Fraud and the Liability of Company Directors

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Directors' Liability for Fraud: a Changing Scene

This paper reviews three significant developments concerning directors' liability for fraud-related conduct. They are:

- the broadening of the concept of dishonesty as it applies to corporate officers;
- the extension of liability to cover passive neglect by corporate officers; and
- the application of money-laundering offences under Commonwealth proceeds of crime legislation.

These dimensions of the law are only a small part of the overall framework of controls against corporate fraud and related offences (see, for example Dorman and Fong 1986; Senate Committee on Legal and Constitutional Affairs 1989; Black 1991). Moreover, the efficacy of the criminal or civil law in this area depends primarily on the level and quality of the enforcement resources available, a topic addressed by several other speakers at this conference. Nonetheless the developments reviewed in this paper may critically affect the scope of liability for corporate fraud and create a number of problems which our law-makers have yet to resolve.

Corporations Law dictionary: the Bierce additions

'Fraud': the soul of religion, the essence of commerce, and the bait of courtship.

'Corporation': an ingenious device for the maximisation of profit and the minimisation of responsibility.

Dishonesty

The more important offences of dishonesty that apply to corporate officers include the offence of dishonesty in the exercise of a power or the discharge of a duty, as now prescribed by s. 232(2) and (3) of the Corporations Law (formerly s. 229(1) of the Companies Code).

Section 232(2) and (3) of the Corporations Law provide as follows:

2. An officer of a corporation shall at all times act honestly in the exercise of his powers and the discharge of the duties of his office.

3. the penalty applicable to a contravention of subsection (2) is:
   - if the contravention was committed with intent to deceive or
defraud the body corporate, members or creditors of the body
corporate or creditors of any other person or for any other
fraudulent purpose - $20,000 or imprisonment for 5 years, or
both; or
b. otherwise - $5,000.

The Basic Offence
In *Marchesi v. Barnes* [1970] VR 434 liability under a previous equivalent of s. 232(2) (s. 124 of the uniform *Companies Act* 1961) was held to require a deliberate disregard of a conscious awareness that what was being done was not in the interests of the company. This restrictive interpretation is consistent with the general principle that criminal liability for serious offences requires a subjectively guilty state of mind. However, in *Australian Growth Resources Corporation Pty Ltd v. Van Reesma* (1988) 13 ACLR 261 the Full Court of the Supreme Court of South Australia seems to have recooked the concept of 'honesty' to the point of evaporation.

In *Australian Growth Resources*, assets of the company had been transferred to a director under an agreement prior to the company being placed in receivership. One central issue was whether the company could recover those assets on the basis of a breach of s. 229 (1) of the *Companies Code* (the precursor to s. 232(2) of the Corporations Law). It was held that there had been a breach of s. 229(1) even if the director had genuinely believed that he was acting in the best interests of the company. The reasoning was as follows:

The penalty provision distinguishes between acts 'done with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose' and other acts, thereby recognising that an officer may fail to 'act honestly' within the meaning of the section without fraud. The section therefore embodies a concept analogous to constructive fraud, a species of dishonesty which does not involve moral turpitude. . . . a director who exercise his powers for a purpose that the law deems to be improper, infringes this provision notwithstanding that according to his own lights he may be acting honestly (*Australian Growth Resources v. Van Reesma* (1988) 13 ACLR 261 at 272).

The test of honesty adopted in *Australian Growth Resources* is thus objective except that the corporate officer must at least be aware of the conduct and circumstances that are taken to amount to a lack of honesty. (*Compare Smith* (1986) where it is suggested that the test under s. 229(1) (a) is one of honest and reasonable belief as under the *Criminal Code* (Qld), s. 24. The equivalent under s. 232(2) would be the common law defence of reasonable mistake of fact).

The interpretation adopted in *Australian Growth Resources* is questionable. First, it is far from clear that a person fails to acts 'honestly' merely because the conduct is inconsistent with the best interests of the company. Some additional element of moral obloquy is required, at least as a matter of ordinary usage. If the additional element is that the defendant should have realised that the conduct was not in the best interests of the company, then the test amounts to negligence, not dishonesty. Yet negligence is not the concept articulated in s. 232(2). Secondly, it is possible to explain the difference between the basic offence under s. 232(2) and the aggravated offence under s. 232(3) without going to the extreme of
interpreting the basic offence as one that does not require some element of fraud. Lanham, Weinberg, Smith and Ryan have offered this explanation of the provision:

... a concept of fraud limited to intending to cause real economic loss to the company or its creditors as suggested by the decision of the High Court in Hardie v. Hanson [(1960) 105 CLR 451] would enable a distinction to be made between the mental elements in the two crimes under s. 229(1)(a) and s. 229(1)(b) and thus would allow some sense to be made of the second offence... which carries a markedly increased penalty (Lanham et al. 1987, p. 285).

It may be argued that Australian Growth Resources is a civil case and that the Marchesi v. Barnes [1970] VR 434 interpretation of the requisite guilty mind required still applies for the purpose of criminal liability under the provision. There is little sense in automatically equating the fault requirement for criminal liability with that appropriate for civil liability: see Hurst v. Vestcorp Ltd (1988) 13 ACLR 17, at 26 per Kirby P; Chugg v. Pacific Dunlop (1990) 50 A Crim R 85 at 88-89, Deane J; United States v. United States Gypsum Co (1978) 438 US 422, at 436-443. However, in Waugh v. Kippen (1986) 160 CLR 156, at 165 a case concerning a statutory provision in the field of industrial safety, the High Court of Australia held otherwise on the ground that the legislature could not be taken to have spoken with a forked tongue. The single-mindedness of Waugh v. Kippen tends to produce a result that is either unsatisfactory from the standpoint of the accused or, if satisfactory in that respect, is too restrictive for the purpose of civil liability. The civil and criminal components of s. 232(2) need to be unscrambled and redefined. For the purposes of civil liability it may be argued that liability should not turn on lack of 'honesty' but on whether the defendant was careless. If so, the ground is adequately covered by s. 232(4). For the purpose of criminal liability, it may well be sufficient to confine liability to what is now the aggravated offence under s. 232(3).

The Aggravated Offence
The aggravated offence under s. 232(3) requires an intent to defraud or a fraudulent purpose but this requirement has been diluted by the tendency of many courts to equate fraud with a populist notion of 'dishonesty'. The populist approach has been adopted by the English courts in relation to the concept of dishonesty under the Theft Act 1968 (Ghosh [1982] QB 341; see also Feely [1973] 1 QB 530), and by the New South Wales and Victorian courts in relation to offences of fraudulent dealings with company property (Glenister [1980] 2 NSWLR 597; Smart [1983] VR 265 at 194-95). By contrast, the Victorian Court of Criminal Appeal has refused to accept the same approach in the context of the offence of dishonestly obtaining property by deception: dishonesty, it has been held, is a legally-defined concept (Bonollo [1981] VR 633; Brow [1981] VR 783; Salvo [1980] VR 401). The leading judicial attempt at definition is that of McGarvie J in Bonollo [1981] VR 633 at 656 in the context of the offence of dishonestly obtaining property by deception: 'dishonestly' requires that an accused, when obtaining property by deception, be aware that by obtaining it he will detrimentally affect the interests of the victim in a significant practical way. The reform of the law of theft in the Australian Capital Territory embodied
essentially the approach taken by McGarvie J. Section 96(4)(b) of the *Crimes Act 1970* (NSW) in its application to the Australian Capital Territory provides that an appropriation of property is not to be regarded as dishonest if undertaken in the belief that it will not cause 'any significant practical detriment to the interests of the person to whom the property belongs'. (*Compare* Elliott 1982; *see also* Williams and Weinberg 1986, p. 118; and, at the opposite extreme, *compare* Canada 1977).

On one interpretation (Smith 1986, pp. 159-62), fraud under s. 232(3) is not a legal concept for the trial judge to define but an everyday notion for the trier of fact to determine. If so, the scope of the offence depends on the trier of fact's conceptions of commercial morality (Cecil 1976, pp. 167-8; *see generally* Williams 1983, pp. 722-31; Smith 1984, pp. 182-7). The absence of a clear standard of liability has been criticised as being excessively vague and inconsistent with the fundamental requirement that guilt be proven beyond a reasonable doubt:

>[W]hatever the word 'dishonesty' is finally decided to mean, its meaning must be a question of law and not left to random interpretation by individual juries and magistrates. Any other course would be a hazardous departure from the fundamental principle of common law that each separately identifiable component of an offence must be proved beyond reasonable doubt by P. If the meaning of one such element of an offence is left at large for popular interpretation, the safeguard of proof beyond reasonable doubt is lost, for no-one knows with any precision what it is that P has to prove (Howard 1982).

It may be critical to the outcome of a case whether the concept of 'fraudulent purpose' is taken to be a populist notion for the trier of fact to decide, or is given specific content as a matter of legal definition. For instance, an accused may honestly believe that he or she was legally entitled to the property in question or to act in way in which he or she did. It may be that legal advice has been obtained and that the advice has been followed in good faith without realising that ultimately it would be found to be wrong (*compare* O'Donovan v. Vereker (1987) 29 A Crim R 292). On a legalist interpretation of s. 232(3), fraud is a legal concept which is defined to include the defence of claim of right (*see generally* Williams 1961, pp. 305-45; Williams and Weinberg 1986, pp. 53-4). This defence, which applies to theft and a wide range of offences against property, is significant largely because it provides an exception to the general rule that ignorance or mistake of law is no excuse (*Walden v. Hensler* (1987) 163 CLR 561; *Lopatta* (1983) 35 SASR 101). On the populist interpretation of fraud or dishonesty, however, the defence of claim of right does not apply: the question is whether the accused's conduct was dishonest in all the circumstances of the case. Thus, the fact that an accused acted in good faith on the basis of legal advice would not necessarily mean that his or her conduct would satisfy a jury's homespun conception of what is required to amount to an act of fraud or dishonesty. The issue is fundamental and requires full consideration by the High Court. The Gibbs Committee (1990), in its review of Commonwealth criminal law, has recommended that the concept of dishonesty be abandoned and replaced by the requirement that the accused act without lawful justification.
Passive Neglect by Corporate Officers

A perennial issue is the extent to which corporate officers are liable for passively neglecting their common law or statutory duties (see generally Menzies 1959; Trebilcock 1969; Cox 1989). The recent trend in the context of the obligation to cease trading when insolvent (see s. 592 of the Corporations Law) has been to impose a positive obligation on directors to monitor the financial state of their company. A similar trend is likely in the context of the obligation under s. 232(4) of the Corporations Law to exercise a reasonable degree of care and diligence in the prevention of the commission of fraud by or against the company.

Trading when Company is Insolvent

The prohibition against continuing to trade when the company becomes insolvent was once widely regarded as a paper tiger but several recent cases indicate that the section does have teeth (see further Burrell and Long 1991). Section 592 provides partly as follows:

1. Where:
   a. a company has incurred a debt;
   b. immediately before the time when the debt was incurred:
      i. there were reasonable grounds to expect that the company will not be able to pay all its debts as and when they become due; or
      ii. there were reasonable grounds to expect that, if the company incurs the debt, it will not be able to pay all its debts as and when they become due; and
   c. the company was, at the time when the debt was incurred, or becomes at a later time, a company to which this section applies,

any person who was a director of the company, or took part in the management of the company, at the time when the debt was incurred contravenes this subsection and the company and that person or, if there are 2 or more such persons, those persons are jointly and severally liable for the payment of the debt.

2. In any proceedings against a person under subsection (1), it is a defence if it is proved:
   a. that the debt was incurred without the person's express or implied authority or consent; or
   b. that at the time when the debt was incurred, the person did not have reasonable cause to expect:
      i. that the company would not be able to pay as and when they became due; or
      ii. that, if the company incurred that debt, it would not be able to pay all its debts as and when they became due.

In Metal Manufacturers Ltd v. Lewis (1988) 13 NSWLR 315 it was held by a majority of the New South Wales Court of Appeal that Mrs Lewis, a passive director, was not liable under s. 556(1) of the Companies Code (the precursor of s. 592(1)) for a debt because she had established under s. 556(2) that the debt was incurred without her express or implied authority or consent. Kirby P dissented.
and observed that much more was expected of the modern company director than passive neglect of the company's financial affairs:

They cannot surround themselves with a shield of immunity from the operation of s. 556 by the simple expedient of washing their hands of the company's affairs and leaving it to a co-director to attend to those affairs and to incur the debts with third parties which it is the very purpose of s. 556 to control (Metal Manufacturers Ltd v. Lewis (1988) 13 NSWLR at 321).

Passive neglect was no excuse in Statewide Tobacco Services Ltd v. Morley (1990) 8 ACLC 827, decided by Ormiston J of the Supreme Court of Victoria. Mrs Morley was a director and shareholder of a small family company, but had taken no part in the company's day-to-day management over a long period prior to its collapse. It was held that she could not rely on the defence under s. 556(2)(a): she has given her son a general authority to look after the business of the company and that was sufficient to amount to an authority to incur debts. It was also held that Mrs Morley's failure to monitor the financial progress of the company meant that she lacked reasonable cause to expect that the company would be able to pay its debts when due. Illness and absence could be taken into account, but complete neglect was unreasonable. A director is expected to 'take a diligent and intelligent interest in the information either available to him or which he might with fairness demand from the executives or other employees and agents of the company' (Statewide Tobacco Services v. Morley (1990) 8 ACLC 827 at 847). Particular expertise was not essential but reasonable diligence was required on the part of a director. Reasonable diligence included the obligation to try to understand or discover sufficient of the company's financial affairs to enable the director to stop the company's activities when it is no longer able to pay its debts as and when they fall due.

A similar approach was recently taken by Tadgell J in Commonwealth Bank of Australia v. Eise (1991) unrep., S. Ct of Vic., No 2263 of 1990, 3 July. Mr Eise, an honorary part-time director of the National Safety Council of Australia, was held liable to repay $96,704,998. The State Bank of Victoria had been duped by John Friedrich, the chief executive officer of The National Safety Council, and had provided finance at a time when the Council was insolvent. The accounts and accounting information provided to the bank had been 'bogus and misleading to an astonishing degree'. It was argued that Mr. Eise was not liable under s. 556(1) of the Companies Code because he too had been deceived by Friedrich. Tadgell J held otherwise. Mr Eise had failed to look properly at the accounts and the auditors' reports. Mr. Friedrich's deceit should also have been apparent to him. The defence under s. 556(2) therefore failed. It also held that it was inappropriate to grant Mr Eise relief from liability under s. 535 of the Companies Code. Although the Bank may have been careless in providing finance to the Council, it was nonetheless the responsibility of the board of directors to ensure that the company was able to meet its current obligations. It was also stressed that Mr Eise had made a grave mistake in signing a directors' report that the 1987 accounts had been considered when the opposite was the case; he had falsely represented that the Board had complied with its obligations in relation to the accounts. This had been conduct of 'the utmost folly'; without it, Friedrich's fraud
would probably have been discovered. To grant relief in such a case would be 'a serious disservice to the administration of the Code and to the commercial community'. In short, Mr Eise's downfall was attributable to his failure to monitor the Council's financial position.

**Prevention of Fraud**

Effective monitoring is also expected of corporate officers in the prevention of fraud by or against their company, whether the fraud is committed by other directors or by employees of the firm. Section 232(4) of the Corporations Law has particular significance in this context. Under this provision there is an obligation on corporate officers to exercise reasonable care. There is little doubt today that the obligation extends to ensuring that the company has in place controls that are adequate to guard against fraud-related losses.

Section 232(4) provides that:

> An officer of a corporation shall at all times exercise a reasonable degree of care and diligence in the exercise of his or her powers and the discharge of his or her duties.

Failure to comply with s. 232(4) is an offence punishable by a fine of up to $5000, and attracts a variety of civil remedies. It may be argued that the relevant standard of negligence is gross or criminal negligence, at least where criminal liability is in issue (see Smith 1986, p. 163; compare Newman [1948] VLR 61 at 67; Shields [1981] VR 717; D [1984] 3 NSWLR 29; see further Senate Committee on Legal and Constitutional Affairs 1989, para. 13.12). To date, however, the High Court has shown itself unwilling to differentiate between the fault elements required for civil and criminal liability, and a requirement of criminal negligence would be inconsistent with the remedial purpose of the provision (Waugh v. Kippen (1986) 160 CLR 156 at 165; but see Hurst v. Vestcorp Ltd (1988) 13 ACLR 17, at 26 per Kirby P; Chugg v. Pacific Dunlop (1990) 50 A Crim R 85 at 88-89, Deane J; United States v. United States Gypsum Co (1978) 438 US 422, at 436-43).

Australian companies enjoy considerable latitude as to the policies and procedures they may adopt for the purpose of complying with legal duties, the prevailing regulatory philosophy being that freedom and efficiency should be maximised by allowing companies to regulate their own internal affairs. There is of course a vast proliferation of rules governing particular facets of company operations (for example, accounting requirements, share issues, conduct of meetings) but the nature and extent of the compliance system devised to prevent fraud is left up to the company concerned. Although the law thus tends to keep out of the 'black box' of organisations (see Stone 1975), it is wrong to suppose that the compliance steps taken or not taken by corporate officers are immune to legal scrutiny. On the contrary, s. 232(4) may well bring them into focus.

Assume that the board of directors of a merchant bank delegates all tasks of fraud prevention to a compliance manager and then exercises no supervisory role over his or her compliance activities. 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 scams such as manipulation of share prices, trading ahead of customers on the futures exchange, and money-laundering. 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. 232(4) by failing to use reasonable care and diligence in exercising their power to manage the business of the company? 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 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 (Re City and Equitable Fire Insurance Co Ltd [1925] Ch 407 at 429, Romer J; Graham v. Allis Chalmers, 188 A 2d 125 (1963). See further Corkery, pp. 137-9; Warnick (1988); also consider Perkins 1986, p. 12). Thus, it was once said that directors would be liable only if 'they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into' (Overend and Gurney Co v. Gibb (1872) LR 5 HL 480 at 487-8 per Lord Hatherley). On the other hand, it may be argued that prevention of commercial fraud is a matter of such significance for a merchant bank that failure to monitor such compliance by requiring periodic reports and assurances may amount to lack of reasonable care by the directors in exercising their power to manage the business of the company. (Compare Gould v. Mount Oxide Mines Ltd (1916) 22 CLR 490 at 530; Perkins 1986). Losses associated with non-compliance may easily be more significant than some of the traditional items of financial business on the agenda of board meetings, for example, review of leases of premises, the financial ramifications of which may pale into insignificance when compared with a major scandal involving fraud. Hence it would be unwise to assume that the duty under s. 232(4) is confined only to the traditional areas of fiscal command expected of directors in the past. Account must also be taken in the change of the law relating to a director's obligation to stop a company from incurring debts when it can no longer meet its current obligations. Passive neglect is no longer an excuse under s. 592 and a comparable interpretation is likely in the setting of s. 232(4).

Another important factor is that much is known today about how organisations can malfunction and what can usefully be done to guard against breakdowns. There is now an extensive literature on preventive law and liability control over a wide variety of fraud-related activities, including embezzlement and computer fraud (see, for example Dinnie 1987), companies and securities fraud (see Levi 1986; Mann 1976; Mann 1974 and Bell 1987), defence procurement fraud (see Schwarz 1987), bribery and corruption (see, for example Price Waterhouse and Co 1979), restrictive trade practices (see, for example Price 1985), and offences relating to consumer protection (see, for example Pengilley 1981).
The likely causes of malfunction can be easy to remedy. Take the precaution of providing an early warning system for alerting top managers to possible illegality lower in the organisation. There are legion instances of compliance problems being concealed at lower or middle levels of management and of companies being taken by surprise when the bad news is aired in public (for example, Exxon in relation to allegations of the payment of bribes by its Italian subsidiary). The solution adopted by many companies (for example, General Electric, Dow Chemical, Exxon, Allied and United Airlines) has been the uncomplicated one of supplementing one-over-one reporting relationships with extra reporting channels to top management (see further Coffee 1977; Braithwaite 1985).

Various other developments point toward the individual liability of corporate officers under s. 232(4) for failing to initiate or monitor compliance controls. These pointers include the following:

- the emphasis on internal compliance controls in response to the foreign bribery cases (see, for example Ferrara 1980), and under recent reforms of US insider trading legislation (see US Insider Trading and Securities Fraud Enforcement Act 1988);
- the emerging relevance of probation as a sentence against corporations, and the use of probationary conditions to require the adoption of effective internal controls (see American Bar Association 1975);
- the insistence on adequate anti-fraud controls in plea agreements negotiated by the US Department of Defence with corporations charged with fraud in defence procurement (see Orland and Tyler 1987);
- the compliance controls required under the Cash Transaction Reports Act 1988 (Cwlth), especially ss. 11-12;
- the corporate governance movement (see generally American Law Institute 1982; Hopt and Teubner 1985), one of the planks of which is that company boards of directors should be required by law to oversee compliance efforts, as by means of audit committees.

Money-Laundering Offences

Another major facet of corporate fraud control in Australia is the legislation we now have on money laundering. The Proceeds of Crime Act 1987 (Cwlth) and other money trail legislation provides an extensive armoury of weapons, including money laundering offences and a suspect transaction reporting requirement. Under the new Corporations Law package, offences under the Corporations Law are subject to the operation of the Proceeds of Crime Act and related Commonwealth legislation. This is significant, partly because money laundering offences under the Proceeds of Crime Act go further than any equivalent under state legislation, and partly because the obligation to report suspect transactions now applies to offences under the Corporations Law.

Section 81 of the Proceeds of Crime Act enacts the serious offence of money-laundering:
1. in this section:
‘transaction’ includes the receiving or making of a gift.

2. A person who, after the commencement of this Act, engages in money laundering is guilty of an offence against this section punishable, upon conviction, by:
   a. if the offender is a natural person - a fine not exceeding $200,000 or imprisonment for a period not exceeding 20 years, or both; or
   b. if the offender is a body corporate - a fine not exceeding $600,000.

3. A person shall be taken to engage in money laundering if, and only if:
   a. the person engages, directly or indirectly, in a transaction that involves money, or other property, that is proceeds of crime; or
   b. the person receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that is proceeds of crime;

and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

The money-laundering offence under s. 81 represents a species of the offence of receiving stolen goods but differs in a number of important respects:

- the maximum penalty is much higher (for individuals, $200,000 and/or gaol for up to 20 years; compare receiving under Crimes Act 1900 (NSW), s. 188, which carries a maximum of 10 years);
- the mental element under s. 81 requires that the accused know or ought reasonably to know that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity; compare the requirement of knowledge or belief under for example, Crimes Act 1900 (NSW), s. 188; Raad [1983] 3 NSWLR 344; (see also Schipanski (1989) 17 NSWLR 618; Anderson v. Lynch (1982) 17 NTR 21; Fallon (1981) 28 SASR 394; Crooks [1981] NZALR 53);
- the defence of claim of right seems inapplicable and no provision is made for cases where the accused intends to return the money or property to the police or the rightful owner; and
- 'proceeds of crime' may be derived directly or indirectly (it does not matter that the proceeds are not traceable at equity) from a much wider range of offences than theft or offences against property.

Section 82 of the Proceeds of Crime Act creates the offence of receiving or possessing money reasonably suspected to be the proceeds of crime:

1. A person who, after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence against this section punishable, upon conviction, by:
   a. if the offender is a natural person - a fine not exceeding $5,000 or imprisonment for a period not exceeding 2 years, or both; or
   b. if the offender is a body corporate - a fine not exceeding $15,000.
Where a person is charged with an offence against this section, it is a defence to the charge if the person satisfies the court that he or she had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

The offence of receipt or possession of suspected proceeds of crime under s. 82 is akin to the offence of being in custody of something reasonably suspected to be stolen (compare Crimes Act (NSW), s. 527C). However, there are several significant differences:

- the maximum penalty is higher (2 years, as compared with 6 months);
- under s. 82 there need be reasonable suspicion only that the money or property amounts to proceeds of crime whereas under Crimes Act (NSW), s. 527C there must be reasonable suspicion that the thing in D's custody is itself stolen (Grant (1980) 55 ALJR 490); and
- under s. 82 there is no requirement that the accused be caught red-handed with the property subject to prosecution (compare Crimes Act (NSW), s. 527C; English (1989) 44 A Crim R 273).

The offence under s. 82, although claimed to be similar to that under s. 527C of the Crimes Act (NSW), is much more broadly defined and is inconsistent with the policy concerns expressed in Grant (1980) 55 ALJR 490.

The implications of the offences under sections 81 and 82 are far-reaching. Consider for example the fact situation in the Guinness case (see further Hobson 1990; Hill 1991). Guinness became involved in a contested takeover bid for the Distillers company. The market value of Guinness shares was critical to the bid because part of the offer consisted of Guinness stock. The market was manipulated by parties acting in cahoots with Guinness and who bought Guinness shares pursuant to a scheme whereby they were indemnified against loss by Guinness. After Guinness succeeded in the bid for Distillers the other parties to the scheme of market manipulation were left with large parcels of Guinness shares. Assuming that the facts took place here today and that the parties were convicted of market manipulation under s. 998(1), then anyone who later bought those shares would commit the offence of money laundering if they had reason to know that the shares were involved in the market manipulation scheme. And if the directors of Guinness later indemnified the other parties against loss then all concerned would be guilty of money laundering in relation to that transaction: the transaction would 'involve' proceeds of crime - the shares - within the meaning of s. 81(3)(a).

The money laundering offence under s. 81 also criminalises the receipt of funds by directors or their companies in the context of deals which, unlike the Guinness scam, are not blatantly illegal and which have hitherto been accepted as within fairly safe bounds. Assume that A, a director of company X, organises and obtains for himself a special consulting fee of $1 million. The payment is in breach of s. 232(3) of the Corporations Law. A later invests the $1 million in company Y under a deal that he arranged with the directors of company Y after he landed the consulting fee from company X. If the directors have reason to
know that the fee has been obtained as a result of conduct by A that was an
offence under s. 232(2), s. 232(3) or any other offence anywhere in the world,
then they commit the offence of money laundering under s. 81 and are liable to
gaal: they have engaged in a transaction that involves the proceeds of an
indictable offence under s. 232(3) and the requisite mental element is also present
(reason to know that the property is derived from an unlawful activity). The
directors may have believed that they were legally entitled to act but claim of
right is no defence under s. 81, nor is ignorance of the law. If company Y is a
cash dealer as defined in the *Cash Transaction Reports Act 1988* (Cwlth), their
best course of action is to report the transaction to the Cash Transaction Reports
Agency (CTRA). Under s. 243D(6) of the *Australian Securities Commission Act
1989* (Cwlth), they would then gain immunity from liability under s. 81 or s. 82.

The main criticism is that the mental element required for liability under s. 81 or
s. 82 of the *Proceeds of Crime Act* is not confined to intention, knowledge or
recklessness (cf. *Confiscation of Proceeds of Crime Act* (NSW), s. 73, where the
offence of money laundering requires knowledge). The objective tests of liability
imposed are inconsistent with the emphasis traditionally attached to subjective
tests of liability for serious offences. Subjective blameworthy states of mind have
been insisted upon in a long line of High Court decisions, from *Parker* (1963)
111 CLR 610, to *Crabbe* (1985) 156 CLR 464, to *He Kaw Teh* (1985) 157 CLR
523 and *Giorgianni* (1985) 156 CLR 473. It should also be realised that ss. 81
and 82 do not adhere to the model provided by the money laundering offences
enacted under the US Money Laundering Act 1986; under the corresponding US
provisions knowledge is required: 18 USC s. 1956(a)(b) (*see further* Plombeck
1988).

Attention is also drawn to the effect of s. 243D of the *Australian Securities
Commission Act*. Under this provision a cash dealer must report suspected
Corporations Law and ASC Law offences even where the suspicion relates to an
offence that may have been committed by the cash dealer itself. When the
*Cash Transaction Reports Act 1988* (Cwlth) first came into effect it was commonly
thought that the suspect transaction reporting obligation related to offences
suspected on the part of persons with whom a cash dealer engaged in a
transaction. The extension of the suspect transaction obligation under s. 243D
means that cash dealers are legally obliged to report suspected breaches of the
Corporations Law whether or not they are implicated as the victim or as an
offender. Assume that the directors of a cash dealer come to learn that dealers in
its trading room have been trading ahead of customer orders. Under s. 243D the
suspected breach of s. 844(2) of the Corporations Law by the cash dealer and the
employees must be reported to the CTRA. Failure to report is a serious offence
on the part of the cash dealer and any director knowingly concerned in the failure
to report is liable for complicity.
Conclusion

Old assumptions about the nature and extent of criminal liability for corporate fraud have been transformed in various ways. The task of enforcement has thereby been assisted. It may also be the case that the breadth and uncertainty of the law will have a real deterrent effect in the commercial world. The major question, however, is whether the law's change in form can be matched by effective enforcement so as to achieve a change in substance.

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