COMMERCIAL LAW ASSOCIATION – 7 JUNE 2024
HOW DO COMPANIES THINK?
PAYNE JA

1 Thank you to the Commercial Law Association for this invitation to address you today.

2 I acknowledge the Gadigal of the Eora nation and pay my respects to their elders past, present and emerging.

3 My topic today is "how do companies think". My answer, which I will provide up front, is: "it depends" – by which I mean that where the question is one which involves civil or criminal statutory liability of a corporation, the starting point should be the statute rather than the general principles of company law or agency although those principles will almost always become part of the assessment.

4 To test my thesis, I asked Chat GPT to explain how a company thinks – in verse.

> In towers tall of glass and steel,
> Where papers shuffle, deals congeal,
> A nameless entity does rise,
> An unseen gaze behind each guise.
>
> For knowledge flows through faceless halls,
> Past conference rooms and banquet walls,
> It merges, splits, and forms anew,
> A corporate mind, collective view.
>
> Yet can we say it thinks, it dreams?
> Or merely acts in cold routines?
> Its wisdom borrowed, leased, or bought,

A soulless host of borrowed thought.

5 Lots of important ideas fighting for attention there.

6 Companies are ubiquitous in modern economies. It is likely that companies, or entities much like companies, have existed for much longer than is commonly thought: Susan Watson, *The Making of the Modern Company* (2022, Hart Publishing).

7 A central conception of a company, that it is a separate legal person – is an oft lamented legal fiction. In *Re Chisum Services Pty Ltd* (1982) 7 ACLR 641, Wootten J said this:

> "The law relating to corporations has been bedevilled in many respects by fictions arising out of the equation of the legal personality given to a corporation with the personality of an individual with all human attributes. Such fictions are to be avoided wherever possible; the law can only hope to operate justly if it looks at the realities. In the present case the reality is that there is no "super mind" identified with the legal personality of the bank, in which the knowledge of various officers can in fact be aggregated for the purpose of reaching a conclusion as to whether the bank acted in good faith. It is not reasonable to assume that something has happened which cannot happen".

8 Lord Thurlow in 1778 succinctly expressed his frustration in stating that a corporation has "no soul to damn, no body to kick".

9 Strictly speaking, corporations (leaving aside so called alter ego one director companies) have no single "guiding" mind. Accordingly, in cases where a knowledge or a particular state of mind, such as intention or recklessness, needs to be determined for a corporate entity, where one is focused upon knowledge and/or the motivation or purpose for an action, the question is whose state of mind is attributable to the company?

10 Regulating companies always requires an answer to the question, 'how may a company act?'. After the demise of the little lamented indoor management rule the position is as follows:

(1) Companies have the legal capacity and power to enter contracts: *Corporations Act 2001* (Cth) s 124(1) (Corporations Act).

(2) That power to contract must be exercised either by the company itself through an organ of the company, or by an agent with authority to exercise that power.

(3) The directors of the company are the primary organ of the company and derive their power and authority to act as the company from Corporations Act s 198A.

(4) Section 198A is a replaceable rule and therefore liable to be displaced or modified by the company's constitution.

(5) In addition to the board of directors acting collectively as an organ of the company, a company can also exercise its power to contract through an authorised agent. This is expressly affirmed in s 126 of the Corporations Act.

(6) The board of directors may confer actual authority on an agent to exercise any power which it itself may exercise. The Corporations Act expressly contemplates that the board may confer actual authority to exercise any of its powers on a managing director, or any other delegate. see ss 198C and 198D.

(7) Section 126 of the Corporations Act provides that an agent may act with the implied authority of the company, where the conduct of the parties and the circumstances of the case give rise to the implication that authority to so act has been conferred.

(8) In the context of a corporation, the implication that actual authority has been granted to the agent frequently arises in one of two ways. The first way is by reason of the position or office to which the person purporting to act as agent has been appointed. It is well accepted that a person

holding the office of managing director is impliedly authorised "to do all such things as fall within the usual scope of that office": *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 583 (Lord Denning MR). Usually this will include the making of contracts in the course of the company's normal trading activities: *Birjandi v Todaytech Distribution Pty Ltd* [2005] WASCA 44 at [34] (Steytler P), citing *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93; *Hely-Hutchinson*; see also *Hightime Investments Pty Ltd v Adamus Resources Ltd* [2012] WASC 295 at [151] (Edelman J). Ultimately, whether a "thing" falls within the usual scope of the managing director's office is a question of fact.

(9) A person holding the office of company secretary is impliedly authorised to undertake acts on behalf of the company which accord with the administrative nature of that office. Usually, the company secretary has implied authority to contract on behalf of the company, although that authority is limited only to transactions connected with the administration of the company's affairs. It does not extend to other commercial transactions which form part of the company's trading or ordinary business, see *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 204–5; [1990] HCA 32 (Dawson J).

(10) An individual director does not have authority by reason of that office to bind the company in contract: *Northside Developments* at [31] (Dawson J); *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279 at 303 and 361. In the absence of actual delegation under s 198D of the Corporations Act, an individual director is empowered only to join in the collective exercise of corporate power by the board of directors.

(11) Implied authority may arise through the acquiescence of the company to previous acts of an agent purporting to act on behalf of the company. Where a board of directors acquiesces to unauthorised acts of an agent purportedly done on behalf of the company, this may found an implication that the board has granted actual authority to the agent to

continue to undertake acts of the same kind, as explained by the Full Court of the Federal Court in *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* (2017) 251 FCR 404; [2017] FCAFC 75; *Junker v Hepburn* [2010] NSWSC 88,

11 In *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, Clarke and Cripps JJA emphasised that the question of implied actual authority must be determined based on the particular facts of the case.

12 In *Equiticorp*, the Court was concerned with whether the chairman of the Equiticorp Group, Mr Hawkins, had acted with each company's respective authority when he agreed with the Bank of New Zealand that it may apply deposits held by Equiticorp Finance Ltd and Equiticorp Financial Services Ltd (Aust) (Mr Hawkins was a director only of the latter) against a debt owed by a third company in the group. At first instance, Giles J found that Mr Hawkins had implied actual authority from both Equiticorp Finance Ltd and Equiticorp Financial Services Ltd (Aust), stemming from the fact that the boards of both companies regarded Mr Hawkins as the ultimate decision-maker and acquiesced in his exercise of authority in directing the conduct of the business of the companies. Cripps and Clarke JJA upheld that conclusion on appeal.

13 There is a debate about whether, in order for an implication of authority to arise, there must not only be acquiescence by the company but also communication by word or conduct of each individual board member's respective consent to each other and to the agent. This additional requirement is suggested in RP Austin, HAJ Ford and IM Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005, LexisNexis Butterworths) at [3.41].

14 In the leading Australian decisions on implied actual authority, there is often no reference to communication of consent, and acquiescence alone is sufficient to found an implication of actual authority: GE Dal Pont, *The Law of Agency* (4th ed, 2020, LexisNexis) at [8.42].

15 Returning to the question 'how do companies think?'. There is a distinction between attribution for the purpose of determining who has authority to *act* for the corporation and the question of whose mind (or minds) are to be examined to determine knowledge and intention. I will examine this topic from a number of perspectives:

(1) Civil liability;

(2) Civil penalty regulatory enforcement.

(3) Criminal law.

16 I will also discuss some potential developments in this area of the law, particularly in light of some challenges posed by artificial intelligence.

17 Let me start at the beginning.

18 It was once thought to be axiomatic that corporations can only act through natural persons. In *Lennard's Carrying Co v Asiatic Petroleum* [1915] AC 705, Viscount Haldane LC stated that knowledge may be attributed to a corporation when an individual is found to be the directing mind and will of the corporation itself. I will return to this later, but in the era of AI, it is surely now a contestable proposition that corporations can only act through natural persons, unless by that we mean that the underlying algorithms were created and, perhaps, maintained, by natural persons.

19 Despite the ubiquity of corporations and the need to determine or attribute a state of mind to a corporation in many different circumstances, the law remains surprisingly unsettled, at least at the margins.

20 In *Tesco v Nattrass*, [1972] AC 153, the large British grocery chain was charged with a regulatory offence (involving a reverse onus subject a defence) that involved selling goods, namely Radiant laundry powder, at a different price than the price which had been advertised. The company sought to raise a defence that the offence was the act of the store manager, not the corporation. Thus,

the question arose of when a natural person such as a store manager was acting as the corporation. It was relevant that the particular statute had a due diligence defence and at the higher level of the company, there were systems in place to ensure compliance with the company's obligations. The Board never delegated any of their duties to the store manager. It was held in *Tesco* that it is normally the directors or their delegates who are the directing mind and will of the company.

21 This approach was approved in Australia by the High Court in *Hamilton v Whitehead* (1988) 166 CLR 121. Mr Whitehead was the managing director of Establish Pty Ltd. He was charged with being knowingly concerned in the commission of an offence by Establish, which was to offer prescribed interests to the public. So far as material, ss 169 and 174 of the Companies (Western Australia) Code read as follows:

> 169. A person ... shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest.
>
> ...
>
> 174.(1) A person shall not
>
> (a) contravene or fail to comply with a provision of section 169 ...".
>
> The word "person" includes a company: the Interpretation Code, s.9

22 The argument was that as managing director Mr Whitehead could not be knowingly concerned in the offence committed by the company (relying on a finding to that effect in *Mallan v Lee* (1949) 80 CLR 198). The High Court in *Hamilton v Whitehead* held that s 169 of the Code speaks directly to the company. This was not a case of a company being made liable for an act performed by a servant of the company on its behalf.

23 The Court reasoned that the respondent, in placing the relevant advertisement and in dealing with those who replied to it, was the company. He was its managing director and his mind was the mind of the company. The company therefore was liable as a principal for the breaches of s 169 of the Code. The

liability was direct, not vicarious. It is against this background that the liability of the respondent fell to be considered. The applicant relied upon s 38(1) of the Companies and Securities (Interpretation and Miscellaneous Provisions) (WA) Code, which provided: "A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly knowingly concerned in or party to, the commission of an offence against any relevant Code shall be deemed to have committed that offence and is punishable accordingly." Since the respondent was the actor in the conduct constituting the offences and had knowledge of all the material circumstances, it must follow, according to the applicant, that the respondent was "knowingly concerned" in the commission of the offences committed by the company. The Court held that the submission was plainly right.

24 Although the "directing mind and will" rule of attribution involves an anthropomorphism which can be misleading, it often presents no difficulty. However, as a rule of attribution a search for the 'directing mind and will' was never intended to be a universal rule. In *Lennard's Carrying* which I earlier referred to, the House of Lords was concerned with the construction of the *Merchant Shipping Act* 1894 (UK) and the rule of attribution in that context.

25 Even if some decisions treated the search for a directing mind and will as a universal rule, it could never have survived as such. Legislation in a variety of contexts, correctly construed, provides for a different rules of attribution. In a statutory context, rules of attribution must be shaped by the text and context of the statute.

26 In *Meridian Global Fund Management Asia v Securities Commission* [1995] 2 AC 500, a case from New Zealand which went to the Privy Council, the relevant actors were senior investment managers, not directors. They could not be described as being the directing mind and will of the company.

27 The question for the Privy Council was whether a corporation, Meridian, knew that it had become a substantial security holder within the terms of s 20 of the *Securities Amendment Act 1988* (NZ). The New Zealand Court of Appeal held

that Meridian had that knowledge through its chief investment officer, Mr Koo. Meridian appealed, arguing that it was the board, not Mr Koo, who was the directing mind and will of Meridian. Lord Hoffmann (delivering the judgment of the Privy Council) dismissed the appeal. The true question was one of construction not of metaphysics. His Lordship held that it was not necessary to ask whether Mr Koo was the directing mind and will of Meridian because it "is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company". The relevant rule of attribution must be tailored to "the terms and policies of the substantive rule" and the rules of attribution in a particular case depend on the construction of the particular statutory provision of attribution. In the context of the *Securities Amendment Act*, the policy was to compel immediate disclosure, in fast moving markets, of substantial security holders in public issuers. Mr Koo was the person who, with authority of the company, acquired the relevant interest. He was a person whose knowledge should be attributed to the company.

28 The reasoning in *Meridian* was adopted in Australia in *Director of Public Prosecutions (Vic) Reference No 1 of 1996* [1998] 3 VR 352. Callaway JA, with whom Phillips CJ and Tadgell JA agreed, said (at 517):

> Lord Hoffman[n]'s approach to the problem of corporate liability [in Meridian] was correct … It merely provides a framework for analysis and dispels the notion that, for all offences, the person with whom a corporation is identified must be its directing mind and will."

29 In *Anderson v Canaccord Genuity Financial Ltd* [2023] NSWCA 294, Gleeson, Leeming and White JJA held that the so-called "directing mind and will test" was never intended to be a universal rule, and that the *Meridian* approach has attracted a considerable weight of Australian appellate authority: see (without intending to be exhaustive) *Director of Public Prosecutions Reference No 1 of 1996* [1998] 3 VR 352 at 355 (Callaway JA, with whom Phillips CJ and Tadgell JA agreed); *Director General, Department of Education and Training v MT* (2006) 67 NSWLR 237; [2006] NSWCA 270 at [16]-[24] (Spigelman CJ, with whom Ipp JA and Hunt AJA agreed); *Commonwealth Bank of Australia v Kojic*

(2016) 249 FCR 421; [2016] FCAFC 186 at [62]-[63] (Allsop CJ), [97]-[99] (Edelman J), (Besanko J agreeing at [69]); *Environment Protection Authority v Wollondilly Abattoirs Pty Ltd* [2019] NSWCCA 312 at [20]-[22], [99], [101]; *Hallmark Construction Pty Ltd v Harford* [2020] NSWCA 41; 294 IR 359 at [73], [110] and [122].

30 It is now tolerably clear that the appropriate test is one of the interpretation of the relevant rule of responsibility, liability or proscription to be applied to the corporate entity. One has to consider the context and purpose of that rule. If the relevant rule was intended to apply to a corporation, how was it intended to apply? Assuming that a particular state of mind of the corporation was required to be established by the rule, the question becomes: whose state of mind was for the purpose of the relevant rule of responsibility to count as the knowledge or state of mind of the corporation? The question is one of the interpretation of the relevant rule taking into account its context and purpose. The label "directing mind and will" is potentially question begging. In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751, Beach J suggested it might be better if the label "'directing mind and will' was allowed to fade away".

Knowledge and civil cases

31 To determine what an artificial person such as a corporation "knows" requires a process of attribution: *QBE Underwriting Ltd v Southern Colliery Maintenance Pty Ltd* (2018) 97 NSWLR 459 at [95] (Leeming JA, with whom Macfarlan JA and I agreed).

32 Knowledge may be knowledge of a corporation if it is known by the officer or agent who is the appropriate one for the particular enquiry, or if it is contained in the current official records of the corporation: *QBE* at [95]; *Commercial Union Assurance Co of Australia v Beard* (1999) 47 NSWLR 735 at [62] (Davies AJA, with whom Meagher JA agreed); *Cargill Australia Ltd v Viterra Malt Pty Ltd* (No 28) [2022] VSC 13 at [2620] (Elliott J).

33 Given the potential breadth of this subject I will address one aspect of the question in a little detail: aggregation of knowledge.

34 In *Krakowski v Eurolynx Properties Limited* (1995) 183 CLR 563, Mr and Mrs Krakowski were looking for an investment property from which they could make a 10% return each year from the rent and decided to purchase a shop from Eurolynx. A contract of sale was drawn up with an instrument of lease that, on its face, provided for the 10% return. However, Eurolynx had a side agreement with the prospective tenant that the Krakowskis did not know about. The side agreement granted the tenant the first three months of rent free and paid the tenant for fit out costs which were the equivalent of one year's rent.

35 The Krakowskis brought a case in deceit. They needed to show that the company, Eurolynx, knowingly made a false representation that induced the Krakowskis into entering the contract of sale. The false representation alleged was that the lease as it was presented to the Krakowskis comprised the whole of the agreement.

36 The question was whether Eurolynx had made that representation fraudulently. The employee who instructed the solicitor to draw up the contract of sale to the Krakowskis did not realise that the side agreement had anything to do with the purchase, nor was there evidence that the solicitor knew that the Krakowskis were purchasing on the basis of the 10% return.

37 Brennan, Deane, Gaudron and McHugh JJ stated that "a division of function among officers of a corporation responsible for different aspects of the one transaction does not relieve the corporation from responsibility determined by reference to the knowledge possessed by each of them", citing *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 446 at 485; *Tesco Supermarkets Ltd v Nattrass* at 170.

38 Stopping there, there is a large difference between saying that knowledge of more than one person can be attributed to a company and saying that you can aggregate that knowledge. Aggregation involves combining "discrete

information held innocently by separate individuals within a corporation in order to attribute to the corporation a combined and guilty state of mind: Oakeshott and Kayis, 'When the Left Hand Does Not (Want to) Know What the Right Hand Is Doing: The Attribution and Aggregation of Corporate Knowledge in Australia' (2022) 30 AJCCL 180.

39 Eurolynx has sometimes been taken to mean that the knowledge of different employees can be aggregated and attributed to the company. The prime example is the famous Bell litigation: *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157; (2012) 44 WAR 1 at [1100], [2179]. I respectfully disagree.

40 The point being made in *Eurolynx* was that Person A's knowledge and actions could be attributed in order to resolve the first question of whether a representation made by Eurolynx and Person B's knowledge could be attributed to resolve the question of whether that representation was false to the knowledge of Eurolynx. The question that the High Court was addressing was whose belief may be attributed, not whether beliefs may be aggregated such that the company is found to hold a belief that none of the individuals held.

41 Eurolynx and the question of aggregation was considered in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421; [2016] FCAFC 186. The primary judge had aggregated the knowledge of two employees of the Bank in order to reach the conclusion that the Bank acted unconscionably. Allsop CJ, Besanko J, and Edelman J found that it was an error to aggregate knowledge this way. Allsop CJ held that if neither "bank officer behaved in a way deserving of any criticism, it would be a startling proposition that the Bank itself acted unconscionably".

42 Edelman J stated that, "whether or not a concept of aggregated corporate knowledge becomes permissible in other areas, it is not a concept that can be applied in order to reach a conclusion that the corporation has acted unconscionably contrary to statutory proscriptions". Edelman J also observed that "it is not easy to see how a corporation, which can only act through natural

persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably".

43 Edelman J had regard to commercial realities, and reasoned that "aggregation could lead to a conclusion that a corporation had acted unconscionably when as a matter of practical reality there was little or nothing that it could have done".

44 *Kojic* left open the question of whether corporate knowledge may be aggregated when the individuals in question had a duty to communicate with each other. In *Kojic*, there was no step that the Bank ought to have taken – there was no statutory requirement for communication between the relevant individuals, or mandate that there should be a single individual who oversees all aspects of a transaction. It would have been problematic to impose requirements on the Bank to spread information among its employees. Thre was no suggestion that the Bank had deliberately "disaggregated" knowledge to avoid liability. Because there was no action that the Bank failed to take and the individuals were not obliged to come together and realise that the relevant statements were wrong, it could not have acted unconscionably. See also: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [52] (Gleeson JA, Macfarlan JA and Young AJA agreeing).

45 *Macquarie Bank v Sixty-Fourth Throne* [1998] 3 VR 133 also reserved the question of whether corporate knowledge can be aggregated where there is a duty to communicate within the corporate structure.

46 In that case, Tadgell JA said, "Neither that passage in *Krakowski* nor any other principle justifies the simple aggregation of the knowledge of a number of persons individually unaware of fraud, or facts which ought to disclose it, to create a notional person with a dishonest intent".

47 As I have sought to emphasise, where the question is one which involves statutory liability of a corporation, the starting point should be the statute rather than the general principles of company law or agency although those principles will almost always become part of the assessment.

48 This process of attribution relevant to a particular statutory provision must be fashioned having regard to the language of the provision and its content and policy, by asking how it was intended to apply and the appropriate officers or agents who, for the purpose of the specific statutory provision, are intended to count as the knowledge of the company.

49 As Beach J explained the position in *Australian Securities and Investments Commission v Westpac Banking Corporation* (No 2) (2018) 266 FCR 147 at [1660]:

> [T]he appropriate test is more one of the interpretation of the relevant rule of responsibility, liability or proscription to be applied to the corporate entity. One has to consider the context and purpose of that rule. If the relevant rule was intended to apply to a corporation, how was it intended to apply? Assuming that a particular state of mind of the corporation was required to be established by the rule, the question becomes: whose state of mind was for the purpose of the relevant rule of responsibility to count as the knowledge or state of mind of the corporation? (see *Bilta (UK) Ltd (in liquidation) v Nazir (No 2)* [2015] UKSC 23; [2015] 2 WLR 1168 at [41] per Lord Mance). The question is one of the interpretation of the relevant rule taking into account its context and purpose.

Knowledge/state of mind and civil penalties

50 There are abundant statutory schemes imposing civil penalties which involve determining the knowledge and/or state of mind of a corporation.

51 I have chosen one fairly recent example as illustrating a number of important points.

52 In *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)* [2022] FCA 1475 O'Bryan J dealt with a civil penalty application of the notoriously complex cartel conduct provisions of the Australian Competition and Consumer Act.

53 The Competition and Consumer Act contains its own bespoke provision about attribution. In relation to intent, s 84(1) provides that where, in a proceeding under Pt VI in respect of conduct engaged in by a body corporate in relation to which (relevantly) s 44ZZRJ applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that:

(a) a director, employee or agent of the body corporate engaged in that conduct; and

(b) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and

(c) the director, employee or agent had that state of mind.

54 Section 84(5) provided that a reference to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.

55 BlueScope submitted that s 84(1) is not applicable in this case because the proceeding is not in respect of conduct engaged in by BlueScope in relation to which s 44ZZRJ applies. That is because the proceeding does not involve an allegation that BlueScope's conduct contravened s 44ZZRJ; it only involves an allegation that BlueScope *attempted to induce a contravention* of s 44ZZRJ within the meaning of s 76(1)(d). Section 76(1) relevantly provided as follows:

> (1) If the Court is satisfied that a person:
>
> (a) has contravened any of the following provisions:
>
> (i) a provision of Part IV (other than section 44ZZRF or 44ZZRG);
>
> (iii) … ; or
>
> (b) has attempted to contravene such a provision; or
>
> (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
>
> (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
>
> (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
>
> (f) has conspired with others to contravene such a provision;

> the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.

56 BlueScope submitted that, as a result, common law principles applied, under which the applicable rule of attribution depended upon the proper construction of the relevant rule of responsibility, liability or proscription as explained by the Privy Council in *Meridian*. BlueScope submitted that, in the present case, which concerns alleged attempts to induce entry into a proscribed arrangement or understanding, the relevant employee whose state of mind can be attributed to the corporation is the employee who has the authority to enter into that arrangement or understanding on the corporation's behalf.

57 O'Bryan J accepted BlueScope's submission that s 84(1) was not applicable to the proof of the mental element required to establish ancillary liability under s 76(1)(d) (the attempt to induce a contravention). However, he rejected BlueScope's submission concerning the application of the common law principles of attribution in this case.

58 His Honour observed that s 84(1) has received surprisingly little judicial consideration since it was first enacted. However, it is clear from the statutory text and the legislative history that s 84(1) is not intended to apply with respect to the proof of the state of mind or intention associated with the accessorial and ancillary liability of a body corporate under s 76(1)(b) to (f) and cognate provisions in Pt VI (in particular, s 75B as incorporated into ss 82 and 87). Rather, s 84(1) is confined to the proof of the state of mind of a body corporate that is a *requisite element* of certain of the prohibitions in the Act.

59 O'Bryan J noted that, as enacted, the section was confined to proceedings under Pt VI in respect of conduct engaged in by a body corporate in relation to which a provision of Pt V applied. Second, the phrase "it is necessary to establish the intention of the body corporate" was implicitly qualified by the

preceding phrase. The necessity to establish the intention of the body corporate concerned the necessity that arose in the proceeding in respect of conduct engaged in by a body corporate in relation to which a provision of Pt V applied. In other words, the intention to which the section referred was the intention of the body corporate as an element of the applicable provision of Pt V. Third, in its original form, s 84(1) had no application to a proceeding in respect of conduct to which a provision of Pt IV applied. The original limitation of s 84(1) to proceedings in respect of conduct to which Pt V applied is explicable by the fact that, at that time, the conduct to which Pt V applied was classified as an offence under the Act punishable by a fine (see original s 79) whereas conduct to which Pt IV applied was subject to the imposition of a civil penalty.

60 O'Bryan J held that, the accessorial or ancillary conduct in each of categories (b) to (f) of s 76 required proof of intention, based upon knowledge of the essential facts that would have rendered the conduct a contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 667, 670 (Mason ACJ, Wilson, Deane and Dawson JJ).

61 From its enactment, s 84(1) did not apply to proof of that intention as the section was confined to proceedings under Pt VI in respect of conduct to which a provision of Pt V applied (and the proof of intention as a necessary element of the contravention of the provision).

62 Section 84 was substantially amended by s 53 of the *Trade Practices Revision Act 1986* (Cth). However, the application of the section was amended in only a minor way: to extend it to proceedings under Pt VI in respect of conduct engaged in by a body corporate in relation to which s 46 (misuse of market power) applied. The extension to s 46 is explicable by the fact that, at that time, it was the only prohibition in Pt IV which required proof, as an element of the prohibition, of the *purpose* of a corporation (the purpose of substantially lessening competition).

63 When the cartel conduct prohibitions were introduced by the 2009 Amendment Act, s 84(1) was again amended to include specific reference to a prosecution

for an offence against ss 44ZZRF or 44ZZRG in respect of conduct engaged in by a body corporate and a proceeding under Pt VI in respect of conduct engaged in by a body corporate in relation to which ss 44ZZRJ and 44ZZRK applied. Those extensions of the section are again explicable by the facts that:

> (a) a prosecution for an offence against ss 44ZZRF or 44ZZRG required proof of intention in accordance with the Commonwealth Criminal Code; and
>
> (b) a proceeding in respect of conduct to which ss 44ZZRJ and 44ZZRK applied required proof of a cartel provision, which potentially required proof of the intention of the provision under s 44ZZRD(2) or the purpose condition in s 44ZZRD(3).

64 His Honour held that the extension of s 84(1) to (relevantly) s 44ZZRJ was consistent with, and indeed confirms, the view that s 84(1) applies to proof of the intention element of cartel conduct, not proof of intention associated with accessorial or ancillary liability under ss 76(1)(b) to (f).

65 His Honour found that the requisite intention of BlueScope in respect of the alleged attempt to induce counterparties to arrive at understandings must be proved through the application of common law principles of attribution. His Honour referred to the analysis of Edelman J in *Commonwealth Bank of Australia v Kojic* to which I have referred. The substantive law was s 76(1)(d) of the Act which provided for the imposition of a pecuniary penalty against a person, including a body corporate, that attempts to induce another person to contravene (relevantly) a provision of Pt IV. The prohibitions in Pt IV concern trading practices of corporations. The trading practices the subject of the prohibitions are diverse, ranging from price fixing agreements with competitors (relevantly, ss 44ZZRJ and 44ZZRK), through to restrictions contained in supply arrangements (ss 47 and 48) and mergers and acquisitions (s 50). A wide range of trading practices may be prohibited by s 46 which concerns conduct of corporations with substantial market power.

66 As noted above, BlueScope submitted that, in a case such as this which concerns alleged attempts to induce entry into a price fixing understanding, the relevant employee whose state of mind can be attributed to the corporation is

the employee who has the authority to enter into that understanding on the corporation's behalf. In my view, O'Bryan J correctly reasoned that the applicable rule of attribution would extend at least that far and in the present case, extended to employees who had the actual or ostensible authority to enter into the understanding on the corporation's behalf. That is for two principal reasons. First, it is consistent with the statutory rule of attribution of conduct that applies in this case under s 84(2), by which conduct of an employee within the scope of the employee's actual or apparent authority is attributed to the corporation. If the legislature considered that such conduct should be attributed to the corporation in a proceeding under s 76(1), it is reasonable to assume that the state of mind of the employee engaging in that conduct is also to be attributed to the corporation for the same purpose. It is that employee's state of mind that will be the most relevant in assessing the liability of the corporation under the Act. Second, it is consistent with the general principles established in company law concerning attribution, as summarised by Lords Toulson and Hodge JJSC in *Bilta (UK) Ltd (in liq) v Nazir* [2016] AC 1 at [183]-[189], under which a company can incur direct liability through the transactions of agents within the scope of their actual or apparent authority.

67 BlueScope submitted that the only certain employees had the authority to enter into that arrangement or understanding on the corporation's behalf. O'Bryan J held that it was relevant to consider the state of mind of each of the BlueScope employees allegedly engaged in the unlawful conduct, and not just the state of mind of those authorised employees. I note, though, that even if BlueScope were correct and only the intention of those authorised employees was attributed to BlueScope, O'Bryan J's analysis of the evidence would not alter in any material way. As BlueScope acknowledged, the understanding of the other employees about BlueScope's strategy remained relevant and probative of the content and intent of the strategy because the strategy was communicated within BlueScope and those employees had a role in implementing it.

68 Some things to observe – despite the bespoke provisions in s 84 addressing attribution of corporate knowledge and intention, the legislative history made it clear that this provision did not apply and the statutory context was the

appropriate liability provision was s 76(1)(d). The terms of the statutory prohibition, however, remained critical in identifying the holders of a relevant state of mind, and in that analysis company law and agency played a part.

Knowledge/state of mind and crime

69 Can I start with some observations I made in sentencing a Mr Cranston to 10 years in prison in August last year. In a report relied upon by Mr Cranston for the purposes of sentencing, Mr Cranston was recorded as saying this:

> "I worked in insolvency, liquifying companies with a large tax debt. I worked for [an insolvency accounting firm]. I saw directors walk away from companies without any possibility of paying their tax debt, keep their assets without a penalty and driving Ferrari's. I was always told that it's immoral but not illegal".

70 I said:

> "Can I be clear. Installing vulnerable drug addicted people as directors of companies, running up massive tax debts in those companies by taking money from them which should be paid to the tax office and then planning to liquidate those companies with large tax debts is a very serious crime. If there are any members of the commercial or insolvency communities who engage in such activities and regard the subject matter of these conspiracies as "immoral but not illegal", those individuals should expect, when they are apprehended, to face a lengthy sentence of imprisonment. The notion that the present conduct could ever be regarded as "immoral but not illegal" is false. For that reason, general deterrence must be at the forefront of the sentence to be imposed here."

71 So, having established – I hope – that I take white collar crime seriously, can I add a caveat. There are real difficulties and real costs to society imposed by ever more complex corporate criminal provisions which are not accompanied by increased resources devoted to real time surveillance and investigation of corporate behaviour. In my view it is appropriate to examine with care claims that it is appropriate to create new and every more complex corporate criminal prohibitions – particularly when there is no concomitant significant increase in resources for the investigation and enforcement of those provisions.

72 In 2020, the Australian Law Reform Commission released the Final Report on Corporate Criminal Responsibility. The Report contained a detailed consideration of the law of corporate attribution and the issues that have arisen

in applying it. The report identified that there are problems with corporate criminal responsibility. Additionally, it stated that civil penalties have been treated by some as the cost of doing business and there are difficulties with sentencing corporations. The ALRC raised a number of proposed reforms.

73 One of the proposed reforms was the introduction of new offences criminalising contraventions of civil liability provisions. These proposed changes related to the liability of directors and officers and would have introduced absolute liability in relation to what were effectively negligence concepts. The criminal conduct of an associate of the corporation would be attributed to a corporation, subject only to a due diligence defence.

74 I don’t think these proposals are an appropriate response to the problem of holding corporations accountable. In addition, applying a unified test to the diverse field of corporate regulation would create unexpected problems. One reason why the rules of attribution contain complexity is that they must adapt to the policy objectives of many different legislative schemes. Uniformity of rules of attribution is unlikely to result in simplicity or effectiveness of application.

75 Implementation of this suggested change could create the incoherent situation where a company is guilty of the same crime that it is also a victim of. Take the example of the companies in Cranston – over 100 million was taken from so called second tier companies which was required to be paid to the ATO. The suggestion that the corporation should be criminally liable for the abuse of the corporate form by shadow directors and advisors seems difficult to justify. Another example is *Macleod v the Queen* (2003) 214 CLR 230; [2003] HCA 24 – on the ALRC’s approach the company (the victim) would be equally criminally liable for Mr Macleod’s siphoning of funds from it.

76 Of course, a due diligence defence was also recommended. That gets back to my point about resources - absent a significant increase in resources for the investigation and enforcement of new and complex corporate criminal liability provisions, there is a risk that all that will happen is that companies will engage in a constant process of defensive documentation and box ticking. I am not

convinced it would improve corporate behaviour. Now – whilst creating a due diligence paperwork trial will considerably enrich most of the people in the room and online – I don't think it is a very effective use of society's limited resources.

77 Another major problem in enacting ever more complex criminal law prohibitions against corporations is that it likely punishes the wrong people – the employees, agents and shareholders at the time the criminal contravention is proved – not the people who were responsible for the wrong – the employees, agents and shareholders at the time of the criminal wrongdoing.

78 If I may be permitted a few anecdotes from the time my adult children call the "olden days". When I was a relatively new junior barrister I remember the senior CSR officer responsible in large part for overseeing the end of CSR's involvement in asbestos sales saying to me that he couldn't understand how James Hardie – which was then still selling asbestos products – was getting away with it. Asbestos and its evils were by then reasonably well known. Fast forward to the NSW Commission of Inquiry about James Hardie many years later, presided over by David Jackson QC, whose recent death is a huge loss to the commercial community and the country more generally. Whist there was an eventual reckoning with James Hardie, in large measure the employees, agents and shareholders at the time of the wrongdoing were not the people punished. Despite the public notoriety of asbestos and its evils, the absence of resources for the investigation and enforcement of prohibitions on its use meant that it was only after David Jackson's Special Commission that enforcement action occurred. By then, those principally responsible for the conduct – who had until then "got away with it" had long ago left the company or died.

79 Another example – there was a time in Australian corporate history where all self-respecting commercial lawyers were involved in a tunnel case – about how they were built, operated, taxed – or why they failed. The perverse structure of incentives, particularly among the merchant banking community, meant that giant success fees were paid to the bankers at the opening of the tunnel. The individuals in receipt of these giant success fees in many cases took the money and left. By the time the tunnel failed – on the basis that the traffic estimates for

tunnel usage were wildly optimistic, the employees, agents and shareholders of virtually all relevant parties were quite different. Now of course, I don't suggest that any person who may or may not have received a giant success fee involved in the various tunnel gate cases did anything wrong, but the outcome is a cogent demonstration that enforcement action, if it is not timely, is likely to completely miss the people who were involved in any relevant conduct.

80 The former Lord Chancellor Lord Birkett, quoted at the outset, is neither the first nor the last judge to experience frustration when faced with a convicted corporation. The problem of corporate punishment seems perversely insoluble: moderate fines do not deter, while severe penalties flow through the corporate shell and fall on the relatively blameless. Nonetheless, as Professor Coffee, of Columbia University, pointed out in his seminal article, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment (1981) 79 Mich. L. Rev. 386, there are ways both to focus the incidence of corporate penalties on those most able to prevent repetition and to increase the efficiency of corporate punishment without employing harsh penalties that are not intended to be practically pursued in Courts.

81 So to return to the topic of attributing states of mind to companies – any reform of corporate criminal liability requires a coherent explanation of why the creation of more corporate offences will lead to effective improvements in corporate behaviour let alone benefits for the Australian community. The entire history of the federal Criminal Code and in particular Chapter 2 and the "corporate culture" provisions has been an unhappy one. This should lead proponents to be very cautious about suggesting a fundamental change unless there are cogent demonstrated reasons for it.

82 The apparent desire to wholly re-write corporate criminal law appears to have gone quiet for now but it remains popular in law reform and academic circles to promote reverse onus "failure to prevent" criminal provisions for corporations – an example is the UK failure to prevent foreign bribery offence in s 7 of the *Bribery Act 2010* (UK).

83 When addressing corporate crime and its knowledge requirements it is also important to acknowledge s 80 of the Constitution which provides:

> "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

84 The High Court in *Cheatle v The Queen* [1993] HCA 44; 177 CLR 541 said this:

> History, principle and authority combine to compel the conclusion that s.80's guarantee of trial by jury precludes a verdict of guilty being returned in a trial upon indictment of an offence against a law of the Commonwealth otherwise than by the agreement or consensus of all the jurors.

85 The transfer of all corporations powers to the Commonwealth means that most crimes involving companies will be federal crimes and s 80 of the Constitution requires all indictable offences to be tried by a jury (unlike judge alone trials permissible in most states and territories) *and* the verdict of the jury must be unanimous – regardless of state or territory legislation providing for majority verdicts. As my old friend Micheal Wigney said in relation to the criminal cartel provisions in the banking cartel case – which appears to have consumed the entire Sydney commercial community and turned you all into white collar crime specialists:

> [246] Those responsible for drafting the cartel offence provisions in the C&C Act – none of whom could possibly have ever set foot in a criminal trial court before – appear to have approached the drafting task as if it were akin to producing a cryptic crossword. The offence provisions, when read with the extensive definitions of the terms used in them, are prolix, convoluted and labyrinthine. When coupled with the general principles of criminal responsibility, including the extensions of criminal responsibility in Ch 2 of the Criminal Code, the complexity of the offences is multiplied. By the time the maze of provisions is worked through, it is very easy to lose sight of exactly what conduct the offence provisions are intended to bring to account and punish.
>
> [247] It is, in all the circumstances, perhaps not difficult to appreciate why the prosecutor appears to have struggled to formulate the charges in this matter.

86 In short, my view is that the understandable desire for regulatory compliance – particularly if not supported by appropriate real time investigation and prosecution resources – is likely to create significant and undesirable unintended consequences.

87 One of the privileges of my current job is you get to work with some of the brightest young minds in our profession at the start of their careers. A recent Melbourne University Law review article by Annabel Anderson – the current Associate to Justice Stern and Hannah Harris (a research fellow at Macquarie University) make the case for a failure to prevent modern slavery offence: 'The failure to prevent modern slavery: proposing a novel legal approach in Attributing Corporate Criminal liability for Transnational Human rights Abuses' (2023) 47 Melb Uni Law Rev 1.

88 Ms Anderson and Ms Harris make a number of thoughtful suggestions – the most interesting of which is the introduction of DPA scheme (Deferred Prosecution Agreement) borrowed from England and Wales. DPAs have a number of features of enforceable undertakings – available to ASIC [1] – and go some way to meeting a number of the criticisms I have advanced about reform of corporate crime. I emphasise, however, that simply passing a DPA law will not be enough. There needs to be greater surveillance and real time attempts at enforcement; both of which require considerably greater funding for regulators, particularly ASIC. Any serious attempt at reform should go into this with eyes wide open about likely additional costs.

Artificial Intelligence

89 Can I turn as a final topic to something I mentioned at the outset. That is, the likelihood that legal rules for attributing knowledge to a corporation will need to be re-examined in the context of algorithmic trading and AI.

90 What happens when a system operates (and is intended to operate) such that no human ever has knowledge of the essential matters which give rise to the contraventions of a statute.

[1] See: ss 93A or 93AA of the Australian Securities and Investments Commission Act 2001 (ASIC Act), s 322 of the National Consumer Credit Protection Act 2009 (National Credit Act), and s 262A of the Superannuation Industry (Supervision) Act 1993 (SIS Act).

91 A computer system does not come into existence or come to be maintained out of thin air. Rather, a computer program is bound by the parameters set by its programmer.

92 Where a program has been set to achieve a particular outcome in particular cases, knowledge of that outcome can be attributed to those responsible for the design and implementation of the program.

93 In *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02 the Singapore Court of Appeal in the context of a cryptocurrency case examined how, in the doctrine of unilateral mistake, the requirement of knowledge of the mistake is to be assessed where the contract is concluded by way of deterministic algorithmic trading. The majority found that the non-mistaken party has sufficient knowledge if the algorithm's programmer had actual or constructive knowledge that an offer automatically made by the algorithm would only ever be accepted by a party operating under a mistake, and if the programmer was acting to take advantage of that mistake.

94 In *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, a case where British Gas disclaimed liability for the repeated (incorrect) issuing of bills demanding payment on the basis that the bills were computer generated, the Court of Appeal of England and Wales noted that "real people are responsible for programming and entering material into the computer. It is British Gas's system which, at the very least, allowed the impugned conduct to happen.

95 Some thoughts about a possible resolution of the problems of attribution in an AI world are, first, a corporation is likely to be fixed with knowledge of its "current official records" as those are the means by which the corporation stores its knowledge and from which what it "knows" is readily ascertainable and retrievable: *Commercial Union Assurance Co of Australia v Beard* (1999) 47 NSWLR 735 at [62]; see also *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [125] (Callinan J).

96 Another fruitful avenue of enquiry is the law's treatment of knowledge imputed to a corporation as not being treated as forgotten or lost when the officer or employee leaves the corporation and the principle that a company "cannot cause itself to shed knowledge by shedding people": *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473 at [244] (Sheller, Stein and Giles JJA). This principle has particular significance where the storage and retrieval of information have become greatly simplified by electronic means: *Rogers* at [125].

97 It is also of note that the law is reluctant to allow persons (whether natural or corporate) to avoid a finding of knowledge if they have been wilfully blind. Wilful blindness is the *deliberate* shutting of one's eyes to what is going on, and is equivalent to knowledge: *Giogianni v The Queen* (1985) 156 CLR 473 at 480 per Gibbs CJ.

98 To similar effect, in *Commonwealth Bank of Australia v Kojic* at [153], Edelman J explained that in a "case where no individual has the knowledge required to establish wrongdoing, it might be difficult for a corporation to avoid a finding that it acted unconscionably if it puts into place procedures intended to ensure that no particular individual could have the requisite knowledge".

99 My own view is that there is place for an enforceable undertaking regime about corporate use of AI, involving clear rules, monitored and prosecuted by an effectively funded oversight body, probably ASIC, given the likely overlap with ASIC's other functions.

Conclusion

100 As I said in opening, the answer to the question of how a company thinks is "it depends" – where the question is one which involves civil or criminal statutory liability of a corporation, the starting point should be the statute rather than the general principles of company law or agency although those principles will almost always become part of the assessment.

101 Despite the ubiquity of corporations there is still much to be worked through and the likelihood is that the widespread use of AI will require new or improved rules to deal with it.

102 Thank you for your attention. I would welcome questions in our remaining time.