

## CONSUMER PROTECTION AND CORPORATE CRIMINAL RESPONSIBILITY

### A CRITIQUE OF TESCO SUPERMARKETS LTD. v. NATTRASS

New English and Australian consumer protection legislation relies heavily upon enforcement by the criminal law<sup>1</sup>. Since the usual defendants are likely to be corporations a fresh round of disputation concerning fundamental issues of corporate criminal responsibility seems almost inevitable. *Tesco Supermarkets Ltd. v. Nattrass*<sup>2</sup>, a recent decision of the House of Lords, revives old doubts as to the range of officers and employees in respect of whose conduct a corporation should be held responsible<sup>3</sup> and, more importantly, raises the question whether the traditional analyses of corporate criminal responsibility adopted by the courts match contemporary enforcement desires or needs.

As regards the terminology used in the ensuing discussion, D stands for a corporate defendant, and X for an officer or employee, at any level, in respect of whose conduct D is charged with responsibility.

#### 1. *Tesco Supermarkets v. Nattrass*

In this case D, a nationally known supermarket operator, was charged under s.11(2) of the Trade Descriptions Act, 1968 (U.K.) with offering goods at a price less than that at which they were in fact offered. At one of D's supermarkets posters indicated that a brand of soap powder was being sold at a discount. In fact this soap powder was offered only at the normal price. An assistant had replaced the reduced-price packets, which had been sold, with packets displaying the normal price. She should have notified the manager of the supermarket, but had not done so. The manager was responsible, in terms of D's organizational structure, for seeing that the proper packets were on sale, but in this respect he had failed.

The central issue was whether D fell within the defence provisions of s.24 of the Trade Descriptions Act. This section provides, so far as is here relevant:

"(1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control."

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1. Consider, *e.g.* Trade Descriptions Act, 1968 (U.K.); Consumer Protection Act, 1969 (N.S.W.); Unfair Advertising Act, 1970-1971 (S.A.).

2. [1971] 2 All E.R. 127.

3. See Leigh, *The Criminal Liability of Corporations in English Law*, chap. 7; Fisse, "The Distinction Between Primary and Vicarious Corporate Criminal Liability" 41 A.L.J. 203 (1967).

After a careful assessment of detailed evidence concerning D's administrative system<sup>4</sup>, the justices convicted D. Although D had established that the commission of the offence was due to the act or default of the supermarket manager, and although all reasonable precautions had been taken and all due diligence had been exercised at higher levels within the corporation, the supermarket manager was not "another person" as required by s.24(1)(a), but represented D in a supervisory capacity<sup>5</sup>. D's conviction was upheld by the Divisional Court for a different reason<sup>6</sup>. This court held that the supermarket manager was "another person" within the meaning of s.24(1)(a) but nonetheless D was vicariously responsible for his conduct under the delegation principle. D had "delegated" to the manager the duty of ensuring compliance with s.11 and the delegate had failed to perform this duty. The earlier Divisional Court decision in *Series v. Poole*<sup>7</sup> was relied upon, inter alia<sup>8</sup>, in support of this strained interpretation of s.11 and s.24(1).

D's appeal to the House of Lords was successful. It was held that vicarious responsibility was inconsistent with s.24 and that *Series v. Poole*, which indicated otherwise, was wrongly decided. The defence in s.24 involved personal, not vicarious, responsibility. The question to be asked under s.24(1)(b) was whether D itself, through its superior officers, had taken reasonable precautions and exercised due diligence. The conduct of the supermarket manager could not be identified as that of Tesco Supermarkets Ltd. itself—his conduct did not fall within the principle of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*<sup>9</sup> and other leading cases on the issue of corporate identification<sup>10</sup>. Consequently, since the manager was "another person" within s.24(1)(a), and since the requirements of reasonable precautions and due diligence under s.24(1)(b) had been met at the hands of those officers exercising management functions or otherwise performing conduct on the part of D *itself*, the conviction could not stand.

Perhaps the principal importance of *Tesco Supermarkets Ltd. v. Natrass* is the triumph of Good over Evil in the realm of vicarious responsibility. The delegation principle has suffered a substantial demise<sup>11</sup>. As regards corporate

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4. For an outline of the justices' findings see [1971] 2 All E.R. 127, at 137-138 per Lord Morris of Borth-y-Gest.
  5. [1971] 2 All E.R. 127, 135-139.
  6. [1970] 3 All E.R. 357.
  7. [1967] 3 All E.R. 849; [1969] 1 Q.B. 676.
  8. *E.g. Hammett (R.C.) Ltd. v. London County Council* (1933) 97 J.P. 105.
  9. [1915] A.C. 705.
  10. Notably *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.* [1944] 1 All E.R. 119; *R. v. I.C.R. Haulage Ltd.* [1944] 1 All E.R. 691; *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1956] 3 All E.R. 624, at 630 per Denning L.J.
  11. It is probable that in England the delegation principle might now be confined to licensing cases, such as *Vane v. Yiannopoulos* [1965] A.C. 486. But consider the judgment of Lord Pearson in *Tesco Supermarkets Ltd. v. Natrass; Quality Dairies (York) Ltd. v. Pedley* [1952] 1 K.B. 275; *John Henshall (Quarries) Ltd. v. Harvey* [1965] 1 All E.R. 725; Rose, "Vicarious Liability in Regulatory Offences" 44 A.L.J. 147 (1970).  
For criticisms of the delegation principle, and the view that the delegation principle need not be applied at all in Australian jurisdictions, see Fisse, "Vicarious Responsibility in Regulatory Offences" 44 A.L.J. 601 (1970).

criminal responsibility the significance of the decision in terms of the law as it is, or as it might be made by the courts, is much less—there is no substantial departure from the traditional corporate identification approach accepted and applied in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* and numerous other decisions<sup>12</sup>. It is in the area of possible legislative approaches to corporate criminal responsibility that the implications of the *Tesco* case are notable, and to these I now turn.

## 2. Some Implications

### A. *The Purposes of Corporate Criminal Responsibility*

Enquiry into the purposes of corporate criminal responsibility is rarely explicit in judicial reasoning; it is buried, without ceremony, under precedent<sup>13</sup>. But for reform it is important to make enquiry since the corporate identification approach, as applied in *Tesco Supermarkets Ltd. v. Nattrass*, seems inconsistent with justifications of entity responsibility which are likely to be advanced. If corporate criminal responsibility is to survive (many would argue that it should not)<sup>14</sup> then ideally the relevant aims should be reflected in reform proposals<sup>15</sup>.

12. See for the Australian case law *Fisse*, *supra* n.3; and *Lamb v. Toledo-Berkel Pty. Ltd.* [1969] V.R. 343.

Compare the *Tesco* case with *Freeman v. C. T. Warne Pty. Ltd.* [1947] V.L.R. 279; and *Brown v. G. J. Coles & Co. Ltd.* [1970] V.R. 867, at 870 per Smith J., where a defence of reasonable precautions under s.291(1)(a) Health Act, 1958 (Vic.) to a charge of selling an adulterated nut loaf was treated as follows:

"The defendant's evidence . . . showed that the grades of ingredients selected for purchase were the best available; and that the premises of the suppliers were inspected and the ingredients tested, and, if necessary, sent for analysis, before being purchased; that warranties were obtained from the suppliers that the ingredients complied with the requirements of Part XIV of the Act; that proper procedures were followed to keep the bakehouse and storeroom clean; that the staff employed in the bakehouse were skilled persons and properly supervised; that standard recipes were worked out for each product and the observance of them checked by frequent sampling by supervisors; and that every month or six weeks the witness, Cook, a diplomat in Domestic Economy, sampled the current production of nut loaves to see that they complied with the standard recipe laid down for that commodity, and ate some to see what it was like. In addition there was evidence that care was taken that no utensils were used in the bakehouse which could cause foreign substances to be deposited in the product; that the bakehouse staff were warned to keep careful watch for and to eliminate any foreign bodies; and that the staff did in fact always look for foreign matter in dates and other ingredients."

The latter part of the above passage suggests perhaps that Smith J. was much more concerned with the question whether reasonable precautions had been exercised throughout the corporation, than with whether reasonable precautions had been taken by management. In this respect consider also the distinction between proscriptive and conformitive negligence drawn by Dubin, "*Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*" 18 Stan. L.R. 322, at 390-39 (1966); and *Spooner v. Alexander* (1912) 13 C.L.R. 704, discussed in Howard, *Strict Responsibility*, 116.

13. Although in *Tesco Supermarkets Ltd. v. Nattrass* the question is often asked why more should be required of D than the taking of reasonable precautions by its management.

14. Consider in particular Leigh, *The Criminal Liability of Corporations in English Law*, chaps. 9 and 10.

15. Contrast the different approach in my earlier article, *supra* n.3.

The aims of entity responsibility are considered in some detail by the framers of the Model Penal Code and the proposed U.S. Federal Criminal Code, but responsibility is defined without explicit direct use of the precise justifications. See

What are the justifications which are likely to be proffered in support of entity responsibility? The following eight, some of which overlap, occur to me:

(i) *Difficulty of Locating Guilty Individual Officers and Employees*

A common argument is that entity responsibility enables the application of a sanction, albeit an indirect one, where it is impossible to locate guilty individual offenders because of complexity of organizational duties and responsibilities, or where, because of loyalty or other pressures within an organization, guilt on the part of particular officers or employees is suspected but cannot be proven beyond a reasonable doubt<sup>16</sup>.

(ii) *Guilty Officers or Employees will be Replaced if the Corporate Employer is not also Responsible*

This justification is also prominent. Corporate evasion by the expedient of replacing guilty employees was of concern in several early cases<sup>17</sup>, and its current practical importance is perhaps evident from the classic American electrical equipment conspiracy cases of 1960-61<sup>18</sup>.

(iii) *Organizational Loyalty*

Organizational loyalty or group cohesion may mean that even if guilty individual officers and employees can be located and convicted effective deterrence requires a sanction aimed at the entity, the source of the loyalty or cohesion, as well as at the particular human offender<sup>19</sup>.

(iv) *Avoidance of Harsh Approaches to Individual Responsibility*

If entity responsibility is abandoned, one argument runs, there will be a reaction towards harsher forms of individual responsibility. Even if negligence, or a failure to take reasonable precautions, or to exercise reasonable supervision, is the minimum fault requirement nonetheless such a requirement is dangerously vague when one is faced with a corporate situation involving extensive division of authority and delegation of powers<sup>20</sup>. Yamashita's might

American Law Institute, Model Penal Code, Proposed Official Draft, s.2.07, Tentative Draft No. 4, 146-155; National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, ss.402-406, I Working Papers, 163-215.

16. See Tentative Draft No. 4, *supra* n.15, 149; I Working Papers, *supra* n.15, 164, 200-201. Consider also the U.S. electrical equipment conspiracy cases of 1960-1961, described in Geis "The Heavy Electrical Equipment Antitrust Cases of 1961," in Geis, *White-Collar Criminal*, 103; and Smith, *Corporations in Crisis*, chaps. 5 and 6. (In some situations note that there may be no guilty individual officer or employee even in theory. See *R. v. Australasian Films Ltd.* (1921) 29 C.L.R. 195). For judicial statements to the contrary see *Lenroot v. Interstate Bakeries Corporation* 146 F. 2d 325, 328 (1945); *U.S. v. Armour & Co.* 168 F. 2d 342, 343 (1948).
17. *E.g. Southern Express Co. v. State* 58 S.E. 67 (1907).
18. See references *supra* n.16.
19. Tentative Draft No. 4, *supra* n.15, 148-149. Consider also the electrical equipment cases, *supra* n.16; and the analysis of group behaviour in II Working Papers of the National Commission on Reform of Federal Criminal Laws, 1012-1016.
20. See Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" 30 Univ. of Chi. L.R. 423 (1963); U.S. Senate, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, 87th Cong.

easily be found in corporations<sup>21</sup>. Corporate responsibility, on the other hand, may well create a pressure to take reasonable, or even extraordinary care, without the conviction of individual persons for offences which possess imperfect or harsh fault requirements, and without their exposure to the stigma and unpleasantness of a sanction directly applied<sup>22</sup>.

(v) *Corporate Rehabilitation or Reformation*

If the aims of a system of corporate criminal responsibility embrace rehabilitation or reformation as well as deterrence, entity responsibility is important to the extent that entity performance, rather than that of individual officers and employees, is in issue<sup>23</sup>. In a forward-looking system the threshold requirement would be the occurrence of some prescribed event or state connected with a corporation's operations; a corporate offence would provide the basis for remedial measures aimed at improving a corporation's performance<sup>23a</sup>, although of course these remedial measures would involve an assessment of both past and future individual performance.

(vi) *Foreign Corporations*

Corporate criminal responsibility enables the imposition of a sanction upon an individual offender in situations where an offence is committed on behalf of a foreign corporation by an employee or officer who is outside the jurisdiction (either at the time of commission, or subsequently) and hence is not amenable to prosecution<sup>24</sup>.

(vii) *Public Information*

It is occasionally asserted that corporate responsibility results in the provision of useful public information. The public has a right to know that certain organizations' operations have led to violations of the law, and the true position would probably not emerge if individual offenders alone were held responsible<sup>25</sup>.

2nd Sess. 1961, Hearings on Administered Prices, Pt. 28, 17670-72, 17711.

As a result of the electrical equipment cases it was often suggested that individual responsibility should be imposed for lack of reasonable diligence in supervision, but such proposals were never implemented. See U.S. Senate, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, 87th Cong. 1st Sess. 1961, Hearings on Legislation to Strengthen Penalties under the Antitrust Laws; and Note, "Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions" 71 Yale L.J. 280 (1961).

Contrast *U.S. v. Dotterweich* 320 U.S. 277 (1943); the statutory offences considered in Leigh, *supra* n.3, 176-186; and I Working Papers, *supra* n.15, 185-188.

21. *Yamashita v. Styer* 327 U.S. 1 (1946). Note also the possibility of discrimination arising because of the comparative ease with which individual responsibility could be established in smaller corporations. See Kramer, "Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy" 48 Georgetown L.J. 530, 540-542 (1960), reproduced in Donnelly, Goldstein, & Schwartz, *Criminal Law*, 1083.

22. On responsibility for a failure to take extraordinary care see n.37 *infra*.

23. Rehabilitation of corporate offenders has rarely been considered, but see *State v. West Plains Tel. Co.* 135 S.W. 20 (1911); Davids, "Penology and Corporate Crime" 58 Jnl. of Crim.L.C. and P.S. 524 (1967).

23a. Compare *State v. Morris and Essex Railroad Company* 23 N.J.L. 360 (1852).

24. Tentative Draft No. 4, *supra* n.15, 150-151.

25. Williams, *Criminal Law—The General Part* (2nd ed.) 863; I Working Papers, *supra* n.15, 164.

(viii) *Recovery of Profits from Illegal Operations*

Corporations may often benefit from the commission of offences on their behalf. Sanctions imposed upon the guilty officers and employees alone would not achieve deprivation of this unjust gain. Corporate fines at least provide a rough method of achieving just recoupment<sup>26</sup>.

Now my purpose here is not to defend or counter the possible justifications of corporate criminal responsibility which have been outlined<sup>27</sup>, but to point out that these justifications are inconsistent with the restriction of entity responsibility to the conduct of a range of superior officers. The position of the officer or employee in the organizational structure seems largely irrelevant. Taking justification (i) initially, it is probably just as difficult to locate and punish guilty officers and employees at low levels in a corporate hierarchy as at high. Indeed the corporate identification approach in *Tesco Supermarkets Ltd. v. Natrass* is likely to have the effect in practice of confining corporate responsibility to situations where, in this respect, it is least needed. Usually in the case of large corporations commission of offences, or even complicity therein, will occur at lower levels, not at the level of management<sup>28</sup>. This is evident from the facts of the *Tesco* case itself, and is likely to be true of the commission of many other offences including, for example, those concerning false or unfair advertising under s.3 of the Unfair Advertising Act, 1970-1971 (S.A.) and s.32(1) of the Consumer Protection Act, 1969 (N.S.W.). Consequently, corporate responsibility will often be impossible, except where the relevant offence imposes vicarious responsibility<sup>29</sup>. Yet in the case of small corporations individual responsibility will be much more readily imposed upon those holding high positions, and for this reason the possible incidence of corporate responsibility will also be greater<sup>30</sup>. The corporate identification theory tends therefore to restrict corporate criminal responsibility to situations where individual responsibility is possible and where justification (i) is inapplicable<sup>31</sup>. To this extent the present law is of a discriminatory nature, a point apparently raised in argument in the *Tesco* case but not answered adequately by the House of Lords<sup>32</sup>.

26. Tentative Draft No. 4, *supra* n.15, 150; Note, "Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions" 71 Yale L.J. 280 (1961).

27. The issues are controversial. See Leigh, *supra* n.3, chap. 9; Fisse "The Elimination of Vicarious Responsibility in Regulatory Offences" 42 A.L.J. 199, 250 (1968).

28. See Gordon, *Business Leadership in the Large Corporation* (University of California Press, 1966), 76, 79-81, 85, 90; I Working Papers, *supra* n.15, 190.

29. Or where the relevant provisions otherwise impose a more extensive form of responsibility. *E.g.* consider the discussion of *Brown v. G. J. Coles & Co. Ltd.* [1970] V.R. 867, *supra* n.12.

30. Some may have faith in prosecutorial discretion here but consider Kramer, *supra* n.21.

31. It is not inconceivable that justification (i) might be applicable where D is a small corporation.

32. Only Lord Reid dealt with the point. In his view there was no discrimination between the large employer and the small shopkeeper because the manager of the supermarket was exposed to conviction, and his position corresponded to that of a small shopkeeper. [1971] 2 All E.R. 127, at 135.

This response is unsatisfactory because it overlooks the point that the supermarket manager is exposed only to individual responsibility whereas in the case

The implications of the remaining justifications are briefly as follows. In terms of justification (ii), replacement of guilty individual offenders is no less likely in the lower echelons of a corporation than in the upper<sup>32a</sup>. Justification (iii) (organizational loyalty) also operates irrespective of organizational level. For example, loyalty pressures arose well below management level in the American electrical equipment cases<sup>33</sup>. As regards the avoidance of harsh approaches to individual responsibility, it could easily be possible that restricting corporate responsibility to the conduct of a range of superior officers creates a pressure, in instances of offences committed at a low level, to impose responsibility upon superior officers on the basis of imperfect or harsh fault requirements<sup>34</sup>. In the case of justification (v), there seems no reason at all why corporate rehabilitation or reformation should come into play only upon the commission of offences by managerial (or equivalent) personnel. Given justification (vi), it is difficult to see why offences committed on behalf of foreign corporations should not occur at any level.<sup>35</sup> Finally, the quest for public information or the desire for recovery of profits from offences clearly extends beyond the form of corporate criminal responsibility shaped by *Tesco Supermarkets Ltd. v. Natrass* and earlier decisions.

But notwithstanding the thrust of the discussion above, there may arise at this stage some persistent questions, questions which were in fact asked in the *Tesco* case<sup>36</sup>. Why hold a corporation responsible where the management or other superior officers have taken all reasonable precautions? What more can be expected? Why not simply a general defence available to corporations which exercise reasonable care at managerial levels? However, it should be clear that such questions are misguided if corporate criminal responsibility rests upon the justifications outlined. For example, if the aim is to apply an indirect sanction to lower level personnel who cannot be located or convicted, what difference does it make that reasonable precautions have been taken by the management<sup>37</sup>?

To sum up, the traditional identification approach to corporate criminal responsibility does not match, otherwise than coincidentally, the main justifications for entity responsibility which are likely to be put forward.

#### B. What are "Management Functions"?

A corporate identification approach to corporate criminal responsibility involves the difficult task of selecting those officers or employees for whose

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of a small corporation both the corporation *and* the manager may easily be held responsible. Lord Reid's answer may be found in relation to individual shopkeepers, but there are other parts to the question. See *General Motors Acceptance Corp. v. Froelich* 273 F. 2d 92 (1959).

32a. Consider the electrical equipment cases, *supra* n.16; and *Southern Express Co. v. State* 58 S.E. 67 (1907).

33. See n.16 *supra*.

34. See n.20 and n.21 *supra*.

35. However, the justification of entity responsibility in question may be concerned much more with the escape of big fish rather than little ones.

36. [1971] 2 All E.R. 127, at 131, 154, especially.

37. Not every offence is so defined anyway, and note the possibility of requiring D to take *extraordinary* care. Compare I Working Papers, *supra* n.15, 165 (defence of "Exceptional Occurrence Without Fault in Supervision or Management").

conduct a corporation can be held responsible<sup>38</sup>. In *Tesco Supermarkets Ltd. v. Nattrass* much space in the judgments is devoted to this task. It is sufficient here, however, to set out the essence of the different approaches adopted by Lord Reid and Lord Diplock and to note that the views of Lord Morris of Borth-y-Gest, Viscount Dilhorne, and Lord Pearson, are in most respects very similar to those of Lord Reid<sup>39</sup>.

Lord Reid's approach to corporate identification was essentially as follows:

“ . . . Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. . . .  
. . . But here the board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also to take orders from their superiors. The acts or omissions of shop managers were not the acts of the company itself”<sup>40</sup>.

By contrast, Lord Diplock chose to stress the formal constitutional organization of a company. Corporate identification depended, in his opinion, upon identifying “those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company”<sup>41</sup>.

Notwithstanding the attempts in *Tesco Supermarkets Ltd. v. Nattrass* to explain what corporate identification requires, the dividing line between conduct attracting responsibility on the part of the corporation itself and that attracting only vicarious responsibility, if vicarious responsibility is possible under the relevant legislation, remains obscure. In placing heavy reliance upon the concept of “management functions” the House of Lords has adopted a position which, in a world of corporate decentralization and extensive delegation of management or executive tasks, is likely to breed confusion and hair-line decisions. Tests of responsibility based upon “the directing mind and will” of a corporation, or a “managerial function”, seem destined to failure when one is faced with a Galbraithian “technostructure” or the complex division of power and authority in a large corporation which Gordon described a quarter of a century ago<sup>42</sup>.

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38. See Leigh, *supra* n.3, chaps. 7 and 8; Fisse, *supra* n.3.

39. Note the different views upon *alter ego* and the “brains” test.

40. [1971] 2 All E.R. 127, at 132 and 135.

41. [1971] 2 All E.R. 127, at 155.

42. Gordon, *supra* n.28.



Consider the following views of Galbraith, these being essentially variations upon one of Gordon's major themes:

"The nominal head of a large corporation, though with slight power, and, perhaps, in the first stages of retirement, is visible, tangible and comprehensible. It is tempting and perhaps valuable for the corporate personality to attribute to him power of decision that in fact, belongs to a dull and not easily comprehended collectivity. Nor is it a valid explanation that the boss, though impotent on specific questions, acts on broad issues of policy. Such issues of policy, if genuine, are pre-eminently the ones that require the specialized information of the group.

. . . [Management] is a collective and imperfectly defined entity; in the large corporation it embraces chairman, president, those vice-presidents with important staff or departmental responsibility, occupants of other major staff positions and, perhaps, division or department heads not included above. It includes, however, only a small proportion of those who, as participants, contribute information to group decisions. This latter group is very large; it extends from the most senior officials of a corporation to where it meets, at the outer perimeter, the white and blue collar workers whose function is to conform more or less mechanically to instruction or routine. It embraces all who bring specialized knowledge, talent or experience to group decision-making. This, not the management, is the guiding intelligence—the brain—of the enterprise. There is no name for all who participate in group decision-making or the organization which they form. I propose to call this organization the Technostructure<sup>43</sup>.

Lord Diplock's approach, which arbitrarily confines identification to those officers who are countenanced by a corporation's formal constitution, is perhaps less productive of uncertainty than the more functional approach (in relative terms) applied by the other members of the court. However, such an approach seems to rest on the patently false assumption that a corporation's constitution reflects the true nature of its managerial functions<sup>44</sup>. Not only is the assumption false but also it conduces to evasion.

A satisfactory test is no more evident from the leading reform suggestions contained in the American Law Institute's Model Penal Code and the proposed U.S. Federal Criminal Code. Both these codes restrict corporate responsibility to conduct on the part of high officers, but before the relevant provisions are considered it should be realized that responsibility is restricted in this way in only a very limited range of situations, much more limited than that to which a corporate identification approach is now applied in English and Australian law. In the case of most regulatory offences the codes contemplate corporate responsibility for the conduct of officers or employees at any level<sup>45</sup>. Yet in our law the same position would hold only if the

43. Galbraith, *The New Industrial State*, 70-71. See also Gordon, *supra* n.28, 76-80; Simon, *Administrative Behaviour* (2nd ed.), 137, chap. 11.

44. For a recent judicial view to this effect see *Lamb v. Toledo-Berkel Pty. Ltd.* [1969] V.R. 343.

45. Proposed Official Draft, *supra* n.15, s.2.07(1)(a) and (b); Study Draft, *supra* n.15, s.402(1).

regulatory offence admits of vicarious responsibility, or where statutory provision is made.

Under the Model Penal Code corporate responsibility is authorised in several specified situations including that where, in the terms of section 2.07(1)(c):

“The commission of the offense was authorised, requested, commanded or performed by the board of directors, or by an agent having responsibility for formation of corporate policy or by a high managerial agent having supervisory responsibility over the subject matter of the offense and acting within the scope of his employment on behalf of the corporation.”

A “high managerial agent” is defined as:

“an officer of a corporation or an unincorporated association or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association”<sup>46</sup>.

The equivalent provisions of the proposed U.S. Federal Criminal Code are somewhat different. The relevant part of s.402 provides:

“(1) . . . A corporation may be convicted of:

(a) any offence committed in furtherance of its affairs on the basis of conduct done, authorised, requested, commanded, ratified or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs, by any of the following or a combination of them:

(i) the board of directors;

(ii) an executive officer or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees;

(iii) any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy . . . ”<sup>47</sup>

These reform proposals exhibit the weakness inherent in the approach of the House of Lords in *Tesco Supermarkets Ltd. v. Natrass* insofar as reliance is placed upon the concept of managerial functions, and, in the case of the proposed Federal Criminal Code, “executive” functions. Furthermore, the proposals make use of the notion of corporate “policy”, a notion which is likely to precipitate a variety of interpretations. This prediction may be supported by Galbraith’s caution that issues of policy really require involvement of the “technostructure” and by the following instructive comments of Gordon:

“ . . . Policy is a highly ambiguous term, meaning different things to different men. To some, policies are what [in an earlier passage], we called decisions of the highest degree, setting forth the aims and

46. Proposed Official Draft, *supra* n.15, s.2.07(4)(c).

47. Study Draft, *supra* n.15.

objectives of an organization. To others, policies include also some lower-ranking decisions, provided they set a guide or criterion for meeting future situations. In the latter sense, policies are of varying degrees, the lower ones providing guides to action as a means of implementing the higher or broader policies. As most commonly used by businessmen themselves, policy seems to mean any important decision, whether or not it sets a precedent or furnishes a guide for the future . . . ”<sup>48</sup>

In short, even statutory attempts to restrict corporate criminal responsibility to conduct performed by a limited range of corporate personnel seem likely to cause much difficulty in operation and, if possible, are probably best avoided. Clearly the problem disappears if corporations are held responsible for conduct at all levels within their structures (as is the position taken by most U.S. courts, and in the case of many, but not all, offences, by the Model Penal Code and the proposed Federal Criminal Code)<sup>49</sup>. Yet this solution is a drastic one, at least at our remove from the U.S.A. As I shall show later there is another possible approach, one which avoids concepts based on “managerial functions” and yet which also avoids the need to hold corporations responsible for the conduct of any officers or employees.

### C. *Interrelationship Between Primary, Vicarious, and Corporate Criminal Responsibility*

Existing approaches to corporate criminal responsibility can involve an unhealthy interrelationship between primary individual responsibility and corporate responsibility, and between vicarious and corporate responsibility.

#### (i) *Relationship Between Primary Individual Responsibility and Corporate Responsibility*

It is important to consider whether fault requirements should be the same for individual primary responsibility as for corporate responsibility. Take first an offence of selling adulterated food or selling defective motor vehicles. Now as far as an actual salesman is concerned it may be desirable to require by way of mental element advertence to the relevant adulteration or defect. Such an employee is usually distant from the processes where the circumstances of adulteration or the causes of defects arise, and responsibility for negligence (if accepted at all for individual responsibility) is probably more clearly warranted in the case of employees or officers operating at the source of the trouble. In the case of the corporate employer, however, it may be much more appropriate to hold D responsible for a failure to exercise reasonable precautions (to prevent the sale of adulterated food or defective motor vehicles) on the part of managerial personnel, the salesman himself, or officers and employees elsewhere in the organizational hierarchy<sup>50</sup>. This possible need

48. *Supra* n.28, 51-52. See also Simon, *supra* n.43, 53.

49. See text to n.45 *supra*; I Working Papers, *supra* n.15, 167-173; Leigh, *supra* n.3, 114-116.

50. See Leigh, *supra* n.3, 149; I Working Papers, *supra* n.15, 198; and consider the discussion of *Brown v. G. J. Coles & Co. Ltd.* [1970] V.R. 867, *supra* n.12. Note that it might also be considered appropriate to impose a duty to exercise reasonable precautions on individual officers or employees at a higher level, but see n.20 *supra*.

for different fault requirements according to whether one is faced with corporate or individual primary responsibility can be covered by careful drafting, but is easily overlooked<sup>51</sup>. Thus, the position concerning corporate responsibility could be unsatisfactory if advertence is required on the part of an individual offender. Absent any specific provision dealing with corporate responsibility, D could be held responsible for the conduct of low-level personnel only on the basis of complicity, and complicity requires advertence—negligent inadvertence, or a failure to take reasonable precautions, would be insufficient<sup>52</sup>. Further, as is evident from the principle in *Tesco Supermarkets Ltd. v. Natrass*, D could be responsible only for complicity on the part of those exercising managerial functions. Nor could D be held vicariously responsible—such an interpretation of the relevant statutory provision would usually be ruled out by the requirement of advertence on the part of a person charged with individual primary responsibility<sup>53</sup>.

Consider secondly the large number of offences in respect of which a defence of taking reasonable precautions is made available to a person charged with individual primary responsibility<sup>54</sup>. Now such a defence may be sensible if one's perspective is limited to individual primary responsibility, but from the perspective of corporate responsibility, it may produce unsatisfactory consequences. Usually the availability of a defence of reasonable precautions to individual offenders would exclude vicarious responsibility and thus only corporate responsibility under the *Tesco* corporate identification approach would be possible. On this approach the extent of responsibility would be limited, of course, to situations where those exercising managerial functions have failed to take reasonable precautions. This is clearly incompatible with a number of justifications which are likely to be given in support of entity responsibility, as I have attempted to show above. For example, it may be a good idea to hold D responsible for a failure to take *extraordinary* precautions on the part of its managerial or other personnel, and yet to restrict individual responsibility to situations where there has been only a failure to take *reasonable* precautions<sup>55</sup>.

It should be realized that in the case of either of the two types of offences discussed above some pressure exists to avoid the problems of corporate

51. *E.g.* s.57(2) Consumer Protection Act, 1969 (N.S.W.) produces the strange effect that in some instances individual responsibility is subject to less demanding requirements than corporate responsibility. See text to n.60 *infra*.
52. *Johnson v. Youden* [1950] 1 K.B. 544; *Churchill v. Walton* [1967] 2 W.L.R. 683. But see Fisse "Complicity in Regulatory Offences" 6 *Melb. Univ. L.R.* 278 (1968).
53. Unless the delegation principle could be applied, but this possibility is open to doubt in Australia, and runs counter to the dislike for the principle shown in *Tesco Supermarkets Ltd. v. Natrass*. See *supra* n.11. Even if the delegation principle could be applied, it would probably require delegation of some substantial function to one person—a widespread division of power or authority to several persons could easily be insufficient, as is evident from the reasoning of Lord Pearson in *Tesco*. See Fisse, "The Delegation Principle" 10 *Crim. L.Q.* 417 (1968). Consider also the possible application of the scope of employment principle to offences of advertence. See *Ferrier v. Wilson* (1906) 4 *C.L.R.* 785; *R. v. Australasian Films Ltd.* (1921) 29 *C.L.R.* 195.
54. *E.g.* s.24(1) Trade Descriptions Act, 1968 (U.K.); s.3(2) Unfair Advertising Act, 1970-1971 (S.A.).
55. See n.37 *supra*.

responsibility described by enacting offences which do not explicitly require fault on the part of the individual performer of the conduct prescribed, and which therefore more readily admit of vicarious responsibility. Such an approach, which is perhaps evident in s.21(1) of the Consumer Protection Act, 1969 (N.S.W.)<sup>56</sup>, should be avoided since it creates strict individual responsibility, extends corporate responsibility beyond the limits suggested by the justifications which are likely to be advanced in support of entity responsibility<sup>57</sup>, and, as will be seen below, may have the effect of bringing non-corporate employers within the reach of vicarious responsibility where there is no need<sup>58</sup>.

A somewhat different point concerning the interrelationship between primary individual responsibility and corporate responsibility arises from a provision such as s.57(2) of the Consumer Protection Act, 1969 (N.S.W.). Section 57(2) provides as follows:

"Where a person convicted of an offence against this Act or the regulations is a body corporate, every person who at the time of the commission of the offence was a director or officer of the body corporate shall be deemed to have committed the like offence and be liable to the pecuniary penalty or imprisonment provided by this Act for that offence, unless he proves that the offence was committed without his knowledge or that he used all due diligence to prevent the commission of the offence"<sup>59</sup>.

This is not a good provision. The principal effect of s.57(2) is to depart from present requirements of complicity by placing a persuasive burden of proof upon a director or officer to show an absence of knowledge. But this effect can only occur if the corporation is first held responsible. Now to prove that the corporation is responsible, it will be necessary under *Tesco Supermarkets Ltd. v. Natrass* to prove complicity or commission on the part of some person performing a managerial function. Except where the relevant offence imposes vicarious responsibility, or requires only negligence on the part of D's management<sup>59a</sup>, corporate responsibility will therefore be excluded where commission or complicity has occurred at a lower level in the corporation and yet where awareness at managerial level is strongly suspected but

56. "No person shall sell any prescribed goods unless there is conspicuously appended thereto, or if so prescribed, to any covering, label or thing used in connection therewith, in such manner as is prescribed, the prescribed trade description relating to those goods."

See also s.27 Consumer Protection Act, 1969 (N.S.W.) and compare the operation of s.24 Trade Descriptions Act, 1968 (U.K.) to equivalent offences.

57. Vicarious responsibility is not limited to situations where those justifications are pertinent. *E.g.* it is not necessary that difficulty exists in locating or convicting guilty individual officers or employees.

58. See text at n.64 *infra*.

59. Contrast the provisions considered by Leigh, *supra* n.3, at 176-186; s.20(1) Trade Descriptions Act, 1968 (U.K.); s.44(5) Consumer Affairs Act, 1970 (Qld.). In addition to the point raised in the text consider why such responsibility should be limited to directors and officers. See text preceding and following n.43 *supra*.

59a See *e.g.* s.20(1) Trade Descriptions Act, 1968 (U.K.), and note that it may be possible to have situations where X's full awareness is strongly suspected and yet where it may be difficult to establish a failure to take reasonable precautions. See the material cited n.20 *supra*; and *Graham v. Allis-Chalmers Manufacturing Company* 182 A.2d 328 (1962).

cannot be proven beyond reasonable doubt. It would seem much more appropriate here to alter the persuasive burden of proof in relation to corporate responsibility but to retain for individual responsibility the requirement that complicity must be established beyond a reasonable doubt<sup>60</sup>.

(ii) *Relationship Between Vicarious and Corporate Responsibility*

The relationship between vicarious and corporate responsibility has a number of aspects<sup>61</sup>, several of which are involved in *Tesco Supermarkets Ltd. v. Natrass*<sup>62</sup>. However, I wish to deal with only one here. It is as follows. As has been discussed already, the present approach to corporate responsibility, as adopted in the *Tesco* case, runs counter to likely justifications of entity responsibility insofar as those justifications suggest that in situations where entity responsibility is called for it may be quite appropriate to hold D responsible for the conduct of low or high level personnel. Consequently, in cases where the need for entity responsibility is suggested by such justifications, and where the relevant offence has been performed (or authorised, or encouraged) by officers or employees other than those exercising managerial functions, the present law creates some pressure to hold D responsible by the method of construing the offence involved as being one of vicarious responsibility. But this method is crude and should not be imported into the law. Construing a particular offence as imposing vicarious responsibility means that this form of responsibility extends to all employers, corporate or individual, large or small. Different fractions are not refined out. This is unfortunate. The need to hold corporate employers vicariously responsible may easily arise from considerations which are inapplicable to most individual employers. For example, division of power and authority is generally much more a problem in the case of corporations. However, for the purpose of vicarious responsibility, no distinction would be drawn between individual and corporate employers if the demands in relation to the larger section of the class (the class being employers) are thought to be sufficiently greater than those of the smaller section<sup>63</sup>. Unless vicarious responsibility is rejected on the basis of the vague "class of luckless victims" reasoning in *Lim Chin Aik v. The Queen*<sup>64</sup>, the fate of the smaller section will be determined according to the vicissitudes of prosecutorial discretion<sup>65</sup>.

Contrast the position if there were a system of corporate criminal responsibility sufficiently attuned to the aims of entity responsibility, as outlined, to

60. See part 2 of this article, justification (iv).

61. See Leigh, *supra* n.3, chap. 6.

62. Notably an attempt on the part of some members of the court to regard the delegation principle as being a principle more of corporate rather than vicarious responsibility. But see *John Henshall (Quarries) Ltd. v. Harvey* [1965] 1 All E.R. 725, at 729.

63. Compare Fisse "Vicarious Responsibility for the Conduct of Independent Contractors" (1968) Crim. L.R. 537, 605.

64. [1963] A.C. 160. See also *Sweet v. Parsley* [1970] A.C. 132; *Moussell Brothers v. London and North Western Ry.* [1917] 2 K.B. 836.

65. In this respect consider Kramer, *supra* n.21; but see Hadden, "Strict Liability and the Enforcement of Regulatory Legislation" (1968) Crim. L.R. 496. I think Hadden's statements at 497-498 tend to underrate the effect that soundly based theoretical fault requirements may have on the behaviour of officials charged with enforcement, and the development of institutional norms.

make resort to the doctrine of vicarious responsibility rarely necessary. The fate of individual employers would be more likely to rest upon defined fault requirements, and not so much upon prosecutorial discretion.

### 3. Some Suggestions

#### A. *The Purposes of Corporate Criminal Responsibility*

It was argued above that the present corporate identification approach does not match possible justifications of corporate criminal responsibility. Why not abandon the present approach and define corporate responsibility expressly in terms of the justifications which are deemed sufficient? Why not state that corporations will be responsible in situations such as the following: where it is beyond reasonable enforcement resources to locate guilty individual officers and employees or to obtain convictions; where a guilty officer or employee is likely to be replaced by another who will commit the offence on a subsequent occasion; where the organizational loyalty of the guilty officer or employee is strong; where the need for measures of corporate rehabilitation or reformation is shown by the offence committed on behalf of the corporation; or where the guilty individual officer or employee has skipped the jurisdiction and is harboured by a foreign corporation related to the corporation on behalf of which the offence was committed<sup>66</sup>? In relation to public information, why not a provision which explicitly enables a court to instigate publication of the relevant details<sup>67</sup>? Finally, why not the institution of a special procedure expressly and exclusively aimed at recovery of profits made by corporations from offences committed on their behalf or within their structures<sup>68</sup>?

Corporate criminal responsibility is complex in nature. A variety of possible justifications exist, and it is inadequate to blend these into one general definition; the concoction will either lack necessary ingredients or be too strong. Thus, as I have attempted to show, the *Tesco* principle both prevents the imposition of corporate responsibility where, on the justifications for entity responsibility outlined, it is warranted, and, in some instances, allows responsibility where it is probably unnecessary<sup>69</sup>. The position would be little better, and possibly worse, if corporations could always be held responsible for the conduct of officers or employees at any level—the possible harshness of so widespread an extension of corporate responsibility is probably too unsavoury<sup>70</sup>. By contrast the approach suggested would require a direct reflection of the relevant justifications for entity responsibility, and in this way would also limit the range of situations where corporations could be held responsible. The scope of corporate criminal responsibility would be restricted on the basis of functions

66. See the discussion in part 2 of this article.

67. See Fisse "The Use of Publicity as a Criminal Sanction Against Business Corporations" 8 M.U.L.R. 107 (1971) for references pertaining to the provision of information, as well as for a discussion of publicity sanctions.

68. See Note, "Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions" 71 Yale L.J. 280 (1961); but see Williams, *Criminal Law—The General Part* (2nd ed.), 864; and compare I Working Papers, *supra* n.15, 203-206 (class suit for recovery of damages).

69. See text at notes 28, 29 and 30, *supra*.

70. But contrast the position in the U.S.A. See n.49 *supra*. In relation to the statement in the text note the disqualification provision in s.30 Consumer Protection Act, 1969 (N.S.W.).

of such responsibility rather than real or imagined visions of the corporate soul.

### B. "Management Functions"

The concept of "management functions" relied upon in *Tesco Supermarkets Ltd. v. Natrass* as a discrimin of corporate criminal responsibility has been criticised here on the grounds of unworkability. Obviously this concept would play no part in the functional approach to corporate responsibility suggested in the preceding section, and the problem of its unworkability would be avoided. However, a functional approach such as that outlined would also create problems in operation. For example, how does one test the strength of feelings of group or organizational loyalty? What is meant by "reasonable enforcement resources"<sup>71</sup>? Is it possible to assess what profits have been made from the commission of offences<sup>72</sup>? Yet at least a functional approach is aimed at questions more concrete in nature than the abstract enquiries concerned with finding the corporation itself, or the conduct or persons which can be "identified" with the corporation. Furthermore, the present corporate identification theory employed by the law is most unlikely to advance knowledge of organizational structures (or at least the law's knowledge thereof) or to shed new light into the fundamental enquiry whether corporate criminal responsibility is really necessary at all<sup>73</sup>. I doubt whether the same is true of the approach suggested.

### C. *Interrelationship Between Primary, Vicarious, and Corporate Criminal Responsibility*

Several suggestions follow on from the discussion of interrelationship in the previous section.

#### (i) *Relationship Between Primary Individual Responsibility and Corporate Responsibility*

Desirable fault requirements for primary individual responsibility may differ from those appropriate for corporate criminal responsibility. Care should be taken in drafting to spell out, where appropriate, the different requirements for responsibility. If the functional approach to corporate responsibility suggested above were to be adopted, either in a general code or in particular regulatory statutes<sup>74</sup>, the present difficulties would largely be avoided. However, it would still be necessary to give careful attention to fault requirements for individual responsibility, especially where different classes of individual offenders are involved. Thus, it may well be desirable to split one offence of say selling defective motor vehicles into several different offences, the fault requirements for which are determined according to whether the particular offence applies to salesmen, to management or executive personnel, or to an employee or

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71. Note the possible relevance of a similar test in relation to the control of demonstrations.

72. This is an enquiry which has yet to be given serious research.

73. Compare Hadden, *supra* n.65; and Leigh, *supra* n.3, chaps. 9 and 10.

74. Particular statutes would be quicker (unless reformers really behave unusually) and could provide a variety of useful experiments toward the production of a general code.



officer charged with some specific task, such as reporting defects to D's board of directors or to some public safety authority<sup>75</sup>.

The difficulties presented by s.57(2) of the Consumer Protection Act, 1969 (N.S.W.) are easily avoided, of course, simply by not making individual responsibility conditional upon the commission of an offence by the corporate employer.

(ii) *Relationship Between Vicarious and Corporate Responsibility*

Care should be taken to distinguish between different types of employers. The arguments for holding a large corporation responsible for the conduct of an employee may not be valid in the case of individual employers. If corporate criminal responsibility were shaped along the lines suggested here there would be little reason to construe offences as imposing vicarious responsibility in order to hold corporations responsible—the grounds for vicarious responsibility would be embraced by the definition of corporate responsibility. Consequently the necessity or otherwise of vicarious responsibility would fall to be determined solely in relation to non-corporate employers<sup>76</sup>.

Two advantages would accrue. First, corporate responsibility would be better delimited. Once an offence has been interpreted as imposing vicarious responsibility it matters not whether any of the specific justifications for entity responsibility outlined in this article are present. In theory at least, the decision whether or not an offence imposes vicarious responsibility is made in relation to a generality of cases, not in relation to the merits of the specific case before a court<sup>77</sup>. Consequently corporations may be held vicariously responsible where there is no need. By contrast, the functional approach to corporate responsibility suggested here would involve an enquiry into the merits of each particular case.

The second advantage would be the need for a closer scrutiny of vicarious responsibility in the case of individual employers. Without corporate foundation, would vicarious responsibility quickly sag<sup>78</sup>?

#### 4. A Conclusion

Contemporary passions for enforcing consumer protection and other new regulatory legislation by means of the criminal law have the effect, perhaps not intended, of urging enquiries into present approaches to corporate criminal responsibility. These enquiries may show that *Tesco Supermarkets Ltd. v. Nattrass*, born of precedent, is an unhappy being, full of brains but given to unco-ordinated movements.

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75. On a duty to report, see s.113 National Traffic and Motor Vehicle Safety Act of 1966 (U.S. Public Law 89-563; 80 Stat. 718); and U.S. Senate, Subcommittee on Labor of the Committee on Labor and Public Welfare, 90th Cong. 2nd Sess., Hearings on the Occupational Safety and Health Act of 1968 (S.2864), 610 (Nader).

76. See text to n.66.

77. See further Fisse, *supra* n.63.

78. See Fisse, *supra* n.27, but note that this article treats corporate and non-corporate employers alike. It is clear from the text that I have changed my views on this score.