
**BREAKING THE CYCLE: THE DEVELOPMENT OF
CORPORATE CRIMINAL LIABILITY**

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I Introduction

In recent years, many events have once again brought the issue of corporate criminal liability back into the spotlight. The global financial crisis, the British Petroleum oil spill and the Pike River mine explosion highlighted the devastating harms that can arise out of a misuse of corporate power. These incidents reignited the debate on corporate criminal liability. Unfortunately, the arguments raised appear all too familiar as legal systems worldwide continue to struggle to hold corporations to account.

Globally, corporate criminal liability has gradually expanded, predominantly through legislative reforms. Legislatures have attempted to construct a model of corporate criminal liability that better accommodates the organisational framework of corporations. However, so far, the legislatures have failed to resolve the inherent deficiencies in corporate criminal law and appear to be content to pass legislation that is largely symbolic.

This dissertation seeks to determine why an effective long-term solution has remained elusive despite repeated calls for more effective corporate criminal liability. This dissertation addresses the socio-political influences that have shaped corporate criminal liability over time. Current literature has largely underestimated the impact of these influences, but understanding these issues is crucial to understanding how corporations continue to undermine and evade corporate criminal liability. Without recognising the importance of these influences, corporate criminal liability will face substantial difficulties in transcending its current limitations.

Chapter One outlines the historical development and the common law approaches to corporate criminal liability. The individualist roots of the criminal law have prevented legislatures and judiciaries worldwide from embracing a truly organisational model of corporate criminal liability.

Chapter Two discusses the development of corporate criminal legislation in four jurisdictions: the United Kingdom, Canada, Australia and Italy. Each jurisdiction faced strong opposition from the corporate sector during the legislative process, resulting in the legislatures significantly diluting the provisions of the eventual legislation. The lack of cases brought under corporate criminal legislation in each jurisdiction indicates that the corporate sector has so far managed to thwart any attempts to construct an effective model of corporate criminal liability.

Chapter Three discusses how external parties are able to influence the content and enforcement of corporate criminal legislation. In particular, this chapter focuses on the impact of corporations, prosecutors, the government, the public and the media on corporate criminal law. The strength of these influences means that it is likely that corporate criminal liability will remain in its latent form until the political and economic environment significantly changes. Meanwhile, governments are likely to pursue alternative, less controversial methods, such as stricter individual criminal offences for directors or senior managers of corporations.

II Chapter One: A Brief Overview

A Historical Development

Initially, the English corporation could only be created by a grant from the Crown or by an act of Parliament.¹ These were mainly ecclesiastical bodies controlling church property but evolved to include lay associations, and mercantile and craft guilds. As business and trade increased, there came a growing need for venture capital and the mobilisation of credit to develop new industries. As a result, unincorporated joint stock companies increased in power and prevalence.² Legally, these companies were more closely associated with partnerships than incorporated companies.³

In the 18th century, many unincorporated joint stock companies began to indulge in wild stock speculation and fraud.⁴ In particular, South Sea Company was heavily involved in speculation, bribery and insider trading which artificially raised the share price from £130 to nearly £1000. The expected profits from South Sea Company's trade monopoly with South America or from taking over the national debt of £7,500,000 never eventuated.⁵ The share price crashed causing one of the worst financial crashes in history.⁶ An investigation was launched and in response, the United Kingdom (the UK) Parliament enacted the Bubble Act

¹ Kathleen Brickey "Corporate Criminal Accountability: A Brief History and an Observation" (1982) 60 Wash U LQ 393 at 397.

² At 398.

³ Paddy Ireland "Capitalism without the capitalist: The joint stock company share and the emergence of the modern doctrine of separate corporate personality" (1996) 17(1) JLH 41 at 43.

⁴ Brickey, above n 1, at 399.

⁵ Julian Hoppit "The Myths of the South Sea Bubble" in Ian Archer and Arthur Burns (eds) *Transactions of the Royal Historical Society: Volume 12* (Cambridge University Press, Cambridge, 2002) 141 at 143.

⁶ Ron Harris "The Bubble Act: Its Passage and Its Effects on Business Organization" (1994) 54 J Econ Hist 610 at 610.

1720.⁷ This Act meant that corporations could only be established by an act of Parliament and existing companies could not act outside the remit of their constitutions.⁸

It took over a century for corporations to regain legal and commercial recognition and acceptance.⁹ The Bubble Act 1720 was finally repealed in 1825 and the number of corporations began to increase. Prior to the 19th century, corporations were incapable of committing unlawful acts because they lacked the necessary physical, mental and moral capacity.¹⁰ The principle of *societas delinquere non potest* (a legal entity cannot be blameworthy)¹¹ held considerable weight across the world, particularly in continental Europe in countries such as Italy and Germany.¹² An anonymous case exemplified the judiciary's reluctance to extend criminal liability to corporations where Holt CJ stated "A corporation is not indictable but the particular members of it are."¹³

By the early 19th century, corporations had become more dominant in society and their potential to cause significant harm to the public increased. The courts began to regulate and punish corporations for public nuisances such as deteriorated roads,¹⁴ decaying bridges,¹⁵ and

⁷ Brickey, above n 1, at 399.

⁸ William Laufer *Corporate Bodies and Guild Minds: The Failure of Corporate Criminal Liability* (1st ed, University of Chicago Press, Chicago, 2008) at 11.

⁹ Brickey, above n 1, at 400.

¹⁰ At 396.

¹¹ Edward Diskant "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure" (2008) 118 Yale LJ 126 at 129.

¹² Mark Pieth and Radha Ivory "Emergence and Convergence: Corporate Criminal Liability Principles in Overview" in *Corporate Criminal Liability* (Springer, London, 2011) 3 at 4.

¹³ *Anonymous* (1701) 88 Eng Rep 1518 (KB).

¹⁴ *Commonwealth v Hancock Free Bridge Corp* (1854) 68 Mass 58.

¹⁵ *State v Morris Canal & Banking Co* (1850) 22 NJL 537.

polluted river basins.¹⁶ Public enforcement was necessary because few people would have the incentives or the ability to pursue these nuisances through private enforcement.¹⁷ Private enforcement required proof of specific injury but often these nuisances would affect the public at large rather than specific individuals.¹⁸

Corporate criminal liability was initially limited to crimes of nonfeasance (the failure to satisfy a duty required by law).¹⁹ However, by the middle of the 19th century, the courts extended criminal liability to corporations for misfeasance (the improper performance of a legal act).²⁰ In 1846 in *The Queen v Great North Of England Railway Co*, Lord Denman provided that corporations could be criminally liable for misfeasance in a case where the corporation had failed to build a bridge over a highway in accordance with statutory requirements.²¹ The courts recognised that the distinction between nonfeasance and misfeasance was specious since the unlawful act could often be characterised as both nonfeasance and misfeasance.²²

¹⁶ *People v Corporation of Albany II* Wend 539 (NY Sup Ct 1834) at 543. See also Ved Nanda “Corporate Criminal Liability in the United States: Is a New Approach Warranted?” in Mark Pieth and Radha Ivory (ed) *Corporate Criminal Liability* (Springer, London, 2011) 62 at 66; Brickey, above n 1, at 406; and Vikramaditya Khanna “Corporate Criminal Liability: What Purpose Does it Serve?” (1996) 109 Harv L Rev 1477 at 1481.

¹⁷ Vikramaditya Khanna “Corporate Crime Legislation: A Political Economy Analysis” (2004) 82 Wash U LQ 95 at 101.

¹⁸ Brickey, above n 1, at 422.

¹⁹ See *Case of Langforth Bridge* 79 ER 919 (KB 1635) cited in Brickey, above n 1, at 401. See also Nanda, above n 16, at 66.

²⁰ Nanda, above n 16, at 66.

²¹ *The Queen v Great North Of England Railway Co* [1846] EngR 803 at [325]-[327]. See LH Leigh *The Criminal Liability of Corporations in English Law* (Weidenfeld & Nicolson, London, 1969) at 17.

²² *Commonwealth v Proprietors of New Bedford Bridge* 68 Mass 339 (1854) cited in Brickey, above n 1, at 409.

The courts, however, continued to have difficulty finding corporations capable of committing crimes requiring specific intent.²³ Corporations were merely a legal fiction under the methodological individualist view.²⁴ They lacked a soul and, therefore, could not have the requisite “wicked intent”.²⁵

The doctrine of ultra vires further inhibited the expansion of corporate criminal liability. Under the doctrine of ultra vires, corporations could neither commit actions nor authorise its agents to commit actions outside the scope of the corporation’s objects.²⁶ The courts, therefore, refused to attribute such ultra vires actions to corporations for crimes of specific intent.²⁷ This doctrine was finally rejected in tort in *Citizens Life Assurance Company v Brown*.²⁸ The Privy Council held that corporations, like employers, were capable of being liable for torts involving malice committed by their employees in the course of their employment.²⁹ This was later extended to corporate criminal law by inference without much discussion.³⁰

In the late 18th to 19th century, the threat of harms caused by corporate activities increased significantly due to the industrial revolution and the development of the railroad industry.³¹

²³ Pieth and Ivory, above n 12, at 18.

²⁴ George Skupski “The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability” (2012) 62 Case W Res L Rev 1 at 3.

²⁵ *State v First National Bank* (1872) 2 SD 568 at 571 cited in Andrew Weissmann and David Newman “Rethinking Criminal Corporate Liability” 2007 82 Ind LJ 411 at 420.

²⁶ Leigh, above n 21, at 8.

²⁷ *Ashbury Ry Carriage and Iron Co. v. Riche* [1875] LR 7 HL 653 and *People v Rochester Ry & Light Co* 88 NE 22 (NY 1909) cited in Leigh, above n 21, at 8. See also Weissmann and Newman, above n 25, at 420; and Brickey, above n 1, at 411.

²⁸ *Citizens Life Assurance Company v Brown* [1904] UKPC 20 (NSW).

²⁹ At 22. See Leigh, above n 21, at 9.

³⁰ *Harker v Britannic Assurance Co. Ltd* [1928] 1 KB 766 cited in Leigh, above n 21, at 9.

³¹ Pieth and Ivory, above n 12, at 7.

Corporations accumulated vast fortunes and committed many crimes including bribery, stock manipulation, exploitation of labour and the maintenance of unsafe working conditions.³² The courts could no longer hide behind the “corporate as a fiction” theory and ignore the potential for corporations to cause substantial damage to society.³³ This led the courts to extend the civil law doctrine of vicarious liability to criminal cases in both the UK and the United States of America (the US).³⁴ The UK, unlike the US, strictly limited the principle of vicarious liability to regulatory offences.³⁵

For traditional mens rea offenses the British courts developed the identification doctrine. In *HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd*, Denning LJ likened a corporation to a human body:³⁶

It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

This anthropomorphic approach oversimplifies the corporate structure, especially in large corporations, and fails to consider complex internal decision-making processes.³⁷ The courts

³² Mary Ramirez “Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority” 2010 93 Marq L Rev 971 at 980.

³³ Skupski, above n 24, at 4.

³⁴ Pieth and Ivory, above n 12, at 7. See also Brickey, above n 1, at 403.

³⁵ Pieth and Ivory, above n 12, at 8.

³⁶ *HL Boulton (Engineering) Co. Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159 at 172.

and legislatures have been reluctant to deviate from this anthropomorphic individualist model of corporations. Additionally, the ascendancy of neo-liberal philosophies of privatization and free market ideals in the 1980s led to deregulation and further hindered the development of corporate criminal liability.³⁸ The UK Parliament only recently introduced legislation dealing with corporate crime after several severe accidents occurred where no corporation or human individual could be held accountable.³⁹

Corporations, as legal persons, gain many benefits similar to natural persons but they continue to be able to hide behind complex corporate structures to evade the liability of natural persons under the criminal law. In New Zealand, s29 of the Interpretation Act 1999 defines a “person” as including a corporation sole, a body corporate, and an unincorporated body. The New Zealand Bill of Rights Act 1990 applies for the benefit of legal persons as well as natural persons.⁴⁰ On the other hand, s158 of the Crimes Act 1961 defines homicide as the killing of a human being by another. Therefore, unlike most other jurisdictions, it is not possible for corporations to be found guilty of murder or manslaughter in New Zealand.

Corporations continue to cause severe injury to individuals, groups and the natural environment through their actions.⁴¹ Their ability to abuse power and evade criminal liability reveals their current privileged position in comparison to individuals.⁴² Recent examples

³⁷ James Gobert “Corporate criminality: four models of fault” (1994) 14 *Legal Stud.* 393 at 401.

³⁸ Laureen Snider and Steven Bittle “The challenges of regulating powerful economic actors” in James Gobert and Ana-Maria Pascal (ed) *European Developments in Corporate Criminal Liability* (Routledge, Oxon, 2011) 53 at 57.

³⁹ The Corporate Manslaughter and Corporate Homicide Act 2007 was introduced after the Herald of Free Enterprise sunk in the port of Zeebrugge, Belgium killing 193 people and many fatal railroad accidents. See Pieth and Ivory, above n 15, at 8.

⁴⁰ New Zealand Bill of Rights Act 1990 (NZ), s29.

⁴¹ Pieth and Ivory, above n 12, at 4.

⁴² At 4.

show the ineffectiveness of individual criminal liability and corporate civil liability in deterring corporate misbehaviour. These examples include the collapse or near collapse of large financial institutions due to mismanagement and fraud,⁴³ product recalls⁴⁴ and the BP oil-rig explosion.⁴⁵ Even after several economic crises⁴⁶ and many deaths as a result of corporate misbehaviour, historical efforts to generate reform in this area have generally been cyclical and weak, developing as little as possible and facing significant resistance at every turn.⁴⁷

B Common Law Approaches to Corporate Criminal Liability

1 Vicarious liability

The principle of vicarious criminal liability allows a corporation to be convicted of a criminal offence by imputing the actus reus (the performance of a legally prohibited act) and the mens rea (criminal intent) of an individual to a corporation.⁴⁸ The corporation's liability is derived from the fault of their employee, officer or agent.⁴⁹ This is the dominant form of corporate criminal liability in the United States of America (the US). At the federal level in

⁴³ Snider and Bittle, above n 38, at 53. For example Lehman Brothers, JP Morgan, Bank of Scotland, Merrill Lynch, Bank of America, Bear Stearns, Fanny Mae and Freddie Mac.

⁴⁴ Amy Sepinwall "Guilt by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime" (2012) 63 Hastings LJ 411 at 414. "Johnson & Johnson recalled 136 million bottles of children's medicines – its fourth recall in less than a year as a result of 'systemic' failures and a culture of mediocrity."

⁴⁵ The BP oil rig explosion claimed 11 lives and was one of the worst environmental disasters in US History. See Sepinwall, above n 44, at 413.

⁴⁶ For example, the dot-com crash of 2000, the savings and loans crisis in the 1980s, the junk bond crisis and the 2007-2008 subprime mortgage crisis.

⁴⁷ See Snider and Bittle, above n 38, at 59.

⁴⁸ Nanda, above n 16, at 65.

⁴⁹ *Canadian Dredge & Dock Co v R* [1985] 1 SCR 662 at [20].

the US, a corporation may be criminally prosecuted for approximately 4000 different federal regulatory offences.⁵⁰

The Supreme Court in the US extended this principle from civil liability to criminal liability over 100 years ago in *New York Central and Hudson River Railroad Company v United States*.⁵¹ New York Central was charged with granting rebates to sugar refineries under the Elkins Act 1903. The Elkins Act provided that the act, omission or failure of any officer, agent or employee acting in the scope of their employment is deemed to be the corporation's act, omission or failure.⁵² Counsel argued that this provision was unconstitutional because Congress had no authority to impute the commission of a criminal offence to a corporation.⁵³ This would unduly punish innocent shareholders and deprive the corporation of its right to the presumption of innocence.⁵⁴ The Court held that the provision was not unconstitutional and that it only required one extra step to extend vicarious liability to criminal offences.⁵⁵ Moreover, the extension of vicarious liability was in the interests of public policy. The Court recognised that corporate bodies conducted most of the business transactions that were occurring in the economy.⁵⁶ The law needed to be able to constrain abuses of corporate power.⁵⁷

⁵⁰ Sara Beale "Solutions: Is Corporate Criminal Liability Unique?" (2007) 44 Am Crim L Rev 1503 at 1507. Contrast Khanna, above n 17, at 95. Khanna suggests there are over 300,000 federal criminal offences.

⁵¹ *NY Central & Hudson River RR Co v United States* 212 US 481 (1909) at 493.

⁵² The Elkins Act 1903, c 708, 32 Stat 847 (US).

⁵³ *NY Central & Hudson River RR Co v United States*, above n 51, at 492.

⁵⁴ At 492.

⁵⁵ At 494.

⁵⁶ At 495.

⁵⁷ At 496. See generally Sara Beale "A Response to the Critics of Corporate Criminal Liability" (2009) 46 Am Crim L Rev 1481 at 1482.

Vicarious liability in the US has developed since the landmark *New York Central* case. Under federal law, vicarious liability currently requires the individual to be acting within the scope and nature of his employment,⁵⁸ and the individual must be acting, at least in part, to benefit the corporation.⁵⁹ The courts have been willing to hold corporations criminally liable for the acts of low-level employees regardless of a genuine and effective corporate compliance program.⁶⁰ Consequently, vicarious criminal liability may be imputed to the corporation even if the illegal actions of the agents or employees involved are contrary to company policies, or even clear instructions from the corporation.⁶¹

This is one of the substantial weaknesses of vicarious liability. It can be over-inclusive and violate the retributivist function of the criminal law.⁶² The retribution theory states that one of the functions of the criminal law is to punish morally blameworthy offenders.⁶³ Vicarious criminal liability can separate liability from culpability.⁶⁴ This may potentially bring the law into disrepute if blameless corporations are found criminally liable for the illegal actions of a rogue employee or agent.⁶⁵ However, the validity of vicarious liability in the US must be

⁵⁸ *United States v Richmond* 700 F 2d 1183 (8th Cir 1983) at 1195. See also Nanda, above n 16, at 68; Khanna, above n 17, at 98; and Sepinwall, above n 44, at 416.

⁵⁹ *United States v Cincotta* 689 F 2d 238 (1st Cir 1982) at 241. See also Nanda, above n 16, at 65; and Sepinwall, above n 44, at 416.

⁶⁰ Nanda, above n 16, at 65.

⁶¹ *United States v Hilton Hotels Corp* 467 F 2d 1000 (9th Cir 1972) at 1004. See Nanda, above n 16, at 69; and Pieth and Ivory, above n 12, at 7.

⁶² Sara Beale and Adam Safwat “What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability” (2004-2005) 8 *Buff Crim L Rev* 89 at 98. See also James Gobert “The Evolving Legal Test of Corporate Criminal Liability” in John Minkes and Leonard Minkes (ed) *Corporate and White-collar Crime* (Sage Publications, London, 2008) 61 at 64.

⁶³ Jonathan Clough “Will the Punishment Fit the Crime? Corporate Manslaughter and the Problem of Sanctions” (2005) 8 *FJLR* 113 at 117.

⁶⁴ Eric Colvin “Corporate Personality and Criminal Liability” (1995) 6 *Crim LF* 1 at 8.

⁶⁵ *Tesco Supermarkets Ltd v Natrass* [1971] UKHL 1 at 2.

viewed in light of the regulatory nature of most of the US federal statutory crimes.⁶⁶ There is likely to be less stigma attached to a conviction of federal crimes in the US.

Under US state law, however, the corporate liability principles tend to be less strict. Many of the states' legislatures have adopted rules similar to those set out in the US Model Penal Code (the MPC).⁶⁷ Under the MPC for crimes requiring intent, a corporation may be criminally liable where an agent's illegal actions were authorised, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.⁶⁸ The MPC allows for a defence of due diligence.⁶⁹ Prosecution and sentencing guidelines have also been amended to allow compliance programs to be taken into account.⁷⁰ State laws will generally cover the offence of corporate homicide. However, the federal law may have jurisdiction in certain exceptions, for example, if the homicide took place on federal property.⁷¹

Generally, most commonwealth countries have rejected vicarious liability. The UK favours the principle that prima facie a principal should not be criminally responsible for the acts of its servants unless it is the intention of the legislature.⁷² As a result, the UK has generally been quite conservative in its development of corporate criminal liability. Vicarious liability is mainly used in regulatory offences that do not require proof of mens rea (many of these

⁶⁶ *Canadian Dredge & Dock Co v R* [1985] 1 SCR 662 at [30].

⁶⁷ Pieth and Ivory, above n 12, at 23. See also Nanda, above n 16, at 71.

⁶⁸ Model Penal Code §2.07(1)(a)-(c). See also Sepinwall, above n 44, at 416; and Ann Foerschler "Toward a Better Understanding of Corporate Misconduct" (1990) 78 CLR 1287 at 1294.

⁶⁹ Model Penal Code §2.07(5).

⁷⁰ Pieth and Ivory, above n 12, at 7. See also Annie Geraghty "Corporate Criminal Liability" (2002) 39 Am Crim L Rev 327 at 331.

⁷¹ 18 United States Code §1111.

⁷² *Moussell Bros Ltd v London and North-Western Railway Co* [1917] 2 KB 836 at 846.

offences also have due diligence defences).⁷³ It is a question of the particular provision: its construction and purpose.⁷⁴ Vicarious liability is appropriate where a failure to hold a corporation vicariously liable would “render nugatory” the statute and defeat Parliament’s intentions.⁷⁵

As mentioned earlier, vicarious liability has been criticised as being over-inclusive, but it can also simultaneously be under-inclusive.⁷⁶ Vicarious liability can be under-inclusive because liability is rooted in the actions and mental state of an individual.⁷⁷ This has caused considerable problems in holding corporations accountable where no one individual is or can be found criminally liable. Without fault present at the individual level there is no corporate criminal liability. As a result, vicarious liability has a limited practical effect because it fails to take into account the holistic nature of corporations.

2 The identification doctrine

The identification doctrine asserts that “those who control or manage the affairs of a company are regarded as embodying the company itself”.⁷⁸ Generally, the board of directors, the managing director or other superior officers of a company carry out the functions of management and speak and act as the company.⁷⁹ This generates primary criminal liability

⁷³ Celia Wells “Corporate crime: opening the eyes of the sentry” (2010) 30 *Legal Studies* 370 at 385.

⁷⁴ *Moussell Bros Ltd v London and North-Western Railway Co*, above n 72, at 844.

⁷⁵ AP Simester and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers Ltd, Wellington, 2002) at 216.

⁷⁶ Colvin, above n 64, at 8.

⁷⁷ At 8.

⁷⁸ Law Commission *Legislating the Criminal Code Involuntary Manslaughter* (Law Com No 237, 1996) at [6.27].

⁷⁹ *Tesco Supermarkets Ltd v Natrass*, above at 65, at 4.

where the corporation itself is held to commit the offence,⁸⁰ although some argue that it is essentially a form of vicarious liability limited to those who control or manage the corporation's affairs.⁸¹

The identification doctrine applies to all mens rea offences in England and Wales where a corporation has been charged (except manslaughter or where vicarious liability applies).⁸² It originated in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* which was a civil case.⁸³ This case considered whether the company caused damage to its own ship by its "actual fault or privity".⁸⁴ The managing owner, who managed the ship on behalf of the company, was at fault and caused the damage. Viscount Haldane looked for "the directing mind and will of the corporation, the very ego and center of the personality of the corporation".⁸⁵ The managing owner was the 'directing mind and will' of the company. Therefore, the courts held that the company could not dissociate itself from the managing owner.

In *Tesco Supermarkets Ltd v Natrass* there was a breach of s11(2) of the Trade Descriptions Act 1968, which provides that a supplier is guilty of an offence if they indicate that goods are being offered at a price less than the actual price offered. A manager failed to remove a sign for a reduced product once stock had run out.⁸⁶ The House of Lords held that Tesco Supermarkets must act through living people who are not acting for the company but as the

⁸⁰ Jennifer Hill "Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?" 1 JBL 1 at 10. See also Neil Cavanagh "Corporate criminal liability: an assessment of the models of fault" (2011) 75 J Crim L 414 at 416.

⁸¹ Gobert, above n 62, at 67.

⁸² Wells, above n 73, at 386.

⁸³ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

⁸⁴ Merchant Shipping Act 1894, s502.

⁸⁵ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*, above n 83, at 713.

⁸⁶ *Tesco Supermarkets Ltd v Natrass*, above at n 65, at 7.

company itself.⁸⁷ The low-level manager did not represent the “directing mind and will” of the company and, therefore, his actions could not be held to be the actions of the company.⁸⁸ The offence contained a defence of due diligence and Tesco Supermarkets was found to have taken all reasonable precautions and devised a proper system for operating the store.⁸⁹ This approach has been adopted in New Zealand⁹⁰ and Canada.⁹¹

New Zealand has more recently developed a more flexible approach to the identification doctrine. In the Privy Council decision, *Meridian Global Funds Management Asia Ltd v Securities Commission*, a corporation was liable for breaching the New Zealand Securities Amendment Act 1988.⁹² The Privy Council took a more policy-based approach than the approach taken in *Tesco* and held that whether an individual’s actions are attributable to a corporation is a matter of construction of the legislative intention in each case.⁹³ This test may be more flexible but it imports a large degree of uncertainty; every offence must be analysed independently in order to determine who is the “directing mind and will” of the corporation.⁹⁴ This test was rejected in England in *Attorney-General’s Reference (No. 2 of 1999)*.⁹⁵

⁸⁷ At 4.

⁸⁸ At 11.

⁸⁹ At 8.

⁹⁰ *Nordik Industries Ltd v Regional Controller of Inland Revenue* [1976] 1 NZLR 194 at 199-201 (SC).

⁹¹ *Canadian Dredge and Dock Co v R*, above n 66, at [28] and [32].

⁹² *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5.

⁹³ At [22] and [23]. See also Cavanagh, above n 80, at 420.

⁹⁴ R Grantham and B Robertson “Corporate Knowledge--Two Views on Meridian (1996) 2 *New Zealand Business Law Quarterly* 63 at 71 cited in Cavanagh, above n 80, at 420.

⁹⁵ *Attorney-General’s Reference (No. 2 of 1999)* [2000] EWCA Crim 91.

In *Linework Ltd v Department of Labour*, the New Zealand Court of Appeal considered s6 of the Health and Safety in Employment Act 1992 which provides that every employer shall take all practicable steps to ensure the safety of employees at work.⁹⁶ The Court applied *Meridian* and held that attributing the foreman's actions to the corporation would be in accordance with Parliament's purpose because this particular statutory duty was far removed from the administrative duties typically covered by middle or upper management.⁹⁷

The identification doctrine has been criticised for not taking sufficient account of the fact that "corporations...are not individuals and do not act as unitary individuals".⁹⁸ Corporations are often able to avoid criminal liability because the identification doctrine ignores the realities of the modern corporate structure where decisions are more likely to result from corporate policies and procedures than individual decisions.⁹⁹ In particular, large corporations are extremely difficult to prosecute given the many layers of management prevalent in large modern corporations.¹⁰⁰ The identification doctrine encourages directors to insulate their companies from criminal liability by isolating themselves from their employees and the lower levels of the company.¹⁰¹ In reality, directors and management may be appointed

⁹⁶ *Linework Ltd v Department of Labour* [2001] NZCA 104.

⁹⁷ At [23].

⁹⁸ Celia Wells *Corporations and Criminal Responsibility* (1st ed, Clarendon Press, Oxford, 1993) at 121.

⁹⁹ Clarkson "Kicking corporate bodies and damning their souls" (1996) 59 MLR 557 at 566 cited in Cavanagh, above n 80, at 418. See also Rick Sarre "White-Collar Crime and Prosecution for "Industrial Manslaughter" as a Means to Reduce Workplace Deaths" in HN Pontell and G Geis (ed) *International Handbook of White-Collar and Corporate Crime* (Springer, New York, 2007) 648 at 649; and Aidan Ricketts and Heidi Avolio "Corporate liability for manslaughter: the need for further reform" (2009) 13 Southern Cross University Law Review 57 at 67.

¹⁰⁰ Gobert, above n 37, at 406.

¹⁰¹ At 406.

simply because of their “perceived gravitas and/or political contacts”.¹⁰² It may actually be the consultants, junior executives or shadow directors who are responsible for corporate policies and wield the decision-making power.¹⁰³

The identification doctrine was ineffective in the English case of *R v P&O European Ferries (Dover) Ltd*¹⁰⁴ even though the whole corporation was “infected with the disease of sloppiness”.¹⁰⁵ The prosecution failed because no individual had the requisite mens rea that could be attributed to the company. The identification doctrine, like vicarious liability, can be both over-inclusive and under-inclusive. A corporation can be criminally liable even where a senior officer has acted contrary to corporate policy.¹⁰⁶ On the other hand, the corporation will not be liable for illegal actions of employees or agents who are not considered the “directing mind and will” of the corporation under the strict *Tesco* formulation.¹⁰⁷ This limits the doctrine’s deterrence effect, both general and specific.¹⁰⁸

3 Aggregation

Aggregation “allows the acts, omissions and mental states of more than one person within a company to be combined in order to satisfy the elements of a crime”.¹⁰⁹ In *United States v Bank of New England*, a federal appellate court used aggregation or “collective knowledge” to determine the extent of the bank’s knowledge which was found to include the sum of the

¹⁰² Gobert, above n 62, at 66.

¹⁰³ At 66.

¹⁰⁴ *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

¹⁰⁵ Barry Sheen *The Merchant Shipping Act 1894, mv Herald of Free Enterprise* (Department of Transport, Report of Court No 8074, 1987) at 14. See Cavanagh, above n 80, at 418.

¹⁰⁶ Cavanagh, above n 80, at 419.

¹⁰⁷ Gobert, above n 37 at 400.

¹⁰⁸ At 401.

¹⁰⁹ At 404.

employees' knowledge within the scope of their employment.¹¹⁰ Aggregation of knowledge was "not only proper but necessary".¹¹¹ This approach recognises that corporations compartmentalise knowledge and takes a more realistic holistic view of modern corporate structures.¹¹²

In Australia, collective knowledge may be attributed to a corporation depending on the circumstances of the case and subject to the court's discretion.¹¹³ In contrast, aggregation was rejected in the UK in *R v HM Coroner for East Kent, ex parte Spooner*.¹¹⁴ The UK Court of Appeal found that aggregation was inconsistent with the doctrine of identification and chose to follow the strict test found in *Tesco*.¹¹⁵

Aggregation takes a small step towards a holistic organisational model of corporate criminal liability.¹¹⁶ This helps to limit some of the evidential and bias issues associated with the identification doctrine. However, it still does not truly reflect commercial reality because it is still rooted in individual culpability.¹¹⁷ In comparison, organisational failure transcends the combined wrongdoings of individuals and allows the courts to view corporations as culpability-bearing agents in their own right.¹¹⁸

¹¹⁰ *United States v Bank of New England* 820 F 2d 844 (1st Cir. 1987) at [46].

¹¹¹ At [56]. See also Cristina de Maglie "Models of Corporate Criminal Liability in Comparative Law" (2005) 4 Wash U Global Stud L Rev 547 at 557.

¹¹² *United States v Bank of New England*, above n 110, at [54].

¹¹³ *The Bell Group Ltd (in Liq) v Westpac Banking Corporation [no 9]* [2008] WASC 239 at [6156]. See Angelo Capuano "Catching the leprechaun: Company liability and the case for a benefit test in organic attribution" (2009) 24 Aust Jnl of Corp Law 177 at 201.

¹¹⁴ *R v HM Coroner for East Kent, ex parte Spooner* (1989) 88 Cr App R 10.

¹¹⁵ *R v HM Coroner for East Kent, ex parte Spooner* (1989) 88 Cr App R 10 at 16 per Bingham LJ.

¹¹⁶ Cavanagh, above n 80 at 425.

¹¹⁷ At 428.

¹¹⁸ Ricketts and Avolio, above n 99, at 70.

C Summary

All three forms of corporate criminal liability rely on individual conduct. However, corporate fault may be qualitatively different from human fault.¹¹⁹ The historical development of corporate criminal liability has centred around an anthropomorphic view of corporations and the idealisation of neo-liberalist free market philosophies. This has generated different forms of liability that essentially suffer from the same weaknesses and fail to take into account the holistic nature of corporations.

¹¹⁹ Gobert, above n 37, at 407.

III Chapter Two: Corporate Criminal Legislation

Across the world there have been significant developments in corporate criminal liability through legislation. Political, social and cultural beliefs about how the law should attribute blame to organisations are beginning to change.¹²⁰ As a result, several jurisdictions across the world have attempted to move away from the individualist model of corporate criminal liability to more holistic models, with various levels of success. The corporate sector has attempted to influence the content and enforcement of corporate criminal legislation worldwide and undermine its practical effect. This has resulted in significant deficiencies in each piece of legislation. Regardless of the practical effect of the legislation, the reform has been somewhat useful in generating considerable dialogue and attempting to reinforce the political message that the legal system can control corporations.¹²¹

A United Kingdom

1 Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH Act)

The catalyst for the reform of corporate criminal liability for manslaughter originated from the Herald of Free Enterprise disaster. The ferry left a port in Zeebrugge with the bow doors still open. The ferry capsized killing 193 people.¹²² The boatswain responsible for closing the doors was asleep at the time. The first officer, who was supposed to oversee the closing of the doors, had left the deck early without checking the doors. The captain assumed that the doors were already shut and the board of directors had refused to install warning lights on the ship. A subsequent inquiry found that the company was infected at every level with the

¹²⁰ Celia Wells *Corporations and Criminal Responsibility* (2nd ed, Clarendon Press, Oxford, 2001) at 41.

¹²¹ Wells, above n 73, at 377.

¹²² Colvin, above n 64, at 16.

“disease of sloppiness”.¹²³ The prosecution failed to gain convictions for manslaughter against the company and seven individuals. This failure highlighted the inadequacy of the identification doctrine and its reliance on individual fault.¹²⁴ Academics, trade unions, the public and politicians became increasingly concerned which resulted in a renewed interest in developing a more holistic form of corporate criminal liability.¹²⁵

In 1996, the Law Commission released a report recommending the creation of a new offence of corporate killing.¹²⁶ The Labour party confirmed that they would implement the Law Commission’s recommendations if they were elected.¹²⁷ However, for a long time, the government lacked the political will to turn the recommendations into reality. In *R v Great Western Trains Company Limited* the judiciary noted:¹²⁸

...if the law is to be changed it is up to Parliament to do so. The Law Commission recommended legislation over three years ago but nothing has been forthcoming. There is little purpose in the Law Commission making recommendations if they are allowed to lie for years on a shelf gathering dust.

¹²³ Sheen, above n 105, at 14.

¹²⁴ Colvin, above n 64, at 18.

¹²⁵ CMV Clarkson “Corporate manslaughter: yet more Government proposals” (2005) 9 Crim LR 677 at 677. See also David Ormerod and Richard Taylor “The Corporate Manslaughter and Corporate Homicide Act 2007” (2008) 8 Crim LR 589 at 593.

¹²⁶ Law Commission, above n 78, at 85.

¹²⁷ Benjamin Haigh “An analysis of the Corporate Manslaughter and Corporate Homicide Act (2007): A Badly Flawed Reform?” (LLM Thesis, Durham University, 2012) at 10.

¹²⁸ *R v Great Western Trains Company Limited* LTL C7800570 30 June 1999.

After the Southall and Paddington disasters,¹²⁹ the Home Office released a consultation paper in 2000 commenting on the Law Commission's recommendations.¹³⁰ The Home Office recommended the inclusion of secondary individual criminal liability.¹³¹ The business community heavily resisted this recommendation due to the potential damage to executives' personal reputations and the possible prospect of jail.¹³² The business community feared that prosecutors might face significant pressure from unions or relatives of the deceased to bring charges against individuals instead of corporations.¹³³ This offence could discourage junior employees from accepting senior managerial positions or discourage senior executives from working in the UK to the detriment of the British economy.¹³⁴

Progress stalled once again until the Hatfield and Potters Bar rail disasters reignited the government's interest in this area.¹³⁵ In 2005, the government finally produced the draft Corporate Manslaughter Bill which removed the possibility of individual criminal liability, a move which the Confederation of Business Industry (CBI) welcomed.¹³⁶ The business

¹²⁹ In 1997 in Southall, a train crashed killing seven people. In 1999 in Ladbroke Grove, another train crashed killing 31 people. Both disasters could have been prevented by an operating Automatic Train Protection System which Great Western Railways had rejected on the grounds of costs.

¹³⁰ Home Office *Reforming the law on involuntary manslaughter: The Government's proposal* (May 2000).

¹³¹ At 19.

¹³² James Gobert "The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?" (2008) 71 MLR 413 at 422. See also Clarkson, above n 125, at 688.

¹³³ Gobert, above n 132, at 422.

¹³⁴ At 422.

¹³⁵ In 2000, a high speed train traveling from London to Leeds crashed as a result of a broken rail near Hatfield and killed four people. In 2002, a train crashed near Potters Bar killing seven people and injuring 76 people. See Stephen Griffin "Corporate Manslaughter: A Radical Reform?" (2007) 71 J Crim L 151 at 152.

¹³⁶ Confederation of Business Industry "CBI Response to Home Office Consultation Document: Corporate Manslaughter, the Government's Draft Bill for Reform June 2005" at 2.

community's lobbying was ultimately successful when the legislature passed the CMCH Act which explicitly specified that no individual can be prosecuted for aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter or corporate homicide.¹³⁷ The absence of individual liability is likely to limit the deterrent effect of the CMCH Act on corporate crime since there is no direct impact on senior managers who have predominant control over corporate policies and actions.¹³⁸ However, individuals can still be liable under the common law offence of gross negligence manslaughter.¹³⁹

The CMCH Act requires consent from the Director of Public Prosecutions (DPP) to bring criminal proceedings.¹⁴⁰ This requirement was contrary to the Law Commission's and the Home Office's recommendations. Generally, prosecutors will bring criminal proceedings where there is a reasonable prospect of conviction and where criminal proceedings are in the public interest.¹⁴¹ Requiring the DPP's consent will inevitably inject a political element into the decision to prosecute corporations given that the DPP's duties include reporting to the Attorney-General. The public and other parties are likely to question the integrity of the criminal process regardless of whether or not corporate lobbying or Members of Parliament are actually able to influence the DPP's decisions.¹⁴²

Political and economical considerations are inextricably linked to corporate criminality and are likely to have caused the significant delay in passing the CMCH Act.¹⁴³ The corporate

¹³⁷ Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s18.

¹³⁸ Julian Harris "The Corporate Manslaughter and Corporate Homicide Act 2007: unfinished business?" (2007) 28 Comp Law 321 at 322.

¹³⁹ Gobert, above n 132, at 423.

¹⁴⁰ Section 17. See Gobert, above n 132, at 429.

¹⁴¹ Crown Prosecution Service *The Code for Crown Prosecutors* (February 2010) at [4].

¹⁴² Gobert, above n 132, at 431.

¹⁴³ Griffin, above n 135, at 153.

manslaughter offence could discourage businesses from operating in the UK.¹⁴⁴ Corporations may move their operations, or at least the most dangerous sectors, to a country with a less hostile corporate environment causing unemployment and reduced taxes for the government.¹⁴⁵ Corporations may invest a socially inefficient level of resources into maintaining safety standards in order to avoid criminal liability.¹⁴⁶ As a result, corporations may become more risk-averse and less competitive compared to corporations operating in less prescriptive states, therefore, reducing the overall competitiveness of the British economy.¹⁴⁷ Even though the legislature eventually passed the CMCH Act, the diluted provisions of the CMCH Act reflect these underlying political considerations.

The CMCH Act applies to an organisation if the way in which its activities are managed or organised causes a person's death and it amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.¹⁴⁸ The CMCH Act applies to a broad range of organisations including corporations, partnerships, police forces, trade unions, employers' associations, as well as a number of specific government departments and bodies.¹⁴⁹ The CMCH Act also applies to non-profit organisations that have very limited resources and may not be as morally blameworthy as profit-making organisations that cut costs and prioritise profits over the health and safety of their employees.¹⁵⁰

¹⁴⁴ Haigh, above n 127, at 107. See also Gobert, above n 132, at 432.

¹⁴⁵ Haigh, above n 127, at 107. See also Gobert, above n 132, at 433.

¹⁴⁶ Clarkson, above n 125, at 688.

¹⁴⁷ Gobert, above n 132, at 433.

¹⁴⁸ Section 1(1).

¹⁴⁹ Section 1(2).

¹⁵⁰ Gobert, above n 132, at 416.

The CMCH Act is limited to incidents that result in death.¹⁵¹ This means that there is no liability under the CMCH Act for incidents causing grievous bodily harm or other injuries (which occur significantly more frequently than incidents resulting in death).¹⁵² Prosecutors are likely to face difficulties in proving that a corporation's actions were a 'cause' of the death.¹⁵³ Under the common law, free and voluntary acts of informed adults of sound mind will ordinarily break the chain of causation.¹⁵⁴ Potentially, the actions of lower-level employees outside of the senior management could easily break the chain of causation and absolve the corporation from liability. Notably, the Crown Prosecution Service Guidelines on Corporate Manslaughter state that the prosecution must only prove that the breach was more than a minimal contribution to the death.¹⁵⁵ Whether corporations are able to abuse this requirement to avoid liability will depend on how strictly the courts interpret and apply this element.

Another element of the offence is that there must be a gross breach of a relevant duty of care. A relevant duty of care is a duty owed under the law of negligence by employers to employees, as occupier of premises, in connection with supplying goods or services or where the organisation is responsible for another person's safety.¹⁵⁶ This duty imports the civil law of negligence into the CMCH Act. Civil law has a very different function from criminal law and a duty of care based on negligence could unduly restrict the scope of the CMCH Act.

¹⁵¹ Section 1(1)(a).

¹⁵² Gobert, above n 132, at 420. See also Celia Wells "Corporate Criminal Liability in England and Wales: Past, Present and Future" in Mark Pieth and Radha Ivory (eds) *Corporate Criminal Liability* (Springer, London, 2011) 91 at 102.

¹⁵³ Wells, above n 152, at 102.

¹⁵⁴ *R v Kennedy (No. 2)* [2007] UKHL 38 at [14].

¹⁵⁵ Crown Prosecution Service "Legal Guidance: Corporate Manslaughter"
<www.cps.gov.uk/legal/a_to_c/corporate_manslaughter>.

¹⁵⁶ Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s2(1).

The Law Commission, the Home Office and the Home Affairs and Work and Pensions Committees did not recommend the inclusion of this requirement. Arguably, this requirement is unnecessary because organisations are already under a duty not to kill innocent persons.¹⁵⁷ This element may simply provide another way for defendants to deflect the trial from its main objective and unnecessarily prolong the criminal proceedings.¹⁵⁸

In establishing whether there has been a gross breach of duty, the jury must consider whether the organisation failed to comply with health and safety legislation, how serious the failure was and how great a risk of death it posed.¹⁵⁹ The jury may also consider the extent to which attitudes, policies, systems or accepted practices within the organisation were likely to have encouraged or tolerated an organisational failure.¹⁶⁰ This allows the jury to consider more holistic factors within the organisation but this is not a mandatory consideration and therefore may not carry much weight with the jury. These factors also do not provide much assistance in determining how far one's actions must fall below the reasonable standard in order to constitute a gross breach.¹⁶¹ The reasonable standard may be driven by political and economical considerations as well, for example, smaller and less financially stable firms may be held to a lower standard.¹⁶²

Finally, the way in which the corporation's activities are managed by senior management must be a substantial element of the gross breach.¹⁶³ The CMCH Act defines "senior management" as persons who play a significant role in managing, or determining how to

¹⁵⁷ Gobert, above n 132, at 416.

¹⁵⁸ At 417.

¹⁵⁹ Corporate Manslaughter and Corporate Homicide Act 2007 (UK), ss8(1) and 8(2).

¹⁶⁰ Section 8(3)(a).

¹⁶¹ Wells, above n 152, at 104.

¹⁶² Griffin, above n 135, at 161.

¹⁶³ Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s1(3).

manage, the whole or a substantial part of the organisation's activities.¹⁶⁴ This provision targets failings in the strategic management of an organisation's activities rather than failings in the lower levels of the organisation. The Centre for Corporate Accountability, a human rights association that promotes worker and public safety, raised valid concerns that the 'senior management failure' test could encourage directors to evade liability by delegating responsibility for safety to lower levels of the corporate structure.¹⁶⁵

The 'senior management' test appears to allow for some form of aggregation across managers.¹⁶⁶ The test is likely to include a broader category of individuals compared to the identification doctrine's 'directing mind and will'. However, this test is still anchored in an individualist perspective and will inevitably suffer from the same weaknesses as the identification doctrine.¹⁶⁷ The 'senior management' test is also likely to have a disproportionate effect on smaller companies where the senior managers are more likely to be substantially involved in a breach of a relevant duty of care.¹⁶⁸ It is also likely to be easier to prove substantial involvement from senior managers in smaller companies.

If the organisation is convicted under the CMCH Act then the organisation is liable for a fine that will seldom be less than £500,000 and may be measured in millions of pounds.¹⁶⁹ The court is able to make a remedial order requiring the organisation to remedy the breach and any other matter resulting from the breach which caused the death.¹⁷⁰ The practical effect of

¹⁶⁴ Section 1(4)(c).

¹⁶⁵ Harris, above n 138, at 322.

¹⁶⁶ Gobert, above n 62, at 75.

¹⁶⁷ At 75.

¹⁶⁸ Ormerod and Taylor, above n 125, at 592.

¹⁶⁹ Sentencing Guidelines Council "Corporate Manslaughter & Health and Safety Offences Causing Death: Definitive Guideline" at [24].

¹⁷⁰ Corporate Manslaughter and Corporate Homicide Act 2007 (UK), ss9(1)(a) and 9(1)(b).

remedial orders may be minimal since there is usually a substantial delay between the breach and the trial.¹⁷¹ The court also has the power to require the organisation to publicise its conviction in addition to the particulars of the offence, the amount of any fine imposed and the terms of any remedial order made.¹⁷² The publicity order is likely to be an effective deterrent because it can cause severe damage to a corporation's reputation and sales, regardless of the outcome of the trial.¹⁷³ However, publicity orders are unlikely to be effective in high profile disasters where all the parties are already subject to media attention and any legal proceedings are widely publicised.¹⁷⁴

The first corporation convicted under the CMCH Act was Cotswold Geotechnical (Holdings) Ltd.¹⁷⁵ The deceased was an engineer who entered trial pits to take soil samples without a second person present when the pit collapsed. The defendant was a small company run by a sole director. The defendant was fined £385,000 which was substantially less than the recommended fine of £500,000 and the company soon went into liquidation.¹⁷⁶ The second convicted corporation was JMW Farms Ltd, a small firm that pleaded guilty and was fined £187,500.¹⁷⁷ One of the company's directors negligently operated a forklift which killed an employee. Most recently, Lion Steel Limited pleaded guilty to a charge of corporate manslaughter where an employee fell 13 metres through a skylight in a roof that the

¹⁷¹ Wells, above n 152, at 106.

¹⁷² Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s10.

¹⁷³ Gobert, above n 132, at 432.

¹⁷⁴ Harris, above n 138 at 322.

¹⁷⁵ *R v Cotswold Geotechnical (Holdings) Ltd* [2011] All ER (D) 100.

¹⁷⁶ FRP Advisory "FRP Advisory appointed Liquidators to Cotswold Geotechnical (Holdings) Ltd (21 June 2011) <www.frpadvisory.com/news/frp-advisory-appointed-liquidators-to-cotswold-geotechnical-%28holdings%29-ltd.html>.

¹⁷⁷ *R v JMW Farm Limited* [2012] NICC 17.

corporation knew was fragile. The company was fined £485,000.¹⁷⁸ Lion Steel Limited was a medium sized firm with approximately 150 employees.

In the five years since the CMCH Act came into force, only three corporations have been charged, of which two have pleaded guilty. The legislation is still relatively untested in the courts. Originally, the legislation was intended to minimise the threat of large complex corporations with decentralised decision-making structures. However, it is likely that the CMCH Act will not threaten large corporations. Currently, prosecutors have brought very few proceedings under the CMCH Act, with all the defendants thus far being small to medium sized firms.

2 Bribery Act 2010

The Organisation for Economic Co-operation and Development's (OECD) Working Group on Bribery placed significant pressure on the UK to reform their laws on corporate bribery. The identification doctrine was wholly inadequate in meeting the UK's obligations under the OECD Anti Bribery Convention.¹⁷⁹ Again, the UK Parliament decided to create a specific stand-alone corporate offence of negligently failing to prevent bribery.¹⁸⁰

Under s7(1) of the Bribery Act 2010, a commercial organisation is guilty of an offence if a person associated with the organisation bribes another person intending to obtain or retain business, or an advantage in the conduct of business, for the organisation. This involves a form of organisational fault.¹⁸¹ The Bribery Act includes a defence of due diligence if the organisation has adequate procedures in place which are designed to prevent employees or

¹⁷⁸ *R v Lion Steel Equipment Limited* T 2011 7411, 20 July 2012.

¹⁷⁹ Wells, above n 73, at 387.

¹⁸⁰ Bribery Act 2010.

¹⁸¹ Law Commission *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) at 197.

agents from being involved in bribery.¹⁸² This defence is similar to determining whether the organisation has demonstrated the existence of an adequate “corporate culture”.¹⁸³

Both the corporate manslaughter and bribery offences were a response to political pressure. The UK Parliament preferred to take a piecemeal approach to corporate crime by creating specific limited offences. It is likely that the opportunity to develop a general doctrine of corporate criminal liability in the UK has been lost.¹⁸⁴

B Canada

In Canada, like in the UK, public outrage drove the reform of corporate criminal liability. In 1992, the Westray mine explosion killed 26 miners. An inquiry into the disaster concluded that the tragedy was foreseeable and preventable. Prior to the explosion, the corporation that operated the mine had committed over 50 violations of health and safety regulations.¹⁸⁵ In response, the legislature took a different approach from the UK in developing Bill C-45. Bill C-45 provides for a general form of corporate criminal liability that distinguishes between offences requiring proof of negligence and offences requiring subjective intent.

As Bill C-45 made its way through the parliamentary process, conservative arguments from the corporate sector dominated the legislative process. The Canadian Bar Association feared that increasing corporate criminal liability would create a ‘director chill’ by discouraging talented corporate executives from working in Canada.¹⁸⁶ Politicians were heavily concerned that corporate criminal liability would increase the costs of production, deter investors, and

¹⁸² Bribery Act 2010 (UK), s7(2).

¹⁸³ Pieth and Ivory, above n 12, at 29.

¹⁸⁴ Wells, above n 152, at 108.

¹⁸⁵ Steven Bittle and Lauren Snider “From Manslaughter to Preventable Accident: Shaping Corporate Criminal Liability” (2006) 28 *JL & Social Pol’y* 470 at 474.

¹⁸⁶ At 487.

cause corporations to shift employment to other jurisdictions.¹⁸⁷ The left-leaning National Democratic Party criticised the diluted provisions in Bill C-45 and the law's contradiction in defining corporations as legal persons for virtually every purpose except criminal liability.¹⁸⁸ It is likely that the underlying conservative belief that corporate crimes are less serious because they are *mala prohibita* (wrong because they are prohibited by the government), rather than *mala se* (intrinsically wrong), influenced the legislature in diluting the provisions in Bill C-45.¹⁸⁹ Bill C-45 was substantially weaker than its predecessor Bill C-284 which failed after its second reading.¹⁹⁰

Bill C-45 extended corporate criminal liability to 'organisations', which includes public bodies, societies, trade unions or municipalities.¹⁹¹ Similar to the CMCH Act, the extension in the scope of corporate criminal liability may create problems as the rationales that justify criminal liability against corporations may not apply equally to other forms of organisations.¹⁹² Bill C-45 rejected the collective 'corporate culture' concept present in Bill C-284 in favour of the "senior officer" test which is essentially a broader form of the identification doctrine.¹⁹³ As in the CMCH Act, Bill C-45 focuses on the actions of senior managers and is based on a methodological individualist model of corporate criminal liability. Therefore, Bill C-45 is likely to suffer from the same inherent problems of requiring individual fault before the corporation can be found liable.

¹⁸⁷ At 489.

¹⁸⁸ At 488.

¹⁸⁹ At 486.

¹⁹⁰ At 476.

¹⁹¹ An Act to amend the Criminal Code (criminal liability of organisations) SC 2003 c 21 (C-45), cl 1(2).

¹⁹² Darcy Macpherson "Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45" (2004) 30 Man LJ 253 at 256.

¹⁹³ Bittle and Snider, above n 185, at 477.

Clause 2 of Bill C-45 inserts ss22.1 and 22.2 into the Canadian Criminal Code 1985. Section 22.1 allows the courts to assess negligence-based offences collectively rather than on an individual basis. Representatives' actions, alone or as an aggregate, can form the act or omission of the offence when they are acting within the scope of their authority. A 'representative' is a director, partner, employee, member, agent or contractor of the organisation.¹⁹⁴ The organisation is a party to the offence where a senior officer, who is responsible for the relevant aspects of the organisation's activities, departs markedly from the standard of care that could reasonably be expected to prevent representatives from committing the offence. A 'senior officer' is a representative who plays an important role in establishing an organisation's policies or manages an important aspect of the organisation's activities.¹⁹⁵ This includes directors, chief executive officers and chief financial officers. Section 22.1 creates a more holistic form of corporate criminal liability as s22.1 allows for the aggregation of senior officers' actions in determining whether there has been a marked departure from a reasonable standard of care.¹⁹⁶

For offences requiring proof of fault other than negligence, s22.2 provides that an organisation is a party to an offence where a senior officer acts in the scope of their authority in three different circumstances. First, the organisation is party to an offence where a senior officer is a party to an offence.¹⁹⁷ Second, the organisation is party to an offence where a senior officer has the requisite mental state and directs another representative to commit the actus reus of the offence.¹⁹⁸ Finally, the organisation is party to an offence where the senior

¹⁹⁴ An Act to amend the Criminal Code (criminal liability of organisations) SC 2003, c 21 (C-45), cl 2.

¹⁹⁵ Criminal Code RSC 1985 c C-46, s2.

¹⁹⁶ Macpherson, above n 192, at 283.

¹⁹⁷ Criminal Code RSC 1985 c C-46, s22.2(a).

¹⁹⁸ Section 22.2(b).

officer, knowing that a representative is or is about to be a party to the offence, does not take all reasonable measures to stop the representative from being a party to the offence.¹⁹⁹

Under s22.2, the organisation can be criminally liable without any active participation by senior officers as long as they were aware of the wrongdoing.²⁰⁰ The senior officer does not have to be able to exercise power in the area of the organisation where the offence was committed. However, s22.2(c) requires senior officers to communicate reasonably with each other to prevent the commission of offences.²⁰¹ Unlike s22.1, s22.2 does not provide for the aggregation of knowledge amongst the senior officers.²⁰² Therefore, s22.2 heavily restricts liability for offences that require specific intent because liability relies on a single senior officer's knowledge and his or her failure to take appropriate measures to prevent the commission of an offence.

Furthermore, the definition of senior officers is very broad and may require external parties to prevent representatives from committing offences. For example, internal auditors may be required to disclose important information to parties outside of the organisation, such as the police, instead of allowing the organisation to deal with the situation internally.²⁰³ This may conflict with internal auditors' professional responsibility to only disclose information to external parties where the organisation allows it.²⁰⁴

The few successful criminal proceedings brought against corporations under ss22.1 and 22.2 have resulted in relatively low fines. In *R v Transpavé Inc*, the defendant was a paving-stone

¹⁹⁹ Section 22.2(c).

²⁰⁰ Macpherson, above n 192, at 262.

²⁰¹ At 266.

²⁰² Colvin, above n 64, at 21.

²⁰³ Macpherson, above n 192, at 265.

²⁰⁴ At 265.

manufacturer and a medium sized firm with approximately 100 employees.²⁰⁵ An employee died while operating a machine used to stack concrete blocks. The machine's safety guard had been disabled for nearly two years. The corporation pleaded guilty and was fined \$100,000. In *R v Metron Construction Corporation*, Metron pleaded guilty to corporate negligence causing death after a platform used in the construction of high-rise buildings collapsed killing four people.²⁰⁶ Metron was only fined \$200,000 plus a 15 per cent victim fine surcharge.²⁰⁷

C Australia

1 The Commonwealth

Part 2.5 of the Commonwealth Criminal Code Act 1995 (Cth) produced the greatest paradigm shift towards a holistic model by focusing on the 'corporate culture' of organisations. It is a general form of corporate criminal liability. Section 12.1(2) of the Criminal Code Act 1995 states that a body corporate may be found guilty of any offence (although this is limited to federal offences which do not include manslaughter). For offences of manslaughter, each state must adopt the provisions in pt 2.5 of the Criminal Code Act 1995 into the state's own criminal legislation.²⁰⁸ Despite various attempts and proposals, the adoption of the Commonwealth provisions has remained extremely limited.

Under s12.2, the actus reus of the offence can be attributed to the body corporate where an employee, agent, or officer of the body corporate commits the actus reus while acting within the scope of their employment or authority. For offences which require negligence, the courts

²⁰⁵ *R v Transpavé Inc* [2008] QCCQ 1598 (Quebec).

²⁰⁶ *R v Metron Construction Corporation* [2012] ONCJ 506 (Ontario).

²⁰⁷ At [33].

²⁰⁸ Ricketts and Avolio, above n 99, at 77.

may view the body corporate's conduct as a whole by aggregating the conduct of its employees, agents or officers.²⁰⁹ Inadequate corporate management or the failure to provide adequate systems for conveying relevant information may provide evidence of negligence where the inadequacy substantially attributed to the prohibited conduct.²¹⁰

For offences which require a fault element other than negligence, such as intention, knowledge or recklessness, the fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.²¹¹ The authorisation or permission may occur through the actions of the corporation's board of directors, high managerial agents, or through the corporation's culture.²¹² "Corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate.²¹³ The corporate culture model is based on organisational fault rather than individual fault and captures the true nature of decision making within modern organisations.²¹⁴ Section 12.3(3) provides a defence of due diligence where the corporation took all reasonable efforts to prevent the authorisation or permission of the prohibited conduct.

One disadvantage of the corporate culture model is the uncertainty that the concept imports into corporate criminal liability. Corporate culture is an amorphous concept and, with limited case law, it is difficult to predict how the courts will interpret it. Two anthropological theories may be helpful in analysing corporate culture. The functionalist theory takes a 'top

²⁰⁹ Criminal Code Act 1995 (Cth), s12.4(2).

²¹⁰ Section 12.4(3).

²¹¹ Section 12.3(1).

²¹² Section 12.3(2).

²¹³ Sections 12.3(6).

²¹⁴ Cavanagh, above n 80, at 434.

down' approach and argues that organisational cultures serve corporate interests.²¹⁵ Therefore, senior management can, and should, manipulate the organisational culture. In contrast, the interpretive theory takes a 'bottom up' approach and argues that all members contribute to an organisation's culture and no single group within an organisation controls its culture.²¹⁶ Most organisational cultures are a combination of these two approaches. Therefore, the courts are likely to find it difficult to specifically identify a corporation's culture because it is constantly evolving and is often affected by many different influences. Organisations can even include multiple conflicting sub-cultures.²¹⁷

Corporate culture encompasses the formal aspects of the organisation, such as the organisation's policies and procedures, as well as the organisation's informal attitudes, practices or 'unwritten rules'.²¹⁸ It is these informal aspects of corporate culture which are likely to create evidentiary difficulties for prosecutors. Evidence of a good corporate culture may include the presence of compliance programs, employee education and training programs, methods for employee communication and possibly whistle-blowing procedures.²¹⁹ In contrast, repeated offending within a corporation may provide evidence of a poor corporate culture.²²⁰

Another significant disadvantage of the 'corporate culture' model is that corporations may be able to avoid liability by portraying an event as a single isolated incident as opposed to a

²¹⁵ Alice Belcher "Imagining How a Company Thinks: What is Corporate Culture" (2006) 11 Deakin LR 1 at 9.

²¹⁶ At 9.

²¹⁷ At 12.

²¹⁸ Hill, above n 80, at 17.

²¹⁹ Belcher, above n 215, at 18.

²²⁰ Mary Ramirez "The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty" (2005) 47 Ariz L Rev 933 at 940.

systemic failure.²²¹ Prosecutors are likely to face greater evidential difficulties in proving that a systemic failure occurred within the corporation compared to proving an isolated incident.²²² The ‘corporate culture’ model is likely to create difficulties in obtaining convictions but it may have indirect benefits by drawing attention to poor ‘corporate cultures’ and by incentivising managers to develop better formal and informal corporate policies.

The corporate culture model engendered political resistance because it is a fundamental shift away from the individualist model of corporate criminal liability. The Federal Government subsequently backpedaled from its radical position by excluding many specific offences from the scope of pt 2.5 of the Criminal Code. For example, offences under the Broadcasting Services Act 1992, the Financial Transactions Reports Act 1988, the Hazardous Waste (Regulation of Exports and Imports) Act 1989 and the Trade Practices Act 1974.²²³

2 Australian Capital Territory (ACT)

The Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT) introduced the offence of industrial manslaughter into the Crimes Act 1900 (ACT). Section 7A of the Crimes Act 1900 states that ch 2 of the Criminal Code 2002 (ACT), which replicates the provisions on corporate criminal responsibility in the Criminal Code Act 1995 (Cth), applies to the industrial manslaughter provisions. Under the Crimes Act 1900, an employer or senior officer is guilty of an offence where the employer or senior officer’s conduct causes the death of a worker, or injuries which later results in death in the course of employment.²²⁴ The

²²¹ Ricketts and Avolio, above n 99, at 77.

²²² See Neil Cavanagh, above n 80, at 435.

²²³ Hill, above n 80, at 4.

²²⁴ Crimes Act 1900(ACT), ss 49C and 49D.

employer or senior officer must be reckless about causing harm to the worker or negligent in causing the death of the worker.²²⁵

The scope of the industrial manslaughter offence in relation to corporate defendants is fairly narrow. The offence only applies to the deaths of workers and therefore corporations are not liable for the deaths of consumers of goods and services. ACT is also a small territory containing approximately 1.5 per cent of Australia's population and there is no heavy industry.²²⁶ The workforce consists mostly of government departments and public servants.²²⁷

Additionally, the Australian government responded to the Crimes (Industrial Manslaughter) Amendment Act 2003 by exempting Commonwealth of Australia employers and employees from the Act's provisions.²²⁸ This effectively exempted approximately 80 per cent of the employers and companies in ACT from being criminally liable for industrial manslaughter.²²⁹ The Commonwealth objected to ACT's industrial manslaughter offence because it focused on the employers' and senior officer's conduct without taking due consideration of the employees' responsibilities. The Commonwealth also thought that the previous general manslaughter offence under s15 of the Crimes Act 1900 (ACT) was sufficient to deal with workplace deaths.²³⁰

²²⁵ Crimes Act 1900 (ACT), ss 49C(c)(i) and 49D(c)(i).

²²⁶ Sarre, above n 99, at 653.

²²⁷ At 653.

²²⁸ Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005 (Cth), sch 1.

²²⁹ Sarre, above n 99, at 653.

²³⁰ Chris Johnson "Ten contentions of corporate manslaughter legislation: Public policy and the legal response to workplace accidents" (2008) 46 Safety Science 349 at 358.

The reaction to the introduction of corporate manslaughter in ACT revealed the deep division in public policy at federal and state level. The Australian Trade Union Congress strongly criticised the federal intervention, calling for stronger penalties and a signal that employers must provide a safe work environment. In contrast, employers' representatives argued that industrial manslaughter offences should focus on individual responsibility rather than punishing corporations.²³¹ The Australian Chamber of Commerce and Industry (ACCI) asserted that an offence of corporate manslaughter is likely to increase legal disputes and discourage managers from taking on higher levels of corporate responsibility. The ACCI also argued that increasing fines and penalties was likely to bankrupt small and medium sized companies. The ACCI argued that there are more effective methods for improving health and safety processes than threatening bankruptcy.²³²

Overall, the impact of this industrial manslaughter offence is difficult to predict. There have been no cases brought under ss49C or 49D of the Crimes Act 1900 as of yet. It is likely that this offence has been rendered purely symbolic in nature due to the significant restrictions placed on the scope of the offence by the Federal Government.

3 Other

Most of the other states and territories have considered introducing corporate criminal liability for corporate manslaughter over the years. Each state and territory faced significant political resistance and the general trend has been to focus instead on creating more onerous occupational health and safety legislation by increasing penalties and sanctions.

²³¹ At 359.

²³² Australian Chamber of Commerce and Industry *Industrial manslaughter and workplace safety* (ACCI Review, 2001). See Johnson, above n 230, at 359.

In 2001, the Victorian Government introduced the Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic). The Bill sought to introduce an offence of corporate manslaughter based on organisational fault into the Crimes Act 1958 (Vic).²³³ The proposed offence required that a body corporate's conduct must fall short of the reasonable standard of care that a body corporate is expected to exercise in the circumstances and where the high risk of death or serious injury merits criminal punishment.²³⁴ The Bill allowed the aggregation of the employees, agents and officer's actions in order to view the conduct of the body corporate as a whole in determining whether or not it had acted negligently.²³⁵ Inadequate management of employees and inadequate communication systems may provide evidence of negligence by the body corporate.²³⁶

The business community heavily criticised this Bill. The Australian Industry Group, Independent Contractors of Australia and the Victorian Employers Chamber of Commerce and Industry lobbied until the Upper House eventually rejected the Bill.²³⁷ Afterwards, the Labour government indicated that it did not plan to reintroduce the Bill. This was a controversial decision that the employer associations supported but the trade unions opposed.²³⁸ Instead, the Victorian government chose to introduce a new offence of 'conduct endangering persons at a workplace' into the Occupational Health and Safety Act 1985

²³³ See generally Ricketts and Avolio, above n 99, at 75.

²³⁴ Crimes (Workplace Deaths and Serious Injuries) Bill 2002, cls 13 and 14B.

²³⁵ Crimes (Workplace Deaths and Serious Injuries) Bill 2002, cl 14B(4). See also Ricketts and Avolio, above n 99, at 75.

²³⁶ Crimes (Workplace Deaths and Serious Injuries) Bill 2002, cl 14B(6). See also Ricketts and Avolio, above n 99, at 75.

²³⁷ Ricketts and Avolio, above n 99, at 76.

²³⁸ Rick Sarre and Jenny Richards "Responding to Culpable Corporate Behaviour – Current Developments in the Industrial Manslaughter Debate" (2005) 8 FJLR 93 at 103.

(Vic).²³⁹ This offence is punishable up to 9000 penalty units for a corporate defendant or currently \$1,267,560.²⁴⁰ Surprisingly, Victoria did introduce a similar corporate culture model of corporate criminal responsibility limited to the offence of destruction of evidence. An individual's intention to prevent documents being used in evidence may be attributed to a body corporate if a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the formation of that intention.²⁴¹

In New South Wales, the Crimes Amendment (Industrial Manslaughter) Bill 2004 (NSW) attempted to introduce corporate criminal liability for industrial manslaughter and gross negligence causing serious injury into the Crimes Act 1900 (NSW). However, this Bill lacked support from the government which later introduced an alternative bill to amend the Occupational Health and Safety Act 2000 (NSW).²⁴² The amendment introduced s32A into the Occupational Health and Safety Act 2000 (NSW) and provided that corporations are liable if they cause a person's death at work by reckless conduct where they owe a duty to the victim under the Act.²⁴³ The maximum penalty for a corporation is 15,000 penalty units or currently \$1,650,000.²⁴⁴ In South Australia, corporations may be liable for a fine of up to \$1,200,000 for an offence of recklessly endangering persons in the workplace under s59 of the Occupational Safety and Welfare Act 1986 (SA). Northern Territory defied the trend and incorporated a 'corporate culture' model of corporate criminal responsibility similar to the

²³⁹ This has since been replaced by the Occupational Health and Safety Act 2004, s32. See generally, Ricketts and Avolio, above n 99, at 76.

²⁴⁰ Monetary Units Act 2004 (Vic), s6; and Office of the Chief Parliament Counsel "Penalty and Fee Units" <www.ocpc.vic.gov.au/CA2572B3001B894B/pages/faqs-penalty-and-fee-units>.

²⁴¹ Crimes Act 1958 (Vic), ss 254 and 255.

²⁴² Sarre, above n 99, at 654.

²⁴³ Occupational Health and Safety Act 2000 (NSW), s32A.

²⁴⁴ Occupational Health and Safety Act 2000 (NSW), s32A. See Sarre and Richards, above n 238, at 96.

Commonwealth model into the Criminal Code Act (NT) in 2005.²⁴⁵ However, there is little evidence of any practical effect of these provisions.

In Australia, the general trend has been for legislatures to increase penalties and sanctions for offences under occupational health and safety legislation. In many overseas jurisdictions, such as the UK and Canada, the legislatures have debated the idea of incorporating a ‘corporate culture’ model of corporate criminal liability into their legislation. However, most jurisdictions have rejected this model because it is too uncertain. While arguably this model best accommodates the true nature of organisations, it is politically unappealing and, even in ACT, it has been reduced to a mere symbol. It is likely that this ‘corporate culture’ model will continue to remain a latent form of corporate criminal liability until the political and economic environment changes in its favour.

D Italy

The Italian legal system has traditionally been reluctant to deviate from the principle of *societas delinquere non potest* and develop corporate criminal liability. The legal system subscribes to the methodological individualist view of corporate criminality. Article 27 of the Italian Constitution provides that criminal responsibility is personal and, therefore, requires a subjective consciousness to generate the guilty intent which corporations lack under the methodological individualism.²⁴⁶ The OECD placed pressure on Italy to introduce corporate criminal liability in accordance with its obligations under the OECD Convention on

²⁴⁵ Criminal Code Act (NT), ss43BK – 43BN.

²⁴⁶ Cristina de Maglie “*Societas Delinquere Postest?* The Italian Solution” in Mark Pieth and Radha Ivory (eds) *Corporate Criminal Liability* (Springer, London, 2011) 255 at 256.

Combating Bribery of Foreign Public Officials in International Business Transactions.²⁴⁷

This convention encouraged member states to enact laws that would hold legal persons criminally liable for bribery of a foreign public official.²⁴⁸ The international community sought greater coordination of Italian law with other European legal systems.²⁴⁹

In 2001, Italy passed the Legislative Decree of June 8, 2001, no. 231 (the Decree) which introduced administrative liability for collective entities. The decree labels the liability as administrative, however, arguably it is criminal in nature for all intents and purposes.²⁵⁰ The criminal courts deal with cases brought under this decree and the defendants are protected by criminal procedures.²⁵¹ This form of corporate criminal liability is a *tertium genus* between criminal and administrative law.²⁵² A significant disadvantage of the Decree is that it lacks the capacity to convict corporations of criminal offences because it labels the liability as administrative. The stigma of a conviction serves a fundamental symbolic function. Removing corporations from the reach of the criminal law sends a message to society that corporate crime is less serious than traditional criminal offences.²⁵³

Originally, the Decree was limited to offences of bribery, corruption and fraud.²⁵⁴ The legislature imposed this limitation because corporations needed time and experience in

²⁴⁷ Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Negotiating Conference on 21 November 1997).

²⁴⁸ See James Gobert and Maurice Punch *Rethinking Corporate Crime* (Butterworths LexisNexis, London, 2003) at 109.

²⁴⁹ de Maglie, above n 246 at 258.

²⁵⁰ At 259.

²⁵¹ Emilia Mugnai and James Gobert “Coping with corporate criminality – some lessons from Italy” (2002) *Crim LR* 619 at 624.

²⁵² de Maglie, above n 111, at 561.

²⁵³ At 562.

²⁵⁴ Pieth and Ivory, above n 12, at 20. See also Gobert and Punch, above n 248, at 110.

setting up appropriate organisational systems.²⁵⁵ The legislature later extended the Decree to include a broader range of offences including financial offences,²⁵⁶ terrorism,²⁵⁷ slavery,²⁵⁸ female genital mutilation,²⁵⁹ money laundering and handling stolen goods,²⁶⁰ and involuntary manslaughter and offences involving serious workplace injuries.²⁶¹ Over time, the trend has been to expand the scope of corporate criminal liability, however, it still does not take full account of the broad range of harms in which corporations may engage.²⁶²

The Decree applies to companies and associations with or without legal personality.²⁶³ It does not apply to the State, territorial public agencies, non-profit public agencies or agencies carrying out functions of constitutional importance.²⁶⁴ Article 4 provides the Italian courts with jurisdiction over foreign subsidiaries as long as the headquarters of the parent company are in Italy and proceedings have not been initiated in the host state of the subsidiary. This creates a more realistic view of the modern global economy than traditional doctrines of territoriality.²⁶⁵ The Decree is likely to discourage corporations from shifting dangerous aspects of the corporation to other jurisdictions with less strict corporate criminal laws or a weaker political will to prosecute corporations.²⁶⁶

²⁵⁵ Gobert and Punch, above n 248, at 110.

²⁵⁶ Legislative Decree of April 11, 2002, no 61.

²⁵⁷ Law of January 14, 2003, no 7.

²⁵⁸ Law of August 11, 2003, no 228.

²⁵⁹ Law of January 9, 2006, no 7.

²⁶⁰ Legislative Decree of November 11, 2007, no 231.

²⁶¹ Law of August 3, 2007, no 123. See also Pieth and Ivory, above n 12, at 20.

²⁶² Cristina de Maglie “Country Report: Italy” in James Gobert and Ana-Maria Pascal (eds) *European Developments in Corporate Criminal Liability* (Routledge, Oxon, 2011) 252 at 260.

²⁶³ Legislative Decree of June 8, 2001, no 231, arts 1(1) and 1(2).

²⁶⁴ Legislative Decree of June 8, 2001, no 231, art 1(3).

²⁶⁵ Mugnai and Gobert, above n 251, at 624.

²⁶⁶ At 624.

The Decree provides that corporations may be liable for offences committed by management and offences committed by low-level employees except where the individuals have acted in their sole interest or the interests of third parties.²⁶⁷ Article 5(1)(a) states that a corporation may be liable for an offence committed in the corporation's interest by a person or organisational unit who has a representative, administrative or managerial function, or who exercises de facto management and control over the organisation. This flexible definition is likely to encompass official directors or senior managers in addition to those who have a substantial influence over corporate policies, such as majority shareholders.²⁶⁸ The courts can look at the functional position held by individuals within the corporation rather than the superficial position represented in an individual's job title.²⁶⁹

In relation to offences committed by the managers of a company, the company will not be liable where it has adopted and effectively implemented adequate organisational models and corporate policies to prevent the commission of offences.²⁷⁰ Article 6 reverses the usual burden of proof by requiring the corporation to prove that they have put in place an efficient and suitable control system that deals with the specific crime committed.²⁷¹ Individual corporations can determine the details of their control system. This allows individual needs and circumstances to be taken into account.²⁷² This form of liability is similar to the identification doctrine with a due diligence defence.

Article 5(1)(b) allows the corporation to be liable for an offence committed by subordinate members of the corporation, although vicarious liability was rejected by the Italian legislature

²⁶⁷ Legislative Decree of June 8, 2001, no 231, art 5(2).

²⁶⁸ Mugnai and Gobert, above n 251, at 625. See also Pieth and Ivory, above n 12, at 32.

²⁶⁹ de Maglie, above n 262, at 256.

²⁷⁰ Legislative Decree of June 8, 2001, no 231, art 6(1).

²⁷¹ Mugnai and Gobert, above 251, at 627

²⁷² At 626.

as being contrary to the principle *nulla poena sine culpa*. Where subordinate members of a corporation have committed an offence, the corporation is liable if the offence is a result of structural negligence or organisational fault by the corporation under art 7(1) of the Decree. Liability can be rebutted by the showing of due diligence if the corporation has adopted an effective model of organisation, management and control capable of preventing the specific crimes.²⁷³

A company can be liable even if it is not possible to identify or convict a human perpetrator of an offence.²⁷⁴ This helps the statute to cover horizontally structured corporations with decentralized decision-making structures. However, while the prosecutor does not have to identify or convict an individual offender it seems that there must still be proof of an underlying human offence.²⁷⁵

After 11 years, few cases have been brought to court so it is difficult to determine how the courts will apply these provisions. However, this decree represents a substantial advance in corporate criminal liability. Unlike the legislation in Canada and the UK, there is no focus on the senior management in terms of organisational fault. However, the Decree contains a substantial weakness in that it requires an individual, whether a senior manager or a subordinate employee, to have committed an underlying offence.

E Summary

Overall, there has been a gradual expansion of corporate criminal liability across the world, in both civil and common law countries. During the legislative process of each piece of legislation, similar arguments seemed to arise, particularly from the corporate sector. These

²⁷³ Legislative Decree of June 8, 2001, no 231, art 7(2).

²⁷⁴ Article 8.

²⁷⁵ Mugnai and Gobert, above n 251, at 629.

arguments slowly eroded the legislation during the legislative process. The legislation in the UK and Canada is less novel than the legislatures would like the public to believe, particularly in comparison to the advances in Italy and Australia. Despite the different approaches taken by each jurisdiction, the practical effect of the legislation is the same. The legislation has had minimal practical effect, particularly on large corporations. It is likely that the corporate sector has been able to place sufficient pressure on the legislature during the legislative process to undermine the legislation's original objectives.

IV Chapter Three: External Influences on Corporate Criminal Liability

In order to analyse and predict how the law will or should develop in this area, it is important to discuss the socio-political dynamics of corporate criminal liability. Various groups, with competing interests, can influence the content and application of the law in this area, especially since legislative reforms have dominated recent developments.²⁷⁶ In the past, reform in this area has generally been cyclical in nature.²⁷⁷ Corporate criminal legislation often arises out of a pressing crisis, public outrage and the political desire to be seen to be taking action.²⁷⁸ However, the eventual legislation and enforcement of such legislation is often much weaker than originally promised.²⁷⁹ It is likely that external influences are able to affect the final content of the legislation and its enforcement. A discussion of how these various groups are able to influence the law is critical to an analysis of the development of corporate criminal liability in order to avoid repeating past mistakes.

A Corporations

Corporations strive to create a favourable political, economic, and regulatory environment for themselves.²⁸⁰ Glasbeek argues that the political and economic structure of Anglo-American

²⁷⁶ For example, the Corporate Manslaughter and Corporate Homicide Act 2007, Bill C-45 and the Sarbanes-Oxley Act 2002.

²⁷⁷ William Laufer and Alan Strudler “Corporate Crime and Making Amends” (2007) 44 Am Crim L Rev 1307 at 1307.

²⁷⁸ See Simon Mackenzie and Penny Green “Performative Regulation: A Case Study in How Powerful People Avoid Criminal Labels” (2008) 48 Brit J Criminol 138 at 139.

²⁷⁹ See Lauren Snider “‘This Time We Really Mean It!’: Cracking Down on Stock Market Fraud” in HN Pontell and G Geis (ed) *International Handbook of White-Collar and Corporate Crime* (Springer, New York, 2007) 627 at 627. See also Mackenzie and Green, above n 278, at 139.

²⁸⁰ James Gobert “Because They Can: Motivations and Intent of White-Collar Criminals” in HN Pontell and G Geis (ed) *International Handbook of White-Collar and Corporate Crime* (Springer, New York, 2007) 98 at 103.

countries, as liberal market capitalist democracies, enables corporations to utilise their coercive power to influence their environment.²⁸¹ Corporations are often treated as an individual unit and, like individuals, gain equal sovereignty in accordance with liberal values. Constitutions and bills of rights protect corporations as well as individuals. Every time corporations successfully exercise their political rights, they reinforce their political standing.²⁸² In particular, corporations use their right to free speech to influence regulation to create and maintain a pro-corporate environment.²⁸³

Corporations have developed over time to become a centre of economic and political power.²⁸⁴ Glasbeek argues that there are now in fact two governments. The first government is provisional, elected and subject to the rule of law. The second government is permanent and comprises of the largest corporations, their lobbyists, the media, the advertisers, and their financial and legal advisers. Glasbeek argues that the “provisional” government relies on the wealth of the “permanent” government which consists of only a small proportion of the population.²⁸⁵ This small demographic is able to use its wealth and power to significantly influence the substantive decisions of the “provisional” government. Both of these powerful groups have an incentive to maintain a pro-corporate environment by limiting political debate on issues of private enterprise, the distribution of wealth and the close consultation between governments and the corporate sector.²⁸⁶

²⁸¹ Harry Glasbeek “The Corporation as a Legally Created Site of Irresponsibility” in HN Pontell and G Geis (ed) *International Handbook of White-Collar and Corporate Crime* (Springer, New York, 2007) 248 at 249.

²⁸² At 252.

²⁸³ Carl Mayer “Personalizing the Impersonal: Corporations and the Bill of Rights” (1990) 41 *Hastings LJ* 577 at 611.

²⁸⁴ Snider, above n 279, at 628. See Glasbeek, above n 281, at 249.

²⁸⁵ Glasbeek, above n 281, at 258.

²⁸⁶ Charles Lindblom *Politics and Markets* (Basic Books Inc, New York, 1977).

Large corporations have the resources to lobby politicians, fund political campaigns and to undertake litigation designed to influence the content and enforcement of government policies.²⁸⁷ BP America Incorporated disclosed that it had spent \$8,130,000 on lobbying in America in 2011 alone.²⁸⁸ The corporate sector often argues that corporate criminal liability will have a corrosive effect on entrepreneurship, risk-taking and foreign investment.²⁸⁹ They can threaten to withhold investment, close down or move to a less restrictive jurisdiction.²⁹⁰ This can place crucial jobs and tax income at risk and cost governments votes and donations.²⁹¹ Corporations are also able to lobby below the political radar to limit the enforcement budget and effectively limit enforcement of corporate crime.²⁹² Corporations are able to hide behind neo-liberal philosophies while using their wealth and power to manipulate democratic institutions and influence their political and economic environment.²⁹³ Therefore, policy change is often a result of corporate pressure parading as democratic reform.²⁹⁴

The events leading up to the Westray coal mine explosion provide a clear example of how corporations can manipulate politicians and political institutions.²⁹⁵ The Westray coal mine

²⁸⁷ Glasbeek, above n 281, at 266. For example, particularly in the US, professional lobbyists were able to convince the government to release banks from the fetters imposed on them after the hyperspeculation that preceded the Great Depression. See also Khanna, above n 17, at 95; Gobert, above n 280, at 103; and Lindblom, above n 286, at 194.

²⁸⁸ “Lobbying Disclosure Act Databases” United States Senate
<www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm>.

²⁸⁹ Laufer and Strudler, above n 277, at 1317.

²⁹⁰ Glasbeek, above n 281, at 253. See also Snider and Bittle, above n 38, at 54.

²⁹¹ Snider and Bittle, above n 38 at 54. See generally Lindblom, above n 286.

²⁹² Beale and Safwat, above n 62, at 102. See Vikramaditya Khanna, above n 17, at 112.

²⁹³ See Harry Glasbeek *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Between the Lines, Toronto, 2002) at 236.

²⁹⁴ Lindblom, above n 286, at 191.

²⁹⁵ Glasbeek, above n 293, at 66.

exploded and killed 26 coal miners in Canada in 1992. Prior to the explosion, politicians wanted to increase employment (and concurrently improve their careers) by encouraging a private company to open and operate the Westray coal mine. The Westray mine was known to be rich in coal but it had a history of frequent occupational accidents and deaths.²⁹⁶ Curragh Resources Incorporated (CRI) managed to gain significant concessions from the government due to substantial pressure from well-connected political lobbyists and because several more experienced mining companies had previously rejected the project. The other mining companies thought that the terrain surrounding the mine made extracting the coal too difficult and dangerous.²⁹⁷

In an effort to finalise the project, the government agreed to guarantee 85 per cent of a \$100 million loan that CRI required to undertake the project. This guarantee effectively shifted the risk from CRI to the Canadian taxpayers. As a result, the government had a substantial interest in the success of the mine and chose to ignore breaches in basic health and safety standards by CRI. Prior to the explosion, the Department of Labour took no action against CRI regardless of CRI committing 52 known violations of safety regulations including several cave-ins and findings of unacceptable levels of methane gas present in the mine.²⁹⁸

This example reveals the potential for significant government interest in private commercial enterprises and how corporations can influence government behaviour in enforcing regulations and offences.

Given the current questionable effectiveness of corporate criminal liability, it appears that corporations have successfully been able to stifle the development of corporate criminal liability for the most part. However, Khanna argues that the well-organised and well-funded

²⁹⁶ At 61.

²⁹⁷ At 63.

²⁹⁸ At 62.

corporate sector should have been more successful in preventing the slow but continued expansion of corporate criminal liability.²⁹⁹ Under Khanna's substitution thesis, corporations may not perceive corporate criminal liability as a threat in comparison to corporate civil liability or individual criminal liability.³⁰⁰ Corporations may prefer to allow corporate criminal liability to advance in the hope that it may deflect attention away from discussion of alternative, more hostile reform. If corporate criminal legislation creates ineffective offences that are difficult in practice to enforce, then the legislation may indirectly benefit corporations by conversely legitimising actions that fall outside the boundaries of the offences.³⁰¹

In comparison to civil liability, corporate criminal liability provides corporations with stronger procedural safeguards such as the beyond reasonable doubt standard of proof.³⁰² Litigation may be less costly to corporations since the enforcement of corporate criminal liability has typically been rather limited, particularly for large corporations.³⁰³ Prosecutors operate within a budget and want to maximise convictions.³⁰⁴

Further, the monetary penalties under criminal liability are generally lower than civil liability damages, although they have begun to increase in recent years.³⁰⁵ Given the lower frequency of criminal proceedings and lower penalties awarded, corporations may face lower expected

²⁹⁹ Khanna, above n 17, at 97.

³⁰⁰ At 105. See also Beale and Safwat, above n 62, at 102.

³⁰¹ Mackenzie and Green, above n 278, at 151.

³⁰² Khanna, above n 17, at 112.

³⁰³ At 105.

³⁰⁴ At 110.

³⁰⁵ At 107. See also Richard Gruner "Preventive Fault and Corporate Criminal Liability: Transforming Corporate Organizations into Private Policing Entities" in HN Pontell and G Geis (ed) *International Handbook of White-Collar and Corporate Crime* (Springer, New York, 2007) 279 at 281.

costs in an expansion of corporate criminal liability compared to corporate civil liability. Therefore, corporations may not have heavily resisted the introduction of recent corporate criminal legislation in a bid to deflect attention and resources away from attempts to develop more hostile corporate civil liability which would arguably be more detrimental to the corporate sector. However, Khanna fails to take full account of the intangible costs of corporate criminal liability such as the reputational damage that can result from criminal proceedings even being brought against a corporation let alone the stigma of a conviction.

An expansion of corporate criminal liability is also likely to be more appealing to employees and managers of corporations compared to stricter individual criminal offences. Corporations require managers and other agents to lobby on its behalf. These individuals have an incentive to allow the development of corporate criminal liability to deflect criminal liability away from themselves and onto the corporation.³⁰⁶ Corporate lobbying provides a conduit for the wealthy to voice their views in the political arena.

Khanna argues that individuals are more likely to avoid a conviction or receive a lesser sentence where the prosecution has concurrently charged a corporation because there have been cases where prosecutors have charged both the corporation and key individuals but only the corporation has received a conviction.³⁰⁷ While Khanna's conclusion may be true, his reasoning remains unconvincing. The fact that corporations can be convicted without individual fault does not in itself prove that individual defendants are less likely to be convicted as corporate criminal liability increases in prevalence. Other factors must be taken into account, for example, prosecutors may use corporate criminal liability to threaten

³⁰⁶ Khanna, above n 17, at 117.

³⁰⁷ For example, *American Medical Association v United States* 130 F 2d 233 (DC Cir 1942). See Khanna, above n 17, at 117; and Foerschler, above n 68, at 1290.

corporations in order to seek cooperation from the corporation in the criminal prosecution of individuals.³⁰⁸

Additionally, it is likely to be more difficult for corporations to lobby governments in Europe than in the US. Countries have very different political traditions, cultures, government structures and institutions.³⁰⁹ In Europe, the European Union (EU) adds an additional layer to the political system which makes it more difficult for interest groups to influence the political process. Lobbying at the EU has been compared to playing three-dimensional chess.³¹⁰ Currently the EU has placed pressure on member states to enact corporate criminal legislation in certain areas, for example environmental crimes, government contract fraud, bribery and money laundering.³¹¹

Another alternative theory which may provide some explanatory power is the public choice theory which applies economic methodology to the study of political institutions.³¹² This theory states that “political choices are determined by the efforts of individuals and groups to further their own interests”.³¹³ Once organised, lobbying for special legislation becomes a relatively low-cost activity for corporations in comparison to the benefits they may receive.³¹⁴

³⁰⁸ Mayer, above n 283, at 653.

³⁰⁹ Beale and Safwat, above n 62, at 148.

³¹⁰ At 153.

³¹¹ At 152.

³¹² Daniel Farber and Philip Frickey “Legislative Intent and Public Choice” (1988) 74 Va L Rev 423 at 424.

³¹³ Gary Becker “A Theory of Competition Among Pressure Groups for Political Influence” (1983) 98 QJ Econ 371 at 371 cited in Daniel Farber and Phillip Frickey *Law and Public Choice* (University of Chicago Press, Chicago, 1991) at 15.

³¹⁴ See generally Robert Tollison “Public Choice and Legislation” (1988) 74 Va L Rev 339 at 342.

Carson suggests that in practice, laws that are adverse to powerful interests are unlikely to be enforced or are designed to be ineffective.³¹⁵ Recent developments in corporate criminal legislation have yet to provide any significant practical effect. Using their vast resources and their ability to participate in the legislative process, it is likely that corporations have successfully been able to stifle the development of effective corporate criminal liability.

B Prosecutors

Prosecutors are central to the enforcement of corporate criminal liability. They have a fairly broad discretion in determining when, how, and whether to prosecute a corporation.³¹⁶ The exercise of prosecutorial discretion is inevitable because prosecutors lack the resources to investigate and prosecute every case.³¹⁷ Prosecutors will be inclined to prosecute the cases that are most likely to lead to convictions.³¹⁸ Prosecutorial guidelines generally only provide a list of factors which may be taken into account.³¹⁹ Therefore, prosecutors are still able to exercise relatively unfettered discretion in making the final decision. This discretion can invite arbitrariness into the decision-making process.³²⁰

³¹⁵ WG Carson “The Sociology of Crime and the Emergence of Criminal Laws” in P Rock and M McIntosh (eds) *Deviance and Social Control* (Tavistock Publications, London, 1974) 67 cited in Mackenzie and Green, above n 278, at 149.

³¹⁶ Skupski, above n 24, at 34. See also Diskant, above n 11, at 160.

³¹⁷ Skupski, above n 24, at 17. See generally Laufer and Strudler, above n 277, at 1315; and Pamela Bucy “Corporate Ethos: A Standard for Imposing Corporate Criminal Liability” (1991) 75 *Minn L Rev* 1095 at 1109.

³¹⁸ Gobert and Punch, above n 248, at 143.

³¹⁹ For example, Crown Law “Prosecution Guidelines” (1 January 2010), cl 6.

³²⁰ Skupski, above n 24, at 18. See also Albert Alschuler “Two Ways to Think About the Punishment of Corporations” (2009) 46 *Am Crim L Rev* 1359 at 1381; and Bucy, above n 317, at 1109.

Moreover, prosecutors can exercise discretion in offering and negotiating plea bargains to indirectly control or coerce defendants.³²¹ A prosecution, documented by the media across the world, can be a crippling penalty for a corporation and can seriously threaten a corporation's financial viability.³²² Prosecutors can use the threat of a high profile prosecution to gain leverage in settlement negotiations which take place without the restraints of judicial oversight or the protection of criminal procedure.³²³ Corporations may have no choice but to comply with the prosecutor's demands.³²⁴ As a result, corporate criminal legislation may inadvertently grant prosecutors the power to act as prosecutor, judge, and jury.³²⁵ This reduces the transparency, accountability and uniformity of the criminal process.³²⁶

There is also potential for prosecutorial discretion to act in a biased manner in favour of large corporations.³²⁷ In modern society these large corporations are sophisticated organisations who are able to navigate legal and political systems.³²⁸ Prosecutors know that corporations can strategically prolong the investigation and trial, they are wealthy and have the ability to outspend the government.³²⁹ Large corporations also understand that in certain circumstances

³²¹ Diskant, above n 11, at 162.

³²² Ray Ball "Market and Political/Regulatory Perspectives on the Recent Accounting Scandals" (2009) 47 *Journal of Accounting Research* 277 at 288. See also Pieth and Ivory, above n 12, at 43.

³²³ Skupski, above n 24, at 19.

³²⁴ See Beale, above n 50, at 1504.

³²⁵ Skupski, above n 24, at 18. See also Geraldine Moohr "The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement" (2009) 46 *Am Crim L Rev* 1459 at 1460.

³²⁶ Miriam Baer "Organizational liability and the tension between corporate and criminal law" (2002) 19 *JL & Pol'y* 1 at 8.

³²⁷ See generally Laufer and Strudler, above n 277, at 1316.

³²⁸ Gobert and Punch, above n 248, at 17.

³²⁹ Cindy Schipani "Falling off the corporate ladder: prosecution for financial fraud in the United States" (2011) 32 *Comp Law* 336 at 339.

resistance may be counterproductive and instead cooperate with prosecutors in order to gain beneficial settlements.³³⁰ Therefore, prosecutors have greater incentives to negotiate settlement agreements with large corporations which are more difficult to convict compared to smaller corporations.³³¹

The case of Arthur Andersen highlighted the potentially devastating effects of a criminal prosecution. Arthur Andersen was charged with obstruction of justice after instructing its employees to destroy documents relating to Enron's fraudulent actions.³³² Due to its connection with Enron, Arthur Andersen attracted widespread public attention.³³³ Arthur Andersen was convicted barely five months after the allegation of destroying documents initially surfaced. As a result of the conviction, Arthur Andersen could no longer hold a licence to audit public companies and the firm collapsed. Arthur Andersen could not recover even though three years later the US Supreme Court unanimously overturned the conviction. At the time, the press, the public and politicians placed considerable pressure on the prosecutors and the judiciary to convict Arthur Andersen.³³⁴ Even though the loss of licence was fundamental to Arthur Andersen's collapse, it would have been extremely difficult for the corporation to recover from the negative worldwide publicity and the detrimental effects to their reputation from the criminal proceedings.³³⁵

³³⁰ Gobert and Punch, above n 248, at 17.

³³¹ See generally Laufer and Strudler, above n 277, at 1310.

³³² Nanda, above n 16, at 72.

³³³ Ball, above n 322, at 287.

³³⁴ At 288. See also Khanna, above n 17, at 126; Ellen Podgor "White-Collar Crime and the Recession: Was the Chicken or Egg First?" (2010) *U Chi Legal F* 205 at 217; Diskant, above n 11, at 160; and Beale, above n 50, at 1530.

³³⁵ See generally Beale, above n 50, at 1504.

Furthermore, in the US, there is a greater potential for abuses of prosecutorial discretion in their highly politicised criminal justice system. The prosecutors are elected and their success and career prospects are closely related to the quantity and notoriety of their convictions.³³⁶ These incentives can cause prosecutors to act in their own self-interest which may not align with societal benefits.³³⁷ A blatant example of such abuse can be found in a negotiated agreement that resulted from an accounting scandal involving Bristol Myers Squibb. One of the terms of the agreement required Bristol-Myers Squibb to endow a chair in business ethics to the prosecutor's university.³³⁸ Another agreement required Zimmer Incorporated to appoint former Attorney-General John Ashcroft as a monitor, paying his firm between \$28 and \$52 million.³³⁹

Overall, prosecutors have enormous discretion in determining whether or not to prosecute a corporation and under what charges. This converts into substantial power. The threat of criminal proceedings can irreversibly damage a corporation's reputation. However, there are serious evidential difficulties in obtaining a conviction under corporate criminal legislation, particularly for large corporations. Corporations can often extract favourable terms through negotiations and settlements and, over time, corporations are likely to view settlement agreements as simply another cost of doing business. If prosecutors rarely prosecute large corporations, for whatever reason, then the law cannot develop in the courts, further cementing the ability of large corporations to evade criminal liability.

³³⁶ Erik Luna "The Curious Case of Corporate Criminality" (2009) 46 Am Crim L Rev 1507 at 1513.

³³⁷ Schipani, above n 329, at 336.

³³⁸ John Hasnas "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability" (2009) 46 Am Crim L Rev 1329 at 1342.

³³⁹ At 1342.

C The Government

Governments are able to significantly influence the content and application of corporate criminal legislation. Corporate criminal liability requires a strong political will to nurture and drive development. Government policies can indicate whether a political environment will be conducive to developing corporate criminal liability. Government policies can also incentivise (or deter) corporations to carry out potentially criminal behaviour by altering the political and economic environment within which the corporations operate.

In the 1980s, under Reagan in the US and Thatcher in the UK, there was an extensive period of deregulation and privatization in the name of efficiency, the free market and neo-liberal philosophies. As privatization increased, the public became increasingly dependent on the private sector to provide basic goods and services which reduced the governments' ability to regulate major economic actors.³⁴⁰ In conjunction with successful corporate lobbying, the political and economic climate resulted in reduced regulations, particularly in the transportation, finance and environmental industries.³⁴¹ As a result, the corporate environment evolved and began to heavily prioritise profit-making above all else.

In particular, at the time of the Southall train crash the British government had privatised the rail industry instead of operating it as a state monopoly. This change in market structure shifted the industry's focus away from safety standards to short-term profitability. Great Western Railways (GWR) had temporarily fitted the trains with an Automatic Train Protection System (ATP) experimentally but it was not operational at the time of the crash because it was too expensive. The Automatic Warning System (AWS) installed on the train

³⁴⁰ Steve Tombs "State complicity in the production of corporate crime" in James Gobert and Ana-Maria Pascal (eds) *European Developments in Corporate Criminal Liability* (Routledge, Oxon, 2011) 70 at 74.

³⁴¹ Snider and Bittle, above n 38, at 57.

required the driver to turn around the train. The company refused to do this because it would cause delays and could result in the government awarding late penalties against GWR. Both of these systems would have prevented the crash if they were operational.³⁴²

While the Southall train crash could easily be blamed on human error, there were multiple causes which contributed to the crash. At the individual level, the driver admitted to packing his bags at the time of the crash and failed to see the warning lights. At the management level, the senior management failed to provide for a second driver on the train, failed to install and train employees to use the ATP system and refused to turn around the train in a bid to avoid penalties. Finally, the government ranked the companies in the industry based on efficiency and imposed penalties for late arrivals. The government's policies contributed to GWR's prioritisation of efficiency and profit over safety. GWR was not alone. The whole British rail industry had rejected the ATP system on the grounds of cost. The government policies contributed indirectly but significantly to the crash.³⁴³ This disaster reveals the vast range of factors that can encourage corporations to conduct potentially criminal behaviour. In the end, it took several disasters and many deaths to force the UK government to change its policies and take corporate manslaughter seriously.

The relationship between corporations and the government has changed over time. Liberal values operate within the law and market to increase the marginalisation of governments.³⁴⁴ Governments rely heavily on large corporations who are key sources of goods, services, taxation and employment.³⁴⁵ This makes it difficult for the government to legislate against the corporate sector. The economy's, and the government's, reliance on large corporations

³⁴² Gobert, above n 280, at 112.

³⁴³ Gobert, above n 280, at 112-114.

³⁴⁴ Glasbeek, above n 293, at 233.

³⁴⁵ Steve Tombs, above n 340, at 73.

was evident when the 2007 global financial crisis forced the US government to bailout a number of large investment banks despite potential mismanagement and fraud coming to light because they were “too big to fail”.³⁴⁶ The relationship between the corporate sector and governments also operates on a deeper level. A significant number of politicians either originate from the corporate sector or join the corporate sector after their political life.³⁴⁷ Therefore, they are likely to share similar ideologies which manifest themselves in a political environment that is favourable to the corporate sector.³⁴⁸

Under the public choice theory, Mackenzie and Green argue that politicians face pressure to find a short-term resolution to conflict due to the length of political office and their desire for re-election.³⁴⁹ This leads political regulation to focus more on suppressing social discord rather than resolving the substance of the conflict itself.³⁵⁰ However, the public choice theory’s predictive ability has been criticised because it fails to take into account ideological considerations which are also important in political decision-making.³⁵¹ The public choice theory even fails to explain fundamental political aspects such as popular voting. Under a public choice theory analysis no rational person would vote because the chance of their vote affecting the outcome of the election is minuscule compared to the substantial costs of voting in time and inconvenience.³⁵²

³⁴⁶ Bernard Shull “Too Big to Fail in Financial Crisis: Motives, Countermeasures, and Prospects” (Working Paper, Levy Economics Institute of Bard College, 2010) at 4.

³⁴⁷ Glasbeek, above n 293, at 234.

³⁴⁸ At 236.

³⁴⁹ See Mackenzie and Green, above n 278, at 142.

³⁵⁰ At 150.

³⁵¹ Dwight Lee “Politics, Ideology, and the Power of Public Choice” (1988) 74 Va L Rev 191 at 197.

³⁵² Farber and Frickey, above n 313, at 24.

The central assumption of the public choice theory that self-interest is the sole driving force in political decision-making is generally unconvincing. However, this theory does provide some insight into the political process by identifying self-interest as an important factor in political decision-making.³⁵³ It would be foolish to completely disregard self-interest as a factor in the political process by taking a more romantic position closer to republicanism where all decisions are made completely in the public interest and civic virtue.³⁵⁴

The political process operates under a number of influences which include self-interest, ideology, and special interest groups. Corporations are able to appeal to the government on each of these levels in order to garner support for a pro-corporate economic and political environment. Further, the political will and surrounding context is important in creating an environment conducive to developing corporate criminal liability. In light of recent corporate scandals, politicians and the general public are calling for greater corporate monitoring and controls. A real paradigm shift in the approach to corporate criminal liability may be viable in the current political and economic environment. However, there are less controversial approaches, such as harsher individual criminal offences for directors or senior managers, which may dominate reform and leave corporate criminal liability in its current latent form.

D The Public

Corporate criminal legislation often arises out of a large public outcry over a corporate disaster or scandal.³⁵⁵ When these crises occur, the government faces political pressure from the public (or voters) to hold someone accountable. The public often desire criminal

³⁵³ At 34.

³⁵⁴ At 44.

³⁵⁵ Khanna, above n 17, at 95.

sanctions, for its retributivist function, against the corporation or key individuals involved.³⁵⁶ Although, traditional retributivist theorists argue that moral culpability can only be assigned to individual actors because corporations cannot be morally blameworthy.³⁵⁷

There is concern that a strong public outcry will cause Parliament to succumb to penal populism (where policies are developed primarily for their anticipated popularity).³⁵⁸ Legislation that arises out of a corporate scandal may be hastily conceived and rushed through the legislative process without sufficient critical debate. Attempting to quickly satisfy the public may leave the legislative process open to criticisms of being unprincipled and opportunistic.³⁵⁹ Public attitudes in the immediate aftermath of a corporate scandal may not reflect sustained concern over the issue.³⁶⁰ Often as time progresses, social concern dissipates alleviating the public pressure on Parliament to hold corporations accountable. In recent times, Parliament has resisted public pressure to steamroll corporate criminal legislation through the legislative process as a response to corporate disasters.³⁶¹

Furthermore, the legislature may prefer corporate criminal legislation because it satisfies the public's condemnation while potentially imposing relatively low costs on the corporate sector.³⁶² The general public are not likely to be familiar with intricate details of corporate

³⁵⁶ At 124.

³⁵⁷ See Schipani, above n 329, at 336.

³⁵⁸ Julian Roberts and others *Penal Populisms and Public Opinion: Lessons from Five Countries* (Oxford University Press, Oxford, 2003) at 65 cited in Paul Almond "Understanding the seriousness of corporate crime: Some lessons for the new 'corporate manslaughter' offence" (2009) 9 CCJ 145 at 149.

³⁵⁹ Almond, above n 358, at 149.

³⁶⁰ At 148.

³⁶¹ As previously discussed, the UK CMCH Act and Bill C-45 took considerable time to come to fruition and faced considerable discussion and critical analysis.³⁶¹

³⁶² Khanna, above n 17, at 98.

criminal law and therefore may not closely follow the laws that the legislature eventually enacts.³⁶³ It is likely that the public will tend to focus on the outcomes (such as the number of convictions) and pay more attention to news intermediaries rather than the exact details of the law and its implications.³⁶⁴ The public may be satisfied with the fact that an act was simply passed without critically questioning the detailed provisions of the legislation. As a result, corporations are likely to be more successful in lobbying to increase the difficulty in attaching criminal liability to corporations rather than attempting to prevent corporate criminal legislation from existing at all. For example, corporations may lobby for broad “carve out” provisions which will significantly reduce the scope of the legislation.³⁶⁵

Additionally, the public suffers from a collective action problem and clearly are not as well resourced or well organised as corporate lobby groups.³⁶⁶ This makes it significantly more difficult for the public to effectively influence the law. However, with the increasing prevalence of social media, these collective action problems may decline over time as it becomes easier for the public to organise protests to lobby Parliament on various issues.³⁶⁷

Corporate criminal liability is not the only way to satisfy the public’s desire for retribution. Public inquiries serve a number of important functions and purposes. They allow those closely affected by the event to publicly display their grief and anger.³⁶⁸ It provides an opportunity to exert pressure for policy changes.³⁶⁹ However, corporations can use public

³⁶³ At 124.

³⁶⁴ At 125.

³⁶⁵ At 102.

³⁶⁶ At 125. See also Tollison, above n 314, at 342.

³⁶⁷ For example, social media played a crucial part in the Occupy movement.

³⁶⁸ Wells, above n 120, at 57.

³⁶⁹ At 57.

inquiries as a way to manipulate the blaming process and avoid open adversarial dispute.³⁷⁰ Therefore, public inquiries cannot replace the need for corporate criminal liability. Overall, it is likely that social concern alone is insufficient to compel the development of a truly effective model of corporate criminal liability.

E The Media

Finally, the media has significant control over society's perception of corporate crime, particularly if the media is looking to maintain current perceptions and dominant ideologies on corporate crime.³⁷¹ The media is supposed to safeguard the political sovereignty of citizens.³⁷² Freedom of expression allows an independent media industry to hold public officials to account and protects the social, political, and economic interests of the public.³⁷³

The media plays a significant role in setting the agenda and the boundaries of discussion and debate of controversial issues.³⁷⁴ The public place substantial weight on the emphasis and prevalence of an issue in the media in determining the importance of that issue. The media is supposed to be independent, provide an objective coverage of events and make sure that all parties are accountable for their actions. As the potential for corporate harm escalates, society is becoming less forgiving of reckless corporate behaviour and the media is a powerful vehicle to initiate change.

³⁷⁰ At 53.

³⁷¹ Lindblom, above n 286, at 207.

³⁷² Glasbeek, above n 293, at 233.

³⁷³ At 111.

³⁷⁴ See Stephen Rosoff "The Role of the Mass Media in the Enron Fraud: Cause or Cure?" in HN Pontell and G Geis (eds) *International Handbook of White-Collar and Corporate Crime* (Springer, New York, 2007) 513 at 518; Michael Barker "Manufacturing policies: the media's role in the policy making process" (paper presented to the Journalism Education Conference, Griffith University, November 2005) at 6.

The media depends on numerous factors in determining the substance of their news narrative. These include geopolitical interests, market needs, budgets and cultural priorities.³⁷⁵ The media faces pressure from investors, lobby groups and political agendas to portray the news in a certain light. Many media outlets worldwide are owned and operated as private corporations and have a significant interest in maintaining a profitable company.³⁷⁶ Media companies rely heavily on corporations in order to survive because they generally make most of their profit through selling advertising. This has the potential to influence the way in which the media operates.³⁷⁷

Unfortunately in reality, the media tends to operate to protect large corporations from accountability by providing a biased version of events. Reporters typically under-represent the harm caused by powerful interests by being substantially more critical of traditional crime, for example theft or assault, than corporate crime.³⁷⁸ When the media does cover corporate crime, the coverage tends to focus on the harms caused by the crime while providing little critical analysis of the facts or causes of the crime.³⁷⁹ This limits the accountability and transparency of the corporate sector.

Immediately after the Westray mining explosion, corporate spokespeople dominated the news coverage and dictated the release of information through press releases.³⁸⁰ Corporate officials were able to deflect blame by referring to the explosion as an “accident” rather than

³⁷⁵ John McMullan “News, Truth, and the Recognition of Corporate Crime” (2006) 48 CJCCJ 905 at 908.

³⁷⁶ Glasbeek, above n 293, at 111. See also Rosoff, above n 374, at 518.

³⁷⁷ Glasbeek, above n 293, at 111. See also Podgor, above n 334, at 218.

³⁷⁸ McMullan, above n 375, at 908. See also Snider, above n 279, at 638.

³⁷⁹ Gabrio Forti and Arianna Visconti “Cesare Beccaria and White-Collar Crimes’ Public Harm: A Study in Italian Systemic Corruption” in HN Pontell and G Geis (eds) *International Handbook of White-Collar and Corporate Crime* (Springer, New York, 2007) 490 at 496.

³⁸⁰ McMullan, above n 375, at 924.

a homicide despite severe breaches of safety standards.³⁸¹ The reference to the disaster as an “accident” reveals the continued underlying societal reluctance to fully blame corporations for their actions. During the criminal trial and public inquiry, more information came to light and the “natural tragedy” was eventually reframed as a “legal disaster”.³⁸²

Furthermore, investigative journalism has the ability to increase public and political awareness of corporate crime and change long-term popular beliefs about corporations.³⁸³ Recently, there has been a decline in the prevalence of print media as a result of the increasing use of digital media and the recession.³⁸⁴ This has had a detrimental impact on the quality and frequency of investigative reporting which is expensive, labour intensive and its returns are hard to quantify.³⁸⁵ As print media continues to decline, online journalism may not have the resources to fill the void in investigative journalism left by print media, particularly in regard to complex corporate crime.³⁸⁶ Over time, this will create a shortage of reporters who have the ability to uncover and communicate the stories of corruption and fraud.³⁸⁷

A lack of funding will force reporters to adopt a coalition style of journalism as opposed to adversarial journalism. Coalition journalism is an active collaboration between journalists and policy-makers in determining policy-making agendas.³⁸⁸ Coalition journalism primarily serves policy-makers and media interests rather than the public because it allows the policy-

³⁸¹ At 924.

³⁸² At 925.

³⁸³ Snider, above n 279, at 638.

³⁸⁴ Podgor, above n 334, at 220.

³⁸⁵ Michael Malone “Investing in Investigative” (2011) 141 *Broadcasting & Cable* 10 at 10.

³⁸⁶ Podgor, above n 334, at 220.

³⁸⁷ Malone, above n 385, at 10.

³⁸⁸ Barker, above n 374, at 4.

makers to control the flow of information.³⁸⁹ This will result in a closer adherence to dominant policy discourses and the general public will become vulnerable to manipulation by the media and policy-makers.³⁹⁰ The public will be pushed further towards the margins of policy-making processes with decreased involvement and a reduced ability to place social pressure on the legislature.

F Summary

Overall, these different parties are able to significantly influence the development of corporate criminal liability. Corporations use their vast wealth and power to lobby for a pro-corporate political and economic environment above and below the political radar. The government faces significant pressure to appease both the corporate sector and the public. The public tends not to focus on the details of the law which has allowed legislatures to pass relatively ineffective corporate criminal legislation. Finally, the media is able to hold corporations and public officials to account and is a heavily influential vehicle for change. However, the media is also vulnerable to the vast wealth and power of the corporate sector and may operate to suppress developments in corporate criminal liability, particularly with the current decline in print media and investigative journalism.

³⁸⁹ At 6.

³⁹⁰ At 5.

V Conclusion

The criminal law originated from an individualist model designed to capture human defendants. As the potential for corporations to cause significant harm increased, the criminal law attempted to anthropomorphise corporations to bring them within the individual paradigm. The enduring reluctance of the criminal law to depart from the individual model and embrace a truly organisational model of criminal liability has continued to cause significant difficulties in holding corporations criminally liable.

Several jurisdictions have addressed this issue through legislative reforms including the United Kingdom, Canada, Australia and Italy. The United Kingdom and Canadian legislatures were satisfied with merely expanding the identification doctrine to encompass the actions of ‘senior management’ or ‘senior officers’ respectively. Australia’s ‘corporate culture’ model is a novel holistic approach that accounts for the diffuse organisational structure of corporations. Unfortunately, the Australian Federal Government subsequently reduced the scope of corporate criminal legislation in both the Commonwealth and ACT. The impact of Australia’s novel approach has been neutralised by its extremely limited scope.

Italy’s derivative model of corporate criminal liability also takes a more organisational approach but it still requires an individual to commit an underlying offence even though the prosecution does not have to identify or convict a human defendant. The lack of successful cases brought under corporate criminal legislation globally indicates that the legislation is still relatively ineffective. However, it is difficult to predict how the courts will interpret these provisions in the future.

Each jurisdiction faced substantial pressure from the corporate sector, trade unions, the public and the media during the legislative process with similar arguments being raised worldwide. Unfortunately, the corporate sector wields significant power and has so far been

able to stifle the development of corporate criminal liability. Overall, an effective organisational model of corporate criminal liability is unlikely to arise unless the political and economic environment substantially changes. In the meantime, governments are likely to focus on far less controversial developments by creating stricter individual criminal offences or increasing damages under corporate civil liability.

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Appendix 1: United Kingdom Statutory Provisions

Corporate Manslaughter and Corporate Homicide Act 2007

1 The offence

- (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—
 - (a) causes a person's death, and
 - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
- (2) The organisations to which this section applies are—
 - (a) a corporation;
 - (b) a department or other body listed in Schedule 1;
 - (c) a police force;
 - (d) a partnership, or a trade union or employers' association, that is an employer.
- (3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).
- (4) For the purposes of this Act—
 - (a) “relevant duty of care” has the meaning given by section 2, read with sections 3 to 7;

- (b) a breach of a duty of care by an organisation is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;
 - (c) “senior management”, in relation to an organisation, means the persons who play significant roles in—
 - (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
 - (ii) the actual managing or organising of the whole or a substantial part of those activities.
- (5) The offence under this section is called—
- (a) corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland;
 - (b) corporate homicide, in so far as it is an offence under the law of Scotland.
- (6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.
- (7) The offence of corporate homicide is indictable only in the High Court of Justiciary.

2 Meaning of “relevant duty of care”

(1) A “relevant duty of care”, in relation to an organisation, means any of the following duties owed by it under the law of negligence—

(a) a duty owed to its employees or to other persons working for the organisation or performing services for it;

(b) a duty owed as occupier of premises;

(c) a duty owed in connection with—

(i) the supply by the organisation of goods or services (whether for consideration or not),

(ii) the carrying on by the organisation of any construction or maintenance operations,

(iii) the carrying on by the organisation of any other activity on a commercial basis, or

(iv) the use or keeping by the organisation of any plant, vehicle or other thing;

(d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible.

(2) A person is within this subsection if—

(a) he is detained at a custodial institution or in a custody area at a court or police station;

- (b) he is detained at a removal centre or short-term holding facility;
 - (c) he is being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements;
 - (d) he is living in secure accommodation in which he has been placed;
 - (e) he is a detained patient.
- (3) Subsection (1) is subject to sections 3 to 7.
- (4) A reference in subsection (1) to a duty owed under the law of negligence includes a reference to a duty that would be owed under the law of negligence but for any statutory provision under which liability is imposed in place of liability under that law.
- (5) For the purposes of this Act, whether a particular organisation owes a duty of care to a particular individual is a question of law.

The judge must make any findings of fact necessary to decide that question.

- (6) For the purposes of this Act there is to be disregarded—
- (a) any rule of the common law that has the effect of preventing a duty of care from being owed by one person to another by reason of the fact that they are jointly engaged in unlawful conduct;

- (b) any such rule that has the effect of preventing a duty of care from being owed to a person by reason of his acceptance of a risk of harm.

(7) In this section—

“construction or maintenance operations” means operations of any of the following descriptions—

- (a) construction, installation, alteration, extension, improvement, repair, maintenance, decoration, cleaning, demolition or dismantling of—
 - (i) any building or structure,
 - (ii) anything else that forms, or is to form, part of the land,
or
 - (iii) any plant, vehicle or other thing;
- (b) operations that form an integral part of, or are preparatory to, or are for rendering complete, any operations within paragraph (a);

“custodial institution” means a prison, a young offender institution, a secure training centre, a young offenders institution, a young offenders centre, a juvenile justice centre or a remand centre;

“detained patient” means—

- (a) a person who is detained in any premises under—
 - (i) Part 2 or 3 of the Mental Health Act 1983 (c. 20) (“the 1983 Act”), or

- (ii) Part 2 or 3 of the Mental Health (Northern Ireland) Order 1986 (S.I. 1986/595 (N.I. 4)) (“the 1986 Order”);
- (b) a person who (otherwise than by reason of being detained as mentioned in paragraph (a)) is deemed to be in legal custody by—
 - (i) section 137 of the 1983 Act,
 - (ii) Article 131 of the 1986 Order, or
 - (iii) article 11 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 (S.I. 2005/2078);
- (c) a person who is detained in any premises, or is otherwise in custody, under the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) or Part 6 of the Criminal Procedure (Scotland) Act 1995 (c. 46) or who is detained in a hospital under section 200 of that Act of 1995;

“immigration escort arrangements” means arrangements made under section 156 of the Immigration and Asylum Act 1999 (c. 33);

“the law of negligence” includes—

- (a) in relation to England and Wales, the Occupiers' Liability Act 1957 (c. 31), the Defective Premises Act 1972 (c. 35) and the Occupiers' Liability Act 1984 (c. 3);

- (b) in relation to Scotland, the Occupiers' Liability (Scotland) Act 1960 (c. 30);
- (c) in relation to Northern Ireland, the Occupiers' Liability Act (Northern Ireland) 1957 (c. 25), the Defective Premises (Northern Ireland) Order 1975 (S.I. 1975/1039 (N.I. 9)), the Occupiers' Liability (Northern Ireland) Order 1987 (S.I. 1987/1280 (N.I. 15)) and the Defective Premises (Landlord's Liability) Act (Northern Ireland) 2001 (c. 10);

“prison escort arrangements” means arrangements made under section 80 of the Criminal Justice Act 1991 (c. 53) or under section 102 or 118 of the Criminal Justice and Public Order Act 1994 (c. 33);

“removal centre” and **“short-term holding facility”** have the meaning given by section 147 of the Immigration and Asylum Act 1999;

“secure accommodation” means accommodation, not consisting of or forming part of a custodial institution, provided for the purpose of restricting the liberty of persons under the age of 18.

8 Factors for jury

(1) This section applies where—

- (a) it is established that an organisation owed a relevant duty of care to a person, and
- (b) it falls to the jury to decide whether there was a gross breach of that duty.

- (2) The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so—
 - (a) how serious that failure was;
 - (b) how much of a risk of death it posed.
- (3) The jury may also—
 - (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;
 - (b) have regard to any health and safety guidance that relates to the alleged breach.
- (4) This section does not prevent the jury from having regard to any other matters they consider relevant.
- (5) In this section “health and safety guidance” means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.

18 No individual liability

- (1) An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter.
- (2) An individual cannot be guilty of aiding, abetting, counselling or procuring, or being art and part in, the commission of an offence of corporate homicide.

Bribery Act 2010

7 Failure of commercial organisations to prevent bribery

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
 - (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
- (3) For the purposes of this section, A bribes another person if, and only if, A—
 - (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
 - (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
- (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section—

“partnership” means—

- (a) a partnership within the Partnership Act 1890, or
- (b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,

“relevant commercial organisation” means—

- (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
- (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
- (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
- (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.

Appendix 2: Canadian Statutory Provisions

Criminal Code 1985

21 Parties to offences

- (1) Every one is a party to an offence who
- (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
 - (c) abets any person in committing it.

22.1 Offences of negligence - organizations

In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) acting within the scope of their authority
 - (i) one of its representatives is a party to the offence, or
 - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart —markedly from the standard of care that, in the circumstances, could reasonably be

expected to prevent a representative of the organization from being a party to the offence.

22.2 Other offences - organizations

In respect of an offence that requires the prosecution to prove fault —other than negligence —an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

Appendix 3: Australian Statutory Provisions

Criminal Code Act 1995 (Cth)

12.1 General principles

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:

- (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
 - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
- (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
 - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or

entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

"board of directors" means the body (by whatever name called) exercising the executive authority of the body corporate.

"corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

"high managerial agent" means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

- (b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Crimes Act 1900 (ACT)

49C Industrial manslaughter - employer offence

An employer commits an offence if—

- (a) a worker of the employer—
 - (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or
 - (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the employer's conduct causes the death of the worker; and

- (c) the employer is—
 - (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or
 - (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

49D Industrial manslaughter—senior officer offence

A senior officer of an employer commits an offence if—

- (a) a worker of the employer—
 - (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or
 - (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the senior officer's conduct causes the death of the worker; and
- (c) the senior officer is—
 - (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or
 - (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

Appendix 4: Italian Statutory Provisions

Legislative Decree of June 8, 2001, no. 231

Article 1 – Subjects

- (1) This legislative decree shall regulate the responsibility of legal entities for administrative offences linked to a crime.
- (2) Its provisions shall apply to legal entities as well as to companies and associations without a status of legal entity.
- (3) These provisions shall not apply to the Italian State, to its territorial authorities, to other non- economic public bodies nor to legal entities carrying out important constitutional functions.

Article 5 – Responsibility of legal entities

- (1) Legal entities shall be responsible for offences committed at their own benefit and in their own interest:
 - (a) by those people holding representation, administration or direction offices in the legal entity or in one of its business units with financial and functional independence, as well as by those people holding, even de facto, management and control positions in the entity;
 - (b) by those people subject to the direction and supervision of one of the subjects under letter (a).
- (2) Legal entities shall not be responsible if those people under subsection (1) acted in their own interest or in the interest of third parties.

Article 6 – Senior management and organizational models of legal entities

(1) Where the offence has been committed by those people under article 5(1)(a), legal entities shall not be responsible if they prove that:

- (a) their managing body has adopted and implemented effectively, before the offence was committed, organizational and management models in order to avoid offences such as the one in question;
- (b) the task to supervise the functioning and observance of the models and to deal with their updating has been assigned to a body of the legal entity with independent initiative and control powers;
- (c) those people have committed the offence fraudulently eluding organizational and managing models;
- (d) the supervision by the body under letter (b) has not been neglected nor inadequate.

(2) Concerning the extent of delegated powers and the risk of committing offences, the models under letter (a), subsection (1), shall meet the following requirements:

- (a) identifying activities where offences may be committed;
- (b) providing for special protocols aiming at planning the development and implementation of the decisions made by legal entities as regards the offences to avoid;

- (c) identifying methods to manage financial resources in order to avoid offences being committed;
 - (d) providing for information liabilities for the body in charge of supervising the functioning and observance of the models;
 - (e) establishing a penalty system aiming at sanctioning the non-respect of the measures stated by the model.
- (3) Organizational and management models can be adopted, meeting the requirements under subsection (2), according to codes of conduct drawn up by representative associations of legal entities and communicated to the Ministry of Justice that, in agreement with the Ministries concerned, can make, within thirty days, comments on the capability of the models to avoid offences.
- (4) In smaller legal entities, the tasks under letter b), subsection (1), can be directly carried out by their managing body.
- (5) At any rate, profits made by legal entities on the offence shall be confiscated, even in an equivalent form.

Article 7 – Subjects under other people’s direction and organizational models of legal entities

- (1) In the case under article 5 (1) b), legal entities shall be responsible if the offence committed has been due to the non-observance of directive or supervisory obligations.
- (2) At any rate, the non-observance of directive or supervisory obligations shall be excluded if legal entities have adopted and implemented

effectively, before the offence was committed, an organizational and management model in order to avoid offences such as the one in question.

- (3) The model shall provide for, according to the type, size and business of legal entities, suitable measures for guaranteeing a legal business development, detecting and eliminating any risk in time.
- (4) For the model to be effective, the following requirements shall be met:
 - (a) the model shall be periodically checked and, if necessary, modified, if significant violations of provisions are detected or if changes in legal entities or in their business occur;
 - (b) a penalty system shall be set up, in order to sanction the non-respect of the measures provided for by the model.

Article 8 – Independent responsibilities of legal entities

- (1) The responsibility of legal entities shall exist even if:
 - (a) the offender has not been identified or (s)he is not indictable;
 - (b) the offence is extinguished for a reason other than amnesty.
- (2) Unless otherwise provided, proceedings shall not be taken against legal entities when amnesty is granted for an offence for which they are responsible and the accused has waived the application of such responsibility.
- (3) Legal entities may waive amnesty.