

## 立法會工商事務委員會

### 董事及合夥人的法律責任

#### 目的

在二零零五年十一月十五日的工商事務委員會會議上，議員要求當局擬備文件，就董事／合夥人對所屬法人團體／合夥機構的不當行為須負法律責任的建議，介紹外地的做法。本文件載述我們搜集其他司法管轄區法例所得的資料。

#### 背景

2. 根據現行的《版權條例》第 125 條，董事或合夥人如同意或縱容所屬法人團體或合夥機構的另一合夥人作出侵權行為，則可能須負法律責任。執法經驗顯示，控方難以證明某項罪行是在有關董事或合夥人的同意或縱容下而觸犯，或是可以歸因於他們本身的任何作為。因此，許多業務最終使用者的盜版個案，結果只是有關公司(作為法律實體)被定罪，並且只處以罰款。有關公司的管理層可能會把這類罰款當作公司營運開支的一部分，並無誘因使其積極採取適當的管理措施，以確保侵權複製品不會用於業務活動。

3. 為加強機構的問責性和鼓勵負責任的業務管治，以防止業務最終使用者盜版活動，當局建議在《版權條例》(第 528 章)增訂一項新罪行：若法人團體或合夥機構的作為引致業務最終使用者刑責，除非該法人團體或該合夥機構負責內部管理的董事或合夥人能夠證明他們沒有授權任何人作出有關侵權作為，否則他們須負上法律責任。若沒有該等董事或合夥人，則在董事或合夥人直接授權下負責內部管理的人士須負上責任。在這建議下，有關的董事、合夥人或高級人員或須由於他們在法人團體和合夥機構內所擔任的職位或負責的管理職能而就機構的不當行為負上個人責任。

4. 工商事務委員會曾在二零零五年十一月十五日的會議討論有關建議，議員對擬議罪行隱含把舉證責任轉移到董事／合夥人的規定表示關注。議員察悉《廣播條例》(第562章)也有類似條文，訂明董事及合夥人對業務上使用未經批准的解碼器的法律責任，並要求當局參考外地的做法。

## 外地的做法

5. 我們研究了英國、新加坡、美國和澳洲的法例。由於董事和合夥人就其公司的不當行為負上責任的問題可涉及廣闊的範疇，在下文各段載述的資料是我們盡力所能找到的資料。

## 與知識產權相關的罪行

6. 英國和新加坡的知識產權法例載有類似《版權條例》第125條的條文<sup>1</sup>。在該等條文下，控方須證明有關的罪行是在董事或合夥人的同意或縱容下進行的，或是歸因於有關人士本身的作為。此外，英國和新加坡的知識產權法例規定合夥機構的合夥人須承擔該機構所觸犯罪行的法律責任。有關條文<sup>2</sup>訂明，合夥機構若根據有關法例被裁定有罪，各合夥人也屬犯罪，可被起訴和懲處，能證明對有關罪行不知情或曾試圖阻止該罪行發生的合夥人，則屬例外。然而，有關法例沒有規定法人團體的董事須承擔類似的法律責任。

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<sup>1</sup> 有關的條文是—

(a) 英國《1998年版權、設計及專利法令》第110(1)及(2)條；《1977年專利法令》第113(1)條；及《1994年商標法令》第101(5)條；及

(b) 新加坡《版權法令》第201B(4)條、《商標法令》第107(4)條，以及《專利法令》第102(1)條。

<sup>2</sup> 有關的條文是英國《1994年商標法令》第101(4)條，及新加坡《版權法令》第201B(3)條、《商標法令》第107(3)條，以及《專利法令》第102(5)條。

## 其他範疇的罪行

7. 在澳洲，某些關於環境保護、職業健康及安全、危險貨物及公平貿易的聯邦、省及領地法例，訂有適用於董事及其他擔當管理職能的人員的法律責任條文。有些條文規定觸犯罪行的法人團體的董事須承擔法律責任；有些則規定凡與法團管理有關或參與法團管理的行政人員，不論其職銜及是否法團董事，須一律承擔法律責任；又有一些條文規定被告人有法律責任按「相對可能性的衡量準則」證明本身提出的辯護。相關條文的詳情載於附件(只備英文版)。

8. 另外，美國法院在食品和藥物法例方面發展了一套「負責法團人員」的原則。在這原則下，法團在某些關於個人健康和福祉的法例下若負上責任，該法團的職員可因其擔任的職位而須承擔個人責任。法院認為，若商業機構提供影響公眾健康和福祉的服務和貨品，在該等機構內擁有相關的責任和權力的人士須承擔較嚴格的責任。亦即是說，該等人士不單有責任主動查究違規的情況，並作出補救的措施，更應推行措施以防止違規的情況發生，否則該等人士須就團體的不當行為負責。

工商及科技局  
工商科  
二零零六年四月

## Derivative liability in Australia

### *Environmental legislation*

Section 91(1) of the Waste Management and Pollution Control Act 1988 (Northern Territory) provides that where a body corporate commits an offence under the Act, every person who is a director of or who is concerned in the management of the body corporate is to be taken to have committed the same offence. Section 91(2) provides that it is a defence if the defendant establishes that –

- (a) the body corporate had, under this Act, a defence to the offence that the defendant is, apart from this section, to be taken to have committed;
- (b) the act or omission that constituted the offence took place without the defendant's authority, permission or consent;
- (c) the defendant did not know, and ought not reasonably be expected to have known, that the offence was to be or was being committed and took all reasonable steps to prevent or stop the commission of the offence; or
- (d) the defendant could not by the exercise of reasonable diligence have prevented the commission of the offence by the body corporate.

Section 493 of the Environmental Protection Act 1994 (Queensland) provides that if a corporation commits an offence under any provision of the Act, each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure that the corporation complies with the Act. However, it is a defence for an executive officer to prove –

- (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence – the officer took all reasonable steps to ensure the corporation complied with the provision; or

- (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

***Occupational health and safety***

Section 26 of the Occupational Health and Safety Act 2000 (New South Wales) provides that if a corporation contravenes any provision of the Act, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that –

- (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

Section 167 of the Workplace Health and Safety Act 1995 (Queensland) provides that if a corporation commits an offence under any provision of the Act, each of the corporation's executive officers<sup>1</sup> also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision. However, it is a defence for an executive officer to prove –

- (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer exercised reasonable diligence to ensure that the corporation complied with the provision; or
- (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

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<sup>1</sup> Schedule 3 of the Act defines executive officer of a corporation, to mean a person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer.

### ***Hazardous goods***

Section 42(5) of the Road and Rail Transport (Dangerous Goods) Act 1997 (New South Wales) provides that if a body corporate commits an offence under the Act, a person who is a director, secretary or manager of the body corporate or who is otherwise concerned in the management of the body corporate is liable to be punished as an individual who has been found guilty of the offence unless the person satisfies the court that –

- (a) the person did not know that the offence was committed, or
- (b) the person was not in a position to influence the conduct of the body corporate in relation to the offence, or
- (c) the person took reasonable precautions and exercised due diligence to prevent the commission of the offence.

Section 173 of the Dangerous Goods Safety Management Act 2001 (Queensland) provides that if a corporation commits an offence under any provision of the Act, each of the corporation's executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision. However, it is a defence for an executive officer to prove –

- (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer exercised reasonable diligence to ensure the corporation complied with the provision; or
- (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

### ***Fair trading legislation***

Section 96 of the Fair Trading Act 1989 (Queensland) provides that if a body corporate commits an offence under the Act, each director or member of the governing body of the body corporate shall, subject to

section 97, be taken also to have committed the offence and is liable to be proceeded against and punished accordingly. Under section 97, it is a defence if the defendant establishes –

- (a) that the contravention in respect of which the proceeding was instituted was due to reasonable mistake; or
- (b) that the contravention in respect of which the proceeding was instituted was due to reasonable reliance on information supplied by another person<sup>2</sup>; or
- (c) that –
  - (i) the contravention in respect of which the proceeding was instituted was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and
  - (ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

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<sup>2</sup> Section 97(2) provides that “another person” does not include a person who was—(a) a servant or agent of the defendant; or (b) in the case of a defendant being a body corporate—a director, servant or agent of the defendant; at the time when the contravention occurred.