

Making a Killing

A separate corporate manslaughter offence for New Zealand?

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Introduction

In [a free] economy, there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.¹

Over the last 200 years, the limited liability corporation² has grown to become the dominant business institution of the Western World. For most of this time, the corporation itself has led a relatively charmed life. The perceived role of a corporation was to concentrate on making the largest possible profit. The institution of the corporation was free from committing many criminal offences, with regulation the designated guard of corporate activity. Popular culture concentrated on a single person within the corporation, often the CEO, who was considered evil and greedy, stopping at nothing to make money.³

In the last 20 years, there have been a number of well-documented and publicised disasters⁴ including trains and ferries in the United Kingdom, the Mt Erebus Air New Zealand plane crash, and the Esso Longford gas explosion in Australia. Reports into these disasters have heavily criticised the actions of the corporations. The result has been that deaths caused by corporations have become a political issue, with the public demanding answers as to how these disasters could have occurred.

The orthodox method of finding corporations guilty of an offence reflects the popular culture idea of one person being at fault within the corporation. This is known as the identification doctrine and involves attributing the acts and state of mind of one person who could be considered the ‘directing mind and will’ of the corporation. However in large corporations the idea of a single person being “the directing mind

¹ M Friedman, *Capitalism and Freedom*, (1st ed, The University of Chicago Press, 1962) 133.

² The use of corporation and company are used throughout this paper interchangeably.

³ CEOs have been portrayed as the bad guy in many movies and long running TV shows, including Mr Burns in *The Simpsons* and Dr Otto Octavius in *Spider Man 2*. For more information see: <http://www.usatoday.com/educate/college/careers/news14.htm>

⁴ These are discussed in more detail in Chapter 1, see below n 82-84.

and will”⁵ of the company is misleading. Large corporations have many levels of management and communication, with a corporate culture which has evolved over many years and can not be attributed to any one person. To address this, overseas jurisdictions⁶ have concentrated on the idea that the organisational fault of the corporation, in its policies, accepted practices and overall culture, is more to blame than any single identified person such as a CEO. While this idea may move away from the public perception of how a corporation commits offences, it is a much more effective way of attributing corporate fault.

In New Zealand, there have been no attempts at change and the identification doctrine is still the accepted practice for corporate criminal liability.⁷ However there is currently no way of holding a corporation liable for manslaughter, due to the wording of homicide in the Crimes Act 1961.⁸ The Health and Safety in Employment Act 1992 is the key health and safety regulation that corporations must adhere to. I aim to show that this regulation is insufficient in New Zealand⁹ and I propose a separate corporate manslaughter offence which is based on the Australian model for corporate criminal law.¹⁰

In the first chapter I discuss how corporations are currently regulated and how liability involving mens rea can be attributed to a corporation. The second chapter discusses the current New Zealand position involving corporate liability with analysis of the Crimes Act and the Health and Safety in Employment Act. The third chapter looks at how the United Kingdom and Australian criminal law has attempted to amend the law involving corporate manslaughter and corporate criminal liability in general. In my final chapter I discuss the business make-up of New Zealand and discuss the advantages and disadvantages of two possible alternatives for corporate manslaughter in New Zealand.

⁵ See identification doctrine, Chapter 1, Part II. b. Doctrine of identification – the orthodox position.

⁶ See Chapter 3 - Overseas Jurisdictions – Attempts at Change.

⁷ See Chapter 1 Part I. d. Meridian Global Funds Management – An adaptation of the Identification Doctrine?

⁸ See Chapter 1 – The birth of the Corporation and Chapter 4 – Corporate Manslaughter in New Zealand – Formulation of an Offence.

⁹ See Chapter 2 - Current New Zealand position.

¹⁰ See Chapter 4 - Corporate Manslaughter in New Zealand – Formulation of an Offence.

Chapter 1 - The birth of the Corporation

I. Regulation – a “lesser” form of criminality?

In the mid-nineteenth century with the awakening of the industrial revolution, sole proprietorships and partnerships made up the vast majority of the business world. There was no separation of management and ownership, which limited the ability for these companies to grow. The awakening of the corporation as perhaps the dominant institution in our society began with the Anglo-American judicial system giving corporations the recognition they required.

This recognition came through the concept of limited liability. This ensured a person would only be liable for his or her original investment and offered entrepreneurs substantially higher opportunities for growth. This was also the beginning of the separation of management and ownership, which causes difficulties in punishing companies today. If a limited liability company pays a fine for breaching the law, the punishment will be felt most by the owners of the company, the shareholders. This loss occurs through lowering of the company's profit and in many cases the dividend, share price, or both. However, the architects of the negligent or criminal act, the managers, will not be punished in any direct way through a fine imposed on companies. To partly counter this, most salaries of senior management are closely linked to the amount of profit the company makes, through share options and bonuses. Therefore, senior management have a vested interest in ensuring the company continues to do well through making high profits.

While the limited liability of a corporation is a key aspect of its dominance today, there was also a need for society to believe that “socially dangerous and unacceptable

activity was predominantly the province of the lower orders”.¹¹ Anglo-American criminal law as it currently stands was originally based on the need to control the working class after the explosion of the industrial revolution and the urbanisation of society in the nineteenth century.¹² The underlying theme behind the beginning of our criminal law system was the concept of criminal activity occurring predominantly through the actions of individuals. Criminal activity was generally limited to violence between individuals and property crime. As Norrie states, the result of these policy decisions in the 19th century is that today, “corporate criminality is usually seen either as not criminal at all, or as a lesser form of criminality properly regulated by a regime of minor offences on the edge of the criminal law proper.”¹³

The viewpoint of society on corporations allowed them the opportunity to pursue profit at the expense of external factors, including environmental and employment issues and the safety of the goods and services provided. However, it was quickly realised that unregulated corporations wholly intent on their bottom line resulted in serious problems. A good example included the factory owners of the nineteenth century who did not care about working conditions and the amount of pollution they were creating, as long as the factory itself was making a profit.¹⁴

The reply by the United Kingdom Government was to regulate the conditions of labour in the UK through the Factories Acts. These came about through pressure from the labour movements and from some of the more advanced capitalist employers, who were feeling the pinch from smaller interests who were able to undercut their bigger rivals through the use of sweatshop labour.¹⁵

The difficulty with this situation was that unlike most other criminal activity of the time, the wrongdoers in this situation had political connections. The captains of finance were upper class citizens of equal status with the magistrate judges who often refused to hold them liable of a criminal act. The factory inspectors also had

¹¹ A Norrie, *Crime, Reason and History A Critical Introduction to Criminal Law*, (2nd ed, Butterworths, 2001) 82.

¹² See above n 11, 82. See also C Wells *Corporations and Criminal Responsibility* (2nd ed, Oxford University Press, 2001) 22.

¹³ See above n 11, 82.

¹⁴ See above n 11, 85.

¹⁵ See above n 11, 85.

difficulty in finding the actual owners at fault. All too often the factory owner simply laid the blame on another employee who had actually hired the child labour. The organisational structure of these early companies allowed the factory owners to easily pass the blame to another person who could not be prosecuted. This situation is still one of the key issues in corporate criminal liability today.¹⁶ The result was the formulation of a regulatory or ‘strict liability’ offence which did not require the proof of mens rea and did not carry the social stigma of a criminal offence.

From these beginnings, regulations have become widespread for corporate liability. The limited liability company plays a major role in the day to day functioning of society, through providing work or through providing goods and services to the public. With the privatisation of previous state-owned enterprises in many industries including telecommunication, transport and energy, regulation plays a significant role in pollution, health and safety standards today.¹⁷ In Chapter 2, I will discuss the current health and safety regulatory system in place in New Zealand, and the extent to which this has an effect on workplace deaths.¹⁸

II. How can the corporation have a state of mind attributed to it?

The corporation is a social and legal institution. It consists of people who come together to work and provide capital for the interests of providing goods and services at a profit. The profit is gained through using this combined labour and capital to realise a monetary gain which is equal to or exceeds the amount of time and money spent on providing these goods and services. It has become a significant social institution of our time due largely to the legal fictions employed to give the corporation the power it wields. Although a corporation is considered to be a ‘person’,¹⁹ it cannot act or form a state of mind, except through its human agents.²⁰ There are two ways that the actions and state of mind of an agent can be attributed to

¹⁶ See above n 11, 86. For a discussion of how this problem could be solved, see Chapter 1 Part III. b. Organisational Fault.

¹⁷ A.P. Simester & G.R Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed, Oxford, 2003) 252.

¹⁸ See below, Chapter 2 Part II. – Regulation – The Health and Safety in Employment Act 1992.

¹⁹ See below, n 88, for a full discussion on the New Zealand position. In the UK, s 2 Interpretation Act 1889 (UK) states that a “person” includes “a body of persons corporate or unincorporated”.

²⁰ A.P. Simester & W.J Brookbanks, *Principles of Criminal Law* (2nd ed, Brooker’s, 2002) 216.

the company. This occurs through the doctrine of vicarious liability or the doctrine of identification.

a. Vicarious Liability

Vicarious liability concentrates on the relationship of agency. To hold a corporation vicariously liable, the conduct of the agent or employee must fulfil the elements of an offence. If this has occurred, the conduct is then considered to have been fulfilled by the principal or employer.²¹ Vicarious liability is utilised in the US federal courts and most US state courts in situations where an individual commits a crime with the intent of benefiting the company he or she is currently working for.²² English law decided against the wide use of vicarious liability for corporate liability. The extent of vicarious liability was limited to nuisance and criminal libel which historically had been decided vicariously and statutory offences where Parliament showed an obvious intent of vicarious liability.²³ The necessary requirements were laid out by Atkin J in *Moussell Bros Ltd v London and North-Western Railway Co*²⁴ who stated that the question of vicarious liability depended on “the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed”.²⁵

b. Doctrine of Identification – the orthodox position

The doctrine of identification is also a form of vicarious liability, in that the actions and state of mind of the senior management are attributed to the actions of the company itself. However, identification has been extended beyond strict liability in certain offences in Commonwealth countries to include crimes involving mens rea.

²¹ For more information, see E Lederman “Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity” (2000) 4. Buff. Crim. L.R. 641, 652-655.

²² J Gobert & M Punch, *Rethinking Corporate Crime* (1st ed, Butterworths, 2003) 56. For a general discussion of the advantages and disadvantages of the vicarious liability doctrine see pages 55-59 and see above, n 21.

²³ See above, n 22.

²⁴ [1917] 2 KB 836.

²⁵ See above, n 24, 845 and see n 20, 59.

The doctrine of identification for corporate criminal liability traces its origins back to 1944. *DPP v Kent and Sussex Contractors*²⁶ and *R v ICR Haulage Ltd*²⁷ held that the companies involved were liable for intending to deceive the Revenue and for conspiracy to defraud respectively. Both decisions adopted the identification doctrine which had first been discussed in the civil case of *Lennards Carrying Co Ltd v Asiatic Petroleum Ltd*.²⁸

Mr Lennard was the managing director of Lennards Carrying Co Ltd and he was aware of the unseaworthiness of a vessel in his fleet. He allowed the vessel to set sail and when the vessel was lost the plaintiffs sued when they lost cargo as a result. The plaintiff's loss was limited by legislation unless the loss could be attributable to the fault of the defendant.²⁹ Lord Haldane held that "Mr Lennard was the directing mind of the company... his action is the very action of the company itself".³⁰ Therefore, Mr Lennard's knowledge was enough to attribute the knowledge to the defendant company and hold Lennards Carrying Co Ltd liable.³¹

Since this case, the conventional analysis of a company for mens rea offences has been through the use of the identification doctrine. However the ability of this doctrine to successfully hold corporations responsible under the criminal law has been debated and criticised amongst the judiciary, academics and other commentators. The main concern is the underlying theme of the doctrine in finding the person who is the directing mind and will of the company. In many cases this has proven to be difficult. The following cases show how the United Kingdom common law has attempted to address this issue.

A key case in the evolution of the identification doctrine in the UK was *Tesco Supermarkets Ltd v Natrass*.³² The House of Lords held that the identification of a

²⁶ [1944] KB 146.

²⁷ [1944] KB 551.

²⁸ [1915] AC 705.

²⁹ See above, n 28.

³⁰ See above, n 28, 713-714.

³¹ See above, n 17, 254.

³² [1972] AC 153. The facts of this case concerned a national supermarket chain which was charged with a violation of the Trade Descriptions Act 1968 after a branch manager of one of the stores failed to put goods on sale at the price which they had been advertised. The company's defence was based on section 24(1) of the Act which stated that a company would not be liable if 'all reasonable precautions'

company was limited to persons considered to be the ‘directing mind and will’ of the company.³³ This was defined by Lord Diplock as “those natural persons who by the memorandum and articles of association or as a result of action taken by directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.”³⁴ This classification did not include the branch manager who was considered to be ‘another person’ under section 24(1) Trade Descriptions Act 1968.

This sets the identification doctrine in quite clear terms. A company “will be criminally liable when a person who can be said to be ‘identified’ with the company commits a crime, orders that a crime be committed, or delegates his/her authority to another person who commits a crime.”³⁵ However, Gobert and Punch argue that this doctrine does not have much practical effect.³⁶ They argue that this doctrine works best in small companies with a simple organisational structure and clear lines of communication. An example of this is a one man liability company where the managing director is the major shareholder and therefore plays a large role in both the management and the ownership of the company. However, in these companies it is often easier to bring charges against the person in charge personally³⁷ and there is not much to be gained by prosecuting the company concurrently.

In large companies the relationship between shareholders and management is generally separate and the lines of communication between different areas of the business are unclear. There is extensive delegation and many key decisions are made without the knowledge of senior management.³⁸ This will make a successful prosecution of a large company difficult to prove. The person who can be ‘identified’ as the company is unlikely to have full knowledge of the day-to-day operations.³⁹ This seems to be the case in the United Kingdom, with only 6 small companies being

were taken and it had undertaken ‘due diligence’ to ensure that there was no default by ‘another person’.

³³ See above, n 20, 63.

³⁴ See above, n 32, 198.

³⁵ See above, n 22, 63.

³⁶ See above n 22, 63.

³⁷ See below Chapter 1 Part III. – Alternative theories of corporate criminal liability – is personal liability of a corporation feasible?

³⁸ See above, n 11, 94.

³⁹ See above, n 22, 63.

convicted for work-related manslaughter as of 2005.⁴⁰ The high profile prosecutions of large companies have failed, including the prosecution of P & O Ltd after the 1987 ferry disaster involving the *Herald of Free Enterprise* sinking off the coast of Zeebrugge.

c. Corporate Manslaughter – The Herald of Free Enterprise Disaster

The Herald of Free Enterprise was a roll-on roll-off car ferry which capsized off the Zeebrugge Harbour on the 6th March 1987, resulting in the deaths of over 200 passengers and crew members. The subsequent report by Sheen J⁴¹ found that three members of the crew were directly to blame for the accident. The assistant bo'sun, who was directly responsible for closing the bow doors, was asleep and did not carry out his duty. The Chief Officer, who was the loading officer and responsible for ensuring the bow doors were closed, left before the bo'sun turned up. The Master was also held to be negligent in not ensuring that the bow doors were closed.⁴² The Sheen report was also scathing on the company that owned and operated the ferry, Townsend Car Ferries Ltd, which had been acquired by P & O Ltd a week before the accident. The report stated:

At first sight the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant bosun, and also the failure by Captain Kirby to issue and enforce clear orders. But a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for the safe management of their ships ... From top to bottom the body corporate was infected with the disease of sloppiness.⁴³

⁴⁰ Home Office (UK) *Corporate Manslaughter: The Government's Draft Bill for Reform* (CM 6497 March 2005), 8.

⁴¹ Department of Transport (UK), *MV Herald of Free Enterprise: Report of the Court no 8074, Department of Transport* (1987) ('Sheen Report').

⁴² For a good summary of the facts of this disaster, see The Hon. Sir Barry Sheen "The Herald of Free Enterprise – Corporate Manslaughter?" *Medico Legal Journal* 64/2 (Spring 1996) 55, 58.

⁴³ See above n 41, para 14.1.

The result of this report and the subsequent Coroner inquest, which ruled that the Company could not be liable for manslaughter, resulted in a judicial review of the Coroner's findings. In *R v H.M Coroner for East Kent, Ex parte Spooner and others*⁴⁴ Bingham L.J held that the Coroner's decision that a company could not be liable for manslaughter was wrong, stating that "I am... tentatively of [the] opinion that on appropriate facts the *mens rea* required for manslaughter can be established against a corporation." However, Bingham L.J agreed with the coroner that on the evidence of this case, those who were the directing mind and will of the company had not committed acts or had the state of mind to amount to manslaughter.

Similarly in 1990, a decision by Turner J in *R v P & O European Ferries (Dover) Ltd*⁴⁵ held that "where a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter." Turner J therefore rejected the aggregation⁴⁶ doctrine, holding that a person needed to be identified as the company. Thus, the manslaughter charge against the company failed as the ships master could not be identified as the company.

After this case, the identification doctrine was at the forefront of corporate criminal liability. However in New Zealand there was no definitive case on the place of the identification doctrine in attributing mens rea to the company. The Privy Council's decision in *Meridian Global Funds Management Asia Ltd v Securities Commission*⁴⁷ changed this.

d. Meridian Global Funds Management – An adaptation of the Identification Doctrine?

In this case, two investment managers from Meridian purchased shares without giving the required New Zealand Securities Amendment Act 1988 notice to the New Zealand Securities Commission. In determining whether the acts and knowledge of these employees could be attributed to the company, Lord Hoffman discussed the basis of

⁴⁴ (1989) 88 Cr.App.R 10, 16.

⁴⁵ (1990) 93 Cr.App.R 72, 84.

⁴⁶ See Chapter 1, Part III. a. Aggregation.

⁴⁷ [1995] 3 NZLR 7.

the rules of attribution. The primary rules of attribution of a company are considered to be the articles of association which are generally found in the company's constitution. These include decisions made by the majority of shareholders at an Annual General Meeting. However, Lord Hoffman noted that these primary rules of attribution fail to allow a company to function effectively in the business world.⁴⁸ A company needs to incorporate the principles of agency into its decision making, to delegate power to people of standing in the company⁴⁹ to make everyday decisions for the company.

However, Lord Hoffman noted that there are situations where the rules of attribution and principles of agency fail. The criminal law is a good example of this where the defendant is only liable for his or her actus reus and mens rea. In coming to an answer for this problem, Lord Hoffman asked the question "whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company?"⁵⁰ Lord Hoffman believed that "the person who, with the authority of the company, acquired the relevant interest [should count as the act of the company]. Otherwise the policy of the act is defeated."⁵¹ In this decision, the Privy Council seemed to alter the concept that only the acts and state of mind of the top senior management could be attributed to the company. However, this was qualified by the statement that:

Their lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will be for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it has been done, should be attributed to the company.⁵²

⁴⁸ Above n 47, 12.

⁴⁹ Above n 47, 12.

⁵⁰ Above n 47, 12.

⁵¹ Above n 47, 16.

⁵² Above n 47, 16.

e. A reaffirmation of the Identification Doctrine – Attorney-General’s Reference (No.2 of 1999)

While *Meridian* seemed to have broadened the scope of the identification doctrine, Rose LJ in *Attorney-General’s Reference (No. 2 of 1999)*⁵³ limited *Meridian* to a reaffirmation of the identification doctrine. The Southall train disaster in 1997 resulted in the Attorney General referred two questions to the court under s36 of the Criminal Justice Act 1972 (UK). The points of law referred to were:

1. Can a defendant be properly convicted of manslaughter by gross negligence in the absence of evidence as to that defendant’s state of mind?
2. Can a non-human defendant be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime?

The use of manslaughter by gross negligence refers to the case of *R v Adamoko*.⁵⁴ In the United Kingdom, the criminal law is based on the common law. Manslaughter by gross negligence is considered to be involuntary manslaughter. Involuntary manslaughter covers a wide range of situations including gross negligence manslaughter, death which is causally linked to assault and constructive or “unlawful act” manslaughter.⁵⁵ The *R v Adamoko*⁵⁶ test of gross negligence holds that the Crown needs to establish:

1. There was a duty of care owed by the accused to the deceased.
2. There was a breach of this duty by the accused.
3. The death of the deceased was caused by the breach of the duty of care by the accused

⁵³ [2000] 3 WLR 195. For a summary of this case, see W Brookbanks, “Corporate Manslaughter: *Attorney General’s Reference (No 2 of 1999)* [2000] 3 WLR 195” NZBLQ 6 2000, 228.

⁵⁴ [1995] 1 AC 171.

⁵⁵ See above, n 17, 361.

⁵⁶ [1995] 1 AC 171. For a general discussion on gross negligence see Gobert and Punch above, n 22, 92-95.

4. The breach of the duty of care by the accused was so great as to be characterised as gross negligence.⁵⁷

The requirement of negligence to be gross provides a high threshold for the Crown to establish. This requires a “high deviation from the norm... and probably not just that which might be induced by a lack of sophistication or intelligence.”⁵⁸ The higher standard of gross negligence compared to objective recklessness⁵⁹ is to be preferred in a corporate situation. In situations where safety standards are analysed in court an objective recklessness standard would allow the possibility of collusion amongst executives in the same industry. This collusion would allow the company to argue that they had reached the requisite health and safety standard.⁶⁰

In *Attorney-General's Reference (No. 2 of 1999)*,⁶¹ the first question was answered affirmatively by Rose LJ. He stated that “although there may be cases where the defendant’s state of mind is relevant to the jury’s consideration when assessing the grossness and criminality of his conduct, evidence of his state of mind is not a prerequisite to a conviction for manslaughter by gross negligence”. The second question was answered negatively. Rose LJ held that “a corporation’s liability for manslaughter is based solely on the principle of identification”. Therefore the ability to prosecute a company for manslaughter by gross negligence in the United Kingdom was limited to the standard interpretation of the identification doctrine.

f. Problems with the Identification Doctrine?

Norrie argues that the identification doctrine raises three distinct problems for corporate criminal liability.⁶² Only the senior management, or the ‘head’ of the corporation can be successfully identified with the company. This analogy does not take into account the major role middle and lower management play in the running of

⁵⁷ See above, n 54, 187.

⁵⁸ See above, n 22, 93.

⁵⁹ Objective reckless is considered to be where a person creates a risk that would be obvious to an ordinary prudent individual and does so without giving thought to the possibility of the resulting harm, *R v Caldwell* [1982] AC 341. For more information on recklessness, see above, n 22, 90-92.

⁶⁰ See above, n 22, 92.

⁶¹ [2000] 3 WLR 195.

⁶² See above, n 11, 93-94.

a large corporation, as shown in *Tesco*⁶³ where the branch manager was seen as not acting for the company.

Another issue with the identification doctrine is that it does not adequately cater to the idea of aggregation. This occurs where the knowledge of senior management, when considered holistically, would be enough to prove the requisite state of mind to accrue liability. The identification doctrine requires one person to be identified as the 'directing mind and will', which in practice is not how a large corporation functions. There is generally many levels of management, all making vital decisions about the policies and actions of the company.

A third problem with the identification doctrine is in situations where the policies or accepted practices of the company cause employees of the company to commit an offence. Under the identification doctrine, there is no way of attributing policies of a company to the directors or executive officers of the company. The idea of company policy causing criminal activity by employees of the company is known as organisational fault. The following paragraphs discuss possible alternatives which have been formulated to fix the inadequacies in the identification doctrine.

*III. Alternative theories of corporate criminal liability – is personal liability of a corporation feasible?*⁶⁴

a. Aggregation

There is often no one clear reason why criminal activity occurs in a corporate situation. The actions are usually the breakdown of a number of areas within a company. The idea of aggregation allows the combined state of mind to be assessed as one to determine whether the company has committed any crime. The idea of aggregation does not imply that any employees are guilty of an offence, but it is the combined acts of a certain number of employees which results in the corporation

⁶³ See above, n 32.

⁶⁴ Personal liability refers to actual liability of a corporation, rather than vicariously through the vicarious liability doctrine and identification doctrine.

being guilty of an offence. This is helpful in circumstances where a number of separate actions may be considered negligent but when considered as a whole the company has acted with gross negligence.⁶⁵

Bingham LJ in *R v HM Coroner for East Kent, ex P Spooner*⁶⁶ did not believe that aggregation was the correct way in attributing corporate fault. He stated that “a case against a personal defendant cannot be fortified by evidence against another defendant. The case against a company can only be made by evidence properly addressed to showing guilt on the part of the company as such.”⁶⁷

Gobert and Punch argue that Bingham LJ has misconstrued the circumstances surrounding a conviction on the basis of aggregation.⁶⁸ The whole idea of aggregation is that the company would be personally liable for the crime, and any sanctions would affect the company itself, not the group of individuals whose acts and state of mind were aggregated to the company.

A key issue to consider is which acts and states of mind could be aggregated. The acts that cause corporate crime are usually carried out by the general employees of the company. If aggregation is limited to those considered to be the ‘directing mind and will’ of the company, the scope of the aggregation theory will not be significantly different from that of the identification doctrine. The only addition to the identification doctrine would be in situations where two or more directors were clearly culpable when considering their state of mind together.⁶⁹ A wider scope would make aggregation more effective at establishing liability within a corporation. This could allow inclusion of employee’s acts, omissions or state of mind.

b. Organisational Fault

A revolutionary way of interpreting corporate criminal liability is the idea of organisational fault. Organisational fault is fundamentally different from the identification and aggregation doctrines and the basis of criminal law as it currently

⁶⁵ See above, n 22, 84.

⁶⁶ See above, n 44.

⁶⁷ See above, n 44, 16-17.

⁶⁸ See above, n 22, 85. For a general discussion on aggregation, see pages 82-86.

⁶⁹ For a discussion on the problems with this option, see above, n 22, 85.

stands. Whereas the identification and aggregation doctrines are based on attributing actions by a company to an individual within the organisation, organisational fault is based on the premise that the corporate culture or accepted practices within the organisation are unsound.⁷⁰

The resultant deficiencies can lead to potentially criminal incidents. Criminal liability could accrue by the corporation's failure to prevent the incident.⁷¹ The failure becomes criminal when it can be proved that there was gross negligence by the company. The gross negligence arises not from the actions of an employee but rather as a result of the policies of the company being insufficient to prevent the company's employees from acting negligently or illegally.⁷² An example of this is the Herald of Free Enterprise. A significant reason for the disaster was due to the time constraints the ferry employees were under in terms of unloading and reloading the ferry. If the ferry was late in leaving, the port imposed monetary penalties on the company. Because of this, the ferry company put undue pressure on their employees to perform their job quickly and this was part of the reason why the safety checks were not completed adequately.

If a company is to be liable for a criminal act by failing to prevent a criminal offence, how can it be proved that the company had the requisite mens rea? Is it possible for a company to intend to allow these policies which cause an employee to commit a criminal act? Peter French⁷³ argues that the decision-making process of the company is the key for ascertaining intentionality. This decision-making process is found in the Corporation's Internal Decision Structure or CID structure. This includes the hierarchy of the company in terms of each person's rank and responsibilities and the procedural rules and policies which state the company's underlying principles and goals.⁷⁴ This idea is furthered by Field and Jorg,⁷⁵ who argue that where the policies of a company allow for the possibility of criminal or negligent conduct occurring by

⁷⁰ See above, n 11, 96

⁷¹ See above, n 11, 96

⁷² See above, n 11, 96.

⁷³ P French, *Collective and Corporate Responsibility* (Columbia University Press, 1984) Chapters 3 and 4.

⁷⁴ See above, n 11, 96.

⁷⁵ S Field & N Jorg "Corporate Liability and Manslaughter: Should We Be Going Dutch?" *Criminal Law Review* 1991, 156.

the company's employees, the company should be held liable for their actions if the company had the power to stop the criminal conduct.⁷⁶

The idea of the company being criminally liable for failure to prevent criminal conduct does have merit. However there are some serious obstacles in putting the theory into practice. The main issue with organisational fault as a realistic and effective theory is the political nature of companies. Many policies and procedures of companies are already aimed at complying with regulatory regimes. Should companies be held liable for not implementing policies or changes which are known to ensure the safety of employees, consumers and the general public when the changes are not required by law? Does it make a difference if the changes would increase costs significantly thereby reducing supply and potentially forcing consumers to substitute into cheaper, less safe alternatives?

This political nature of safety regulation is shown by the *Herald* disaster. With the installation of lights on the bridge showing the bow doors to be open, the disaster could have been averted. However, this was not required by the regulation at the time and it was simply not cost-effective. The technological improvements of the newer ferries on the market also made an equal level of safety standards impossible without further regulation of the older ferries, which would have made them uneconomic to use.⁷⁷ It is a sad fact of the way our business world functions that a disaster of this nature is often required to make any real difference in the safety standards of an industry.

c. Reactive Fault

If a disaster is what is needed for the business world to stand up and take notice about health and safety standards, a possible concept is the idea of "reactive fault".⁷⁸ Reactive fault focuses on the reaction by the company post-accident rather than concentrating on ensuring health and safety standards are met before an accident. Reactive fault is:

⁷⁶ See above, n 11, 96.

⁷⁷ See above, n 11, 97.

⁷⁸ For a full analysis of reactive fault, see B Fisse & J Braithwaite, *Corporations, Crime and Accountability*, (1st ed, Cambridge University Press, 1993) chapter 2 and in particular pages 47-49.

An unreasonable corporate failure to devise and undertake satisfactory preventative or corrective measures in response to the commission of the *actus reus* of the offence by personnel acting on behalf of the organisation.⁷⁹

This poses major changes to the basis of our criminal law. The difficulty with attempting to make these changes for the relatively small area of corporate manslaughter was discussed by the Law Commission (UK) which held that a discussion on corporate manslaughter “was not the appropriate occasion to consider a reform which would affect the whole of the criminal law.”⁸⁰

Reactive fault would not be effective in prosecuting corporations. The trial of a corporation under a reactive fault doctrine would concentrate on the health and safety policies of the company pre- and post-accident as well as the general corporate culture over a long period of time. The amount of evidence required would be extensive and would be too large a strain on the court system for any more than the worst prosecutions to ever make it to trial.⁸¹

d. Beyond the identification doctrine – are these alternatives feasible?

The intricacies of the above theories show why practical effective change in corporate criminal liability is so difficult. The difficulties with a criminal law system designed to protect against personal individual crime being used to hold a multi-faceted organisation criminally liable are numerous. The identification doctrine clearly does not work in ensuring those who are culpable within a company are identified as the company. The aggregation doctrine, while perhaps an improvement on the identification doctrine, is still based on the idea of attributing corporate fault on individuals. Organisational fault is perhaps the best theory in holding culpable companies truly liable for their criminal acts but cannot be completely effective due to political interference. Reactive fault would require a complete overhaul of the criminal law system and the evidential burden would be too great for this doctrine to be effective.

⁷⁹ See above, n 78, 48.

⁸⁰ *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com (UK) no 237 (1996) para 7.34.

⁸¹ See above, n 17, 259-260.

While for many years corporate criminal liability passed under the radar of the general public, the number of incidents occurring in recent times ensures corporations are well and truly in the public mind. The train and ferry disasters in the UK,⁸² the Air New Zealand Mount Erebus crash in 1979⁸³ and the Esso Longford explosion in Victoria⁸⁴ are all examples of sensational disasters which have resulted in formal inquiries seriously criticising the corporate structure within these companies. However, in many situations a workplace death falls under the radar of public knowledge.⁸⁵ How does New Zealand currently deal with workplace deaths? Is there any way of punishing corporations for all situations from the death of a construction worker to the deaths of over 250 people from a plane accident? The next chapter will discuss the current position in New Zealand regarding these issues.

⁸² For further discussion see Chapter 1 Part II. a. – Vicarious Liability and e. – A reaffirmation of the Identification Doctrine – Attorney-General’s Reference (No.2 of 1999).

⁸³ This tragedy, resulting from an Air New Zealand plane crashing into Mount Erebus in Antarctica, caused the death of 257 passengers and crew. This disaster resulted in a Royal Commission of Inquiry headed by Justice Peter Mahon. For more information see: Royal Commission of Inquiry, *Report of the Royal Commission to inquire into the Crash of Mount Erebus, Antarctica of a DC 10 Aircraft FT Aircraft operated by Air New Zealand Ltd* (1981) (Mahon Report)

⁸⁴ This explosion occurred on 25 September 1998, killing 2 people and injuring 8. For more information see K. Haine & T. John, Workplace death and serious injury: a snapshot of legislative developments in Australia and overseas, Research Brief no.7 2004-2005 at <http://www.aph.gov.au/library/Pubs/rb/2004-05/05rb07.htm> and K. Wheelwright, ‘Corporate Liability for Workplace Deaths and Injuries – Reflecting on Victoria’s Laws in Light of the Esso Longford Explosion’, *Deakin Law Review*, 7, 2, October 2002.

⁸⁵ See Chapter 2 Part II. d. Statistics – Number of prosecutions and investigations into work place deaths.

Chapter 2 – Current New Zealand Position

I. Crimes Act 1961 – Definition of Manslaughter in the Corporate Context

New Zealand criminal law, unlike the UK common law approach, is codified in the Crimes Act 1961. The original criminal code of New Zealand in 1893 was based on the Criminal Code (Indictable offences) Bill 1879 by Sir James Fitzjames Stephen, which was drafted for the United Kingdom but never enacted.⁸⁶ The Crimes Act 1961 is based on the 1908 Act which closely followed the 1893 Act and the definition of manslaughter is essentially unchanged.⁸⁷

A corporation can be convicted of crimes under the Crimes Act 1961. In section 2 of the Crimes Act 1961 the definition of “person” includes “the Crown and any public body or local authority, and any board, society, or company and any other body of persons, whether incorporated or not.”⁸⁸ However, the decision of *R v Murray Wright Ltd*⁸⁹ cut off any opportunity of the Crown pursuing a corporation for manslaughter under the current statutory law.

The facts of *R v Murray Wright Ltd*⁹⁰ involved a chemist business which incorrectly prepared some medicine. As a result of this incorrect preparation the patient who received the prescription died after taking the drugs. A manslaughter prosecution was brought against Murray Wright Ltd under section 160(2)(b) of the Crimes Act 1961 that the company did, by an omission or without lawful excuse to perform or observe

⁸⁶ For further information see Royal Commission (UK) *The Law Relating to Indictable Offences: with an appendix containing a Draft Code embodying the Suggestions of the Commissioners*. 1879 C-2345, 23 and reproduced in British Parliamentary Papers *Royal Commission Select Committee and Other Reports on the Criminal Law with Proceedings minutes of evidence, appendix and index 1847-79*. Legal Administration Criminal Law 6, Irish University Press, 369, 391

⁸⁷ See s186 Crimes Act 1908 and s166 Criminal Code 1893.

⁸⁸ This definition of “person” needs to be considered together with s 30 Interpretation Act 1999 which defines a “person” for Acts passed prior to the Interpretation Act as “a corporation sole, and also a body of persons, whether corporate or unincorporated”. This is qualified by section 4(1)(a) and (b) Interpretation Act which states that the definition of “person” does not apply where the provision or the context of the provision points to a different meaning. See Robertson, Adams on Criminal Law, (4th ed, Brookers, 2005), 21.

⁸⁹ (1970) NZLR 476.

⁹⁰ See above, n 89.

a legal duty, kill the patient. Homicide is defined in section 158 of the Crimes Act as “the killing of a human being by another, directly or indirectly, by any means whatsoever.” Under section 160, homicide can be either culpable⁹¹ or non-culpable. Non-culpable homicide is not an offence.⁹²

Culpable homicide is considered murder or manslaughter, with the exception of infanticide under s178 of the Crimes Act. North P in *R v Murray Wright Ltd* held that

those responsible for the drafting of the Crimes Act 1961 failed to appreciate that in defining ‘Homicide’ as the killing of a human being by another of necessity they excluded a company which cannot possibly be described as another human being.⁹³

As a result of this case, the current position in New Zealand is that a corporation cannot be prosecuted for manslaughter under the Crimes Act 1961. However, the Court of Appeal in *R v Murray Wright Ltd* left open the possibility of a company being a party to the crime of manslaughter through section 66 of the Crimes Act 1961. A company has been held liable as a party to a crime in the United Kingdom in *R v Robert Millar (Contractors) Ltd*.⁹⁴ However, as this case was brought under the statutory offence of dangerous driving, rather than a manslaughter prosecution, it failed to hold the same social impact that a manslaughter conviction would have had on corporate criminal liability.⁹⁵

II. Regulation – *The Health and Safety in Employment Act 1992*

If a company in New Zealand cannot be prosecuted for manslaughter, what are the possibilities to punish a company which has caused the death of a person? The

⁹¹ See s160(2) Crimes Act 1961 in Appendix 1.

⁹² See s160(4) Crimes Act 1961 in Appendix 1.

⁹³ See above, n 89, 482.

⁹⁴ [1970] 2 QB 54. The Court of Appeal held the company liable for counselling and procuring death by dangerous driving by the employee. The company had knowledge of the defect in the tyre and by permitting the employee to drive the vehicle, the company had counselled and procured the employee to do so. The court fined the company 750 pounds and imprisoned the managing director for 9 months.

⁹⁵ C Wells *Corporation and Criminal Responsibility* (2nd ed, Oxford University Press, 2001) 119-120.

current approach is through health and safety regulation. As discussed earlier, regulation is seen to have a lower social stigma attached to it than a full criminal conviction. Often companies are in the media for a breach of regulations, which usually result in fines but few other repercussions. Society in general seems to be apathetic towards regulatory breaches. A corporation's reputation generally emerges unscathed following such breaches.

Is regulation an effective remedy for society against companies breaking the law? More importantly, is this an effective deterrence to stop companies from breaking the law in the future or does it become a simple cost benefit analysis? In other words, if the company knows that the extent of a fine for failing to reach regulatory standards is less than the cost to the company of upholding these standards, will the company simply pay the fine if and when it gets caught? The following discussion analyses the Health and Safety in Employment Act 1992 and how workplace and other work related deaths are covered by this Act.

a. Health and Safety in Employment Act 1992 – Key provisions

The Health and Safety in Employment Act 1992⁹⁶ came into force on 1st April 1993. Section 5 states that the “object of this Act is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work”. This is achieved by “promoting excellence in health and safety management”, by “defining hazards and harm in a comprehensive way” and by “imposing various duties on persons who are responsible for work and those who do the work”. This Act replaced a number of statutes that were prescriptive in nature, such as the Coal Mines Act 1979 and the Agricultural Workers Act 1977.

The HSE Act puts in place a number of duties on employees and employers. Section 6 requires that:

Every employer shall take all practicable steps⁹⁷ to ensure the safety of employees while at work; and in particular shall take all practicable steps to— -

- a) Provide and maintain for employees a safe working environment; and

⁹⁶ Hereafter HSE Act.

⁹⁷ See s2A HSE Act in Appendix 1.

- b) Provide and maintain for employees while they are at work facilities for their safety and health; and
- c) Ensure that plant used by any employee at work is so arranged, designed, made and maintained that it is safe for the employee to use; and
- d) Ensure that employees are not exposed to hazards while at work; and
- e) Develop procedures for dealing with emergencies that may arise while employees are at work.

In 2002 a comprehensive amendment of the HSE Act 1992 was completed. The main purposes of the Health and Safety in Employment (Amendment) Act 2002 were stated in section 3. These included increasing the coverage of the original HSE Act, requiring good faith co-operation between employers and employees in relation to health and safety, providing for more effective enforcement of the principal Act, prohibiting persons from being indemnified for failing to comply with the principal Act and to promote compliance with International Labour Convention 155.⁹⁸

The two most controversial additions⁹⁹ in the Amendment Act of 2002 were the increase in the level of penalties and the ability of any person to lay an information for an offence under the Act. The two offence provisions in the HSE Act 1992 are sections 49¹⁰⁰ and 50.¹⁰¹ After the 2002 Amendment, the penalty for a breach of section 49 has been increased to a fine of \$500,000 or imprisonment for up to 2 years, or both. This increases the level of the fine by five times and doubles the length of imprisonment. The penalty for a breach of section 50 is a fine not exceeding \$250,000 and there is no imprisonment provision. This is also a five fold increase by the 2002 amendment.¹⁰²

The new levels of fines have to be considered in light of the Sentencing Act 2002 and section 51A of the HSE Act. The ability of the Court to award part or all of a fine to a victim or victim's family is removed by the Sentencing Act 2002.¹⁰³ This has been

⁹⁸ For more information see S Carr & A Sheriff *Health and Safety in Employment Amendment Act 2002* New Zealand Law Society Seminar April/May 2003.

⁹⁹ See above, n 98, 58.

¹⁰⁰ See s49 HSE Act in Appendix 1.

¹⁰¹ See s50 HSE Act in Appendix 1.

¹⁰² It is likely that where no serious harm occurs, the new infringement notices regime under section 56B will be used. See Appendix 1.

¹⁰³ See above, n 98, 53.

replaced by the new sentence of reparation in section 32 of the Sentencing Act 2002.¹⁰⁴ Under section 32(2), a Court may only impose a sentence of reparation in respect of emotional harm, or loss or damage consequential on emotional harm, if the person who suffered the emotional harm is a person described in paragraph (a) of the definition of ‘victim’¹⁰⁵ in section 4.

Therefore in situations where a person has died and the employer is found guilty of an offence under the HSE Act, the immediate family of the person can receive reparation for the emotional harm caused. The immediate family or any other person can also bring an information and prosecute under the HSE Act. This is possible where an inspector has failed to take enforcement action against any possible defendant or an enforcement authority has not taken prosecution action under any other Act for the matter in question.¹⁰⁶

The case of *Linework Ltd v Department of Labour*,¹⁰⁷ a case involving section 6 of the HSE Act, decided affirmatively that an employer under the HSE Act does not need to be identified as the ‘directing mind and will’ of the company to be liable. Blanchard J believed that the approach taken by *R v British Steel plc*¹⁰⁸ was appropriate, partly because of Steyn LJ’s comments that a strict or absolute liability approach would “simplify the law... [and] would promote a culture of guarding against the risks to health and safety that arise through hazardous industrial operations.”¹⁰⁹ However, unlike Steyn LJ, Blanchard J believed that while the foreman’s “acts or omissions as Linework’s foreman or site supervisor are properly attributable to the company”,¹¹⁰ the use of the term strict liability for employers under ss 6 and 50 was not particularly helpful. “Liability will always depend upon proof of blameworthiness in the particular circumstances.”¹¹¹ Therefore employers can be held liable under s 6 of the

¹⁰⁴ See s32 Sentencing Act 2002 in Appendix 1.

¹⁰⁵ See s4 Sentencing Act 2002 in Appendix 1.

¹⁰⁶ See s54A(2) HSE Act in Appendix 1.

¹⁰⁷ [2001] 2 NZLR 639.

¹⁰⁸ [1995] ICR 586. The facts of this case involved a worker who died after a steel platform collapsed. The Court of Appeal (UK) held that s3(1) Health and Safety at Work Act 1974 was an absolute prohibition and the ‘identification doctrine’ was irrelevant. The company was fined 100 pounds. For more information on the British Steel case, see above, n 22, 67-68.

¹⁰⁹ See above, n 107, 646.

¹¹⁰ See above, n 107, 648.

¹¹¹ See above, n 107, 649.

HSE Act for a breach of a duty even when one of their employees has also personally breached a duty under the Act.

b. The position of companies causing the death of any other person who is not an employee

To be complete, the HSE Act needs to provide protection not only for employees but also for consumers and the general public. The long title states that the HSE Act is an “Act to reform the law relating to the health and safety of employees, and other people at work or affected by the work of other people”. Persons affected by the work of other people would include a situation where the company has caused the death of any other person.

Section 15 of the HSE Act is the closest provision which covers this situation by stating an employer has a duty to take all practicable steps to ensure that no action or inaction of any employee harms any other person whilst the employee is working. A case that arose in New Zealand regarding this situation was *Department of Labour v Nelson Dive Centre Ltd*,¹¹² where the employer, Nelson Dive Centre Ltd, was charged¹¹³ under section 15 of the HSE Act.

The facts were that on 10 March 2000, 6 student divers and their instructor, Mr Stuart, entered the water at French Pass with the intention of completing a ‘drift dive’.¹¹⁴ However, this dive went tragically wrong and the divers were pulled by a strong current into deep water. Two of the divers died, one was never found and three survived but were severely injured.¹¹⁵ Judge J A Walker held that the area in which Mr Stuart took his student divers should never have been used for drift diving instruction.¹¹⁶ The defendant knew that Mr Stuart was carrying out these drift dive lessons in the French Pass, and should have known the dangers. Judge J A Walker

¹¹² DCR [2001] 1079, 1082.

¹¹³ The charge was: Being an employer, it failed to take all practicable steps to ensure that no action of an employee namely Andrew David Stuart while at work harmed any other person namely (a named diver) in respect of a training dive at French Pass.

¹¹⁴ A drift dive involves descending below the water and with the aid of the water current moving underwater before ascending at a designated spot.

¹¹⁵ See above, n 112, 1081-1082.

¹¹⁶ See above, n 112, 1091.

held that the defendant did not take all practicable steps¹¹⁷ to ensure that no action of an employee while at work harmed any other person.¹¹⁸ This case confirms the HSE Act protects the situation where a member of the public dies as a result of the action of an employee.

c. Double Jeopardy – Can a Director be found guilty of culpable homicide where the company has already been found guilty of an offence under the HSE Act?

Another important aspect of the HSE Act is the ability of the Crown to bring a manslaughter prosecution against a director of a company where the death breaches the HSE Act. This issue was decided affirmatively after the death of a worker from a trench collapse at Wellington Airport.¹¹⁹ Mr Spencer was the sole director and major shareholder of David Spencer Ltd. On 25 March 1999, the company pleaded guilty to a breach of sections 6 and 50(a) of the HSE Act by failing to take all practicable steps to ensure the safety of an employee. A fine of \$25,000 was imposed with \$17,000 of this going to the partner of Mr Rosson. Subsequently, on 1 April 1999 Mr Spencer had an information laid against him by the police for the crime of manslaughter.¹²⁰

The Court of Appeal¹²¹ overturned the manslaughter conviction based on inadequate directions by the trial judge to the jury and no new trial was ordered. However, the abuse of judicial process and double jeopardy was left unresolved, leaving the decision by Gendall J in *Spencer v Wellington District Court*¹²² in the High Court as the only existing authority.¹²³

The High Court decision held that there is no double jeopardy when a company is charged under the HSE Act and the major shareholder or director of that company is

¹¹⁷ See above, n 112.

¹¹⁸ See above, n 112, 1098.

¹¹⁹ *R v David Walton Spencer* CA 353/00 5 April 2001 – The facts were that Mr Spencer and Mr Rosson were both working in a trench which collapsed and as a result Mr Rosson died.

¹²⁰ *Spencer v Wellington District Court* [2000] 3 NZLR 102. The charge was that: having made a trench which in the absence of precaution or care may endanger human life omitted without lawful excuse to take reasonable precautions and care to avoid such danger thereby causing the death of Paul Kevin Rosson.

¹²¹ See above, n 119.

¹²² See above, n 120.

¹²³ S Carr & A Sheriff *Health and Safety in Employment Act 1992* New Zealand Law Society Seminar May 1996, 37

also charged with manslaughter relating to the same event. Gendall J makes the observation that “if a co-employee (not a director of the company) performs the act, or defaults in his duty, so as to lead to an “unlawful” killing would he be protected from a charge of manslaughter because the employer is first convicted of a health and safety offence arising out of these events? I think not.” Gendall J also discusses the protection afforded to companies by the corporate veil.¹²⁴ He states that “the protection of incorporation... provides the barrier to a company being charged with manslaughter. Should the protective corporate veil be later lifted so that its director may call in aid [for] the double punishment argument, so as to prevent prosecution?”¹²⁵

It follows that directors of a company can be found personally liable for manslaughter as well as the company being found strictly liable under the regulatory HSE Act. However, as Gendall J notes, “if matters of sentence arise and there exists in truth a real practical issue of double punishment or penalty, then such should be taken into account for sentence.”¹²⁶ It is submitted that it is unlikely that a director of a large company, in a similar situation to this case, would be found personally liable for manslaughter. Mr Spencer was the director and the man directly responsible on the site for his employees. In a large company, the director would not be onsite making the decisions. This responsibility would fall on a site foreman or manager, who would likely be relatively low in a large company’s hierarchy. Therefore the director would not have the requisite mens rea or actus reus to support a conviction.

The ability for an individual manslaughter prosecution to be brought concurrently with an HSE Act prosecution adds further sting to the HSE Act. If senior management could successfully plead double jeopardy for cases where the company has been prosecuted under the HSE Act, it would give more opportunity for the company to limit their health and safety standards. A company could easily factor in an HSE Act prosecution and the probable fine which would be handed out as punishment in a cost benefit analysis. However, the possibility of senior management being subject to the high social stigma of a manslaughter conviction creates a greater

¹²⁴ For discussion on piercing the corporate veil, see D. A. DeMott, “Inside the corporate veil: the character and consequences of executive duties” *AJCL* 19.3 (Aug 2006), 251-267.

¹²⁵ See above, n 120, 111.

¹²⁶ See above, n 120, 111.

deterrence factor. Senior management will want to maintain health and safety standards to ensure that they are not held personally liable.

d. Statistics – Number of prosecutions and investigations into work place deaths

The amendments to the HSE Act in 2002 have significantly increased the scope of the courts to fine companies for breaches of health and safety regulations. The issue is whether the changes have made any real impact on the number of workplace deaths or the overall level of health and safety in the workplace. The next section analyses the trends over the last 5 years, discussing the amount of fines and prosecutions prior to the amendment and after the amendment and any notable differences in the amount of each.

The statistics on the Department of Labour website give some indication as to the trends of health and safety. In terms of prosecutions and convictions,¹²⁷ the actual number of convictions under the HSE Act in April 2004 to March 2005 was 74. Three of those were convicted and discharged, with the rest receiving fines of \$633,300 in total, an average of \$8,900. To the year ending March 2004 there was 80 convictions with fines, for a total of \$532,750 and an average of \$6,650. The previous year had a total of 142 convictions. The total fines paid were \$930,650 from 107 convictions for an average of \$8,700. The year ending March 2002 was inconsistent with the long term downward trend. There were 259 convictions in total, with 137 of these convicted and discharged and total fines of \$2,053,900 for an average of \$15,000. The year ending March 2001 had total fines of \$1,366,100 for 189 convictions with fines, for an average of \$7,200.

These numbers clearly show that the new amendments have not brought about higher fines which were clearly intended by parliament as a result of the five fold increase in the Amendment Act. In fact, the number of cases initiated by OSH inspectors and as a result, the number of convictions, has fallen drastically. The average amount of the

¹²⁷ See OSH Prosecutions and Convictions at <http://www.osh.govt.nz/resources/stats/prosecutions/prosec-convict.shtml> and see also OSH Prosecution Statistics at <http://www.osh.govt.nz/resources/stats/prosecutions/prosec-sum-2004-05.shtml>.

finances handed down have stayed within a range of \$6,500 to \$9,000 for most of the last 5 years, with the year ended March 2002 the one outlier with an average of \$15,000. This could be a sign that the new amendment is working successfully, in that companies are improving their health and safety policies and as a result there are less breaches of the HSE Act.

If the amendment is working and there are less accidents occurring, there would be an expectation that the number of fatal accidents investigated by the Department of Labour would also decrease. However, between 2001 and 2006, the number of investigations has been 73, 73, 62, 46, and 65 respectively, with the latest reporting period being between the 1st July 2005 to the 30th June 2006. These numbers show the amount of workplace deaths investigated by OSH have not significantly decreased over the five years, apart from the 2004/05 year which only had 46 investigations.

The Department of Labour statistics are not a complete list of workplace deaths, as they only report cases where OSH has investigated the death. The ACC statistics may provide a more complete picture of the number of workplace deaths because their statistics include all claims for funeral costs by family members. Here, the number of deaths has been 90, 83, 104 and 80 in the same first four periods, with the latest reporting period being 2004/2005. This does not show the expected drop in work related deaths.¹²⁸

The trends of the last 5 years, which covers workplace death numbers pre- and post-amendment to the HSE Act, show that the amount of cases initiated under the HSE Act are significantly down post-amendment, but the number of workplace deaths has stayed relatively stable. This shows that while companies may be changing their practices, they have not been successful in stopping fatal injuries. Further, the actual fines handed down have not increased and in fact on average have showed signs of decreasing post-amendment.

The statistics indicate that the amendments to the HSE Act may have implemented a change in health and safety policy but this has not translated into less workplace

¹²⁸ See ACC injury statistics 2005 (first edition):
http://www.acc.co.nz/wcm001/idcplg?IdcService=SS_GET_PAGE&ssDocName=SS_WCM_115740&ssSourceNodeId=8070.

deaths. If the amendments have failed, is there a better way? A separate corporate manslaughter offence may be the answer. While it may not bring about many prosecutions, the practical effect may be the impetus for companies to spend more time and money ensuring the safety of their employees, as well as the consumers of their goods and services and the general public. If a separate corporate manslaughter offence would have this result, how should it be formulated? Which theory of corporate criminal liability best serves the needs of society? In the next chapter I will discuss how overseas jurisdictions have dealt with this issue, with the aim of implementing a similar offence in New Zealand.

Chapter 3 – Overseas Jurisdictions – Attempts at Change

I. United Kingdom position

a. *Corporate Manslaughter and Corporate Homicide Bill (UK)– How effective will this be?*

The Corporate Manslaughter and Corporate Homicide Bill currently before the United Kingdom parliament is a result of over 10 years of discussion on the merits of a separate corporate manslaughter offence.¹²⁹ The UK Law Commission first proposed a new offence of “corporate killing” in 1996.¹³⁰ This report discussed the reform of involuntary manslaughter law and devoted a large part to discussing how an effective corporate manslaughter offence could be formulated.

The Law Commission believed that corporate liability for involuntary manslaughter was part of the common law and there was no “practical difficulty in attributing to many ‘one-man’ or small companies the acts and omissions of those who control them”.¹³¹ As we have seen,¹³² the difficulty with the identification doctrine is in situations where the organisational structure of a large company makes it very difficult to identify the ‘directing mind and will’ of the company whose conduct should be attributable to the company following a workplace death.¹³³ Likewise, the Law Commission did not believe extending the identification doctrine through the principle of aggregation was a viable prospect¹³⁴ and did not want to follow the United States path of vicarious liability.¹³⁵ A change to “reactive fault” was considered too radical for a relatively small area such as corporate manslaughter.¹³⁶

¹²⁹ This began in 1994 with a consultation paper on Involuntary Manslaughter: Law Commission (UK) *Involuntary Manslaughter: a Consultation Paper*, Law Com no 135, (1994).

¹³⁰ See above, n 80.

¹³¹ See above, n 80, para 7.18.

¹³² See above Chapter 1 Part II. f. Problems with the Identification doctrine?

¹³³ See above, n 80, para 7.19 and also see above Chapter 1 Part II.b. – Doctrine of Identification – the orthodox position.

¹³⁴ See above, n 80, paras 7.32-7.33.

¹³⁵ See above, n 80, paras 7.28-7.31.

¹³⁶ See above, n 80, paras 7.34-7.35.

The Law Commission believed that the identification doctrine was untenable and instead believed a corporate killing offence based on an organisational approach to corporate fault was required.¹³⁷

After the recommendation of an organisational corporate killing offence by the Law Commission, it took four years for the United Kingdom Home Office to reply. In May 2000, the Government accepted the Law Commission's proposal for a new corporate killing offence but with some significant changes.¹³⁸ The Government believed that instead of limiting the offence to any body corporate, the definition of 'undertaking' in the Health and Safety at Work Act 1974 should be applied. This would have increased the scope of the new offence to effectively all employing organisations, which was estimated at 3.5 million enterprises.¹³⁹

Following this report, the predictable dragging of feet by the UK Parliament resulted in no action on this issue for 5 years. It is possible to contend that the reason for this delay was due to political pressure from large corporations. The people in control of large organisations in general would not want a separate corporate manslaughter offence and are likely to exert their political power to stop such an offence being enacted. The implications of this offence are far-reaching and could result in a fundamental change in the way companies are managed. For a long time, regulation has been the protector against big industry, a classic David versus Goliath scene. Regulatory agencies have a limited publicly funded budget while big corporations have almost unlimited cash at their disposal. It is not a level playing field and cannot

¹³⁷The Law Commission drafted a bill in their 1996 report, which included a corporate manslaughter offence. In clause 4 of the Law Commission's Draft Bill, it stated:

- 4(1) A corporation is guilty of corporate killing if –
- (a) a management failure by the corporation is the cause or one of the causes of a person's death; and
 - (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.

Clause 4(2) defines 'management failure' as:

- (a) There is a management failure by the company if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and
- (b) Such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.

¹³⁸ Home Office (UK) *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* May 2000

¹³⁹ See above n 138, para 3.2.5.

be while corporations have the ability to move their business out of any legal jurisdiction which they perceive as too risky to their bottom line.

It is likely a company will weigh the value of doing business in any jurisdiction which has a separate corporate manslaughter offence with the chance of being held liable of such an offence. The best outcome for the country would be for the company to realise that business is still profitable, even with extensive health and safety procedures in place. However there is the risk that a company would pull out of such a country. Most Western Governments would view this as undesirable because of today's reliance on big business for jobs, economic growth and political stability. This shows how the issue of corporate criminal liability will remain a political issue, even after any corporate manslaughter offence becomes law.

Despite the controversy, the Corporate Manslaughter Draft Bill for Reform was presented to the United Kingdom Parliament in March 2005. The key implications of the Draft Bill included a new test based on an 'organisation'¹⁴⁰ and whether the senior managers of the organisation caused the death of a person by a gross breach of a relevant duty of care owed by the organisation to the deceased.¹⁴¹ The inclusion of 'corporation or government department' in the Draft Bill is far more restrictive than the Home Office's proposal in 2000 of 'undertakings'. Other aspects of the Draft Bill included punishment of an unlimited fine when a company was found liable¹⁴² and the exclusion of an individual secondary offence.¹⁴³

The summary of responses to the Draft Corporate Manslaughter Bill¹⁴⁴ highlights the difficulties in the wording of the offence. A major concern was that "a management failing by senior managers would continue to focus the offence on the culpable

¹⁴⁰The full definition of organisation is as follows from the Draft Corporate Manslaughter Bill:

1 The offence

(2) The organisations to which this section applies are –

(a) a corporation;

(b) a government department or other body listed in the Schedule

¹⁴¹Clause 1 of the Draft Corporate Manslaughter Bill is the same as the Bill currently before Parliament in the United Kingdom – See Appendix 3.

¹⁴²Draft Corporate Manslaughter Bill Cl 6(4)(a).

¹⁴³Draft Corporate Manslaughter Bill Cl 1(5). Examples of secondary offences include aiding, abetting, counselling and procuring.

¹⁴⁴*Summary of Responses to Corporate Manslaughter: The Government's Draft Bill for Reform* (CM 6497 March 2005).

actions of individuals, doing little to broaden the identification doctrine.”¹⁴⁵ Further, Trade Unions in particular believed that the use of “senior manager” would encourage delegation of health and safety to junior staff to manoeuvre around the Bill and would result in lower emphasis on health and safety in large corporations.¹⁴⁶ Overall most respondents believed that the offence should apply to all employment organisations, similar to the definition of ‘undertaking’ in the Health and Safety Act 1974 (UK). The lifting of Crown immunity was predictably approved. The view on whether individuals should be criminally liable as a secondary party for the corporate offence was mixed, as was the view on what sanctions should be available. The main concern of the respondents was the uncertainty surrounding the definition of ‘senior manager’ and how the definition would differ when considering organisations of different sizes.

The corporations themselves believed that individuals should not be held accountable under the corporate offence and the current health and safety laws were adequate. However, many other respondents believed that this issue had not been sufficiently addressed. A popular belief was that further statutory duties on directors for health and safety should be implemented, but not in a corporate manslaughter context. Some respondents felt that an unlimited fine would not be an effective deterrent for corporations, especially with an offence limited to the actions of “senior managers”. Innovative new sanctions, such as corporate probation, disqualification and possible imprisonment of directors, negative publicity orders and equity fines were discussed as possible alternatives to an unlimited fine. The idea of these sanctions, while controversial, would ensure that corporations and managers take an offence of corporate manslaughter seriously.

Following the Draft Bill being released in March 2005, it was over a year before the Corporate Manslaughter and Corporate Homicide Bill was introduced into the House of Commons on 20th July 2006. The general idea of the Draft Bill has been kept. Clause 1 of the Bill states:

(1) An organisation to which this section applies is guilty of an offence if the way in which any of its activities are managed or organised by its senior managers-

¹⁴⁵ See above n 144, page 5.

¹⁴⁶ See above n 144, page 5.

- (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.

The definition of 'senior manager'¹⁴⁷ is the same as in the Draft Bill. However, the definition of 'organisations' is slightly altered to include corporations, a department or other body listed in Schedule 1 and a police force as defined in clause 13(1), but not including a corporation sole. The definition of a 'gross' breach of a relevant duty of care¹⁴⁸ has been limited to that in clause 1(3)(c) –

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.

A duty that falls far below what is reasonably expected can be judged by the instructions for the jury in Clause 9.¹⁴⁹ It is important to look at the level of seriousness of the failure and the risk of death, with a higher risk of death or a more serious failure of health and safety requirements being more likely to 'fall far below what can reasonably be expected'. The seriousness of the failure can be determined through the attitudes, policies and accepted practices within the business in regards to health and safety.

The overall impact of the Corporate Manslaughter and Corporate Homicide Bill, in its current guise, is arguably very little. A senior manager who plays a significant role in the making of decisions or actual managing of the organisation needs to have caused the person's death by a gross breach of a relevant duty of care. While in clause 9 the jury can take into account the company policy in regards to health and safety and the definition of 'senior manager' is wider than the 'directing mind and will', it is unlikely that the offence is significantly wider than the current identification doctrine.

¹⁴⁷ See clause 2. The meaning of senior manager in the Corporate Manslaughter and Corporate Homicide Bill in Appendix 3.

¹⁴⁸ See clause 3. Relevant duty of care in Appendix 3. For more information see *House of Commons Explanatory Notes on the Corporate Manslaughter and Corporate Homicide Bill* at <http://www.publications.parliament.uk/pa/cm200506/cmbills/220/en/06220x--.htm>

¹⁴⁹ See Clause 9. Factors for jury in Appendix 3.

II. *Australian Position*

a. *The Commonwealth Criminal Code 1995*

While the United Kingdom Bill may be a shadow of what is actually required for an effective offence of corporate manslaughter, the Australian Commonwealth Criminal Code Act 1995 goes much further in holding corporations responsible for their actions. The Criminal Code 1995 (Cth) came into force in December 2001 for all Commonwealth criminal offences. These offences are typically regulatory offences created at the Federal Government level. Most criminal offences in Australia are at the state level which includes the eight main states and territories of Australia. For offences such as homicide, each state or territory has the ability to legislate as they see fit. This results in different law, as shown by South Australia and Victoria relying on common law for crimes and the other states and territories relying on statutory criminal codes.¹⁵⁰

The stated aim of the Federal Government in implementing the Criminal Code was for the states and territories to adopt the measures within the Act, to ensure uniformity of criminal offences across Australia and to improve the law relating to corporate criminal liability. However, currently only the Australian Capital Territory has implemented a Criminal Code based on the Commonwealth code.¹⁵¹

While the other states and territories of Australia have not yet adopted the Commonwealth code as part of the state law, it is still an important step towards effective corporate criminal liability. Part 2.5 of the Criminal Code Act 1995 involves Corporate Criminal Responsibility with section 12.1 laying out the general principles.¹⁵² The code breaks up the principles of corporate criminal liability into

¹⁵⁰ B McSherry & B Naylor *Australian Criminal Laws Critical Perspectives* (1st ed, Oxford University Press, 2004) 120.

¹⁵¹ See above, n 150, page 30.

¹⁵² See s12.1 in Criminal Code 1995 (Commonwealth) in Appendix 2.

those offences requiring proof of negligence¹⁵³ and fault elements other than negligence.¹⁵⁴

This test is more complex and complete in relation to the United Kingdom Bill currently before the House of Commons. For negligence, through section 12.4(3)(b) the organisational fault doctrine is applied while also allowing the actions of employees, executives and agents of the company to be aggregated in section 12.4(2).

For fault elements other than negligence,¹⁵⁵ sections 12.3(2)(a) and (b) incorporate the standard identification doctrine into the Code, with a defence for section 12.3(2)(b) where the “body corporate proves that it exercised due diligence to prevent the conduct or the authorisation or permission.” This allows the corporation to distance itself from one employee who is acting against company policy and commits some criminal offence covered under this section. Organisational fault is also included in section 12.3(2)(c) and (d) for fault elements other than negligence, which requires a corporate culture. Corporate culture is defined in Section 12.3(4):

(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.

This section seems to limit the impact of section 12.3(2)(c) and (d) by requiring the corporate culture to be authorised by a high managerial agent or that there is a reasonable belief by an employee, agent or officer that a high managerial agent would have authorised or permitted the commission of the offence. As Jennifer Hill notes, it is not clear whether authorisation under section 12.3(4)(b) would be satisfied if a high

¹⁵³ See s12.4 in Criminal Code 1995 (Commonwealth) in Appendix 2.

¹⁵⁴ See s12.3 in Criminal Code 1995 (Commonwealth) in Appendix 2.

¹⁵⁵ See s12.3 Criminal Code 1995 in Appendix 2.

managerial agent simply turns a “blind eye” to the action.¹⁵⁶ However if this legislation applied in New Zealand, the doctrine of wilful blindness could be attributed to the person to infer knowledge. The defendant could be wilfully blind if he does not ask “because he knew what the answer would be”.¹⁵⁷ The doctrine would also apply in a situation where the defendant could easily gain the knowledge but does not ask to ensure he does not know.¹⁵⁸ The definition of ‘corporate culture’ is not exhaustive, as shown by the use of the word ‘includes’. The extent of this section is therefore open to judicial examination and interpretation. However the aim of the section does seem to limit the effectiveness of the organisational fault sections in 12.3(2)(c) and (d).

The Criminal Code is not exclusively limited to occupational health and safety and corporate killing but is an important aspect of its coverage. While ACT is currently the only State to adopt similar legislation to that of the federal code, Queensland has released a discussion paper¹⁵⁹ and the Victorian State Government released a draft bill on corporate manslaughter¹⁶⁰ which was blocked by the Victorian Upper House on 29 May 2002.¹⁶¹ The Victorian draft bill was heavily criticised by the business community.¹⁶² With its ultimate dismissal by the Victorian Upper House in 2002, the business community managed once again to hide their failures behind the umbrella of regulation rather than a complete manslaughter offence.

b. ACT Industrial Manslaughter

The ACT Crimes (Industrial Manslaughter) Amendment Act 2003 amended the ACT Crimes Act 1900 and came into force in March 2004. Section 49C defines the offence for ‘industrial manslaughter’ by an employer.¹⁶³ Section 49D defines a similar offence for ‘senior officer’ by replacing the word ‘employer’ from Section

¹⁵⁶ Jennifer Hill, “Corporate Criminal Liability in Australia” [2003] J.B.L 19

¹⁵⁷ *R v Crooks* [1981] 2 NZLR 53, 58 (CA).

¹⁵⁸ *Severinsen v DSW* 31/5/94, Penlington J, HC Hamilton AP1/94. For further information on Wilful Blindness, see Lanham, “Wilful blindness and the criminal law” (1985) 9 Crim LJ 261 and for general information the discussion in J Gobert & M Punch *Rethinking Corporate Crime*, see above, n 22, 89.

¹⁵⁹ Queensland Government, Department of Justice and Attorney-General, Discussion Paper, *Dangerous Industrial Conduct* (2000).

¹⁶⁰ Crimes (Workplace Deaths and Serious Injuries) Bill 2001.

¹⁶¹ See above n 156, page 36.

¹⁶² See above n 156, page 36.

¹⁶³ See s49C Crimes Act 1900 (ACT) in Appendix 2.

49C with “a senior officer [of an employer].”¹⁶⁴ Section 7A¹⁶⁵ of the Crimes Act 1900 (ACT) allows sections 49C and 49D to be integrated with the Criminal Code 2002 (ACT), which is modelled on the Commonwealth Criminal Code 1995. This allows for the fault element of recklessness to be proven from a corporate culture or negligence can be proven by showing that the corporations conduct as a whole was negligent.¹⁶⁶ Section 49B provides that in terms of the ‘conduct’ that caused the industrial fatality, an employer or senior officer’s omission to act can be ‘conduct’ if:

- it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from—
- (a) an act of the employer or senior officer; or
 - (b) anything in the employer or senior officer’s possession or control; or
 - (c) any undertaking of the employer or senior officer.¹⁶⁷

This offence, when considered together with the definition of negligence¹⁶⁸ and recklessness,¹⁶⁹ is a clear improvement on the standard identification doctrine. The inclusion of fault through ‘corporate culture’ or through aggregate negligence¹⁷⁰ ensures this offence will be taken seriously by corporations in implementing health and safety policies. However, although this may be an improvement on the identification doctrine, the “ACT Government expects the legislation to address only the most reckless and negligent organisations and their senior officers.”¹⁷¹ The full

¹⁶⁴ See s49A Definitions for Part 2A in Crimes Act 1900 (ACT) in Appendix 2. For more information see N Cowdery AM QC *Australian Developments – Especially in the Workplace* International Society for the Reform of Criminal Law 19th International Conference 30 June 2005 www.isrc.org/Papers/2005/Cowdery.pdf

¹⁶⁵ See Crimes Act 1900 (ACT) in Appendix 2 .

¹⁶⁶ For more information see *Crimes (Industrial Manslaughter) Amendment Bill 2002 Report No 6* Standing Committee on Legal Affairs, September 2003 Paras 2.11-2.13 at [http://www.parliament.act.gov.au/downloads/reports/la06Crimes.pdf#search=%22Crimes%20\(Industrial%20Manslaughter\)%20Amendment%20Act%202003%20%22](http://www.parliament.act.gov.au/downloads/reports/la06Crimes.pdf#search=%22Crimes%20(Industrial%20Manslaughter)%20Amendment%20Act%202003%20%22)

¹⁶⁷ See A Hall, R Johnstone & Alexa Ridgway, *Reflection On Reforms: Developing Criminal Accountability For Industrial Deaths* National Research Centre for Occupational Health and Safety Working Paper 33 April 2004, 44 [http://www.ohs.anu.edu.au/publications/pdf/wp%2026%20-%20Hall,%20Johnstone%20and%20Ridgway.pdf#search=%22Australian%20capital%20territory%20Crimes%20\(Industrial%20Manslaughter\)%20Amendment%20Act%202003%20%22](http://www.ohs.anu.edu.au/publications/pdf/wp%2026%20-%20Hall,%20Johnstone%20and%20Ridgway.pdf#search=%22Australian%20capital%20territory%20Crimes%20(Industrial%20Manslaughter)%20Amendment%20Act%202003%20%22)

¹⁶⁸ Criminal Code 2002 (ACT) is based on the Criminal Code 1995 (Cth). See ss21, 52 and 55 of the Criminal Code 2002 (ACT) in Appendix 2.

¹⁶⁹ Recklessness in s 51 of the Criminal Code 2002 (ACT) is based on the Criminal Code 1995 (Cth). See Appendix 2. For a person such as a senior officer to be reckless, see s 20 Criminal Code 2002 in Appendix 2.

¹⁷⁰ See ss 21 and 52 of the Criminal Code 2002 (ACT) which refers to the standard of care required for negligence for corporations in Appendix 2.

¹⁷¹ See above, n 167, 43.

implication of this legislation has not been tested through a prosecution to date and as ACT is a small jurisdiction in terms of population than, the likelihood of an ‘industrial manslaughter’ occurring is low.¹⁷² However the ACT government has stated that the importance of this legislation extends to the symbolic nature of holding an industrial death caused by recklessness or negligence at the same level of condemnation as any other homicide.¹⁷³

The significant limit on the scope of these sections is that the offence is restricted to the death of a worker.¹⁷⁴ That is, the death of consumers and the general public in disasters, which has been instrumental in bringing corporate criminality to the political arena, are not covered by these sections. For example, while the deceased crew members in the Herald of Free Enterprise disaster could be victims of an ‘industrial manslaughter’ offence, the deceased passengers could not. The next section discusses the likely outcome if this offence was the relevant legislation at the time of the Herald disaster and the issue of limiting the offence to workers.

c. Herald of Free Enterprise – A different result?

There were a number of crew members who lost their lives in the Herald of Free Enterprise disaster. If the ACT legislation was used to prosecute the employer of these crew members, P & O Ltd, then the following would need to be satisfied¹⁷⁵:

- The worker of the employer died in the course of employment
- The employer’s conduct causes the death of the worker
- The employer is negligent about causing the death of the worker or reckless about causing serious harm to the worker by the conduct.

The crew members have clearly died in the course of employment. For the employer’s conduct to cause the death of the worker there needs to be an omission to

¹⁷² There were only 3 industrial fatalities within the ACT jurisdiction in 2002/03. See further Industrial Manslaughter Fact Sheet’ accompanying the Media Release by Katy Gallagher MLA ‘Industrial Manslaughter Laws Passed,’ 27th November 2003.

¹⁷³ See above n 167, 43.

¹⁷⁴ A worker is defined in s49A as an employee or an independent contractor or an outworker or an apprentice or trainee or a volunteer. See Appendix 2.

¹⁷⁵ Section 49C Crimes Act 1900 (ACT). See Appendix 2.

perform the duty to avoid or prevent danger to the life of the worker¹⁷⁶ if the danger arises from anything within the employer's control. The employer also needs to be negligent in causing the death or reckless in causing serious harm. This approach offers a higher likelihood of a successful conviction than the identification doctrine under which P & O Ltd were originally charged.¹⁷⁷

Under section 55 of the Criminal Code 2002 (ACT),¹⁷⁸ negligence may be evidenced by the fact that the conduct was substantially attributable to –

inadequate corporate management, control or supervision of the corporation's employees or failure to provide adequate systems for giving relevant information to relevant people in the corporation.¹⁷⁹

In the Herald of Free Enterprise disaster, it is clear that there was a failure to provide adequate systems for the Master to receive the relevant information that the bow doors were still open. This problem could have been overcome if P and O Ltd had implemented a strict policy of the Master ensuring the doors were closed or by having a light on the deck alerting the Master to the fact that the bow doors were still open. The burden of a very short time schedule added pressure on the employees to get the ferry out of port as quickly as possible. There was a clear lack of supervision of the conduct of the employees, with the Chief Officer failing to check that the assistant bo'sun had completed his job of closing the doors. Under section 21 of the Criminal Code 2002 (ACT), these failings need to greatly fall short of the standard of care that a reasonable person would exercise. The ability under section 51¹⁸⁰ of the Criminal Code 2002 (ACT) to allow the aggregation of the negligent acts adds further weight to the argument and it is submitted that the aggregate negligence satisfied this high threshold.

If a corporation such as P & O Ltd were to be found liable in ACT for their actions, there are a number of sanctions available. Under section 49C, the maximum penalty available is 2000 penalty units or imprisonment for 20 years or both. Under section

¹⁷⁶ See above, n 167, 44.

¹⁷⁷ See Chapter 1, Part II. c. Corporate Manslaughter – The Herald of Free Enterprise Disaster.

¹⁷⁸ See Appendix 2.

¹⁷⁹ See Appendix 2.

¹⁸⁰ See Appendix 2.

49D, the maximum penalty available is 2000 penalty units or imprisonment for 20 years or both. Under section 133 of the Legislation Act 2001 (ACT) a penalty unit for an individual is equal to a fine of \$100 and a penalty unit for a corporation is equal to a fine of \$500. Therefore the maximum fine for an individual (s49C) is \$200,000 and for a corporation (s49D) is \$1,000,000. There are also additional, revolutionary sanctions available under Section 49E¹⁸¹ of the Crimes Act 1900 (ACT) if a corporation is found guilty under section 49C of the Act. These include a ‘name and shame’ sanction by ordering it to publicise the deaths and any subsequent deaths from similar conduct, or to operate and carry out a stated project for the public benefit, such as community service.

In my opinion, it is likely that the deaths of crew members of the Herald of Free Enterprise would be covered by the ACT legislation. However there would be no scope to prosecute for the deaths of the passengers. This would result in no reparation and no sense of justice for the surviving family members of a deceased passenger. This is not a fair situation. The ACT legislation is clearly not designed to deal with public disaster situations. The use of sanctions such as the ‘name and shame’ of liable corporations will ensure to a certain extent that the public will be aware of any workplace deaths. However the ACT Government has missed a good opportunity to cover all aspects of corporate manslaughter and the resulting ‘industrial manslaughter’ offence is of limited practical effect because of this.

The experiences in Australia and the United Kingdom have shown the difficulties of enacting a corporate manslaughter offence with the opposition of a powerful business community. The next chapter will discuss how a corporate manslaughter offence could be formulated for New Zealand.

¹⁸¹ See s49E Crimes Act 1900 (ACT) in Appendix 2.

Chapter 4 - Corporate Manslaughter in New Zealand - Formulation of an Offence

I. Statistics on New Zealand businesses

New Zealand is a small, developed country. The make-up of our business world differs from America and the United Kingdom. While there is the presence of multi-national corporations, the overall majority of businesses in New Zealand are small, with 96% having fewer than 20 employees in 2005.¹⁸² These small businesses impact significantly on the New Zealand economy and provide work for 512,840 employees. However, the majority of employees work for large businesses. This is shown by the fact that in 2005, businesses with over 100 employees employed 813,200 people, despite only being 0.55% of the total businesses in New Zealand.¹⁸³ Statistics New Zealand studies show that

of the total number of enterprises in New Zealand in February 2005, 51 percent (169,290) were registered limited liability companies, 22 percent (74,660) were individual proprietorships, and 14 percent (46,240) were partnerships. Of the total number of employees engaged, registered limited liability companies contributed 67 percent (1,165,300), while the central government contributed 14 percent (237,500).¹⁸⁴

These figures show that there is an overweighting of workers in limited liability companies and generally the larger businesses within New Zealand are limited liability companies. Examples of these include Telecom, Fonterra and Fisher and Paykel. Telecom has a market capitalisation of approximately \$NZ8.5 billion¹⁸⁵, with

¹⁸² <http://www.stats.govt.nz/products-and-services/new-zealand-in-profile-2006/Businesses.htm>

¹⁸³ In total there were 1,728,000 employees in 2005, making large businesses with over 100 employees the employer of 47% of New Zealand's employees in 2005. See above n 149.

¹⁸⁴ For more information see:

<http://www2.stats.govt.nz/domino/external/pasfull/pasfull.nsf/7cf46ae26dcb6800cc256a62000a2248/4c2567ef00247c6acc2570bd000fb33a?OpenDocument>

¹⁸⁵ http://www.nzx.com/market/security_details/by_security?code=TEL Accessed 3/10/2006

approximately 9100 employees.¹⁸⁶ This shows a need for protection of workers, consumers and the general public from workplace and work related deaths from both small and large businesses.

It is submitted that the current regulatory regime in New Zealand has not been successful in limiting deaths in the workplace.¹⁸⁷ This discussion concentrates on two options to facilitate corporations being held liable for manslaughter in New Zealand. These are discussed below.

II. Option 1 – Changing the current Crimes Act 1961

The first option would be to change the definition of homicide in the Crimes Act 1961 to “the killing of a human being by another person” instead of “the killing of a human being by another”.¹⁸⁸ If this change was made, the judiciary would likely resort to the current United Kingdom approach of the identification doctrine in attributing the commission of the crime to the corporation. This would leave New Zealand with the same problems currently faced in the United Kingdom.¹⁸⁹ However, Gobert and Punch argue that the identification doctrine is effective in dealing with small companies where the management and ownership are not separated. As the majority of New Zealand’s companies are of this nature, would the identification doctrine be sufficient?

It is submitted that the identification doctrine would not be sufficient. By adopting the identification doctrine the issue of attributing fault to large corporations remains. As discussed, New Zealand does have large companies with multi-layered management structures and separation between ownership and management. These businesses would likely fall through the cracks of such a system, just as P & O Ltd did in the United Kingdom.

¹⁸⁶ Telecom Annual Report, Disclosures: <http://www.telecom.co.nz/binarys/telecom-ar-4-disclosures-05-06.pdf#search=%22telecom%20new%20zealand%20employee%20numbers%22>, 110.

¹⁸⁷ See Chapter 2 – Current New Zealand Position.

¹⁸⁸ See s158 Crimes Act 1961 in Appendix 1.

¹⁸⁹ See Chapter 1 Part I. for a general discussion on these issues.

One possible solution would be for the judiciary to adopt a wider interpretation of Lord Hoffman's decision in *Meridian*.¹⁹⁰ This would result in concentrating on the actual function the individual undertakes in the company rather than simply limiting the identification to the directors and executive officers of the company. Lord Hoffman believed that the acts of the person who had the authority of the company to do those acts should count as the acts of the company.¹⁹¹ In *Attorney-General's Reference (No. 2 of 1999)*¹⁹² Rose LJ limited *Meridian* to a reaffirmation of the classic identification doctrine. However this case is not binding on New Zealand, so as *Meridian* is the highest authority in New Zealand it is open to the judiciary to adopt the wider interpretation.

If a company was to be prosecuted in New Zealand under a modified Crimes Act for manslaughter, the culpable homicide provisions in the Act would apply. This differs from the UK common law approach of involuntary manslaughter by gross negligence.¹⁹³ Any culpable homicide which does not meet the definition of murder in sections 167¹⁹⁴ and 168¹⁹⁵ of the Crimes Act is necessarily manslaughter.¹⁹⁶ A murder charge will unlikely succeed against a company because of the difficulty in showing the required mens rea of meaning to cause the death or meaning to cause bodily injury and being reckless as to whether death ensues or not. The question is likely to be whether or not the death meets the definition of culpable homicide.¹⁹⁷ The definition of culpable homicide which would cover the acts of a corporation would be section 160 (2)(b) of the Crimes Act. This states that:

- (2) Homicide is culpable when it consists in the killing of any person-
 - (b) By an omission without lawful excuse to perform or observe any legal duty.

¹⁹⁰ See above, n 47.

¹⁹¹ See above, n 47, 16.

¹⁹² [2000] 3 WLR 195

¹⁹³ See above, n 54-59.

¹⁹⁴ See s167 Crimes Act 1961 in Appendix 1.

¹⁹⁵ See s168 Crimes Act 1961 in Appendix 1.

¹⁹⁶ Apart from the section 178 infanticide exception. Note also that section 169 allows a partial defence of provocation which reduces murder to manslaughter. See s171 Crimes Act 1961 in Appendix 1.

¹⁹⁷ See s 160 Crimes Act 1961 in Appendix 1.

In the Crimes Act, the duties tending to the preservation of life include sections 151-153 and 155-157.¹⁹⁸ Under section 150A, a person is criminally responsible through omission or neglect only if there is “a major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances.”¹⁹⁹ To qualify as a “major departure”, the negligence must be “of a sufficiently high degree to incur criminal responsibility.”²⁰⁰ It is likely that a corporation would be liable for manslaughter under the modified Crimes Act if the ‘directing mind’ of the corporation omits to discharge a legal duty and such an omission is a major departure of the standard of care expected.²⁰¹

It is submitted that changing the current definition of homicide in the Crimes Act is inadequate due mainly to the flaws in the use of the identification doctrine. The issues with the identification doctrine have been discussed earlier²⁰² and if the courts adopted this doctrine it would leave very little scope for any large company to be found liable. The action of changing the definition of homicide is also too piecemeal to be effective in every situation. If Parliament decided to hold corporations liable for manslaughter, a more effective implementation would be to create a separate offence.

III. Option 2 – A separate corporate manslaughter offence

If a separate corporate manslaughter offence is to be drafted for New Zealand, how should it be formulated? It is submitted that the Corporate Manslaughter and Corporate Homicide Bill (UK) should not be the basis for a New Zealand offence because of the inadequacies of the Bill as it currently stands.²⁰³ However, the use of ‘organisation’ from the Bill is recommended, due to the difficulties in holding a non-legal entity, such as a partnership, liable for an offence.

It is submitted that a New Zealand corporate manslaughter offence should be based on the ‘industrial manslaughter’ offence in the Crimes Act 1900 (ACT) and the Criminal

¹⁹⁸ See ss150-157 Crimes Act 1961 in Appendix 1.

¹⁹⁹ See s150A Crimes Act 1961 in Appendix 1. Cf “such a great falling short” in Section 21 Criminal Code 2002 (ACT) in Appendix 2.

²⁰⁰ *R v Walker* [1958] NZLR 810, 815,816.

²⁰¹ Court of Appeal has held a legal duty includes common law duties. See *R v Mwai* [1995] 3 NZLR 149, 156-157.

²⁰² For more information see Chapter 1 Part II. b-f.

²⁰³ See above, Chapter 3 Part I. a. Corporate Manslaughter and Corporate Homicide Bill (UK) – how effective will this be?

Code 2002 (ACT).²⁰⁴ New Zealand and Australia have a history of attempting to synchronize business law, with the Memorandum of Understanding between the Governments of New Zealand and Australia on coordination of Business Law.²⁰⁵ While this does not specifically mention corporate criminality, under the heading mutual benefits to be obtained by the two countries, the memorandum states:

- Both Governments acknowledge the importance of a global approach to business law issues (particularly in light of the increasing prevalence of electronic commerce) and the significance of the trans-Tasman relationship in that approach.
- Both Governments are aware that existing laws and regulatory practices relating to business within each economy may impede the development of trans-Tasman business activity. Through the development of increased coordination and dialogue, both parties will endeavour to minimise such impediments.

Therefore the benefits of having a similar criminal corporate liability regime to Australia are clear. Businesses that operate in both Australia and New Zealand would benefit from the synergies of a single regime. The advantages of using the ACT ‘industrial manslaughter’ offence include providing for an offence for both corporations and individuals. This is important as senior officers of the corporation need to be held accountable as well as the corporation for an offence to have a significant deterrent effect. It also allows corporations to be found liable through negligence on a company wide scale and recklessness brought on by a corporate culture. However, the one major drawback is the lack of an offence in situations where consumers or the general public are the victims.²⁰⁶ It is submitted that a New Zealand offence should go further and cover any person who dies as a result of the employer’s conduct. This would hold a corporation or senior officer liable for the deaths of the passengers in situations such as the *Herald of Free Enterprise*.²⁰⁷

²⁰⁴ For more information on these Acts, see Chapter 3, Part II. a. and b and Appendix 2.

²⁰⁵ Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of business law, see more at: <http://www.mfat.govt.nz/Foreign-Relations/Australia/1-CER/0-Reference/0-business-law-memo.php>

²⁰⁶ See above Chapter 3 part II.c *Herald of Free Enterprise* – A different result?

²⁰⁷ See the discussion on the *Herald of Free Enterprise* situation with the current Crimes Act 1900 (ACT) sections on industrial manslaughter, above Chapter 3, Part II. c.

This would mean the offence would have a broad application and covers any person who dies from any accident caused by a corporation. However, the actual coverage would be limited significantly by the corporation being held to a standard of gross negligence. Judges use the concept of gross negligence from the common law when directing juries on what a “major departure” from the standard of care of a reasonable person would be.²⁰⁸ The issue of whether the negligence is “gross” should be decided by the jury but there should be guidance tailored to the situation.²⁰⁹ In a corporate context, this means that for the proposed offence below, the idea of a corporate culture and the ability of the acts, omissions and state of mind of employees to be aggregated would need to be explained to the jury. A proposed New Zealand offence could be as follows:

Corporate Manslaughter Draft Bill

1. An organisation means -

- (1) a corporation;
- (2) a Government department;
- (3) a police force

In this Act “corporation” does not include a corporation sole but includes any body corporate wherever incorporated.²¹⁰

2. An organisation commits an offence if-

- (1) the organisation’s conduct causes the death of any person; and
- (2) the organisation is –
 - (a) reckless²¹¹ about causing serious harm to any person by this conduct; or
 - (b) negligent²¹² about causing the death of any person by the conduct.

3. A senior officer²¹³ of an organisation commits an offence if –

²⁰⁸ See above, n, 20, 565. See the discussion of gross negligence in Chapter 1 Part 1.e – A reaffirmation of the Identification Doctrine – Attorney-General’s Reference (No.2 of 1999) and see the discussion of gross negligence in ss150A – 157 of the Crimes Act 1961, n 178-181.

²⁰⁹ See above, n 20, 565 and n119.

²¹⁰ Unincorporated bodies, such as large accounting or law firms, are not included. This is due to the fact that as they are not separate legal entities, there would be difficulty in prosecuting the business. Personal manslaughter prosecutions can still be brought against the partners. See Corporate Manslaughter Bill 2005, 15-16.

²¹¹ For corporations, section 12.3 of the Criminal Code 1995 (Cth) would be followed – see above n 155 and Appendix 2.

²¹² Negligence is defined in clause 5 of the Bill, see below.

- (1) the senior officer's conduct causes the death of any person; and
- (2) the senior officer is –
 - (a) reckless about causing serious harm to any person by this conduct; or
 - (b) negligent about causing the death of any person by the conduct.

4. The conduct of an organisation or senior officer includes –

(1) An organisation's omission to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of any person if the danger arises from—

- (a) an act of the organisation; or
- (b) anything in the organisation's possession or control; or
- (c) any undertaking of the organisation.

(1) An omission of a senior officer of an organisation to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of any person if the danger arises from—

- (a) an act of the senior officer; or
- (b) anything in the senior officer's possession or control; or
- (c) any undertaking of the senior officer.²¹⁴

5. Negligence –

1) A person (including an organisation) is negligent in relation to a physical element of an offence only if, in the circumstances of the particular case, the conduct is a major departure from the standard of care expected of a reasonable person.²¹⁵

2) The fault element of negligence may exist for the corporation in relation to the physical element if the corporation's conduct is

²¹³ The definition of senior officer would be adopted from the Crimes Act 1900 (ACT), see above n 131 and Appendix 2.

²¹⁴ Based on section 49B Crimes Act 1900 (ACT) see Appendix 2.

²¹⁵ Adapted from s150A Crimes Act 1900 – See Appendix 1.

negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers)²¹⁶

The sanctions available should include a monetary fine and imprisonment for the senior officer and organisation offence. It is also proposed that the sanctions in section 49E of the Crimes Act 1900 (ACT)²¹⁷ should apply for the organisation offence. This adds the deterrent of profit loss, as a 'name and shame' system can cause consumers to change their consumption habits away from the offending organisation's products or services. This adds an unknowable element to the extent of the penalty which has the effect of precluding a cost-benefit analysis of implementing sufficient safeguards. This has the practical effect of ensuring health and safety standards are complied with.²¹⁸

The proposed offence has a broad scope. It applies to an organisation, including any body corporate, Government department or police force, when any person dies as a result of the organisation's conduct. However, the offence is limited by the requirement for the conduct to be a major departure from the standard of care expected of a reasonable person. The adoption in clause 5(1) of the proposed Bill of the negligence standard in section 150A of the Crimes Act 1961 means that the existing case law on this section is relevant.²¹⁹

The inclusion of separate corporate manslaughter offences is currently in its infancy in commonwealth jurisdictions. The above offence has a wider scope than the Bill before the United Kingdom parliament and currently in force in ACT. While I have argued that these offences do not go far enough in terms of protecting all people from the actions of corporations, it remains to be seen how the courts will implement the provisions. The most important aspect of a corporate manslaughter offence is to deter corporate wrongdoing which causes the death of workers, consumers or the general public. If the current overseas legislation is an effective deterrent there may be strong arguments for similar legislation in New Zealand. There may also be difficulties in passing the proposed offence in the current political environment, where neither major party has a clear majority. Presenting such an offence currently to Parliament may be

²¹⁶ See s 52 Criminal Code 2002 (ACT) in Appendix 2.

²¹⁷ See Appendix 2.

²¹⁸ For further information on sanctions, see n 22, 221-245.

²¹⁹ See above, n 198-201.

considered too risky for any party in power to undertake. There is already a constant stream of companies being moved overseas to cheaper manufacturing conditions such as China and Malaysia. The proposed offence may be the catalyst for the majority of manufacturing jobs in New Zealand to move offshore. However, the fact remains that the value of New Zealand lives should be placed above profits. A corporate manslaughter offence is the most effective vehicle to ensure this occurs.

Conclusion

The quote by Milton Friedman at the beginning of this paper points to an outdated model of a corporation. Corporations cannot simply concentrate on making profits without taking into account health and safety laws. The corporation of the 21st century will be safety conscious and environmentally sound. This is the only way forward for a sustainable future. The increased public awareness of corporate malfeasance in all manner of areas ensures that corporations can no longer hide behind the contention that their only stakeholders are shareholders.

There has been a number of high-profile disasters in which a corporation has been at fault but due to the law at the time of the disaster was unable to be sanctioned. The identification doctrine has not been effective in finding fault in a corporation. The need for accountability for these disasters has resulted in overseas jurisdictions legislating criminal law for corporations, including the UK Corporate Manslaughter and Corporate Homicide Bill and the Australian Criminal Code.

In New Zealand the Crimes Act 1961 in its current form does not allow for a corporation to be held liable for manslaughter. The extent of our health and safety legislation is limited to regulation through the Health and Safety in Employment Act 1992. In this paper I have discussed why this regulation has not been effective in New Zealand. There have been no significant changes in the amounts of workplace deaths even with fewer investigations into workplace accidents. I have examined the position currently and the effect of changes overseas. After this analysis, I concluded that a separate corporate manslaughter offence is required for New Zealand. This offence would result in a more effective deterrent against corporate malfeasance and higher accountability for transgressions.

It was decided that a separate corporate manslaughter offence based on the 'industrial manslaughter' offence in the Crimes Act 1900 (ACT) would be the most effective way forward for New Zealand. However the proposed offence was of wider scope than that in ACT, with the death of any person covered. A change of the Crimes Act to allow corporations to be included in the current homicide provisions

would result in the same problems the United Kingdom are currently facing with the identification doctrine. Following Australia would allow further merging of our business law and make New Zealand a safer place to work and live in.

The underlying issue with corporate criminal liability is the merging of politics in the criminal law. Corporations have become very powerful and overseas have successfully lobbied for either the changes to be scrapped altogether or a great reduction in the scope of the new law. The aim of this paper has been to discuss the current law within New Zealand and overseas and to propose a possible way forward for New Zealand. Corporate criminal liability, while a relatively small area of the criminal law, will have a higher level of importance as corporations play an increasingly large part of everyday life. The safety of employees and consumers and the general public is of utmost importance. This paper has raised the awareness of this importance.

Appendix 1 – New Zealand Legislation

I. Crimes Act 1961

2. Interpretation –

“**Person**”, “**owner**”, and other words and expressions of the like kind, include the Crown and any public body or local authority, and any board, society, or company, and any other body of persons, whether incorporated or not, and the inhabitants of the district of any local authority, in relation to such acts and things as it or they are capable of doing or owning:

Part 8 – Crimes against the Person

Duties tending to the preservation of life

[150A. Standard of care required of persons under legal duties—

(1) This section applies in respect of the legal duties specified in any of sections 151, 152, 153, 155, 156, and 157.

(2) For the purposes of this Part, a person is criminally responsible for—

(a) Omitting to discharge or perform a legal duty to which this section applies; or

(b) Neglecting a legal duty to which this section applies—

only if, in the circumstances of the particular case, the omission or neglect is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances.]

151. Duty to provide the necessaries of life—

(1) Every one who has charge of any other person unable, by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is (whether such charge is undertaken by him under any contract or is imposed upon him by law or by reason of his unlawful act or otherwise howsoever) under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that person is caused, or if his life is endangered or his health permanently injured, by such omission.

(2) Every one is liable to imprisonment for a term not exceeding 7 years who, without lawful excuse, neglects the duty specified in this section so that the

life of the person under his charge is endangered or his health permanently injured by such neglect.

Cf 1908 No 32 s 166

152. Duty of parent or guardian to provide necessities—

(1)Every one who as a parent or person in place of a parent is under a legal duty to provide necessities for any child under the age of 16 years, being a child in his actual custody, is criminally responsible for omitting without lawful excuse to do so, whether the child is helpless or not, if the death of the child is caused, or if his life is endangered or his health permanently injured, by such omission.

(2)Every one is liable to imprisonment for a term not exceeding 7 years who, without lawful excuse, neglects the duty specified in this section so that the life of the child is endangered or his health permanently injured by such neglect.

Cf 1908 No 32 s 167

153. Duty of employers to provide necessities—

(1)Every one who as employer has contracted to provide necessary food, clothing, or lodging for any servant or apprentice under the age of 16 years is under a legal duty to provide the same, and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that servant or apprentice is caused, or if his life is endangered or his health permanently injured, by such omission.

(2)Every one is liable to imprisonment for a term not exceeding 5 years who, without lawful excuse, neglects the duty specified in this section so that the life of the servant or apprentice is endangered or his health permanently injured by such neglect.

Cf 1908 No 32 s 168

154. Abandoning child under 6—

Every one is liable to imprisonment for a term not exceeding 7 years who unlawfully abandons or exposes any child under the age of 6 years.

Cf 1908 No 32 s 169

155. Duty of persons doing dangerous acts—

Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable

knowledge, skill, and care in doing any such act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

Cf 1908 No 32 s 170

156. Duty of persons in charge of dangerous things—

Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

Cf 1908 No 32 s 171

157. Duty to avoid omissions dangerous to life—

Every one who undertakes to do any act the omission to do which is or may be dangerous to life is under a legal duty to do that act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

Cf 1908 No 32 s 172

Homicide

158. Homicide defined—

Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

Cf 1908 No 32 s 173

160. Culpable homicide—

(1) Homicide may be either culpable or not culpable.

(2) Homicide is culpable when it consists in the killing of any person—

- (a) By an unlawful act; or
- (b) By an omission without lawful excuse to perform or observe any legal duty; or
- (c) By both combined; or
- (d) By causing that person by threats or fear of violence, or by deception, to do an act which causes his death; or
- (e) By wilfully frightening a child under the age of 16 years or a sick person.

(3) Except as provided in section 178 of this Act, culpable homicide is either murder or manslaughter.

(4) Homicide that is not culpable is not an offence.

Cf 1908 No 32 s 175

Murder, manslaughter, etc

167. Murder defined—

Culpable homicide is murder in each of the following cases:

- (a) If the offender means to cause the death of the person killed:
- (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
- (c) If the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed:
- (d) If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

Cf 1908 No 32 s 182

168. Further definition of murder—

(1) Culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:

- (a) If he means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in subsection (2) of this section, or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from such injury:
- (b) If he administers any stupefying or overpowering thing for any of the purposes aforesaid, and death ensues from the effects thereof:
- (c) If he by any means wilfully stops the breath of any person for any of the purposes aforesaid, and death ensues from such stopping of breath.

(2) The offences referred to in subsection (1) of this section are those specified in the following provisions of this Act, namely:

- (a) Section 73 (treason) or section 78 (communicating secrets):
- (b) Section 79 (sabotage):
- (c) Section 92 (piracy):
- (d) Section 93 (piratical acts):

(e)Section 119 to 122 (escape or rescue from [prison] or lawful custody or detention):

[(f)section 128 (sexual violation):]

(g)Section 167 (murder):

(h)Section 208 (abduction):

(i)Section 209 (kidnapping):

[(j)section 231 (burglary):]

[(k)section 234 (robbery):]

[(l)section 267 (arson)]

Cf 1908 No 32 s 183

171. Manslaughter—

Except as provided in section 178 of this Act, culpable homicide not amounting to murder is manslaughter.

Cf 1908 No 32 s 186

II. Health and Safety in Employment Act 1992

[2A. All practicable steps –

(1) In this Act, “all practicable steps”, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to-

- (a) the nature and severity of the harm that may be suffered if the result is not achieved; and
- (b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
- (c) the current state of knowledge about harm of that nature; and
- (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
- (e) the availability and cost of each of those means

(2) To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.]

[5.Object of Act—

The object of this Act is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work by—

- (a) promoting excellence in health and safety management, in particular through promoting the systematic management of health and safety; and
- (b) defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work-related stress and hazardous behaviour caused by certain temporary conditions; and
- (c) imposing various duties on persons who are responsible for work and those who do the work; and
- (d) setting requirements that—
 - (i) relate to taking all practicable steps to ensure health and safety; and
 - (ii) are flexible to cover different circumstances; and
- (e) recognising that volunteers doing work activities for other persons should have their health and safety protected because their well-being and work are as important as the well-being and work of employees; and
- (f) recognising that successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work; and
- (g) providing a range of enforcement methods, including various notices and prosecution, so as to enable an appropriate response to a failure to comply with the Act depending on its nature and gravity; and
- (h) prohibiting persons from being indemnified or from indemnifying others against the cost of fines and infringement fees for failing to comply with the Act.]

6. Employers to ensure safety of employees—

Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to—

- (a) Provide and maintain for employees a safe working environment; and
- (b) Provide and maintain for employees while they are at work facilities for their safety and health; and
- (c) Ensure that plant used by any employee at work is so arranged, designed, made, and maintained that it is safe for the employee to use; and
- (d) Ensure that while at work employees are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working, or use of things—
 - (i) In their place of work; or
 - (ii) Near their place of work and under the employer's control; and
- (e) Develop procedures for dealing with emergencies that may arise while employees are at work.

49. Offences likely to cause serious harm –

(1) Where-

- (a) A person who, knowing that any action is reasonably likely to cause serious harm to any person, takes the action; and
- (b) The action is contrary to a provision of this Act,-

The person commits an offence against this Act

(2) Where-

- (a) A person who, knowing that failure to take any action is reasonably likely to cause serious harm to any person, fails to take the action; and
- (b) The person is required by this Act to take the action,

the person commits an offence against this Act.

(3) Every person who commits an offence under this section is liable on conviction to-

- [(a) imprisonment for a term of not more than 2 years; or]
- [(b) a fine of not more than \$500,000; or]
- (c) Both.

(4) A person charged with an offence under this section may be convicted of an offence against section 50 of the Act as if the person had been charged under that section

50. Other offences-

[(1) Every person commits an offence, and is liable on summary conviction to a fine not exceeding \$250,000, who fails to comply with the requirements of-

- (a) a provision of Part 2 other than section 16(3); or
- (b) section 19B, section 25, section 26, section 37(2), section 39(5), section 42(1), section 43, section 47, section 48, section 56I(2), section 58, or clause 6 of Schedule 1A; or

(c) a provision of any regulations made under this Act, or continued in force by section 24, declared by the regulations to be a provision to which this section applies.]

[(2) Every person who fails to comply with section 16(3) commits an offence, and is liable on summary conviction to a fine not exceeding \$10,000.]

[51A.Sentencing criteria—

(1)This section applies when the Court is determining how to sentence or otherwise deal with a person convicted of an offence under this Act.

(2)The Court must apply the Sentencing Act 2002 and must have particular regard to—

- (a)sections 7 to 10 of that Act; and
- (b)the requirements of sections 35 and 40 of that Act relating to the financial capacity of the person to pay any fine or sentence of reparation imposed; and
- (c)the degree of harm, if any, that has occurred; and
- (d)the safety record of the person (which includes but is not limited to warnings and notices referred to in section 56C) to the extent that it shows whether any aggravating factor is absent; and
- (e)whether the person has—
 - (i)pleaded guilty;
 - (ii)shown remorse for the offence and any harm caused by the offence;
 - (iii)co-operated with the authorities in relation to the investigation and prosecution of the offence;
 - (iv)taken remedial action to prevent circumstances of the kind that led to the commission of the offence occurring in the future.

(3)This section does not limit the Sentencing Act 2002.]

[54A.Laying information—

(1)An inspector may lay an information in respect of an offence under this Act unless an infringement notice has been issued to the same defendant in respect of the same matter.

(2)A person other than an inspector may lay an information in respect of an offence under this Act only if—

- (a)an inspector or another person has not taken enforcement action against any possible defendant in respect of the same matter; and
- (b)an enforcement authority has not taken prosecution action under any other Act against any possible defendant in respect of the same incident, situation, or set of circumstances; and
- (c)any person has received notification from the Secretary under section 54(2) that an inspector has not and will not take enforcement action against any possible defendant in respect of the same matter.

(3)Despite subsection (2)(b), a person may lay an information even though an enforcement authority has taken prosecution action if—

- (a)the person has leave of the Court to lay the information; and
- (b)subsection (2)(a) and (c) is complied with.]

[56A.Infringement offences—

In sections 56B to 56H, an infringement offence means an offence described in section 50(1).]

[56B.Infringement notices—

(1)An inspector may issue an infringement notice if—

- (a)the inspector believes on reasonable grounds that the person is committing, or has committed, an infringement offence; and
- (b)the person has had prior warning of the infringement offence under section 56C; and
- (c)an inspector or another person has not taken enforcement action against the same defendant in respect of the same matter.

(2)An inspector may revoke an infringement notice before the infringement fee is paid, or an order for payment of a fine is made or deemed to be made by a Court under section 21 of the Summary Proceedings Act 1957.

(3)An infringement notice is revoked by giving written notice to the person to whom it was issued that the notice is revoked.]

III. Sentencing Act 2002

4. Interpretation –

“victim”—

[(a)means—

- (i) a person against whom an offence is committed by another person; and
- (ii) a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property; and
- (iii) a parent or legal guardian of a child, or of a young person, who falls within subparagraph (i) or subparagraph (ii), unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and
- (iv) a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable, unless that member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and]

(b) despite paragraph (a), if an offence is committed by a person, does not include another person charged (whether as a principal or party or accessory after the fact or otherwise) with the commission of, or convicted or found guilty of, or who pleads guilty to,—

- (i) that offence; or
- (ii) an offence relating to the same incident or series of incidents as that offence.

32. Sentence of reparation—

(1) A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer—

- (a) loss of or damage to property; or
- (b) emotional harm; or
- (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

(2) Despite subsection (1), a court must not impose a sentence of reparation in respect of emotional harm, or loss or damage consequential on emotional harm, unless the person who suffered the emotional harm is a person described in paragraph (a) of the definition of “victim” in section 4.

(3) In determining whether a sentence of reparation is appropriate or the amount of reparation to be made for any consequential loss or damage described in subsection (1)(c), the court must take into account whether there is or may be, under the provisions of any enactment or rule of law, a right available to the person who suffered the loss or damage to bring proceedings or to make any application in relation to that loss or damage.

(4) Subsection (3) applies whether or not the right to bring proceedings or make the application has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired.

(5) Despite subsections (1) and (3), the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which the court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

(6) When determining the amount of reparation to be made, the court must take into account any offer, agreement, response, measure, or action as described in section 10.

(7) The court must not impose as part of a sentence of reparation an obligation on the offender to perform any form of work or service for the person who suffered the harm, loss, or damage.

(8) Nothing in section 320 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 applies to sentencing proceedings.

Cf 1985 No 120 s 22(1)

Appendix 2 – Australian Legislation

I. Crimes Act 1900 (ACT)

7A Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to the following offences against this Act (see Code, pt 2.1):

- s 49C (Industrial manslaughter—employer offence)
- s 49D (Industrial manslaughter—senior officer offence)
- s 64 (Using child for production of child pornography etc)
- s 64A (Trading in child pornography)
- s 65 (Possessing child pornography)
- s 114B (Money laundering)
- s 114C (Possession etc of property suspected of being proceeds of crime)
- s 114D (1) (Organised fraud)
- s 439 (Offence of criminal defamation).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

Part 2A Industrial manslaughter

49A Definitions for pt 2A

employee means a person engaged under a contract of service.

employer, of a worker—a person is an *employer* of a worker if—

- (a) the person engages the worker as a worker of the person; or
- (b) an agent of the person engages the worker as a worker of the agent.

independent contractor means a person engaged under a contract for services.

officer, of a corporation—see the Corporations Act, section 9.

Note At the commencement of this section, the definition of *officer* in the Corporations Act, section 9 is as follows:

officer of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:

- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (ii) who has the capacity to affect significantly the corporation's financial standing; or
- (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

senior officer, of an employer, means—

- (a) for an employer that is a government, or an entity so far as it is a government entity—any of the following:
 - (i) a Minister in relation to the government or government entity;
 - (ii) a person occupying a chief executive officer position (however described) in relation to the government or government entity;
 - (iii) a person occupying an executive position (however described) in relation to the government or government entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the government or government entity; or
- (b) for an employer that is another corporation (including a corporation so far as it is not a government entity)—an officer of the corporation; or
- (c) for an employer that is another entity—any of the following:
 - (i) a person occupying an executive position (however described) in relation to the entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the entity;
 - (ii) a person who would be an officer of the entity if the entity were a corporation.

worker means—

- (a) an employee; or
- (b) an independent contractor; or
- (c) an outworker; or
- (d) an apprentice or trainee; or

- (e) a volunteer.

49B Omissions of employers and senior officers

- (1) An employer's omission to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from—
 - (a) an act of the employer; or
 - (b) anything in the employer's possession or control; or
 - (c) any undertaking of the employer.
- (2) An omission of a senior officer of an employer to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from—
 - (a) an act of the senior officer; or
 - (b) anything in the senior officer's possession or control; or
 - (c) any undertaking of the senior officer.
- (3) For this section, if, apart from an agreement between a person and someone else, something would have been in the person's control, the agreement must be disregarded and the thing must be taken to be in the person's control.

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.

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

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.

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

Note The general offence of manslaughter in s 15 applies to everyone, including workers.

49E Court may order corporation to take certain actions

- (1) This section applies if a court finds a corporation guilty of an offence against section 49C.
- (2) In addition to or instead of any other penalty the court may impose on the corporation, the court may order the corporation to do 1 or more of the following:
 - (a) take any action stated by the court to publicise—
 - (i) the offence; and
 - (ii) the deaths or serious injuries or other consequences resulting from or related to the conduct from which the offence arose; and
 - (iii) any penalties imposed, or other orders made, because of the offence;
 - (b) take any action stated by the court to notify 1 or more stated people of the matters mentioned in paragraph (a);
 - (c) do stated things or establish or carry out a stated project for the public benefit even if the project is unrelated to the offence.
- (3) In making the order, the court may state a period within which the action must be taken, the thing must be done or the project must be established or carried out, and may also impose any other requirement that it considers necessary or desirable for enforcement of the order or to make the order effective.
- (4) The total cost to the corporation of compliance with an order or orders under subsection (2) in relation to a single offence must not be more than \$5 000 000 (including any fine imposed for the offence).
- (5) If the court decides to make an order under subsection (2), it must, in deciding the kind of order, take into account, as far as practicable, the financial circumstances of the corporation and the nature of the burden that compliance with the order will impose.
- (6) The court is not prevented from making an order under subsection (2) only because it has been unable to find out the financial circumstances of the corporation.
- (7) If a corporation fails, without reasonable excuse, to comply with an order under subsection (2) (a) or (b) within the stated period (if any) the court may, on application by the commissioner for OH&S, by order authorise the commissioner—

- (a) to do anything that is necessary or convenient to carry out any action that remains to be done under the order and that it is still practicable to do; and
 - (b) to publicise the failure of the corporation to comply with the order.
- (8) If the court makes an order under subsection (7), the commissioner must comply with the order.
 - (9) Subsection (7) does not prevent contempt of court proceedings from being started or continued against a corporation that has failed to comply with an order under this section.
 - (10) The reasonable cost of complying with an order under subsection (7) is a debt owing to the Territory by the corporation against which the order was made.

II. Criminal Code 2002 (ACT)

13 Definitions—*conduct and engage in conduct*

In this Act:

conduct means an act, an omission to do an act or a state of affairs.

20 Recklessness

- (1) A person is **reckless** in relation to a result if—
 - (a) the person is aware of a substantial risk that the result will happen; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (2) A person is **reckless** in relation to a circumstance if—
 - (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is a question of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.

21 Negligence

A person is **negligent** in relation to a physical element of an offence if the person's conduct merits criminal punishment for the offence because it involves—

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the physical element exists or will exist.

Part 2.5 Corporate criminal responsibility

49 General principles

- (1) This Act applies to corporations as well as individuals.

Note A law that creates an offence applies to a corporation as well as to an individual (see Legislation Act, s 161).
- (2) The Act applies to corporations in the same way as it applies to individuals, but subject to the changes made by this part and any other changes necessary because criminal responsibility is being imposed on a corporation rather than an individual.

50 Physical elements

A physical element of an offence consisting of conduct is taken to be committed by a corporation if it is committed by an employee, agent or

officer of the corporation acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority.

51 Corporation—fault elements other than negligence

- (1) In deciding whether the fault element of intention, knowledge or recklessness exists for an offence in relation to a corporation, the fault element is taken to exist if the corporation expressly, tacitly or impliedly authorises or permits the commission of the offence.
- (2) The ways in which authorisation or permission may be established include—
 - (a) proving that the corporation’s board of directors intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (b) proving that a high managerial agent of the corporation intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (c) proving that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to noncompliance with the contravened law; or
 - (d) proving that the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law.
- (3) Subsection (2) (b) does not apply if the corporation proves that it exercised appropriate diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to subsection (2) (c) and (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 corporation; and
 - (b) whether the employee, agent or officer of the corporation who committed the offence reasonably believed, or had a reasonable expectation, that a high managerial agent of the corporation would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element for 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 corporation recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

board of directors, of a corporation, means the body exercising the corporation’s executive authority, whether or not the body is called the board of directors.

corporate culture, for a corporation, means an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in the part of the corporation where the relevant conduct happens.

high managerial agent, of a corporation, means an employee, agent or officer of the corporation whose conduct may fairly be assumed to represent the corporation's policy because of the level of responsibility of his or her duties.

52 Corporation—negligence

- (1) This section applies if negligence is a fault element in relation to a physical element of an offence and no individual employee, agent or officer of a corporation has the fault element.
- (2) The fault element of negligence may exist for the corporation in relation to the physical element if the corporation's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers).

Note The test of negligence for a corporation is that set out in s 21 (Negligence).

53 Corporation—mistake of fact—strict liability

A corporation may only rely on section 36 (Mistake of fact—strict liability) in relation to the conduct that would make up an offence by the corporation if—

- (a) the employee, agent or officer of the corporation who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have been an offence; and
- (b) the corporation proves that it exercised appropriate diligence to prevent the conduct.

54 Corporation—intervening conduct or event

A corporation may not rely on section 39 (Intervening conduct or event) in relation to a physical element of an offence brought about by someone else if the other person is an employee, agent or officer of the corporation.

55 Evidence of negligence or failure to exercise appropriate diligence

Negligence, or failure to exercise appropriate diligence, in relation to conduct of a corporation may be evidenced by the fact that the conduct was substantially attributable to—

- (a) inadequate corporate management, control or supervision of the conduct of 1 or more of the corporation's employees, agents or officers; or
- (b) failure to provide adequate systems for giving relevant information to relevant people in the corporation

III. Criminal Code 1995 (Commonwealth)

Part 2.5 — Corporate criminal responsibility

Division 12

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.

Note: [Section 4B](#) of the [Crimes Act 1914](#) enables a fine to be imposed for offences that only specify imprisonment as a penalty.

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.

12.5 Mistake of fact (strict liability)

(1) A body corporate can only rely on [section 9.2](#) (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

(a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

(b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence 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.

12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

Appendix 3 – UK Legislation

I. Corporate Manslaughter and Corporate Homicide Bill

A BILL TO create a new offence that, in England and Wales or Northern Ireland, is to be called corporate manslaughter and, in Scotland, is to be called corporate homicide; and to make provision in connection with that offence.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Corporate manslaughter and corporate homicide

1 The offence

(1) An organisation to which this section applies is guilty of an offence if the way in which any of its activities are managed or organised by its senior managers—

- (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 (as defined in section 13(1)).

In this Act “corporation” does not include a corporation sole but includes any body corporate wherever incorporated.

(3) For the purposes of this Act—

- (a) “senior manager” has the meaning given by section 2;
- (b) “relevant duty of care” has the meaning given by section 3, read with sections 4 to 8;
- (c) 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.

(4) 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.

(5) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.

(6) The offence of corporate homicide is indictable only in the High Court of Justiciary.

Senior managers

2. Meaning of “senior manager”

A person is a “senior manager” of an organisation if he plays a significant role in—

- (a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
- (b) the actual managing or organising of the whole or a substantial part of those activities.

Relevant duty of care

3 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.

(2) Subsection (1) is subject to sections 4 to 8.

(3) 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.

Gross breach

9. 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.

Remedial orders

10 Power to order breach etc to be remedied

(1) A court before which an organisation is convicted of corporate manslaughter or corporate homicide may order it to take specified steps to remedy—

- (a) the breach mentioned in section 1(1);
- (b) any matter that appears to the court to have resulted from that breach and to have been a cause of the death.

(2) An order under this section may be made only on an application by the prosecution specifying the terms of the proposed order. Any such order must be on such terms (whether those proposed or others) as the court considers appropriate having regard to any representations made, and any evidence adduced, in relation to that matter by the prosecution or on behalf of the organisation.

(3) An order under this section must specify a period within which the steps referred to in subsection (1) are to be taken. The period so specified may be extended or further extended by order of the

court on an application made before the end of that period or extended period.

(4) An organisation that fails to comply with an order under this section is guilty of an offence, and liable on conviction on indictment to a fine.

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