

PROSECUTION OF CORPORATE EXECUTIVES: EMERGING TREND OR THE ETERNAL STRUGGLE?

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Introduction

1 In the wake of the Global Financial Crisis, there has been no shortage of media coverage questioning the responsibility of individuals for corporate misconduct. The quickest of internet searches reveals, in the United States media, headlines such as “*How Wall Street’s Bankers Stayed Out of Jail*”,¹ and “*Why Only One Top Banker Went to Jail for the Financial Crisis*”,² and in my own jurisdiction within the past year, “*Australian company collapses during GFC have resulted in very few criminal convictions*”.³

2 In addition, there is probably no jurisdiction that has not seen some sort of legal, regulatory or policy change. The United States has seen the enactment

¹ William D Cohan, ‘How Wall Street’s Bankers Stayed Out of Jail’, *The Atlantic*, September 2015 <<https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/>>

² Jesse Eisinger, ‘Why Only One Top Banker Went to Jail for the Financial Crisis’, *The New York Times Magazine*, 30 April 2014 <https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?_r=0>

³ Liam Walsh, ‘Australian company collapses during GFC have resulted in very few criminal convictions’ *The Courier-Mail*, 21 March 2016 <<http://www.couriermail.com.au/business/australian-company-collapses-during-gfc-have-resulted-in-very-few-criminal-convictions/news-story/b3cdca0d3c7d416488ffa0f3267f70c5>>

of the *Dodd–Frank Wall Street Reform and Consumer Protection Act*. The G20 group of countries, at the 2009 Pittsburgh Summit, committed to raising capital standards, to improving over-the-counter derivatives markets and to the creation of more powerful tools to hold large global firms accountable for their risk taking.⁴ In 2015, United States Deputy Attorney-General Sally Yates promulgated the now eponymous “Yates Memo” setting out the policy of the United States Department of Justice in relation to “*Individual Accountability for Corporate Wrongdoing*”.⁵ In particular, the Yates Memo set out six key steps or policy positions designed “*to strengthen [the DOJ’s] pursuit of individual wrongdoing*”.⁶

3 The 6 steps are required reading for all those engaged with corporate misconduct – I stress engaged with, not involved in, corporate misconduct. They are:

- “*To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about individuals involved in corporate misconduct*”.
- “*Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation*”.
- “*Criminal and civil attorneys handling corporate investigations should be in routine communication with one another*”.
- “*Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals*”.

⁴ University of Toronto G20 Information Centre, *G20 Leaders Statement: The Pittsburgh Summit* (24-25 September 2009) <<http://www.g20.utoronto.ca/2009/2009communique0925.html>> at [17]

⁵ Deputy Attorney General Sally Quillian Yates, ‘Memorandum: Individual Accountability for Corporate Wrongdoing’ (9 September 2015)

⁶ *Ibid* 2-3

- “*Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized*”.
- “*Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay*”.⁷

Corporate legal identity and individual responsibility

4 As a judge from the opposite side of the Pacific Ocean to the United States, the intricacies of the Department of Justice’s prosecutorial policy are not within my expertise. With that said, it is apparent to me that the Yates Memo and other recent developments in relation to civil and criminal responsibility for corporate misconduct are best understood through the prism of a tension that goes to the very heart of the law of corporations.

5 The fundamental tension is this. The juristic nature of a corporation is as an entity with an independent legal existence. Despite that fact, being juristically inorganic, a corporation must act through directors, agents and employees.

6 As an independent legal entity, a corporation *can* be held responsible for wrongs. Traditionally, that was taken to mean that it is the corporation that *should* be held responsible for wrongs. In 1846, for example, Lord Denman CJ observed that corporate employees involved in wrongdoing:

...are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation ...and there is no principle which places [the corporation] beyond the reach of the law for such proceedings.⁸

⁷ Ibid

⁸ *R v The Great North of England Railway Company* (1846) 115 ER 1294,1298

7 Holding the corporation responsible may, however, have unintended consequences in the form of “*collateral damage*” or so-called “*negative externalities*”. As Prof John C Coffee once put it, “*when the corporation catches a cold, someone else sneezes*” – be it innocent employees, shareholders or creditors of the company.⁹

8 It is now well recognised that deterring corporate misconduct requires some measure of individual accountability. United States District Court Judge Jed S Rakoff, writing extra-judicially, has put the point this way:

...from a moral standpoint, punishing a company and its many innocent employees and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility.¹⁰

9 Accordingly, the fundamental question that arises from this tension between corporate legal identity and the reality of individuals within corporations is essentially, who should bear the blame? More particularly, the question might be framed who should pay and for what? Or in the case of criminal prosecutions, the question may simply be for how long? That is, how long should the prison term be?

10 The Yates memo has focussed the minds of those engaged with the topic of corporate misconduct as to the best modes of detecting, punishing and ultimately deterring wrongful conduct by and within corporations. In that context I wish to explore the following matters:

- (1) The models of liability;
- (2) Prosecutorial policy;
- (3) Legal issues which arise in the investigation of corporate misconduct;

⁹ John C Coffee Jr, ‘No soul to damn: no body to kick: an unscandalized inquiry into the problem of corporate punishment’ (1981) 79(3) *Michigan Law Review* 386, 401

¹⁰ Jed S Rakoff, ‘The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?’, *The New York Review of Books*, 9 January 2014 <<http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>>

- (4) The protection of corporate whistle-blowers; and
- (5) Emerging fields of liability.

Models of liability

- 11 It is necessary at the outset to understand the different available mechanisms for holding individuals liable for corporate wrongdoing. Individuals have always been subject to criminal or civil liability for their own individual misconduct. Fraud is the classic example.
- 12 The traditional common law aversion to veil piercing notwithstanding, at least in Australia, there are now a plethora of modes by which individuals can be held responsible for corporate misconduct. The scope of this paper only permits me to give a flavour of those available under Australian law.¹¹
- 13 As in most common law jurisdictions, as a matter of general law, Australian company directors owe to their company the core fiduciary duties not to profit from their position and not to act in conflict of interest. They also owe general law duties to act with care and diligence, to act in good faith in the best interests of their company, and to exercise their powers for a proper purpose. These duties are now also imposed as a matter of statute.¹² Indeed, in addition to the duties just mentioned, directors owe a statutory duty to prevent insolvent trading and in certain circumstances can be held personally liable to compensate creditors for loss or damage caused by the insolvency of the corporation.¹³

¹¹ In 2006, the Australian Government's Corporations and Markets Advisory Committee conducted a review into the diversity of ways in which directors and other individuals can incur personal liability for corporate misconduct: see CAMAC, *Personal Liability for Corporate Fault: Report* (September 2006). See also Karen Wheelwright, 'Chapter 2 – Australia' in Helen Anderson (ed) *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (Wolters Kluwer, 2008)

¹² See, eg, *Corporations Act 2001* (Cth), ss 180-184

¹³ *Ibid* s 588G, 588M; *Treloar Constructions Pty Ltd v McMillan* [2017] NSWCA 72

14 Importantly, the statutory directors' duties are not only enforceable by the company or by way of a shareholders' derivative action – they are also enforceable at the instance of Australia's corporate regulator, the Australian Securities and Investments Commission (ASIC). These duties are so-called "civil penalty provisions" under the *Corporations Act 2001* (Cth), and can thus ground a declaration of contravention by the Courts, an individual pecuniary penalty of up to \$200,000 or a disqualification from managing corporations.¹⁴ The importance of having deterrent civil penalties is well accepted in Australia. In the context of civil penalties imposed under Australia's trade practices law, for example, it has been remarked that:

...those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention.¹⁵

15 Importantly, where a misuse of position or information involves intentional dishonesty or recklessness, the breach of directors' duty involved will constitute a criminal offence.¹⁶

16 There are other models of individual responsibility for corporate wrongs available under Australian law. It has been recognised that, as a consequence of corporate legal identity, company directors can be accessories to a company's offence – even though it is the directors' acts and intentions that form the basis of the company's liability.¹⁷ An individual can also incur personal liability or be charged for being "involved" in a company's contravention of the *Corporations Act*. This notion of involvement is statutorily defined to encompass:

¹⁴ Ibid ss 1317E, 1317G, 206C

¹⁵ *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 at [66] cited with approval by the High Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [66]

¹⁶ Ibid s 184

¹⁷ See, eg, *Hamilton v Whitehead* (1988) 166 CLR 121,128

- Aiding, abetting, counselling or procuring a contravention;
- Inducing a contravention;
- Being knowingly concerned in, or party to, a contravention;
- Conspiring with others to effect the contravention.¹⁸

17 Additionally, in certain statutory contexts, individuals holding particular offices or involved in particular functions within a company are deemed to have contravened the statute if it is established that the company has breached a statutory duty. This model of liability does not generally require proof of knowledge or involvement in the contravention itself. For example, the *Protection of the Environment Operations Act 1997* (NSW) provides that if a company has contravened certain provisions of the Act, subject to certain defences, “each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision”.¹⁹ This model is also employed to deem directors liable for company tax offences.²⁰

18 The available models of individual liability for corporate misconduct may be narrower in other jurisdictions. As I understand it, in the United States, in some statutory contexts a director or employee of a corporation can be held criminally or civilly liable for statutory violations committed for the corporation’s benefit.²¹ The availability of this model of liability appears to depend on statutory context and, in particular, on the definition of the

¹⁸ *Corporations Act 2001* (Cth), s 79

¹⁹ *Protection of the Environment Operations Act 1997* (NSW), s 169

²⁰ For example, under s 8Y of the *Taxation Administration Act 1953* (Cth), persons concerned in the management of a company are deemed to be liable for the company’s taxation offences, and there is a rebuttable presumption that directors are concerned in the management of their company. It falls to the individual director to establish as an affirmative offence that they did not aid or abet the contravention and were not knowingly concerned in or party thereto.

²¹ See, eg, *United States v Wise* 370 US 405 (1962)

“persons” who may be held liable under the relevant enactment. It has been suggested that “*Scienter and other mens rea requirements severely limit the threat*” of this model of liability, particularly for directors of large corporations.²²

- 19 Another available model of liability in the United States is the so-called “*responsible corporate officer*” doctrine which imposes strict liability on directors for corporate misconduct in certain statutory contexts. In one of the seminal cases in this regard, *United States v Park*, it was held that this model of individual liability did not require awareness of wrongdoing because the particular statute in question evinced an intention by Congress to impose a “*positive duty to seek out and remedy violations*” and a “*duty to implement measures that will insure the violations will not occur*”.²³
- 20 The point of this brief survey of the different modes of imposing individual liability for corporate wrongs is to highlight the important policy decisions involved. For example, it might be said that a deemed liability model gives less emphasis to the separateness of individuals from the corporation, whereas the involvement or accessory models of liability uphold that separateness by requiring some additional element of moral opprobrium on the part of the individual in order for corporate misconduct to be brought home.

Prosecutorial policy

- 21 As has been foreshadowed, the tension between corporate legal identity and the reality of individuals within modern corporations is of particular concern to prosecuting authorities and regulatory agencies. In most jurisdictions, the prosecution of individuals is acknowledged as being vital to the effective deterrence of corporate misconduct.

²² Erik Gerding, ‘Chapter 12 – United States of America’ in Helen Anderson (ed) *Directors’ Personal Liability for Corporate Fault: A Comparative Analysis* (Wolters Kluwer, 2008) 313

²³ *United States v Park* 421 US 658, 672-673 (1975)

- 22 The Yates Memo is a prime example of a prosecutorial policy designed to achieve that policy objective: it states that the six key steps or policy positions it promulgates are designed “*to strengthen [the DOJ’s] pursuit of individual wrongdoing*”. For example, there is the much discussed requirement for full corporate cooperation in order for a corporation to qualify for any cooperation credit.
- 23 However, the prefatory paragraphs of the Yates Memo recognise the underlying tension in the law of corporations that I am seeking to illustrate. The law having established a separate entity with legal status which can create businesses, trade and engage labour, the policy then looks to the very persons who, it might have been thought, were entitled to stand apart from, and even be protected by, this artificial entity, so as keep the conduct of the entity in check. In short, the policy is directed, at least to an extent, to laying the ultimate blame for corporate wrongdoing on individuals.
- 24 Why is this so? What underlies the policy? The second paragraph of the Yates Memo observes that:

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behaviour, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.

- 25 Individual accountability is also emphasised in the enforcement policy of the Hong Kong Securities and Futures Commission. The Commission notes on its website that through criminal prosecutions and civil proceedings it seeks to achieve, *inter alia*:

Punishment – Justly punish wrongdoers for their misconduct

Deterrence – Deter wrongdoers from repeating the misconduct and warn other market participants against mimicking similar misconduct.²⁴

²⁴ Securities and Futures Commission of Hong Kong, *Enforcement Philosophy* (5 March 2010) <<http://www.sfc.hk/web/EN/regulatory-functions/enforcement/enforcement-philosophy.html>>

26 In 2007, then chairman of ASIC, Tony D'Aloisio, gave an address to the Australian Institute of Company Directors in which he directly addressed the balance between corporate liability and individual accountability. D'Aloisio observed:

From ASIC's perspective, we have run a series of court cases where we have said that it is in the public interest to pursue directors (i.e. individual liability). Examples are HIH where we were concerned that behaviour fell short of what the law expected. In OneTel, in the Greaves case, to ensure directors were across the company's financial position. In Water Wheel we wanted to send the message that insolvent trading would be treated seriously and directors would be held personally liable.²⁵

27 The importance of pursuing individuals also recurs throughout ASIC's formal policy statements. For example, ASIC has articulated the range of factors that are taken into account when deciding whether to investigate and take enforcement action.²⁶ These factors include:

- The compliance history of the person or entity;
- Whether behaviour (of an entity or broader industry) is more likely to change if the person or entity suffers imprisonment or a financial penalty;
- Whether the behaviour is systemic or part of a growing industry trend.²⁷

28 This focus on individual deterrence is also apparent in the reports on enforcement outcomes released by ASIC and in which it sets out its six

²⁵ Tony D'Aloisio, *An Update on ASIC's priorities for 2007/2008 and how these relate to AICD members* (Australian Institute of Company Directors luncheon, 26 November 2007) <http://download.asic.gov.au/media/1310479/AICD_speech_nov_07.pdf>

²⁶ Australian Securities and Investments Commission, *Information Sheet 151 – ASIC's approach to enforcement*, <http://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf>

²⁷ Ibid

monthly enforcement focuses. One specific focus for the latter six months of 2016 was ensuring that:

...gatekeepers—company directors and officers, auditors, insolvency practitioners and business advisers—adhere to the high standards required by law. Where necessary, we [ASIC] will take action against those who fail to meet these standards.²⁸

- 29 This focus on gatekeepers reflects the trust placed in gatekeepers and their role in promoting market integrity. The Enron collapse is perhaps the most striking example of what can happen when the gatekeeper role fails.²⁹ Although ASIC's focus on gatekeepers does not reflect the comprehensive prosecutorial policy articulated by the DOJ in the Yates' memo, it underscores a current regulatory approach to ensuring that individuals cannot operate with impunity behind the corporate veil.

Difficulties in investigating corporate misconduct

- 30 The underlying tension between independent corporate identity and the reality of individual action within corporations has important practical implications in terms of the gathering and use of evidence in enforcement proceedings.

Corporate investigations and the protection of client legal privilege

- 31 When misconduct by or within a corporation is alleged, best practice will generally dictate that the company conduct an internal investigation, whether through in-house lawyers or an external investigator, in order to inform a deliberate response to the relevant facts. Records of interviews and reports prepared in these internal investigations are, unsurprisingly, juicy targets for regulators and litigants. The protection afforded by privileges in the nature of

²⁸ Australian Securities and Investments Commission, *Report 485 – ASIC Enforcement Outcomes January to June 2016*, <<http://download.asic.gov.au/media/3971855/rep485-published-08-august-2016.pdf>>

²⁹ See John C Coffee Jr, 'Understanding Enron: It's About the Gatekeepers, Stupid' (2002) 57 *Business Lawyer* 1403

client legal privilege or attorney client privilege in such circumstances warrants special consideration.

- 32 Issues have arisen as to whether communications and documents created in the context of internal corporate investigations, even those involving lawyers, are necessarily protected by privilege. These issues arise because internal investigations may be conducted for a range of purposes, not confined to obtaining legal advice or defending proceedings.
- 33 In Australia, most jurisdictions have a statute-based legal professional privilege regime.³⁰ The so-called “*uniform evidence law*” distinguishes between “*legal advice privilege*” and “*litigation privilege*”. The former doctrine prevents the adducing of evidence of confidential communications between client/lawyer or multiple lawyers for the *dominant* purpose of the lawyer or lawyers providing legal advice to the client.³¹ This privilege also prevents the disclosure of the contents of confidential documents prepared by a client, lawyer or third party for the dominant purpose of the lawyer providing legal advice to the client.
- 34 Litigation privilege, on the other hand, prevents the adducing of evidence disclosing confidential communications or the contents of confidential documents engaged in or prepared for the dominant purpose of the client being provided with legal services relating to proceedings in which the client was, is or may be a party.³²
- 35 A number of Australian decisions have grappled with the application of the “*dominant purpose*” criterion to communications and documents involving in-house corporate counsel. In 2005, for example, Tamberlin J of the Federal

³⁰ See *Evidence Act 1995* (Cth), Pt 3.10 Div 1; *Evidence Act 1995* (NSW), Pt 3.10 Div 1; *Evidence Act 2001* (Tas) Pt 10 Div 1; *Evidence Act 2008* (Vic) Pt 3.10 Div 1; *Evidence Act 2011* (ACT), Pt 3.10 Div 3.10.1

³¹ See, eg, *Evidence Act 1995* (NSW), s 118

³² *Ibid* s 119

Court of Australia in *Seven Network Ltd v News Ltd* [2005] FCA 142 determined an application for access to 22 documents in respect of which privilege was claimed in an affidavit verifying discovery. The original affidavit verifying discovery had been sworn by the respondent company's Chief General Counsel, who also held directorships and alternate directorships in six associated companies and was described as being actively involved in the commercial affairs of the respondent corporation.³³

36 The issue was whether the documents in question had been prepared for the dominant purpose of giving legal advice. Tamberlin J made clear that involvement by in-house counsel in the giving of advice of a commercial nature "*does not necessarily disqualify the documents relating to that role from privilege*".³⁴ His Honour explained:

[T]here is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions. In other words, it is often practically impossible to segregate commercial activities from purely "legal" functions. The two will often be intertwined and privilege should not be denied simply on the basis of some commercial involvement.³⁵

37 Ultimately, however, Tamberlin J was not persuaded that the respondent's Chief General Counsel had been acting in a legal context, and observed that he had been "*actively engaged in the commercial decisions to such an extent that significant weight must be given to this participation*".

38 In *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445, Graham J was also confronted with a claim of legal advice privilege in respect of communications and documents involving in-house corporate counsel. Having cited the judgment of Tamberlin J, and the need for counsel to have an appropriate

³³ *Seven Network Ltd v News Ltd* [2005] FCA 142 at [14]

³⁴ *Ibid* [5]

³⁵ *Ibid* [38]

degree of independence for legal professional privilege to apply, Graham J expressed the view that:

[A]n in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer.³⁶

39 Graham J was critical of the absence of any evidence as to the independence of the legal advisers involved in the communications or as to the purpose for which they were brought into existence.³⁷

40 Australia's corporate regulator, ASIC, has issued written guidance in which it has made clear that it will not regard the fact of in-house lawyers, or indeed external lawyers, being instructed to conduct a review of facts and circumstances as sufficient basis for a privilege claim in relation to communications or documents arising in that review. As ASIC expresses the point:

ASIC will not accept a claim that the mere occurrence of the lawyer's review gives rise to a valid LPP claim over information relating to those facts and circumstances. ASIC draws a distinction between documents brought into existence for the purposes of the lawyer's review, where a valid claim of LPP may be available, and the documents and information that existed prior to the lawyer's review, where a valid claim of LPP is generally less likely to be available.³⁸ (emphasis added)

41 There have been a number of cases in the United States District Court, Southern District of New York, which have similarly grappled with the diverse purposes for which internal corporate investigations may be conducted. In *Re Kidder Peabody Securities Litigation* 168 FRD 459 (1996), external counsel had been retained to conduct interviews and an internal investigation in a

³⁶ *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445 at [35]

³⁷ *Ibid* [35], [41]

³⁸ Australian Securities and Investments Commission, *Information Sheet 151 – Claims of legal professional privilege*, < <http://download.asic.gov.au/media/1339100/infosheet-165-legal-professional-privilege.pdf>>

brokerage firm following revelations of misconduct by a prominent trader in the firm. In rejecting a claim of attorney-client privilege in respect of summaries of the interviews conducted, it was emphasised that “[a] *detailed and painstaking inquiry was required for pressing business purposes*”. It was observed that the company’s:

...unique public profile and its vulnerability to the ebb and flow of market opinion and the predations of its competitors made it urgent that the internal investigation be well publicized and viewed as the inquiry of an “independent” and incorruptible outsider.³⁹

42 Likewise, in *Cruz v Coach Stores Inc* 196 FRD 228 (2000), the fact that an audit conducted by external investigators was commissioned not just by General Counsel but also by the company’s Chief Administrative Officer who used the results to remove employees implicated in improprieties was instanced as tending against the audit having had a sole or primary purpose of enabling counsel to render legal advice.

43 These approaches may be contrasted with the approach of the United States Court of Appeals for the District of Columbia Circuit in the famous *Kellogg Brown & Root Inc* litigation concerning allegations of kickbacks during the Iraq War. In upholding a claim of attorney-client privilege, the Court of Appeals applied a “*primary purpose*” test, explained in terms of whether “*obtaining or providing legal advice was a primary purpose of the communication, meaning one of the significant purposes of the communication?*”⁴⁰ In relation to the “*primary purpose*” test it applied in assessing attorney-client privilege, the Court of Appeals explained that:

[T]he primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping

³⁹ *Re Kidder Peabody Securities Litigation* 168 F.R.D. 459, 466 (1996)

⁴⁰ *In Re Kellogg Brown & Root Inc* 756 F.3d 754, 760 (2014)

purposes (one legal and one business, for example) can be an inherently impossible task.⁴¹

- 44 The point to be made is that, across jurisdictions, there are serious issues raised by the diversity of functions undertaken by lawyers within modern corporations. An internal investigation or review, whether involving in-house counsel or external lawyers, will not necessarily stamp communications and documents as having arisen for the dominant or primary purpose of legal advice or the defence of litigation.

Joint legal privilege and waiver in cooperation with regulators

- 45 There are also important practical implications in relation to the waiver of privilege, particularly given the first principle in the Yates Memo which makes it clear in the United States that the Department of Justice will only afford cooperation credit where there has been full and frank disclosure by the corporation. Where an individual within a corporation can themselves claim privilege in respect of communications and documents created during an internal investigation, the opportunity for the corporation to secure cooperation credit may be jeopardised.
- 46 This is a well-known peril of internal corporate investigations in the United States. In *Upjohn Co v United States* 449 US 383 (1981), the Supreme Court of the United States made clear that attorney-client privilege will protect communications between legal counsel and corporate employees at any level within the corporation – and not only communications with directors or members of some “control group”. Importantly, internal corporate investigations will oftentimes require communication with, or the interviewing of, employees who are themselves implicated in wrongdoing.
- 47 Certain practices have developed in the United States in order to avoid any claim of joint representation or joint privilege by a company officer or employee in the context of internal corporate investigations. In this regard, by

⁴¹ Ibid 759

means of what are now referred to as “*Upjohn* warnings” or “corporate *Miranda* warnings”,⁴² investigating counsel will warn individuals within the company that:

- The lawyer represents the corporation and not the individual personally;
- The purpose of the communication is to obtain facts for the purpose of providing legal advice to the company;
- Any attorney-client privilege that may exist in connection with the communication belongs exclusively to the corporation and may be waived by the company without the individual’s consent;
- The communication should be kept confidential.⁴³

48 Similar issues have been considered in Australia through the prism of claims of joint privilege and common interest privilege. In *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1995) 13 ACLC 1329, the former directors of a company sought to restrain use of certain documents on the basis that they held privilege jointly with the company. The argument was that there had been no effective waiver by the company’s liquidator releasing the documents to the plaintiff as they had not joined in any such waiver.

49 Young J rejected the former directors’ assertion of joint privilege. His Honour was of the view that the relevant retainer was with the company and not the individual directors, and emphasised that “*the company both sought and paid*

⁴² See, eg, Grace M Giesel, ‘Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony’ (2010) 65 *University of Miami Law Review* 109, 110

⁴³ See, eg, American Bar Association Criminal Justice Section White Collar Crime Committee, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* (17 July 2009) <<https://www.crowell.com/PDF/ABAUjohnTaskForceReport.pdf>>

for the advice".⁴⁴ However, as his Honour went on to note, that did not necessarily preclude the documents being privileged. Young J observed that:

[Legal professional privilege] extends beyond the person who retained the solicitor. It extends to those who have a common interest with the person who retained the lawyer and it also extends to those who believed on reasonable grounds that the person giving the advice was his or her solicitor.⁴⁵

50 His Honour cited the following observations of Lord Denning MR in *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223 at 243:

There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him — who have the self-same interest as he — and who have consulted lawyers on the self-same points as he — but these others have not been made parties to the action.... In all such cases I think the court should — for the purposes of discovery — treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation.

51 Young J went on to suggest that, at least in some circumstances, there may be such commonality of interest between company and directors that it would be "*artificial in the extreme to dissect the entities and to say that the company alone has privilege in communications from lawyers, which the company intended would be obtained for the benefit of both itself and the directors*".⁴⁶

52 In dismissing an appeal from Young J's judgment, Sheller JA (Waddell AJA agreeing), accepted the application of this doctrine of common interest privilege in Australia. His Honour observed that:

Common interest is not in this context a rigidly defined concept. A mere common interest in the outcome of litigation will be sufficient to enable any party with that interest to rely on it.⁴⁷

⁴⁴ *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1995) 13 ACLC 1329, 1330

⁴⁵ *Ibid* 1331

⁴⁶ *Ibid* 1332

⁴⁷ *Farrow Mortgage Services Pty Ltd (In liq) v Webb* (1996) 39 NSWLR 601, 609

- 53 However, Sheller JA went on to cite the observation by Giles J in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405 that “two persons interested in a particular question will not have a common interest for the purposes of common interest privilege if their individual interests in the question are selfish and potentially adverse to each other”.⁴⁸
- 54 This focus on whether there is the necessary identity of interest has been emphasised in a number of more recent cases involving claims of common interest privilege involving company directors,⁴⁹ and will potentially stand in the way of company employees themselves involved in misconduct making a claim of common interest privilege. Indeed, it has been remarked that “[t]he authorities are to the effect that after a conflict of interest has clearly been identified common interest privilege will not apply”.⁵⁰
- 55 Again, the point to be emphasised is that the tension between independent corporate identity and the reality of individuals within corporations may have serious implications in relation to the invocation and waiver of privilege.

⁴⁸ *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405, 409-410 cited in *Farrow Mortgage Services Pty Ltd (In liq) v Webb* (1996) 39 NSWLR 601, 612

⁴⁹ See, eg, *Media Ocean Ltd v Optus Mobile Pty Ltd (No 10)* [2010] FCA 1348 at [53] per Katzmann J

⁵⁰ *Patrick v Capital Finance Corporation (Australasia) Pty Ltd* [2004] FCA 1249 at [20] per Tamberlin J

The protection of corporate whistleblowers

- 56 The tension between corporate legal identity and the reality of individuals within corporations is also felt in relation to the protection of corporate whistleblowers. As a result of government corruption inquiries in the 1980s, most Australian jurisdictions have enacted protections for public sector whistleblowers. However, private sector whistleblowers have remained imperfectly protected.
- 57 Part 9.4AAA of the *Corporations Act* was enacted in 2004 to provide some measure of protection to company officers, employees and contractors who report suspected contraventions of the *Corporations Act*. Similar regimes can be found in Part VIA of the *Banking Act 1959* (Cth), Part IIIA Div 4 of the *Insurance Act 1973* (Cth), Part 29A of the *Superannuation Industry (Supervision) Act 1993* (Cth) and Part 7 Div 5 of the *Life Insurance Act 1995* (Cth) in relation to contraventions of those Acts.
- 58 Each of the *Corporations Act* and the Acts I have just mentioned adopt a similar approach to whistleblower protection. There is a definition of the kinds of disclosures that will attract protection under the relevant regime. There is then a provision excluding civil or criminal liability for the whistleblower making a qualifying disclosure. These whistleblower regimes then do two things: (1) they create offences for the victimisation of whistleblowers; and (2) they create a civil action in a whistleblower to recover compensation for damage suffered as a result of victimisation. Importantly, however, these civil actions lie in the whistleblower – they cannot be pursued by regulatory agencies.
- 59 The Joint Parliamentary Committee on Corporations and Financial Services is currently undertaking an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. The Committee's terms of reference specifically include:

d) compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the United States of America

e) measures needed to ensure effective access to justice, including legal services, for persons who make or may make disclosures and require access to protection as a whistleblower

60 The latter is a response to a number of recent high-profile private sector disclosures in Australia that have thrown into question the adequacy of the protection afforded to whistleblowers by the conferral of a civil action for victimisation. It has been remarked in this regard that “*career oblivion often follows corporate whistleblowing*”,⁵¹ and one whistleblower has commented that “[t]here is not a lot you can do about being trashed, unless you have enough wealth and emotional energy to take on everyone legally”.⁵²

61 Such concerns have seen calls for the implementation of a bounty system, such as that implemented in the United States by the Securities and Exchange Commission. In the context of the current parliamentary inquiry, there have also been calls for the entire process of disclosures by whistleblowers to be transparent and open to public scrutiny “*with all decisions reported in real time*” on the internet “*so that...cover-ups will no longer be seen as the smart option*”.⁵³

62 The need to protect corporate whistleblowers from adverse action by their corporate employers serves to demonstrate, yet again, the fundamental importance of distinguishing between corporate wrongdoing and the role of individuals within modern corporations.

⁵¹ Nick McKenzie and Richard Baker, ‘Should Australian whistleblowers earn multimillion-dollar bounties?’, *Sydney Morning Herald*, 30 December 2016 <<http://www.smh.com.au/national/should-australian-whistleblowers-earn-multimillion-dollar-bounties-20161222-gtgz7e.html>>

⁵² Ibid

⁵³ Whistleblowers Australia, Submission No 59 to Joint Parliamentary Committee on Corporations and Financial Services, *Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors*, 15 February 2017, 2

Emerging fields of liability

63 In closing, I would like to dwell briefly on the future significance of this tension between independent corporate identity and the reality that corporations act through individuals. There has been talk for a number of years of an impending wave of “*climate litigation*” and there have been some interesting recent developments in the Australian context.

64 On 17 February 2017, Geoff Summerhayes, Executive Board Member of the Australian Prudential Regulation Authority (APRA), gave a speech in which he made clear that while climate risks have often been seen as future non-financial problems, APRA is now of the view that:

Some climate risks are distinctly ‘financial’ in nature. Many of these risks are foreseeable, material and actionable now. Climate risks also have potential system-wide implications that APRA and other regulators here and abroad are paying much closer attention to.⁵⁴

65 A recent report by the Australian Institute of Company Directors emphasised, *inter alia*, that under the Australian Securities Exchange’s Corporate Governance Council’s Principles and Regulations “[a] listed entity should disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks”.⁵⁵

66 The development that has attracted the most media attention was the release of a legal opinion by two Sydney barristers on the extent to which directors’ duties require company directors to respond to climate change. The opinion argues that directors’ duties under Australian law are “*capable of requiring company directors to consider and disclose their [company’s] exposure to*

⁵⁴ Geoff Summerhayes, *Australia’s new horizon: Climate change challenges and prudential risk* (Insurance Council of Australia Annual Forum, 17 February 2017)
<<http://www.apra.gov.au/Speeches/Pages/Australias-new-horizon.aspx>>

⁵⁵ Australian Institute of Company Directors, *Climate Change and Good Governance*
<<http://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/practice-of-governance/climate-change-and-good-corporate-governance-new-report>>

physical, transition and liability risks associated with climate change".⁵⁶ The opinion expresses the view that:

It is likely to be only a matter of time before we see litigation against a director who has failed to perceive, disclose or take steps in relation to a foreseeable climate-related risk that can be demonstrated to have caused harm to a company.⁵⁷

67 There can be no better example of the on-going tension between independent corporate identity and the role of individuals within modern corporations than the attempt to allocate responsibility for responding to the great problem of our age, climate change.

Conclusion

68 I referred at the commencement of this paper to the unintended consequences of holding a corporation liable for its wrongs – the “*negative externalities*”. Interestingly, the Yates Memo may have given rise its own “*negative externalities*”.

69 Two things have been noted since its release. First, there does not seem to have been any significant uplift in individual prosecutions for corporate wrongdoing. Secondly, in the years following the release of the Yates Memo, a number of settlements have been entered into with multinational corporations. In order to obtain cooperation credit, in accordance with the first of the principles in the Yates Memo, these companies have been required to disclose full facts about individual misconduct. That has resulted in persons

⁵⁶ Noel Hutley SC and Sebastian Hartford-Davis, *Memorandum of Opinion – Climate Change and Directors’ Duties* (7 October 2016) <<https://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf>> [51]

⁵⁷ *Ibid*

being named in filed documents, with consequential reputational and other damage, without any means of redress or defence.⁵⁸

- 70 The need for effective corporate regulation may be taken as a given. However, effectiveness requires an appreciation of how and when to use specific mechanisms to punish those responsible for wrongdoing and to deter others. This calls for a need, by regulators, not only to have a policy as to how to achieve those twin requirements, but also to understand the underpinnings of that policy and its consequences. A protocol that carries unnecessary or unintended collateral damage will eventually fail because it will be met with resistance and potentially with political pressure. Whatever the prosecutorial policy is, it needs to have a high level of transparency and efficient implementation. However, nothing will replace a well-developed corporate culture of good governance and good conduct.

⁵⁸ Joan E Meyer, '1 year after Yates Memo: the DOJ's Yates-Lite Approach', *Law360*, 19 October 2016 <<https://www.law360.com/health/articles/841773/1-year-after-yates-memo-the-doj-s-yates-lite-approach>>