

## **Legislative Council Panel on Commerce and Industry**

### **Liability of directors and partners**

#### **Purpose**

At the meeting of the Panel on 15 November 2005, the Administration was asked to prepare a paper on overseas practices on the liability of directors/partners for the misconduct of their corporate/partnership. This paper sets out the results of our research regarding the laws of other jurisdictions.

#### **Background**

2. Under the existing section 125 of the Copyright Ordinance, a director or partner may be liable if he has given consent or connivance to an infringing act committed by his corporate or committed by another partner in the partnership. Enforcement experience reveals that it is not easy for the prosecutions to prove that the offence had been committed with the consent or connivance of, or to be attributable to any act on the part of, the director or the partner concerned. As a result, many cases of business end-user piracy would only result in the company, as a legal entity, being convicted and subjected to only a fine. The management of the companies concerned may treat such fines as one element of the company's operational cost and have no incentive to put in place proper management measures to ensure that infringing copies would not be used in their business.

3. To promote corporate accountability and responsible governance to prevent business end-user piracy, the Administration proposes to introduce a new offence under the Copyright Ordinance (Cap. 528) to the effect that if a body corporate or partnership has done an act attracting the business end-user criminal liability, the directors or partners responsible for the internal management of the body corporate or partnership would be liable unless they can show that they have not authorized the infringing act to be done. If there is no such director or partner, the persons responsible for the internal management of the body corporate or partnership under the immediate authority of the directors or partners would be liable. Under this proposal, the concerned directors, partners or senior officers might be personally liable for corporate misconduct in consequence of the positions they held or the managerial functions they performed in their corporations or partnerships.

4. When the proposal was discussed at the meeting of this Panel on 15 November 2005, Members were concerned about the implied shift of burden of proof to the directors/partners under the proposed offence. Noting that the Broadcasting Ordinance (Cap. 562) also contained similar provisions on the liability of directors and partners for the use of unauthorized decoders in business, Members requested the Administration to also draw reference from overseas practices.

### **Overseas practices**

5. The Administration has studied the legislation in the United Kingdom, Singapore, the United States and Australia. As the issue of directors' and partners' liability for the misconduct of their companies could cover a broad range of subjects, the information set out in the ensuing paragraphs represent the available information that we could identify with our best efforts.

### ***Intellectual property related offences***

6. Provisions similar to the existing section 125 of the Copyright Ordinance can be found in the intellectual property legislation in the United Kingdom and Singapore<sup>1</sup>. Under these provisions, the prosecution has to prove that the offence had been committed with the consent or connivance of, or to be attributable to any act on the part of, the director or the partner concerned. Besides, there are also provisions in the intellectual property legislation in the United Kingdom and Singapore imposing liability on partners for offences committed by the partnership. The concerned provisions<sup>2</sup> have the effect that where a partnership is guilty of an offence under the relevant legislation, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is also guilty of the offence and liable to be proceeded against and punished accordingly. However, no similar liability is imposed on the directors of body corporate.

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<sup>1</sup> The concerned provisions are –

(a) section 110(1) and (2) of UK Copyright, Designs and Patents Act 1988, section 113(1) of the UK Patents Act 1977 and section 101(5) of the UK Trade Marks Act 1994; and  
(b) section 201B(4) of Copyright Act, section 107(4) of Trade Marks Act and section 102(1) of Patents Act of Singapore.

<sup>2</sup> The concerned provisions are section 101(4) of the Trade Marks Act 1994 of the United Kingdom, as well as section 201B(3) of the Copyright Act, section 107(3) of the Trade Marks Act and section 102(5) of the Patents Act of Singapore.

*Offences in other areas*

7. Liability provisions on directors and other officers having managerial functions are found in certain Commonwealth, State and Territory legislation in Australia concerning environmental protection, occupational health and safety, hazardous goods and fair trading. Some provisions impose liability on the directors of a body corporate which committed an offence; some provisions impose liability on the executive officer who is concerned with, or has taken part in, the corporation's management, whatever the person's position is called and whether or not the person is a director of the corporation. Some provisions impose a legal burden on a defendant to prove on balance of probabilities any defence that has been raised. Details of the relevant provisions are at Annex.

8. Separately, Courts in the United States have developed a "responsible corporate officer" doctrine in the context of food and drug legislation. Under this doctrine, the liability of a corporation under certain statutes concerning the health and well-being of an individual could be imputed to a corporate officer by reason of his position in the corporation. The courts take the view that persons vested with the necessary responsibilities and power in business enterprises whose services and products affect the health and well-being of the public should assume more stringent responsibilities. That is, such persons should not only have a positive duty to seek out and remedy violations when they occur but also a duty to implement measures that will ensure the violations will not occur, otherwise the persons concerned may be liable for the misconduct of the corporation.

Commerce and Industry Branch  
Commerce, Industry and Technology Bureau  
April 2006

## 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.