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# Corporations That Kill: The Criminal Liability of Tobacco Manufacturers

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*In April 2002 British American Tobacco Australia became the first tobacco company in Australia to be ordered to pay compensation to a person dying of smoking-related illness. In the United States such civil claims have resulted in tobacco companies being ordered to pay massive remedial and punitive damages. While many now accept that tobacco companies may be civilly liable, little attention has been given to their potential criminal liability. This article challenges the false assumptions surrounding the "legality" of the tobacco industry and outlines the case for criminal responsibility. It then concludes with suggestions for reform of the tobacco industry.*

## Introduction

Over 20 years ago, Ernest Pepples, a lawyer for the United States tobacco manufacturer Brown & Williamson, dared put the unmentionable to paper: the possibility that the tobacco industry might be held *criminally* liable for the harm its products cause. In a draft internal company memorandum,<sup>1</sup> Pepples eloquently described a tobacco industry conundrum:

"If we admit that smoking is harmful to heavy smokers, do we not admit that BAT [Brown & Williamson's parent company] has killed a lot of people each year for a very long time? Moreover, if the evidence we have today is not significantly different from the evidence we had five years ago, might it not be argued that we have been 'wilfully' killing our customers for this long period? Aside from the catastrophic civil damage and governmental regulation which would flow from such an admission, I foresee serious criminal liability problems."<sup>2</sup>

The idea that the manufacture and marketing of tobacco products might result in criminal liability is, to many, an extreme suggestion. Yet the logic is clear. The serious health effects and the addictiveness of tobacco products are well known. Most importantly, they are known to tobacco manufacturers. Yet these companies continue to

produce, market and profit from this inherently dangerous and addictive product.

In Australia, since 1950, tobacco products have taken over 700,000 lives prematurely.<sup>3</sup> The most recent Australian Institute of Health and Welfare study puts the annual figure at 19,019<sup>4</sup> — that is, over 50 deaths a day. Of these, more than 4,000 occur in middle age, with an average of 20 years of life lost.<sup>5</sup> Around 75 per cent of smokers have tried to quit,<sup>6</sup> and around the same proportion say they would quit if it were painless to do so, with only 18 per cent saying they would continue to smoke.<sup>7</sup>

"Cigarettes and other forms of tobacco are addicting. Patterns of tobacco use are regular and compulsive, and a withdrawal syndrome usually accompanies tobacco abstinence ... [T]he pharmacological and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine."<sup>8</sup>

The overwhelming majority of smokers

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<sup>1</sup> One of millions of previously secret internal tobacco company documents which have come to light over the last eight years through litigation, United States Food and Drug Administration investigations and disclosures by former tobacco industry employees.

<sup>2</sup> Kessler, *A Question of Intent: A Great American Battle with a Deadly Industry* (Public Affairs, 2001), p 370.

<sup>3</sup> See Peto, Lopez, Boreham, Thun and Health Jnr, *Mortality from Smoking in Developed Countries 1950–2000* (Oxford University Press, 1994), pp 36–37 and Ridolfo and Stevenson, *The Quantification of Drug Caused Morbidity and Mortality in Australia* (Australian Institute of Health and Welfare, 1998), p xiii.

<sup>4</sup> Ridolfo and Stevenson, n 3, p xiii.

<sup>5</sup> Ridolfo and Stevenson, n 3, p xiii.

<sup>6</sup> Hassard (ed), *Australia's National Tobacco Campaign, Evaluation Report, Vol 2* (Commonwealth Department of Health and Aged Care, 2000), p 39.

<sup>7</sup> Mullins and Borland, "Do Smokers Want to Quit?" (1996) 20 *Australian and New Zealand Journal of Public Health* at 426–427.

<sup>8</sup> United States Department of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction. A Report of the Surgeon General* (1988), p 14.

commenced smoking before turning 18<sup>9</sup> and about half of all regular smokers die as a result of their smoking.<sup>10</sup>

The point cannot be emphasised strongly enough: tobacco is a product that is inherently addictive and lethal, with no advertised therapeutic benefit and no safe level of use. The notion of a corporation manufacturing and marketing such a product for profit is radically counter to many basic principles that apply across society and that are, in fact, reflected and enshrined in the law. One need only reflect on current debates about harmful psychoactive drugs other than tobacco to appreciate just how extraordinary the current situation is. The boundaries of these debates — at what might be called the progressive end — extend no further than the notion that such drugs ought to be available to those who are addicted to them or, in some circumstances, to those who otherwise want to use them. The debate stops well short of countenancing profit-making. Nobody suggests that if you make harmful psychoactive drugs available to addicts, or even recreational users, you must, as a matter of logic or necessity, open a commercial market in those drugs. A clear distinction is drawn between users and those who profit from use and exploit addiction: the traffickers and dealers. The distinction is a crucial and an obvious one, yet it is one that has been lost in respect of tobacco.

Profiting from the manufacture and sale of a product with tobacco's characteristics is objectionable on at least two grounds. The first is moral, and was clearly expressed by the Prime Minister, John Howard, when he said, of (non-tobacco) drug traffickers:

"I don't think there's anybody in the Australian community who has anything other than maximum contempt and zero tolerance for those who seek to make money out of human misery and human suffering."<sup>11</sup>

The second is practical, with the sale of a dangerous, addictive drug for profit inevitably increasing its dangerousness. The primary concern of the manufacturer is to satisfy shareholders and maximise profits. Issues of public safety do not feature. On the contrary, as much as possible of the drug must be sold, regardless of the negative health consequences for smokers. Consequently, the toll of death and disease must rise as a matter of commercial necessity.

Yet the tobacco industry is not seen to be

trafficking in drugs. It does not find itself shunned and condemned by society. On the contrary, it is feted for its sponsorship and regarded as a good corporate citizen. It is a master of lobbying, hospitality, marketing, product design and public relations, portraying itself as a caring industry doing no more than looking after the needs of its customers. It has profited, and continues to profit, as if it were an ordinary profit-making industry.

The purpose of this article is to present a different view and to show that there is substance to the "serious criminal liability problems" envisaged by Pepples: that tobacco manufacturers may be criminally liable under the general criminal law. Initial responses to suggestions of tobacco industry criminal liability are often dismissive. We argue that such responses are peremptory, and tend to rest on false and unexplored assumptions. Once these assumptions are challenged, the realities they obscure exposed, and the history and ongoing story of tobacco industry conduct revealed, the case for tobacco industry criminal liability becomes a compelling one. Pepples' anxieties can be seen for the well-founded fears they are, and a matter of genuine concern for tobacco manufacturers, their executives, lawyers and shareholders.

In stating the case for the criminal liability of tobacco corporations, we do not underestimate the practical difficulties in successfully bringing such a prosecution. However, the criminality of conduct is not lessened by difficulties in bringing successful prosecutions. Our purpose is to demonstrate the inherent criminality of selling a dangerous, addictive product with full knowledge of the negative health consequences. The difficulty of bringing prosecutions in respect of such conduct only serves to highlight that the current situation is intolerable, and to underline the urgent need for regulation of the tobacco industry.

## **Unravelling the false assumptions: Looking beneath the veneer of legality**

Before considering the substantive basis on which tobacco companies may be held criminally liable for their actions, it is necessary to consider the key assumptions which tend to prevent us from thinking of the tobacco industry as criminal. Tobacco is such an everyday part of our culture and our physical environment that it cannot but be the subject of countless assumptions and inferences. Over 20 per cent of the adult Australian population smokes. Tobacco products are sold in newsagents, milk bars, supermarkets, tobacconists, petrol stations, convenience stores, and so on. It is impossible to go for a five minute walk in a shopping district without coming across numerous tobacco retail outlets and scores of people smoking. Tobacco products are still advertised — though in

<sup>9</sup> Hill and Borland, "Adult accounts of onset of regular smoking: influences of school, work and other settings", *Public Health Reports* 1991; 109: 181–185.

<sup>10</sup> Doll, Peto, Wheatley, Gray and Sutherland, "Mortality in Relation to Smoking: 40 Years' Observations on Male British Doctors" (1994) 39 *BMJ* 901.

<sup>11</sup> Brady and Shaw, "PM Pledges Help For Users, War On Pushers", *The Age*, 19 March 1999, p 6.

increasingly limited ways — and resplendently packaged and branded so as to invoke associations of sophistication, sexuality and freedom; associations which owe their power to the success of marketing campaigns of the past. Many of the assumptions we make about tobacco relate to tobacco manufacturers and their place in society and under the law. While we may accept that tobacco manufacturers act unethically and irresponsibly — after all, they profit from death and disease — surely they act legally?

Such an assumption is supported by three premises. First is the notion that tobacco is a “legal product”. Second is the notion of the tobacco industry as a “legal industry”, or one sanctioned or authorised by government. The third, which is really a variant of the second, is that tobacco manufacturers must act legally because if they did not they would be prosecuted. These assumptions exercise tremendous influence in framing perceptions of the lawfulness or unlawfulness of the conduct of the tobacco industry, and of the appropriate role of the criminal law in judging or punishing that conduct. They are aired regularly when issues of tobacco industry legal liability — let alone criminal liability — are raised. However, we argue that closer analysis reveals that each is based on deeply flawed reasoning.

### *The “legal product” non sequitur*

The term “legal product” plays a powerful role not only in reflections on tobacco industry legal liability, but across tobacco regulation and policy debates generally. Tobacco industry donations to political parties, sponsorship of sporting events and exploitation of the remaining avenues of tobacco advertising are often defended on the ground that tobacco is a “legal product”. The corollary of that statement is said to be that tobacco companies must be treated as any other manufacturer of a “legal product” would be. While we may debate whether tobacco ought to be banned — made an “illegal product” — if we are not prepared to embrace prohibition as a solution, so it is argued, there is no basis upon which to distinguish between tobacco manufacturers and other corporations.

Such conclusions are based on a false premise: that there is such a thing as a legal or an illegal product. While such terminology is convenient shorthand in certain contexts, it conceals a fundamental distinction: that the law applies to *conduct*, not to products. Products cannot be legal or illegal. Products simply exist. It is the conduct of human actors — whether as individuals or corporate entities — who do things with, or in relation to, products that has legal status.

The distinction may clearly be demonstrated in the context of so-called “illegal” drugs such as heroin. Heroin itself is neither legal nor illegal. It is regulated as a controlled substance, such that certain

conduct in respect of it may be illegal, but the drug itself is not legal or illegal. Imagine two people in a room, alone with a cap of heroin. They may be two drug dealers, a drug dealer and an addict, or two addicts. They may be two police officers in a station after seizing the cap of heroin from a dealer. Or two scientists conducting an experiment. Or two students who have broken into the scientists’ laboratory. The story can be told in different ways. In none of these versions will the cap of heroin be either legal or illegal. It will just be a cap of heroin. But the *conduct* of the two people in the room may be legal or illegal. The law needs to know who, why, where, what, and how before legality can be determined.

If heroin is unthinkingly branded an “illegal product”, tobacco is shoved in the “legal product” category just as quickly. But what does this mean? It is illegal to sell tobacco to children. It is illegal to smoke it in certain enclosed public places. These examples again demonstrate the point that the law is concerned only with contextual conduct, not with meaningless labels.

To designate a product as a controlled substance (that is, colloquially, an “illegal” substance) is a convenient way of controlling and regulating conduct in respect of that product. But the fact that a particular product is not so designated (that is, is colloquially regarded as a “legal” product) should not be allowed to clothe the conduct of all those who deal with the product in any way whatsoever with the guise of legality. For people can do all sorts of illegal things with products that it is not illegal to use or possess. Just as the use or possession of heroin may be lawful, so we would suggest that the manufacture and marketing of tobacco may be criminal.

### *The “legal industry” non sequitur*

Criticisms of the tobacco industry are often defended on the ground that the industry is a “legal industry” or engaged in a “legal business”. Again, the corollary of that position is said to be that, as long as tobacco is not prohibited, the tobacco industry must be left to do what it does; for it is acting legally. Such an argument seems more plausible because of the web of laws relating to tobacco products and the tobacco industry. In Australia those laws include the prohibition of print and electronic advertising, the mandating of rotating health warnings and tar/nicotine/carbon monoxide measurements on cigarette packs, the prohibition of sales to minors, the restriction of in-store displays and the imposition of substantial excise taxes on manufacturers. This combination of regulation and taxation policy is said to demonstrate a government (and community) decision to allow the tobacco industry to operate; to designate it a “legal industry”.

However, such an assumption is based on the

same flawed reasoning as the description of tobacco as a “legal product”. As with products, industries and corporations are neither legal nor illegal — only their *conduct* can be legal or illegal. Industries or corporations may be regulated, but the fact of their regulation does not endow legality upon every element of their conduct. Any person or corporation — specifically regulated or not — may commit an illegal act, or engage in illegal conduct. It is axiomatic that all individuals and corporations are bound not only by the laws that specifically apply to them, but also by the generally applicable laws that apply to their conduct. The fact that a person or corporation is specifically regulated does not confer an immunity from the operation of other laws. So while there may be no industry-specific laws prohibiting the manufacture and marketing of tobacco, tobacco manufacturers are, like everybody else, subject to the general criminal law; and it is here that we argue that the criminal liability of these companies may be found.

For example, imagine a tobacco manufacturer that complies with every law that applies specifically to the conduct of tobacco manufacturers. It places the prescribed health warnings on its products, it does not advertise on television, and so on. Now imagine that this manufacturer has, after years of painstaking investigation, discovered the cheapest way ever to make cigarettes that taste good. However, the scientists tell the manufacturer that these new cigarettes will cause paralysis-inducing brain tumours in one in every two teenage smokers. The company’s lawyers are briefed. They scour the provisions of the legislation and regulations dealing specifically with tobacco. They cannot find a single provision that states that the company cannot, to maximise its returns, sell cigarettes it knows will cause paralysis-inducing brain tumours in one in every two teenage smokers, without telling this to its consumers. The company proceeds to manufacture and market the product and, sure enough, the scientists’ warnings come true. Would anyone seriously suggest that such conduct was not criminal?

Though the example might appear extreme (to the reader who has not followed the tobacco story closely), what it clearly demonstrates is that compliance with all specific laws and regulations does not equate with legal conduct. This is because all laws that have general application apply as much to those covered by specific laws as they do to everyone else, unless their operation is either specifically or impliedly excluded. Questions of legality must be asked in the context of the general as well as the specific. Obviously, the *Tobacco Advertising Prohibition Act 1992* (Cth), the *Trade Practices (Consumer Product Information Standards) (Tobacco) Regulations* (Cth) and the *Tobacco Act 1987* (Vic) all apply to tobacco

manufacturers. But so, too, do the common law and the *Crimes Act 1958* (Vic).

*If it were illegal, they would be prosecuted*

It is tempting to think that all conduct which is illegal is prosecuted. However, many offences are not prosecuted for various reasons — generally, because a prosecution would not be in the public interest, or for other reasons of public policy. For example, minor drug offences will often be dealt with by a caution. This does not mean that a crime has not been committed, only that prosecution is not appropriate in the circumstances. In the context of tobacco manufacturers, the likely explanation is not that it is not in the public interest to prosecute, but rather that prosecutors themselves are seduced by the idea that tobacco manufacturers must be acting lawfully. However, the question is not whether the conduct is prosecuted or not, but whether it is legal or illegal. The fact that nobody looks for criminal behaviour does not mean that it does not exist. The fact that tobacco corporations have not been prosecuted does not prove that they are acting legally. It simply means that the proposition has not been tested.

The wrongfulness of the tobacco manufacturers’ actions has been demonstrated in the United States where, in addition to awarding compensatory damages, five separate United States juries have now returned massive punitive damages verdicts against the tobacco industry in personal injury litigation:<sup>12</sup> *Henley*, San Francisco, 1999, punitive damages of \$US50 million (reduced by the trial judge to \$US25 million); *Branch-Williams*, Portland, Oregon, 1999, \$US71.5 million (reduced to \$US32.5 million); *Whiteley*, San Francisco, 2000, \$US20 million; *Engle*, class action on behalf of up to 500,000 Floridians, Florida, 2000, \$US145 billion;<sup>13</sup> *Boeken*, Los Angeles, 2001, \$US3 billion (reduced to \$US100 million). Punitive damages

“which have been described as quasi-criminal ... operate as private fines intended to punish the defendant and to deter future wrongdoing ... [They are levied] to punish reprehensible conduct and to deter its future occurrence ... ([P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant’s misconduct was especially reprehensible).”<sup>14</sup>

<sup>12</sup> Causes of action pursued have included negligence, false representation, deceit, breach of express warranty, unfair competition/unlawful business practices, negligent false and misleading advertising, intentional false and misleading advertising, fraud, failure to warn and strict product liability.

<sup>13</sup> This verdict is under appeal.

<sup>14</sup> *Cooper Industries Inc v Leatherman Tool Group Inc* 121 S Ct 1678 at 1683 (2001) per Stevens J, with Rehnquist, CJ, O’Connor, Kennedy, Souter, Thomas and Breyer JJ joining.

The award of punitive damages represents a statement by the jury that it considers the defendant's conduct not simply as justifying compensation, but to be wrong and deserving of punishment. So, where conduct which causes death and disease is judged by jury after jury to be deserving of record amounts of punitive damages, the question must be asked: why should the criminal law not also apply?

### **The criminal liability of tobacco corporations**

So far, we have exposed the myths that would seek to characterise the conduct of tobacco companies as lawful. We now turn to consider how it is that the conduct of these companies may fall within the ambit of the general criminal law.

It is now generally accepted that a corporation may be held criminally liable in its own right, and corporations are routinely subject to criminal prosecutions across the range of corporate activity, from consumer protection to workplace safety. Because a corporation is an artificial entity, it is apparent that it cannot act except through its employees or agents. There must therefore be a method of attributing the conduct of individuals to the corporation.

There are essentially two ways in which this may be done: vicarious liability and direct liability. Under the doctrine of vicarious liability, the corporation is made liable for the conduct of its employees or agents acting within the scope of their employment/agency.<sup>15</sup> Vicarious liability is contrary to the common law presumption that criminal liability is personal, and is therefore a creature of statute. However, vicarious liability is inapplicable in this context for two reasons. First, there are no statutory offences which are directed specifically at rendering tobacco manufacturers liable for causing death or injury. Secondly, vicarious liability is generally imposed in respect of less serious "regulatory offences" and would not be imposed for offences which are truly criminal in nature such as those under the *Crimes Act 1958* (Vic).

This leaves direct liability. Under direct liability, or the identification doctrine, liability is imposed upon a corporation for the conduct of individuals who are found to be the "directing mind and will" of the corporation.<sup>16</sup> Under this doctrine the corporation will only be liable for the conduct of those individuals who are of sufficient seniority that they may be identified as being the company. In practice, this is limited to the directors and senior managers of the company. Therefore, for the

company to have committed the offence, that offence must essentially have been committed by a senior officer of the company. In addition, the conduct of the board of directors is regarded as being the conduct of the company itself and this may be sufficient to ground criminal liability.<sup>17</sup> Consequently, in order for a corporation to be criminally liable it must be shown that the relevant conduct was engaged in by the board or senior management. We now turn to consider the nature of that conduct in the context of tobacco manufacturers.

### *The offending conduct*

Traditionally, in applying the identification doctrine one looks for the conduct of an individual which may be attributed to the corporation. This focus on individuals is understandable, given that in other businesses the causing of harm is not an inherent aspect of the business. However, such an approach is unhelpful in the context of tobacco manufacturers as it is not the actions of individual employees that gives rise to the harm. It is the very nature of the business itself.

Therefore we do not propose to focus on individual employees as the source of the offending conduct. Rather, we argue that the relevant conduct is the collective enterprise of design, manufacture, distribution and marketing of tobacco products. The whole business of the corporation is to persuade individuals to engage in an activity which is harmful to their health, and it is this which constitutes the *actus reus* of the offence.

However it is not sufficient simply to describe the relevant conduct as the design, manufacture, distribution and marketing of tobacco products. The full criminality is revealed only when a detailed inquiry is made into every element of conduct the aim or effect of which is to cause or contribute to harm, together with every relevant element of the relationships between the tobacco manufacturers and their consumers.

Through the remainder of the article, the term "offending conduct" is used to refer to the combination of "acts, omissions, statements or silence" which, taken together and in all the relevant circumstances, arguably offend against provisions of the criminal law.<sup>18</sup> This "offending conduct" includes, but is not limited to, the following elements, each of which is readily provable either by testimony of individuals, documents and statements on the public record, and/or previously secret internal tobacco industry documents. The

<sup>15</sup> See, eg, *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715; 58 A Crim R 428.

<sup>16</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, applied in *Hamilton v Whitehead* (1988) 166 CLR 121; 63 ALJR 80.

<sup>17</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 at 923 per Lord Hoffmann.

<sup>18</sup> This draws on the notion of conduct used in the context of misleading and deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth) in *Demagogue Pty Ltd v Ramensky* (1993) 39 FCR 31 at 41 per Gummow J.

essential conduct involves manufacturing tobacco products and placing them in the stream of commerce for sale to individuals while:

- deliberately obfuscating — through public statements, lobbying and misleading advertising — the reality of the dangers and addictiveness of tobacco products;
- developing and using techniques which enable the precise control of nicotine delivery to smokers, and designing products in ways that make it more likely that people will become addicted to them;
- suppressing the development of less harmful products out of a fear this would effectively constitute an admission that existing products were harmful;
- using misleading terminology such as “low tar”, “lights” and “milds” in the knowledge that consumers mistakenly believe these to be less harmful than “regular” products;
- using marketing techniques either deliberately targeted at children, or in the knowledge that such techniques act strongly and persuasively upon children and that the overwhelming majority of the industry’s market commence smoking in childhood;
- failing to disclose the full range and magnitude of the health risks of use of the product;
- funding and conducting deliberately biased scientific research, and suppressing or doctoring damaging scientific research; and
- failing, and continuing to fail, to offer any assistance whatsoever to addicted smokers wanting to quit.

Further, this conduct needs to be seen in its full context including:

- that the overwhelming majority of smokers begin smoking as children;
- that the overwhelming majority of smokers express a desire to quit smoking but continue to smoke primarily because they are addicted to nicotine;
- that the perceptions and smoking patterns of smokers are formed and/or influenced by false and misleading advertising, marketing, branding and imagery;<sup>19</sup> and

<sup>19</sup> Numerous studies have demonstrated that tobacco industry marketing has influenced consumers, and increased the industry’s market, particularly among children and young people. See, eg, Redmond, “Effects of Sales Promotions on Smoking Among US Ninth Graders” (1999) *Preventive Medicine* 28 at 243–250; Feighery, Borzekowski, Schooler and Flora, “Seeing, Wanting, Owning: The Relationship Between Receptivity to Tobacco Marketing and Smoking Susceptibility in Young People” (1998) 7 *Tobacco Control* 123; Gilpin and Pierce, “Trends in Adolescent Smoking Initiation in the United States: Is Tobacco Marketing an Influence?” (1997) 6 *Tobacco Control* 122; Evans, Farkas, Gilpin et al, “Influence of Tobacco Marketing and Exposure to Smokers

- that the overwhelming majority of smokers are less than fully informed about the health risks and addictiveness of smoking.<sup>20</sup>

While individual elements of the offending conduct may not cause death or disease, it can be seen that in its entirety the conduct is intended to increase the sale of an inherently dangerous product to a largely addicted population. It is this conduct which we argue may be criminal, and it is conduct which is, or has been, clearly engaged in by the tobacco manufacturers. It could be shown relatively easily that the board itself, or at least senior management, expressly, or at the very least tacitly or impliedly, authorised or permitted the offending conduct. After all, the offending conduct represents the very essence of the corporation’s business. The same is true in respect of the relevant mental states where they represent the will of the board which itself represents the corporation.<sup>21</sup> Tobacco manufacturers are unusual in this respect as

“[c]riminal acts are not usually made the subject of votes of authorisation or ratification by corporate Boards of Directors”.<sup>22</sup>

### *The prohibition against aggregation*

It may be thought that to rely on this broad notion of “offending conduct” is contrary to the general prohibition against aggregation.<sup>23</sup> That is, in order to prove an offence against a corporation it is necessary to show that the relevant physical and mental elements of the offence can be found in the conduct of one person who is the embodiment of the company. It is not possible to aggregate the acts/omissions and mental states of various people to found liability for the organisation as a whole.

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on Adolescent Susceptibility to Smoking” (1995) 87 *J Natl Cancer Inst* 1538; and Pierce, Lee and Gilpin, “Smoking Initiation by Adolescent Girls, 1944 Through 1988, An Association With Targeted Advertising” (1994) 271 *JAMA* 608.

<sup>20</sup> Although health warnings have appeared on tobacco packaging in Australia since 1974, and most, if not all, of the general public knows that smoking is harmful, the warnings cover only a small number of the diseases and conditions caused by smoking and convey no information as to the magnitude of risks. Research shows that many smokers both underestimate the risks of smoking generally, and are prone to a range of “self-exempting” beliefs. That is, they believe that the general information of which they are aware does not apply to them specifically. See Carter, “Smokers’ Perceptions of Risk (A Compilation of Data from Published Papers)” available from the VicHealth Centre for Tobacco Control and Borland and Lal, “Smokers’ Knowledge and Attitudes About Contents of Tobacco Smoke and of Health Risks”, unpublished paper available from the VicHealth Centre for Tobacco Control.

<sup>21</sup> The individual officers could also be liable as accessories to the principal offence of the company: see *Hamilton v Whitehead* (1988) 166 CLR 121; 63 ALJR 80.

<sup>22</sup> *Commonwealth v Beneficial Finance Co* 275 NE 2d 33 at 82 (1971) per Spiegel J quoting the trial judge.

<sup>23</sup> *HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr App R 10 at 16–17 per Bingham LJ.

However, we would argue that the position of tobacco manufacturers presents a unique situation. It is not the usual situation where it is sought to aggregate the conduct and mental states of various employees to form the actus reus and mens rea of the offence. We are not proposing aggregation in this sense. We are proposing that the entire business of the corporation may be regarded as the actus reus of the offence. While this is, in a broad sense, aggregating the conduct of all relevant employees, it is not a fiction to say that what we are describing is the very conduct of the corporation itself. Such an approach was in fact proposed by the Canadian Law Reform Commission which proposed that the relevant conduct could be committed by corporate representatives acting “individually or collectively”.<sup>24</sup> Further, there is no need to aggregate mental states as we argue that the relevant mental state is found in the board itself or, at the very least, senior management. The conduct and the mens rea are therefore both found in the company in its own right.<sup>25</sup>

### *Causation*

A number of offences for which tobacco manufacturers may be liable are “result” crimes. That is, what is prohibited is conduct which results in certain consequences, rather than the conduct itself. This applies to offences involving the causing of injury and to homicide offences. In such cases, there is a threshold issue of causation whereby it must be shown that the conduct of the accused caused the death or injury. However, it is not necessary to show that the conduct was the sole cause, nor even that it was the dominant cause. It is enough that it was an operating and substantial cause.<sup>26</sup> Thus, it is possible to argue that where a person contracts, or dies of, a smoking-related illness, the offending conduct of the tobacco manufacturer has “caused” the injury or death for the purposes of the criminal law. The presence of other contributing factors does not negate the contribution of the company.

### *Liability for omissions*

Our primary argument is that the conduct of the tobacco corporations, as described above, may be regarded as criminal. An alternative basis of liability

is for the corporation to be criminally liable without resort to principles of attribution by focusing on its failure to act:

“Though a notional entity is incapable of acting in its own proper person; it is not incapable of failing to act.”<sup>27</sup>

This basis of liability is particularly appropriate in the context of offences committed negligently. Where a corporation is under a duty to act, and fails to discharge that duty, then it may be said to have been negligent in its own right, without resort to identification.

“It is in our view much easier to say that a corporation, as such, has failed to do something, or has failed to meet a particular standard of conduct than it is to say that a corporation has done a positive act, or has entertained a particular subjective state of mind. The former statements can be made directly without recourse to the intermediary step of finding a human mind and a decision-making process on the part of an individual within or representing the company, and thus the need for the identification theory, in order to bring the corporation within the subjective requirements of the law, largely falls away.”<sup>28</sup>

There are a number of possible duties to which tobacco companies could be subject. First, there are duties such as that found imposed by s 22 of the *Occupational Health and Safety Act 1985* (Vic) which states that every employer shall ensure so far as is practicable that persons “other than the employees of the employer” are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.<sup>29</sup> It has been held that this duty is not limited to the workplace<sup>30</sup> and so it may be argued that every company, including tobacco manufacturers, is subject to a duty to ensure that others are not exposed to risks as a result of their undertaking. There is also a common law duty to act where the conduct of the accused gives rise to a situation of danger. The accused is then under a duty to take reasonable steps to avert that danger.<sup>31</sup> The failure of a tobacco manufacturer to act in accordance with either of these duties may provide the basis for a criminal charge.

### **Specific offences**

<sup>24</sup> Law Reform Commission of Canada, *Recodifying Criminal Law*, Report No 31 (1987), cl 22(2)(a).

<sup>25</sup> Further, because the offending conduct is broadly defined, there may also be difficulties in framing the presentment with sufficient particularity. Nonetheless, the rule against duplicity does recognise that “conduct which need not, but in some circumstances might, be constituted by activity over time could quite properly be charged in a single count”: see *Walsh v Tattersall* (1996) 188 CLR 77 at 107; 88 A Crim R 496 at 519 per Kirby J.

<sup>26</sup> *Hallett* [1969] SASR 141 and *Royall v The Queen* (1991) 172 CLR 378; 54 A Crim R 53.

<sup>27</sup> Williams, *Criminal Law The General Part* (2nd ed, Steven & Sons Ltd, 1961), p 854.

<sup>28</sup> Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996) at 5.77.

<sup>29</sup> See also *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth), s 17; *Occupational Health and Safety Act 1989* (ACT), s 28; *Work Health Act* (NT), s 29; *Workplace Health And Safety Act 1995* (Qld), s 28; and *Occupational Safety And Health Act 1984* (WA), s 21.

<sup>30</sup> *Whittaker v Delmina Pty Ltd* [1998] VSC 175.

<sup>31</sup> *Miller* [1982] 2 All ER 386.

Having identified the conduct which is alleged to be criminal, it is necessary to identify those criminal offences which may be applicable to that conduct. We will consider three general classes of offences: conduct endangering life or endangering persons; intentionally, recklessly or negligently causing injury/serious injury; and homicide. While our focus is on the law of Victoria and the common law, these should be seen as representative offences only, there being equivalent offences in most other jurisdictions.

### *Conduct endangering life and conduct endangering persons*

Under s 22 of the *Crimes Act 1958* (Vic) a person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence. Similarly, under s 23, a person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence. The offending conduct of the tobacco manufacturers is as described above. The first question that must be asked is whether that conduct places or potentially places another person in danger of death or serious injury. The danger of death or serious injury need only be “appreciable”,<sup>32</sup> that is, more than a remote possibility, and the terms of the legislation clearly state that the conduct need not be proved to have placed a person in danger of death or serious injury. It is enough that it *may* have done so. Whether the conduct is dangerous is determined objectively, the question being whether a reasonable corporation, in the accused’s position, would have realised that its conduct would expose others to an appreciable risk of death or serious injury.<sup>33</sup>

In terms of the mental element of the offence, there are two aspects. It must be shown that the corporation intended to engage in the relevant conduct, and that it was reckless as to the danger which could arise as a result of that conduct.<sup>34</sup> Naturally, the conduct being the business of the corporation, it can clearly be said to have intentionally engaged in the conduct, but was it reckless as to the dangers? Reckless, in this context, requires that the accused realised that the danger of death or serious injury was a probable consequence of its conduct.<sup>35</sup> In the context of tobacco manufacturers, it could clearly be shown that the board of directors knew that their business would

probably expose others to an appreciable risk of death or serious injury. It has been held by the High Court that “good chance” or “likely” are acceptable synonyms for “probable”.<sup>36</sup>

### *Intentionally, recklessly or negligently causing serious injury/injury*

Tobacco manufacturers may also be criminally liable under the *Crimes Act 1958* (Vic) provisions dealing with the infliction of injury. Under ss 16 and 17 it is an indictable offence for a person to intentionally or recklessly cause serious injury. Similarly, it is an offence under s 18 to intentionally or recklessly cause injury. The difference between injury and serious injury is one of degree. Injury is inclusively defined in s 15 as including “unconsciousness, hysteria, pain and any substantial impairment of bodily function”. Serious injury is defined to include a combination of injuries although it need not involve a combination of injuries. A single injury may be sufficient, the concept being approximately equivalent to the common law term “grievous bodily harm”; that is, injury of a really serious kind. Clearly, the causing of diseases such as lung cancer, heart disease, emphysema, stroke, bladder cancer and throat cancer (to name but a few) would constitute at the very least injury and, given their impact, ought to be regarded as serious injury.

However, it is not enough to show that the accused intended to engage in the relevant conduct. It must be shown that the accused intended to cause the relevant injury or serious injury, or was reckless as to whether it resulted.<sup>37</sup> Although there is clearly an awareness on the part of tobacco manufacturers that their products are harmful, it is unlikely that they intend that injury to be the result of their conduct in the sense that they wish to bring it about. It is no longer the case that the law deems an accused to intend the natural and probable consequences of his or her actions, although the fact that the injury was a natural and probable consequence will be one factor suggesting that the accused did, in fact, intend that result.

However, there would appear little doubt that tobacco manufacturers have acted recklessly. For an accused to be reckless under these provisions it must be shown that he or she foresaw the probability that the injury would result.<sup>38</sup> As

<sup>32</sup> *Mutemeri v Cheesman* [1998] 4 VR 484 at 491; (1998) 100 A Crim R 397 at 403 per Mandie J.

<sup>33</sup> *Nuri* [1990] VR 641 at 643-644; (1989) 49 A Crim R 253 at 255-256 per the court.

<sup>34</sup> *Mutemeri v Cheesman* [1998] 4 VR 484 at 486; (1998) 100 A Crim R 397 at 399 per Mandie J.

<sup>35</sup> *Mutemeri v Cheesman* [1998] 4 VR 484 at 490-491; (1998) 100 A Crim R 397 at 404 per Mandie J.

<sup>36</sup> *Boughey v The Queen* (1986) 161 CLR 10; 20 A Crim R 156.

<sup>37</sup> *Westaway* (1991) 52 A Crim R 336.

<sup>38</sup> *Campbell* [1997] 2 VR 585; (1997) 95 A Crim R 391. This high level of foresight is a peculiarity of the provisions of the *Crimes Act 1958* (Vic) and in other jurisdictions all that would be required would be foresight of possibility, making liability even more likely: see, eg, *Coleman* (1990) 19 NSWLR 467; 47

outlined above, it has been held that the words “good chance” or “likely” are appropriate synonyms for “probable”. Therefore it would need to be shown that a tobacco manufacturer knew that there was a “good chance” that its conduct would result in injury and proceeded regardless. The evidence cited earlier, that over 700,000 Australians have died prematurely as a result of tobacco since 1950, and that approximately half of regular smokers die prematurely, would seem ample evidence to satisfy the “good chance” standard.

Tobacco manufacturers may also be liable under s 24 of the *Crimes Act 1958* (Vic) for the offence of negligently causing serious injury. The application of this offence is essentially the same as for negligent manslaughter, the test of negligence being the same, and this test is discussed below.

### *Homicide*

As the conduct of tobacco manufacturers results in the deaths of many people, it is arguable that they may be made criminally liable for homicide. In particular, given that they are aware that tobacco products may cause death, it may be argued that they could be liable for murder. While it may be difficult to establish an intention to cause death, murder may also be committed where the accused was aware that death was a probable consequence of his or her actions.<sup>39</sup> As outlined above, it would be possible to prove that the corporation knew that its activities would probably result in death, thus giving rise to liability for murder. There are, however, practical limitations in prosecuting a corporation for murder which carries a mandatory punishment of imprisonment.<sup>40</sup> As a corporation cannot be imprisoned, it may be argued that

“[T]he court will not stultify itself by embarking on a trial in which if a verdict of Guilty is returned, no effective order by way of sentence can be made.”<sup>41</sup>

Nonetheless, the practical impediments to bringing such a charge should not be allowed to conceal the egregious conduct engaged in by the tobacco manufacturers.

A more practical charge is that of negligent manslaughter. It is difficult to conceive of the conduct of tobacco manufacturers in terms of negligence because the impugned conduct is what they intend to do and do well, and in this context it is perhaps more appropriate to consider liability for omissions. That is, rather than focusing on positive negligent acts, it is simpler to focus on the corporation’s failure to act, thus avoiding issues of

attribution entirely. Consequently it may be argued that, by having created a risk of danger to others, tobacco manufacturers are under a legal duty to take reasonable steps to avert that danger and in failing to do so they may be said to be guilty of negligent manslaughter.

The test of negligence is that the accused’s conduct must have fallen so far short of the standard of care of a reasonable company, and must carry with it such a high risk of death or grievous bodily harm, that the doing of the act merits criminal punishment.<sup>42</sup> Therefore, if we compare the conduct of tobacco manufacturers to the conduct of other companies, we see that they fall far short of the standard of care of a reasonable company. A reasonable company, upon discovering that its products posed a serious threat of death or injury, would either withdraw those products from sale or would render them safe. Clearly, tobacco manufacturers have taken no such steps and, in fact, continue to promote their products and to manufacture them in ways which make it more likely that people will become addicted to them. In doing so, they pose a high risk of death or grievous bodily harm to the public and a jury may find that such conduct, in the circumstances, merits criminal punishment.

### **Tobacco industry defences: “There can be no injury to the willing”<sup>43</sup>**

Historically, one of the main legal obstacles for people suffering from tobacco-related diseases who have sought compensation from tobacco manufacturers has been that of voluntary assumption of risk. After all, the argument goes, nobody is forced to smoke, and smokers who exercise choice must accept responsibility for that choice. The concept of *volenti non fit injuria* is a familiar one in the context of the civil law of negligence.

In the criminal law, issues relating to the contribution of the victim to his or her harm, or acceptance of the risk of harm, are played out in two contexts: those of causation and consent. Undoubtedly, a defendant tobacco manufacturer charged with one of the offences referred to earlier would seek to run strong defences under each of these two heads. That is, consent would be raised as a “lawful excuse” to justify their conduct. How, the defendant would ask, can it be held criminally liable, or causally responsible, for harm that it does not directly inflict and that occurs, if at all, because of the choices and actions of the “victim”? The issue is a crucial one and again, careful analysis

A Crim R 306.

<sup>39</sup> *Crabbe* (1985) 156 CLR 464; 16 A Crim R 19.

<sup>40</sup> *Crimes Act 1958* (Vic), s 3. See, generally, Corns, “The Liability of Corporations for Homicide in Victoria” (1991) 15 Crim LJ 351 at 353–355.

<sup>41</sup> *IRC Haulage Ltd* [1944] KB 551 at 554 per Stable J.

<sup>42</sup> *Nydam v The Queen* [1977] VR 430.

<sup>43</sup> This concept is encapsulated in the Latin maxim *volenti non fit injuria*.

betrays the argument to be superficial and ultimately unconvincing.

The causation argument is easily addressed. As stated earlier, the establishment of legal causation does not require that the defendant's conduct be the sole, or even dominant, cause of harm — it is enough that it is an operating and substantial cause of harm. This is so even where the victim has contributed to his or her own death.<sup>44</sup> On this issue, there ought not be any serious dispute. It can hardly be said that the offending conduct of the tobacco manufacturers is not an operating and substantial cause of harm.

The issue of consent is more difficult. In certain circumstances, it is a defence to an offence against the person to argue that the "victim" consented to the infliction of harm. Therefore, in the context of tobacco, it may be argued that, knowing the risks, the alleged victim chose to smoke and thereby consented to any harm arising from smoking. The issue of consent is not relevant to a homicide charge as a person cannot consent to the causing of his or her own death. In addition, consent is arguably irrelevant to endangerment offences, the offence being the conduct rather than the consequences of that conduct.<sup>45</sup>

Consent is, however, relevant to offences involving the infliction of injury. But do smokers "consent" to any harm they may suffer or any danger to which they are exposed? The notion of consent, as it has evolved in the criminal law, relates to consent by the victim to the infliction of direct force or violence by another; that is, to an assault. Of course, in the tobacco context, we are not talking about the infliction of direct force or violence, but the concepts developed in the cases are nevertheless of relevance. There are two aspects to the issue of consent in this context.

First, consent is no defence to harm above the level of actual bodily harm unless it can be shown that there is some public interest in recognising consent in the circumstances:

"[I]t is not in the public interest that people should try to cause or should cause bodily harm for no good reason."<sup>46</sup>

Exceptions such as boxing (but not prize-fighting), incidental harm caused during sporting contests, chastisement of children, surgery and body piercing have been allowed or tolerated on broad public interest grounds. But where a public interest argument cannot be made out, ordinarily a victim's

"consent" to the infliction of greater than actual bodily harm will be no defence to an assault charge. Clearly the fatal diseases caused by tobacco such as lung cancer, heart disease, stroke, emphysema, bladder cancer and throat cancer cause greater than the level of actual bodily harm. Therefore, *prima facie*, consent is no defence unless it can be shown that there is a public interest involved. It is difficult to argue that there is any relevant public interest at work here. As has been stated, about 19,000 deaths occur a year on current figures. While shareholders and executives in tobacco companies continue to collect several hundred million dollars in profits each year, the rest of society bears billions of dollars in costs associated with increased health care expenditure<sup>47</sup> and reduced productivity.<sup>48</sup> The \$4.6 billion paid by smokers in taxes in 2000-2001 does not adequately compensate the rest of society for the costs it is currently bearing,<sup>49</sup> it being estimated that smoking costs the Australian community more than \$12.7 billion each year.<sup>50</sup>

Secondly, "consent must be full and free and must be as to the actual level of force used or pain inflicted".<sup>51</sup> As to informed consent, most of the offending conduct set out above is unknown to smokers. Smokers generally are unaware of the steps taken by tobacco companies which increase use of tobacco products. Nor are smokers generally aware of the magnitude of the risks that smoking poses, or of the range of conditions caused by smoking which are not currently warned of on tobacco product packaging and of which the tobacco companies continue to fail to inform consumers. In terms of consent which is freely given, it is difficult to talk about genuine consent to the harms of an addictive product, a product which is designed to overcome the capacity to exercise free choice, and to which the vast majority of users have, to the tobacco manufacturers' knowledge, become addicted before reaching the age of 18.

<sup>47</sup> At least \$832.5 million in 1992: Collins and Lapsley, *The Social Costs of Drug Abuse in Australia in 1988 and 1992*, National Drug Strategy, Monograph Series No 3 (Commonwealth Department of Human Services and Health, 1996), Table 4(b) 1, p 35.

<sup>48</sup> Both in the workforce and among those people who are not paid, but whose work keeps the rest of the population fed, clothed and adequately housed (at least \$3,689.5 million in 1992): Collins and Lapsley, n 47, p 35.

<sup>49</sup> Meanwhile, Australian smokers diverted more than \$7 billion of their incomes in the year 2000 on purchasing a product that at least 75 per cent of them wish they were not using, expenditure which could have been spent in other, more productive areas of the economy. Neither the government nor the tobacco companies compensate smokers for the tangible costs of involuntary tobacco use, let alone the immense pain and suffering experienced by their families and friends: ABS, Table 54 Household Final Consumption Expenditure, Current Prices Original (\$m); in *Australian National Accounts: National, Income, Expenditure and Product* (Australian Bureau of Statistics, 2001).

<sup>50</sup> Collins and Lapsley, n 47, p 36.

<sup>51</sup> *R v Brown* [1994] 1 AC 212 at 279 per Lord Slynn.

<sup>44</sup> *Bingapore* (1975) 11 SASR 469.

<sup>45</sup> Compare *R v B* (unreported, Vic Sup Ct, 19 July 1995) where it was held by Teague J that voluntary acceptance of danger may fall within the term "lawful excuse" in the endangerment offences.

<sup>46</sup> *Brown* [1994] 1 AC 212 at 233 per Lord Templeman quoting with approval Lord Lane CJ in *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715 at 719.

Following on from the need for fully informed consent is the need for an equal relationship between the defendant and the alleged victim. The defendant should be able to show that it was of one mind with the alleged victim in respect of the allegedly unlawful conduct. That is, that they had a mutual understanding about what it entailed, that the defendant had nothing to gain by the victim's consent and did nothing to procure or coerce it and that the defendant at all times dealt openly and truthfully with the victim. To the extent that the defence of consent recognises that individuals, as autonomous beings, are capable of making choices as to what they wish to do or not to do, it relies on notions of full information and freedom in decision-making. But the very essence of the offending conduct in this case is to take these away from the victim. Tobacco manufacturers have not, and do not, seek to create honest, equal, mutual relationships with their customers, free of any inappropriate exercise of power. On the contrary, the conduct of tobacco manufacturers is largely about exploitation: exploiting addiction, taking the minds of consumers as far away from the realities of the effects of tobacco use as possible and persuading individuals who wish they were not using tobacco products to do so. In these circumstances, we would argue that "consent" is uninformed, involuntary and meaningless.

### Consequences for regulation

In the memorandum with which we began this article, Ernest Pepples expressed his concern not only at the "serious criminal liability problems" we have outlined, but also at the "governmental regulation" which he feared would flow from an admission that BAT had been "wilfully killing its customers". Pepples' advertence to the likelihood of governmental regulation is understandable. Ordinarily, governments do not sit back and allow companies to wilfully kill their customers. Yet that is precisely what is happening. Twenty years on, things are not all that bad for tobacco manufacturers — in Australia, in particular. Although their conduct is regulated, business otherwise goes on as usual. The profits of tobacco manufacturers increase with every additional product they sell, regardless of the circumstances of purchase or the consequent harm.<sup>52</sup>

We have demonstrated that the conduct of tobacco manufacturers in producing and marketing a product which they know to be dangerous may contravene the existing criminal law and that there is no lawful excuse which justifies their actions. Criminal prosecutions are one possible response to

this situation. Another, and more appropriate long-term solution, is regulation.

It is beyond the scope of this article to set out in detail what an appropriate governmental response would look like. But let us just sketch it in outline. First, it is important to stress that an appropriate governmental response would not require "prohibition", that is, the criminalisation of use and possession of tobacco. Rather, it would facilitate the supply of tobacco products to those who are addicted to them, or otherwise wish to use them, but in circumstances where no person or corporation stands in a position to profit from that supply such that its profits increase with every additional product sold, regardless of the harm caused. Instead, a not-for-profit independent statutory authority, with a statutory harm-minimisation charter, would have the responsibility for ensuring distribution and supply of tobacco products. The authority would also take over communication with consumers about tobacco products. With no incentive to sell more product, and acting under a harm-minimisation charter, it would communicate honestly with consumers, and use its powers of communication to assist consumers to quit smoking, or to shift to less harmful products, if such products were to become available. The products required by the statutory authority would still need to be manufactured by someone (whether the current tobacco manufacturers or others), but the customer of the manufacturer would be the fully informed statutory authority, and not the addicted, uninformed and vulnerable smoker. Manufacturers would compete with one another to satisfy the authority's product requirements. These requirements would be set by the authority, balancing calculations about consumer demand with public health concerns. The incentive to keep growing the market — with all the inevitable human and social costs — would be gone. The tobacco epidemic could be genuinely tackled and conduct which can quite legitimately be described as criminal would no longer be tolerated.<sup>53</sup>

### Conclusion

It is not hard, today, to understand at least some of what was going through Ernest Pepples' mind when he identified his trinity of concerns — catastrophic civil damage, governmental regulation and "serious criminal liability problems" — in that 1980 draft memorandum. The last eight years have seen the release of an avalanche of documents and testimony which have elucidated the basis of Pepples' concerns.

The first of these, catastrophic civil damage, has begun to materialise in the United States. Civil

<sup>52</sup> For example, in its 2000 *Annual Report*, British American Tobacco Australasia reported attributable profit after income tax of \$93 million including abnormal items.

<sup>53</sup> A fuller exposition of such a regulatory response is available from the VicHealth Centre for Tobacco Control.

litigation against tobacco manufacturers is now on foot in countless jurisdictions across the globe, including in Australia. On 11 April 2002, Rolah McCabe became the first person in Australia to successfully sue a tobacco manufacturer for compensation for smoking-related disease. A jury in the Supreme Court of Victoria awarded Mrs McCabe \$700,000 after Eames J had struck out the defence of British American Tobacco Australia Services on the grounds that it had destroyed documents in anticipation of litigation, misled the court about what had happened to these documents, and “warehoused” documents to keep them from Mrs McCabe and the court.<sup>54</sup> So far, however, tobacco manufacturers have managed to avert — or at least delay — the other two of Pepples’ trinity of concerns. We argue here that the time has come to talk openly about both of these — criminal liability and appropriate governmental regulation.

We have, through this article, unravelled the various assumptions that have protected tobacco manufacturers from the sort of legal scrutiny which their conduct has warranted. We have outlined the specific criminal law offences against which that conduct ought to be examined. Whether or not

criminal prosecutions are ultimately pursued, we argue that the current situation cannot be allowed to continue. Not only does it take an unconscionable number of lives and years away from individuals and their families, and impose massive social costs on the community, but it is also offensive to, and makes a mockery of, the ordinary operation of the law. In our view, what we have said here calls for the adoption of a regulatory solution of the type outlined above — where the product is made available to those who are addicted or who otherwise wish to use, but the commercial incentive to sell more and more, and, in so doing, to cause more and more harm and expense, is ended. Such a regulatory solution is eminently practicable and feasible. It meets the needs of those who are addicted to, or simply wish to keep using, tobacco, while addressing the community interest in ensuring that those who wish to stop using are given the best opportunity to do so, and in discouraging new smokers from starting. It does not put tobacco manufacturers out of business — it allows them to operate, but only in the legitimate activity of servicing the needs of the harm-minimising statutory authority, not in endlessly trying to grow the tobacco market. Once the self-serving tobacco industry rhetoric is swept aside, the legal case for such a regulatory solution is clear. Who, apart from those with a vested interest in increased tobacco consumption, could seriously object to such a model?

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<sup>54</sup> *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73. As at the time of writing, the decision and verdict were under appeal.