reporting, penalties were still to be set. The maximum penalty for an offence by an individual is a fine of $55 000. The maximum penalty for a body corporate is a fine of $220 000.

The prosecution is also seeking a reparation order under section 21B of the Crimes Act in respect to the cost of cleaning up the oil spill.

Phoenix Enterprises Pty Ltd
This company traded in abalone meat. Its four directors held abalone fishing licences. It was alleged that the directors set up a scheme of false invoicing with the connivance of overseas companies. The scheme allowed the company to understate its income in its income tax returns. In the financial years 1985 to 1987 the company evaded tax totalling $350 000.

The company was charged with three counts of defrauding the Commonwealth under section 29D of the Crimes Act. The directors were each charged with being knowingly concerned in the commission of those offences.

All five defendants pleaded guilty. The company was fined $50 000. Each director was fined $10 000 and sentenced to a suspended sentence of twelve months imprisonment.

The company also had to pay the tax evaded plus penalties and interest totalling $270 000.