

# ARTICLES

## CORPORATE LIABILITY FOR MANSLAUGHTER: THE NEED FOR FURTHER REFORM

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This article explores the problem of corporate liability for manslaughter by examining common law principles as well as a range of statutory reform attempts in Australia and the United Kingdom. The metaphor of ‘corporations-as-persons’ has proved entirely inadequate as a basis for establishing proper criminal responsibility for death by corporate negligence at common law and attempts at statutory reform have been limited and less than successful in establishing an adequate alternative basis for liability. The authors suggest a more radical approach to corporate criminal responsibility that would facilitate aggregation of corporate negligence, an abandonment of the strict requirements for *mens rea* and novel forms of sentencing to achieve higher levels of compliance and successful prosecution of corporate offenders.

### I INTRODUCTION

The need to establish an adequate and comprehensive model of criminal responsibility for homicide that is suitable for application to corporate defendants has generated significant debate in most Australian jurisdictions during the last decade. Whilst some significant statutory reform has occurred, persistent obstacles to effective prosecution of corporate negligence remain. The issue is not one that is likely to go away, recent figures released by the Australian Safety and Compensation Council revealed a 16 per cent increase in workplace deaths in 2006–7 compared to the baseline year of 2003–4.<sup>1</sup> Each new episode of death associated with corporate negligence renews calls for more effective reform. This article explores the existing obstacles to prosecution of corporations for manslaughter, the existing judicial and statutory responses to these problems and offers some potentially ground-breaking suggestions for further reform.

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1 Australian Safety and Compensation Council, *Statistical Report: Notified Fatalities* (July 2006 – June 2007) <<http://www.ascc.gov.au/NR/rdonlyres/6B4946A7-6D8C-4034-9D8C-B89E9DEB0BA0/0/AnnualNotifiedFatalitiesReport20062007.pdf>> at 6 February 2008.

Prosecution for corporate manslaughter has always been inherently problematic because of a number of fundamental dissimilarities between human and corporate defendants. Attempts by common law courts to adapt the application of the principle of *mens rea* to corporations have failed to establish a comprehensive basis for corporate criminal liability and have instead tended to create further loopholes that have provided a template for corporations to avoid liability altogether. Statutory reforms, which will be discussed, have attempted to resolve the difficulties experienced at common law but have generally failed to be far-reaching enough to resolve the difficulties entirely. There is still a demonstrable need for further reform of both the offence formulations and the sentencing of corporate offenders. Reform is only likely to be successful when there is widespread acceptance of the need to expand corporate liability for serious crimes such as manslaughter and a deeper recognition of the inappropriateness of applying criminal responsibility principles that evolved in relation to natural persons to corporations.

## II WHY CRIMINAL LIABILITY REMAINS ESSENTIAL

Homicide is traditionally recognised as one of the most serious crimes known to criminal law and holding corporations responsible for causing human death is essential for the coherence of the criminal law. Effective administration of justice, victim and community satisfaction in the face of negligently caused human deaths and the need to have an effective deterrent to life threatening corporate negligence demands an effective legal remedy.<sup>2</sup> Major disasters such as the Air New Zealand Mount Erebus crash, the Bhopal disaster in India, the Chernobyl nuclear explosion and the Exxon Valdez oil spill serve to demonstrate the capacity for large scale human tragedy as a result of negligence within corporations.<sup>3</sup> Even without such large scale public tragedies, Australia continues to suffer a significantly high number of work-related deaths every year including a steady trickle of high profile episodes such as the Longford deaths and recent tragedies in the mines in Tasmania.<sup>4</sup>

A company registered under the *Corporations Act 2001* (Cth), or any earlier corresponding law, becomes a separate legal entity with the legal capacity and powers of an individual.<sup>5</sup> It is a fundamental feature of the common law's

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2 S Bronitt and B McSherry, *Principles of Criminal Law* (2001) 59.

3 Ibid 154. See also, further discussions in P Grabosky and A Sutton (eds), *Stains on a White Collar: Fourteen Studies in Corporate Crime or Corporate Harm* (1989).

4 Between January 1987 and December 1990, 353 work-related deaths occurred in Victoria alone. Of those deaths, 203 occurred in a corporate context and 25 involved an 'extreme level of company negligence' sufficient to establish criminal culpability to sustain a criminal conviction. S Perrone, 'Workplace Fatalities and the Adequacy of Prosecutions' (1995) 13(1) *Law in Context* 81, 87.

5 H A Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (11<sup>th</sup> ed, 2003) 638-9.

treatment of the human legal subject that an individual's legal capacity also attracts responsibility or liability for actions under one's control. There is no doubt that corporations have the requisite legal capacity to exert control over workplace activities, the challenge is to attach an appropriate level of liability for the outcomes of poor practice.

The criminal justice system rationalises penal punishments by reference to a number of desirable goals. These include the public condemnation or denunciation of wrongful acts, retribution upon offenders for their wrongdoing, deterrence of future wrongdoing by offenders and others, and rehabilitation of offenders.<sup>6</sup> Significantly, public condemnation and denunciation reaffirm the value that society places on human life. To allow corporations to escape criminal liability for organisational failures which cause death trivialises the value of human life,<sup>7</sup> and disregards the effective control that a corporation has over the actions of its agents.

Despite the significant procedural and even doctrinal difficulties that currently make successful manslaughter convictions near impossible, it is imperative that criminal rather than merely civil, administrative or quasi-criminal consequences are employed.<sup>8</sup> Reliance on quasi-criminal offences under existing occupational health and safety (OHS) and/or workers compensation legislation fails to recognise the inexcusable nature of workplace death,<sup>9</sup> as the purpose of OHS legislation is remedial rather than specifically punitive in nature.<sup>10</sup> Despite increases in OHS penalties,<sup>11</sup> prosecutions are still limited by trivial penalties, a failure to distinguish between organisational failures which

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6 Tasmania Law Reform Institute, *Criminal Liability of Organisations*, Issues Paper No 9 (June 2005) 2.

7 Ibid 7–8.

8 David Neal, 'Corporate Manslaughter' (1996) (October) *Law Institute Journal* 39, 41.

9 J Varghese, 'Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004 (Cth)', *Bills Digest* No 135 (2003–4) 2; Tasmania Law Reform Institute, above n 6, 22.

10 P Prior, 'Enforcement: An Inspectorate's View' quoted in Alan Clayton, 'Regulating Occupational Health and Safety: The Need for a New Paradigm' (2003) 7(1) *Safety Science Monitor* 8. Note also, punitive approaches to OHS legislation have been opposed by the Australian Chamber of Commerce and Industry (ACCI) who argue the 'employers need advice and guidance not enforcement and punishment.' See 'Industrial Manslaughter and Workplace Safety' (2004) (May) 75 *ACCI Review* 4.

11 For example under s 27 of the *Occupational Health and Safety Act 1989* (ACT) a fine for failure by an employer to 'take all reasonably practical steps to protect the health, safety and welfare at work of employees' attracts a maximum penalty of \$125,000 for a corporate employer, or a maximum of \$25,000 for an individual employer. There have been increased penalties in Queensland ranging up to \$88,000 and in New South Wales up to \$825,000 and/ or a custodial sentence of between two and five years. See M Addison, *Industrial Manslaughter: Is it Necessary?* (2004) *Lawyers Weekly Website*, State Legal Update, 30 March 2004 <<http://www.lawyersweekly.com.au/articles/D6/0C01EAD6.asp?Type=55&Category=868>> at 13 March 2007.

cause minor injuries and those causing serious injury or death, and limited denunciation.<sup>12</sup> OHS violations are potentially ‘purchasable commodities’ rather than socially intolerable criminal offences.<sup>13</sup> Workers compensation legislation is primarily concerned with rehabilitation and compensation for the victims of workplace injury or death. It is therefore unlikely to punish, denounce or deter corporations for unsafe workplaces or practices, especially when insurance rather than direct capital outlays pay for compensation.<sup>14</sup>

While OHS legislation can play an important role in discouraging practices that can lead to workplace deaths, the importance of the criminal law cannot be underestimated.<sup>15</sup> It can denounce behaviour, punish and deter wrongdoing, and allow the community and victim’s families to be satisfied that justice has been served.<sup>16</sup> The current procedural difficulties associated with ensuring corporate compliance with the criminal law can be overcome, but it may require some judicial courage as well as some bold statutory reforms.<sup>17</sup>

### III THE CURRENT COMMON LAW POSITION

Manslaughter is a statutory offence in all Australian jurisdictions except South Australia and Victoria.<sup>18</sup> Whilst there are minor differences in the law of manslaughter between common law and code jurisdictions,<sup>19</sup> the code jurisdictions substantially mirror the pre-existing common law.<sup>20</sup> In particular the two categories of manslaughter remain similar and have been consistently interpreted by the courts.<sup>21</sup> Therefore, for the purposes of this discussion, common law concepts of negligence and *mens rea* will be referred to unless otherwise specified. Although the different statutory formulations may well

12 J Varghese, ‘Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004 (Cth)’ (2004) (May) *Bills Digest* 135, 3.2.

13 Alan Clayton, ‘Regulating Occupational Health and Safety: The Need for a New Paradigm’ (2003) 7(1) *Safety Science Monitor* 8, 13.

14 Tasmania Law Reform Institute, above n 6, 23.

15 V Khanna, ‘Corporate Criminal Liability: What Purpose Does it Serve?’ (1996) 109 *Harvard Law Review* 1477, 1492.

16 Tasmania Law Reform Institute, above n 6, 14.

17 Legislation presumes that, subject to a contrary parliamentary intention, whether expressed or implied, the wording of the statute and the nature and scope of the offence will determine whether a particular offence applies to corporations: *R v Young* (1986) NSWLR 689.

18 *Crimes Act 1900* (ACT) s 15; *Crimes Act 1900* (NSW) ss 18, 24; *Criminal Code Act 1983* (NT) ss 163, 167; *Criminal Code Act 1899* (Qld) ss 303, 310; *Criminal Law Consolidation Act 1935* (SA) s 13; *Criminal Code Act 1924* (Tas) s 159; *Criminal Code Act 1913* (WA) ss 280, 287.

19 For example Queensland (as a code state) requires a breach of a duty-imposing provision to establish negligence. E Colvin, S Linden and J McKechine, *Criminal Law in Queensland and Western Australia* (3<sup>rd</sup> ed, 2001) 53.

20 Jonathan Clough and Carmel Mulhern, *Criminal Law: Tutorial Series* (1999) 82.

21 *Pemble v The Queen* (1971) 124 CLR 107, 122 (Barwick CJ); *Bouhey v The Queen* (1986) 161 CLR 10, 40.

lead to specific differences in pleadings, this will not affect the arguments under analysis in this article in any substantive way.<sup>22</sup>

The general principles governing criminal liability, in particular the requirement to prove the requisite *mens rea*<sup>23</sup> and *actus reus*<sup>24</sup> of an offence were developed with individual human offenders in mind rather than private bureaucracies such as corporations.<sup>25</sup> At common law, manslaughter is divided into one of two categories, voluntary or involuntary manslaughter. An accused commits voluntary manslaughter where he or she commits murder but is convicted of manslaughter because of mitigating circumstances, this category will not normally be applicable to corporations.<sup>26</sup> An accused commits involuntary manslaughter when he or she causes the death of the victim, but without the fault element required for murder.<sup>27</sup> Involuntary manslaughter is further divided into two categories, ‘unlawful and dangerous act manslaughter’ and ‘negligent manslaughter’.

Unlawful and dangerous act manslaughter occurs when a person performs an unlawful and dangerous act,<sup>28</sup> and by doing so, causes the death of another person.<sup>29</sup> It requires proof of three elements: (1) that an unlawful act was committed; (2) that the act caused the victim’s death; and (3) the act was

22 For example under the *Criminal Code Act 1899* (Qld) there are two types of manslaughter. The first involves situations where death is caused in the pursuance of intentional violence, such as assault (s 291). This will constitute manslaughter unless there is an authorisation, justification or excuse for the killing. The second involves situations where death is caused through negligence which is established through a breach of a duty-imposing provision and the degree of negligence constitutes ‘criminal negligence’. The most commonly invoked provision establishes a duty on persons in charge of or in control of dangerous things to use reasonable care and to take reasonable precautions in their use and management. This duty applies to anything which may endanger life, safety and health of any person in the absence of care and precaution in its use or management. See generally Colvin et al, above n 19.

23 *Mens rea* refers to the state of mind or mental element required to constitute a particular crime: *He Kaw Teh v The Queen* (1985) 157 CLR 523.

24 *Actus reus* refers to the voluntary actions or omissions, or the physical elements, constituting an offence: *Ryan v The Queen* (1967) 121 CLR 205.

25 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders: Corporate Criminal Liability*, Report No 102 (2003).

26 This commonly arises in circumstances giving rise to the defence of provocation. See Clough and Mulhern, above n 20, 82, Ch 11.

27 *Ibid* 82.

28 An unlawful act means a criminal act; torts and other civil wrongs will not suffice: *Pemble v The Queen* 124 (1971) CLR 107, 122; *R v Pullman* (1991) 25 NSWLR 89, 91–2. The most common unlawful act is assault: *R v Holzer* [1968] VR 481; *R v Wills* [1983] 2 VR 201; *R v Larkin* [1943] KB 174.

29 *R v Larkin* [1943] KB 174, 219, affirmed in the more recent case of *R v Bednikov* (1997) 95 A Crim R 200. In Queensland and Western Australia, it is the intentional infliction of harm less than grievous bodily harm that constitutes manslaughter: *Criminal Code Act 1899* (Qld), *Criminal Code Compilation Act 1913* (WA) s 268. Also see *R v Van den Bemd* (1994) 179 CLR 137.

objectively dangerous.<sup>30</sup> Despite the possibility of corporations committing unlawful and dangerous act manslaughter, ordinarily corporations would be more likely to commit negligent manslaughter. Therefore the template for negligent manslaughter and its effectiveness in the corporate context will be the principal focus of this article. Negligent manslaughter is also particularly indicated in death occasioned by cumulative negligence, also referred to here as ‘organisational failure’.

### A *Negligent Manslaughter*

Negligent manslaughter requires a gross or criminal degree of negligence,<sup>31</sup> established by asking (1) whether there is a duty of care owed by the accused to the victim; (2) if so, what is the standard of care required; and (3) has there been such a gross departure from the standard of care so as to constitute criminal negligence?<sup>32</sup> A duty of care is a duty to take reasonable care in the circumstances, and at common law there is a general duty not to cause harm to others.<sup>33</sup> Once the duty of care is established, the standard of care must be considered. This is an objective test of a ‘reasonable’ person in the position of the accused.<sup>34</sup> The test relies upon assumptions about the mind and mental capacity of the natural person. It is applied by comparing the expected responses, behaviours, actions or omissions of the reasonable person to the responses of the actual defendant. Criminal negligence requires proof of such a gross departure by the defendant from the standard of care expected of a reasonable person as to warrant criminal punishment.<sup>35</sup>

Establishing corporate criminal negligence therefore requires considering whether a corporation has greatly fallen short of the standard of care of a reasonable person in the circumstances. This question cannot be asked directly of a corporation as it lacks the mental characteristics on which the test relies. The courts have reacted to this problem by adopting the ‘identification principle’, which allows them to apply the test to the most proximate natural person.

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30 Clough and Mulhern, above n 20, 82.

31 *Callaghan v The Queen* (1952) 87 CLR 115.

32 Clough and Mulhern, above n 20, 88.

33 *R v Doherty* (1887) 16 Cox CC 306, 330; *Nyram v The Queen* [1977] VR 430, 445.

34 *Nyram v The Queen* [1977] VR 430, 439–46 per Full Court of the Supreme Court of Victoria rejecting the subjective test suggested by Smith J in *R v Holzer* [1968] VR 481.

35 Clough and Mulhern, above n 20, 90.



## B *Doctrinal and Procedural Difficulties with Corporate Negligence*

General interpretative provisions in Australia define ‘persons’ to include ‘corporations’ or ‘bodies corporate’,<sup>36</sup> and provide that corporations, as legal persons are subject to the law for all purposes, including criminal offences.<sup>37</sup> However such interpretative provisions do not of themselves resolve inherent contradictions in applying older principles to a relatively new type of legal entity.

The test for criminal negligence relies upon assumptions about the mind and mental capacity of the natural person through its application of the reasonable person test. There is an incoherence involved in trying to apply such a template to a corporation, for two reasons. The first is that the ‘persona’ of the corporation against which the objective test of negligence is measured, remains ambiguous. Secondly, corporations lack the kind of moral faculty that is an assumed characteristic of criminal defendants charged with negligence.

Despite a corporation being considered a legal person and thereby a single unified entity, case law and literature on corporate criminal liability repeatedly refers to corporations as fictional entities represented only through the ‘minds and wills’ of directors. Lord Hoffman in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413 (‘*Meridian*’) characterised a corporation as an entity, that does not, in truth, exist:

Judges sometimes say that a company ‘as such’ cannot do anything; it must act by servants or agents... But a reference to a company ‘as such’ might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ‘ding an sich’, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.<sup>38</sup>

36 *Acts Interpretation Act 1901* (Cth) s 22(1)(a)(2); *Interpretation Act 1967* (ACT) s 14; *Interpretation Act 1987* (NSW) s 21; *Interpretation Act 1978* (NT) s 19; *Acts Interpretation Act 1954* (Qld) s 36; *Acts Interpretation Act 1915* (SA) s 4; *Acts Interpretation Act 1931* (Tas) s 41(1); *Interpretation of Legislation Act 1984* (Vic) s 38; *Interpretation Act 1984* (WA) s 5.

37 *Crimes Act 1914* (Cth) s 4B(1); *Interpretation Act 1967* (ACT) s 32(1); *Crimes Act 1900* (ACT) s 4; *Crimes Act 1900* (NSW) s 4; *Criminal Procedure Act 1986* (NSW) s 59; *Interpretation Act 1978* (NT) s 38B; *Acts Interpretation Act 1954* (Qld) s 46; *Acts Interpretation Act 1931* (Tas) s 35(1); *Interpretation Act 1984* (WA) s 69(1). See R Sarre, ‘Legislative Attempts to Imprison those Prosecuted for Criminal Manslaughter in the Workplace’ (2002) 9(3) *E-Law – Murdoch University Electronic Journal of Law* (Paper presented to the Law and Social Justice Interest Group of Australasian Law Teachers) [9] <<http://www.murdoch.edu.au/elaw/issues/v9n3/sarre93.html>> at 28 July 2010.

38 *Meridian Global Funds Management Asia Ltd v Securities Commission* (1995) 3 WLR 413, 418–19.

In reality, corporations fundamentally differ from natural persons. This can be demonstrated by an examination of both the physical and metaphysical differences between corporations and natural persons.<sup>39</sup> Natural persons are completely encapsulated within a single identifiable physical body. Unlike natural persons corporations have no body, and decision making takes place in a dispersed way that involves a range of human agents. Problematically, the courts have chosen to treat the actions of some agents and not others as constituting the corporate mind.

### C *The Identification Principle*

The ‘identification’ principle of corporate responsibility looks for proof of an act or omission by the most proximate natural person with authority. It considers acts of the ‘directing mind and will’, usually the directing officers of the corporation as acts of the corporation itself.<sup>40</sup> The principle was developed by Viscount Haldane in *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705:

Corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; the very ego and centre of the personality of the corporation.<sup>41</sup>

This approach stems from the nominalist theory or derivative model of corporate personality.<sup>42</sup> As such the identification principle requires firstly proving fault on the part of an officer, agent or employee of the corporation and then attributing that fault to the corporation, provided the officer, agent or employee can be regarded as the corporation for that purpose.<sup>43</sup> Essentially it provides that a corporation will be criminally liable, only where one of its most senior officers have individually acted with the requisite fault.<sup>44</sup>

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39 A Ricketts, ‘Stretching the Metaphor: The Political Rights of the Corporate “Person”, A Critique of the Extension of Political Rights to Business Corporations’ (2001) (March) Unpublished Thesis Submitted for Masters of Law at Queensland University of Technology, 94.

40 M Goode, *Corporate Criminal Liability*, Australian Institute of Criminology Website <<http://www.aic.gov.au/publications/proceedings/26/goode.pdf>> at 13 March 2007, 2.

41 *Ibid.*

42 The derivate model considers corporations as simply collections of people, fictional in character, and therefore incapable of fault in their own right. The theory contends that corporations do not commit crimes, the people within them do. See C Wells, *Corporations and Criminal Responsibility* (2<sup>nd</sup> ed, 2001) 153–4; J C Coffee, ‘Corporate Criminal Responsibility’ (1983) *Encyclopedia of Crime and Justice* 256. See also Clough and Mulhern, above n 20, 64.

43 *DPP v Kent and Sussex Contractors* [1944] KB 146; *R v ICR Haulage Ltd* [1944] KB 551; *Moore v I Bresler* [1944] 2 All ER 515.

44 C Wells, ‘Corporate Criminal Developments in Europe’ (2001) *Law Society Journal* 62.



*Tesco Supermarkets Ltd v Natrass* [1972] AC 153 ('Tesco')<sup>45</sup> is the leading case on the applicability of the identification principle. *Tesco* involved a supermarket's breach of the *Trade Descriptions Act* 1968 UK and required the court to determine whether the identification principle could be applied to the store manager. The House of Lords held that the store's manager was not a person of sufficiently important stature within the corporate structure to be identified as the company for this purpose.<sup>46</sup>

The courts have attempted to avoid the problem of establishing corporate *mens rea* by relying upon the identification principle, and focusing only upon the state of mind of the directors and senior management. Such an approach leaves open significant lacunae of responsibility within corporations and contradicts the underlying assertion of a corporation as a fully legally responsible entity. This is a significant problem because in a practical sense organisational failure is more often the underlying cause of corporate negligence, rather than identifiable negligence attributable to a single individual.<sup>47</sup>

The identification principle which locates corporate liability only in the minds of the highest decision makers (the directing mind and will) has created significant barriers to the prosecution of companies under the general law of manslaughter. The Victorian case of *R v Denbo Pty Ltd* [1994] 6 VIR 157 appears to have been one of the few successful corporate manslaughter prosecutions but was unusual in that Denbo Pty Ltd actually pleaded guilty to breaches under the *Occupational Health and Safety Act* 1985 (Vic). The corporation was convicted of manslaughter and fined \$120,000, but as it was insolvent the fine was never paid.<sup>48</sup>

Despite extensive literature criticising the *Tesco* approach and the inability of the identification principle to fairly capture the responsibility of corporations,<sup>49</sup> the Australian courts have continued to apply *Tesco*.<sup>50</sup> For example, in *R v AC Hatrick Chemicals Pty Ltd* [1995] 152 A Crim R 384 (Unreported, Supreme Court of Victoria, Hampel J, 29 November 1995) ('*AC Hatrick*')<sup>51</sup> the company and two of its employees (a plant engineer and plant manager) were charged with manslaughter and negligently inflicting serious injury when a tank explosion occurred during a welding operation which killed one worker and seriously injured another. The defendants were also charged

45 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 ('*Tesco*').

46 *Ibid.*

47 For example, *R v HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr App R 10; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413, 419.

48 Neal, above n 8, 40.

49 Wells, above n 44, 64.

50 Goode, above n 40, 4.

51 *R v AC Hatrick Chemicals Pty Ltd* [1995] 152 A Crim R 384.

with numerous offences under the *Occupational Health and Safety Act 1985* (Vic). The manslaughter charges against the individuals were withdrawn before committal. Justice Hampel of the Supreme Court of Victoria directed an acquittal verdict in relation to the company based on arguments which contended that the two managers did not embody ‘the guiding mind’ of the company and their actions were not grossly negligent. It had been argued that the principles in *Tesco* had been overridden by two subsequent decisions, *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* (1995) 1 AC 456 and *Meridian*,<sup>52</sup> and that a company could be vicariously liable for the criminal acts of its employees. However Justice Hampel in *AC Hatrick* rejected these arguments holding that it was unacceptable for vicarious liability to be used as a basis for a manslaughter conviction.

Certainly it would be a significant extension of criminal law to find a natural person vicariously liable for manslaughter; it would, however be a very practical extension to apply to corporate defendants. The identification principle is arguably a form of vicarious liability in any case, albeit restricted to a confined class of corporate agents. A preparedness by the courts to apply liability principles differently for corporations than for natural persons would be an obvious way to resolve the problems, but one that the courts remain reluctant to pursue.

The courts strict adherence to the need to find the directing mind and will specifically allows corporations to avoid liability for gross negligence that occurs at any other strata in the organisation. Today larger corporations have many levels of management from the top-tier directors, to general managers to frontline employees.<sup>53</sup> The larger the corporation, the less likely it is that the causal negligence will have occurred solely at the very top of the organisation’s structure. The identification principle fails to recognise the dispersed nature of corporate decision making, including the fact that collective organisational failures can result through the actions and/or omissions of individuals at any, or all organisational levels. It fails to recognise that difficulties in isolating the defaulting and/or responsible person may actually encourage organisational structures that deliberately avoid liability. The failure of the identification principle to recognise the dispersed nature of decision making within corporations is further exacerbated by the courts’ unwillingness to aggregate decisions made by separate individuals into a single act of corporate negligence.

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52 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413 (*‘Meridian’*).

53 Addison, above n 11.

## D *Difficulties in Isolating Culpable Individual(s)*

In practice, particularly in cases of organisational failure it may be difficult, or impossible to isolate the individual defaulting party or parties responsible for causing death, especially in circumstances where there is no single obvious negligent action or omission causing death.<sup>54</sup> Death may be attributable to the accumulation or aggregation of negligent acts and/or omissions by different individuals at different levels of the decision making stratum. Corporations function as real and complex entities with their own policies, procedures and standards of behaviour which cannot be reduced to an accumulation of the individuals who compose it.<sup>55</sup> Collective organisational failures causing death may result, not from individual actions, but from a breakdown in more than one section of the corporation's operations.<sup>56</sup> Each officer, agent or employee may alone be able to function and perform his/her own duties, but may not have access to all the information required to make reasonable and appropriate decisions, to know what other decisions have been made or to avoid organisational failure. The choice between various courses of action can often only be fairly attributed to the corporation itself, as it is the only legal entity capable of bearing overall responsibility for the policies and procedures which officers, agents and employees of the corporation follow, such as those relating to safety.<sup>57</sup> The failure to view corporations as special legal entities that in fact function as complex collectives has meant that corporations are in practice virtually beyond the reach of the criminal law of negligent manslaughter. There is a need for the law to develop a means of establishing whole-of-corporation liability, and the issue of aggregating negligence lies at the heart of any successful reform.

## E *Aggregation of Corporate Acts and Omissions*

Aggregate negligence occurs where death has resulted from the accumulated negligence of a number of individuals, which, if considered independently, would not constitute the requisite criminal degree of negligence. This occurs for example when A, B and C each have behaved negligently, and the cumulative effect of their negligence has resulted in a breakdown of the corporation's system of safety checks sufficient to constitute gross negligence and cause human death. As neither A, B or C's individual conduct constituted a gross departure from the reasonable standard of care constituting criminal

54 B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993) 36–41.

55 Wells, above n 42.

56 J Gobert, 'Corporate Criminality: New Crimes for the Times' (1994) *Criminal Law Review* 722, 723.

57 C M V Clarkson, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59 *Modern Law Review* 557, 561.

negligence, none of them can be convicted of manslaughter, despite the fact that a gross departure has still occurred within the defendant corporation.<sup>58</sup>

A real example of this problem is demonstrated by the case of *R v HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr App R 10 ('*Spooner*'),<sup>59</sup> involving the Zeebrugge ferry disaster. This case involved the 'Herald of Free Enterprise', an English Channel ferry, which went out to sea with its bow doors open and subsequently capsized killing nearly 200 people.<sup>60</sup> The official inquiry into the disaster found that errors had been made by the assistant boatswain, whose duty it was to close the doors; the officer in charge of one of the loading decks whose duty it was to ensure the doors had been closed; the captain of the ferry, who had overall responsibility for the safety of the vessel; the senior master, who had the responsibility of implementing a safety system for the ferry; and the board of directors of the company who owned the ferry.

There appears to have been a lack of thought about the way in which the *Herald* ought to have been organised... All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.<sup>61</sup>

Despite the company and seven individuals being prosecuted for manslaughter, the court refused to aggregate the actions of the accused into a single corporate act of negligence. Justice Turner directed the jury to acquit such charges due to the difficulty in proving that opened ferry doors posed a 'serious and obvious' risk to ferry travellers.<sup>62</sup> This case demonstrates the difficulties associated with establishing the requisite *mens rea*. It also suggests that application of the identification principle prevented the court attaching any significance to the 'organisational sloppiness' (or aggregated negligence) found by the inquiry.<sup>63</sup>

In comparison, the decision in *Meridian* [1995] 3 WLR 413 appears to have unveiled a modern concept of organisational liability. The case involved an

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58 M Wilkinson, 'Corporate Criminal Liability – The Move Towards Recognising Genuine Corporate Fault' (2003) 9 *Canterbury Law Review* 42, 61.

59 *R v HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr App R 10 ('*Spooner*').

60 D Bergman, 'Recklessness in the Boardroom' (1990) 140 *New Law Journal* 1496; C Wells, 'Manslaughter and Corporate Crime' (1989) 139 *New Law Journal* 931; D Burles, 'The Criminal Liability of Corporations' (1991) 141 *New Law Journal* 609.

61 Justice Sheen, '*The Merchant Shipping Act of 1984: MV Herald of Free Enterprise – Report to the Court No 8047*' (1987) United Kingdom, Department of Transport, outlined in Eric Colvin, 'Corporate Criminal Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1, 17.

62 M Wilkinson, 'Corporate Criminal Liability – The Move Towards Recognising Genuine Corporate Fault' (2003) 9 *Canterbury Law Review* 42, 61.

63 *Spooner* (1989) 88 Cr App R 10, 12 (Bingham LJ, quoting the report by Sheen J). Also see Colvin, above n 61, 18; Clough and Mulhern, above n 20, 173.

alleged breach of the New Zealand securities legislation. The question arose as to whether the company had knowledge of the activities of its investment managers. Lord Hoffman commented upon the need for a more sophisticated and flexible approach to the problem of attributing knowledge, or other *mens rea*, to a corporate body, as it raised difficult philosophical questions. His lordship suggested that the ‘directing mind’ model may not always be appropriate, and examining the content, language and policy of the particular statute was important.<sup>64</sup>

In large organisations, task specialisation means that individuals may not have access to all the information by which the courts can base a finding of knowledge or negligence.<sup>65</sup> It is therefore highly desirable for the purposes of establishing corporate *mens rea*, that the actions and/or omissions of individual representatives within the corporation should, if required, be aggregated. An aggregative approach could even require taking the *actus reus* of one individual and combining it with the *mens rea* of another. Alternatively, if the offence requires a particular level of knowledge or negligence, it may require aggregating the knowledge or negligence of the collective.<sup>66</sup> An aggregative approach would recognise true collective organisational failure by establishing the *mens rea* element of criminal negligence in the light of corporate, rather than directorship action. It would allow the courts to provide a criminal remedy for organisational sloppiness in cases like *Spooner*. Aggregation would be a sound means by which a corporate defendant could be made liable for gross negligence that occurred within its structures. Aggregation need not, on the other hand, pose any increased risk of personal liability for individuals within the corporation.

The Federal Courts in the United States have accepted an aggregative model of liability which allows the acts and mental states of individuals within a corporation to be combined to satisfy elements of the crime.<sup>67</sup> In *United States v Bank of New England*, 821 F 2d 844, 855 (1987), it was recognised that collecting the knowledge of a number of employees may be appropriate because ‘corporations compartmentalise knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation’.<sup>68</sup>

64 Lord Hoffman (at 423) further stated, with respect to the case in question, that as the security legislation compelled disclosure of a substantial security holder, the relevant knowledge should be that of the person who acquired the relevant knowledge, 423.

65 Wilkinson, above n 62, 62.

66 Ibid.

67 Ibid.

68 In this case the jury was instructed that ‘if employee A knows one facet, B knows another facet and C a third facet, the Bank knows it all’: 85–6.

English and Australian common law continues to rely on the identification principle for knowledge-based offences. In the case of *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 73, the notion of adopting an aggregative approach was dismissed on the basis that a case against a personal defendant should not be fortified by evidence against another defendant. This was confirmed in *Attorney-General's Reference Number 2 of 1999* [2000] 3 WLR 195, a train collision case where seven passengers were killed and 151 were injured. Lord Justice Rose confirmed that unless a single person's conduct was characterised as gross criminal negligence and attributed to the corporation (via the identification principle), the corporation was not, in the present state of the common law, liable for manslaughter. Accordingly the company was not found guilty of manslaughter.<sup>69</sup> Whilst these cases certainly identify vital principles of law in relation to natural persons, they fail to recognise the strong arguments in favour of aggregating individual actions within a corporate collective. The arguments of justice that support the conclusion that no individual person should be liable for the acts of another simply do not have the same force when the defendant is a legally recognised collective entity. Furthermore it must be emphasised that the legal device of aggregating the acts, omissions and knowledge of several individuals to construct a single corporate act of negligence, need not lead to any increased liability for the individuals (natural persons) themselves.

Coincidentally, it has also been argued, that an aggregative approach may not entirely resolve the difficulties in the law of corporate criminal liability. This is because as a derivative model of liability it fails to look further than individuals, and thereby fails to adequately measure the reality of truly corporate fault. That is 'culpability on the part of the corporation *as a corporation*'.<sup>70</sup> Corporations should also be viewed as a culpability-bearing agent in their own right, as organisational failure can result from deficiencies that may transcend even the combined individual wrongdoings of its officers and employees.<sup>71</sup> Arguably the question is therefore 'not whether responsibility can be constructed from bits and pieces of information about individuals, but rather whether it inheres in the organisation itself'.<sup>72</sup> Such an approach would therefore facilitate the prosecution of corporations as distinctly liable entities.<sup>73</sup> Aggregation of individual actions into a single act of corporate negligence and an acceptance of an overarching concept of 'corporate fault' would operate most effectively as distinct but interlocking principles.

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69 The company was convicted of a statutory offence under the *Health and Safety at Work Act 1974* (UK) and fined £1.5 million.

70 Wilkinson, above n 62, 64.

71 Ibid.

72 Colvin, above n 61, 23.

73 *State v Morris & Essex Railroad* (1852) 23 NLR 360.



## F *The Need to Develop New Principles of Criminal Law for Corporations alone*

A significant reason why the courts have struggled so much with developing more appropriate liability principles for corporate negligence lies in a failure to adequately distinguish corporations from natural persons in the context of criminal law. The old but inaccurate metaphor of corporations as fully analogous legal persons (whilst it may be useful in contract law) leads to incoherence for criminal law because it conceals the jurisprudential significance of the corporate legal entity. The physical and metaphysical characteristics of corporations render them so qualitatively different to natural persons that the application of traditional tests of *mens rea* cannot be unproblematic. Whilst these physical and metaphysical differences may appear self-evident, they rarely receive serious judicial consideration.<sup>74</sup> The reluctance of Australian courts to aggregate fault and to expand vicarious responsibility is laudable and is a fundamental value in relation to human defendants, but is much less compelling in relation to a corporation.

One of the few cases to seriously consider the idea that the law's tenderness toward human defendants should be tempered when applied to corporations was *Environmental Protection Agency v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 ('*EPA v Caltex*').<sup>75</sup>

In that case the Australian High Court departed substantially from the corporations-as-persons metaphor by suggesting that corporations are a unique kind of legal and political actor in their own right.<sup>76</sup> The case considered the appropriateness of extending common law privileges, specifically the privilege against self-incrimination, to corporations. The majority, acknowledged extensions of the privilege in other jurisdictions,<sup>77</sup> but decided on grounds of public policy, utility and principle that the privilege should not extend to corporations.<sup>78</sup> In considering the historical reasons for the creation of the privilege the Court decided that its principal rationale was to protect natural persons from torture and inhumane treatment, and that although corporations were susceptible to punishment they were incapable of

<sup>74</sup> When such differences are judicially considered, they are usually considered a reason for declining the extension of 'human' rights to corporations. See Ricketts, above n 39, 62.

<sup>75</sup> *Environmental Protection Agency v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 ('*EPA v Caltex*').

<sup>76</sup> Ricketts, above n 39, 62.

<sup>77</sup> With Mason C J noting extensions in England, New Zealand and Canada by reference to the House of Lords decision in *Re Westinghouse Uranium Contract* [1978] AC 547, the New Zealand case of *NZ Apple and Pear Marketing Board v Master and Sons* (1986) 1 NZLR 191, and the Canadian case of *Webster v Solloway Mills* (1931) 1 DLR 831.

<sup>78</sup> Ricketts, above n 39, 60.

suffering physical punishment.<sup>79</sup> Further the Court considered the language in the *International Covenant on Civil and Political Rights* (1966) as stating the ‘purpose of its provisions is to protect individual human beings.’<sup>80</sup> In response to arguments suggesting the privilege should be available to maintain a fair balance of power between the individual and state, Chief Justice Mason and Justice Toohey responded:

We reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between the state and corporation. In general, a corporation is usually in a stronger position viz-a-viz the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons. The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively... Accordingly, in maintaining a ‘fair’ or ‘correct’ balance between the state and corporation, the operation of the privilege should be confined to natural persons.<sup>81</sup>

*EPA v Caltex* therefore demonstrates that the courts may be prepared to modify the application of well-established common law principles to corporations on the basis of their fundamental dissimilarity to natural persons.<sup>82</sup> The Court’s departure from the corporations-as-persons metaphor, suggests the view that corporations are a unique kind of legal and political actor, for which special modifications of principle may be required. The case makes an important although lateral contribution to understanding how the application of manslaughter to corporations could be re-conceptualised. The case establishes a precedent for deciding that older common law principles may need to be modified in the interests of justice and public policy. Such an approach if applied to manslaughter could allow courts the flexibility to modify the tests of *mens rea* as they apply to corporations, without devaluing the application of those principles for the human defendant.

## G Common Law: Outcomes of Current Approaches

The current approaches of Australian courts in dealing with corporate negligence have been inadequate to establish a comprehensive basis for corporate liability for manslaughter. The identification principle too narrowly defines the range of corporate officers capable of contributing to corporate liability and the courts’ refusal to allow aggregation further protects

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79 *EPA v Caltex* (1993) 178 CLR 477, 499–500.

80 *Ibid.*

81 *Ibid* 499–502.

82 Ricketts, above n 39, 62.

corporations from the consequences of their collective failure. This creates loopholes for corporate liability that are so significant that corporations could endeavour to pro-actively arrange their internal affairs to make successful prosecution for manslaughter virtually impossible. Far from developing an effective means of establishing liability, the courts have potentially created a template for avoiding liability altogether. These problems could be remedied at the judicial level by an acceptance of the appropriateness of aggregating fault and expanding vicarious responsibility, without devaluing in any way the sound historical basis for the criminal law's tenderness toward the human defendant. Thus far the failure of the common law to find an adequate means for finding corporations guilty of manslaughter propels arguments for statutory reform. The following section will explore and evaluate recent attempts at statutory reform.

#### IV STATUTORY REFORM ATTEMPTS IN AUSTRALIA AND THE UNITED KINGDOM

Growing public pressure and dissatisfaction with the inability of the common law to successfully prosecute corporations for manslaughter, limitations of workplace health and safety legislation and the ongoing occurrence of deaths in the workplace has continued to propel review of corporate manslaughter offences. The Standing Committee of Attorneys-General from Federal, State and Territory Governments delivered a report in 1993 on corporate criminal liability in Australia which concluded that the identification principle was no longer appropriate in view of more 'diffuse governance structures and delegation to junior officers of corporations.'<sup>83</sup> The report preferred a corporate criminal liability mechanism which recognised independent corporate fault. The committee's primary objective was to establish a model of liability which 'as nearly as possible, adapted personal criminal responsibility to fit the modern corporation'.<sup>84</sup>

Statutory reforms and proposals have occurred in some Australian States.<sup>85</sup>

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83 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *General Principles of Criminal Responsibility – Report (1992–3)* 107, Ch 2.

84 Ibid 105.

85 'Proposals for a Crimes (Industrial Manslaughter) Bill – Explanatory Information' *Workplace Health and Safety* (2000) (Qld) 1.

For example Queensland,<sup>86</sup> New South Wales,<sup>87</sup> South Australia,<sup>88</sup> Western Australia and Tasmania<sup>89</sup> have considered introducing new corporate specific manslaughter offences with Bills and Issue Papers discussing the current problem and the need for stricter penalties for workplace death under OHS legislation.<sup>90</sup> Victoria has attempted to introduce a corporate manslaughter offence, and the Commonwealth has attempted to resolve corporate liability problems though its model *Criminal Code Act 1995* (Cth), most significant so far however, is the Australian Capital Territory's (ACT) introduction of a new substantive industrial manslaughter offence.

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86 The Queensland Government has released a Discussion Paper for comment and draft proposals of a Bill to enact a specific offence relating to corporate manslaughter ('Proposals for a Crimes (Industrial Manslaughter) Bill – Explanatory Information' (2000), above n 85) and a Discussion Paper on the issue of dangerous conduct in the workplace, but as yet no proposals have been implemented. The discussion papers propose a new offence 'dangerous industrial conduct', such proposals are based on the same theoretical model of corporate criminal liability that underpins the Australian Criminal Code. Instead of relying on the corporate liability derivative of the individual, the proposed offence would recognise that corporations have their own cultures. See 'Proposals for a Crimes (Industrial Manslaughter) Bill – Explanatory Information', above n 85, 12.

87 The new *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* (NSW) received royal assent on 15 June 2005, to amend the *Occupational Health and Safety Act 2000* (NSW). The Bill provides that a person will be guilty of an offence if their conduct causes the death of another person at any place of work; or they owe a duty of care (for employers, the duty to ensure health, safety and welfare at work) but are reckless as to the danger of death or serious injury to any person to whom that duty is owed. The offence provides a maximum penalty of \$1.65 million for a company and \$165,000 for an individual and five years jail or both. It provides a defence of a 'reasonable excuse for conduct'. The reform has been criticised for its limited jail time and by the Australian Mines and Metals Association (AMMA) as containing significant flaws in both principle and law. See L Browning, 'Companies Fighting Manslaughter in Workplace Laws' (2005) (October) 76(9) *National Safety* 24, 26–31. Prior to changes in the *Occupational Health and Safety Act 2000* (NSW) there were two private Bills seeking to amend the *Crimes Act 1900* (NSW) to include the offence of either corporate or industrial manslaughter, both of which had not progressed through the NSW lower house. See K Haines and T John, 'Workplace Death and Serious Injury: A Snapshot of Legislative Developments in Australia and Overseas' (2004–05) 7 *Research Brief* 10.

88 South Australia introduced a Private Members Occupational Health Safety and Welfare (Industrial Manslaughter) Amendment Bill 2004 on 8 December 2004 which proposed to introduce the specific offence of manslaughter into the *Occupational Health Safety and Welfare Act 1986* (SA). The proposed offence applied to both employers and senior officers and was modeled on the ACT's industrial manslaughter laws and the Model Commonwealth *Criminal Code*. However the private Bill has not been passed. See also discussion in Tasmania Law Reform Institute, above n 6, 31.

89 The Tasmania Law Reform Institute, above n 6, 31, considered the criminal liability of organisations, particularly for causing death or injuries in the workplace; however, it appears no further action has been undertaken.

90 J Varghese, 'Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill' (2005) March, *Bills Digest* 131. Also see R Sarre and J Richards, 'Criminal Manslaughter in the Workplace: What Options for Legislators?' (2004) (January-February) *Industrial Safety* 59, 60–61.

## A *Victoria: Proposed Corporate Manslaughter Offence*

In November 2001, based on the findings of the Longford Royal Commission,<sup>91</sup> and an extended period of policy development, the Victorian Government introduced the controversial, Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic) to the Victorian Parliament.<sup>92</sup> The Bill aimed to introduce the offence of ‘corporate manslaughter’ into the *Crimes Act 1958* (Vic),<sup>93</sup> with criminal liability for senior officers.<sup>94</sup> Its focus was on the organisational responsibility and liability of corporate entities,<sup>95</sup> and the creation of offences of a derivative rather than a direct liability nature.<sup>96</sup> The Bill provided that a corporation would be guilty of ‘corporate manslaughter’ if its conduct has fallen short of the standard of care that a reasonable body corporate would exercise in the circumstances and posed ‘such a high risk of death or really serious injury’ as to warrant criminal punishment.<sup>97</sup> Significantly the Bill would have allowed the Court to consider the conduct of the corporation as a whole, by combining or aggregating the negligence of any number of employees, agents and officers of the corporation.<sup>98</sup> Negligence could be demonstrated by certain organisational failures, including inadequate supervision and control of employees and agents, inadequate internal communication systems, and failure to respond to dangerous situations of which an officer has actual knowledge.<sup>99</sup>

Pressure from the Australian Industry Group and the Victorian Employers Chamber of Commerce and Industry (VECCI) resulted in the Victorian Crimes (Workplace Deaths and Serious Injuries) Bill 2002 being rejected by the Upper House in May 2002. The Victorian government has instead concentrated on changes to Victoria’s *Occupational Health and Safety Act 1985* (Vic) which in December 2004 resulted in the introduction of a new

91 The Royal Commission was chaired by former High Court Justice Sir Daryl Dawson with Commissioner Brian Brooks. Findings were released in June 1999.

92 Haines and John, above n 87, 9.

93 Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic) s 13: Corporate Manslaughter Offence. A body corporate that by negligence kills (a) an employee in the course of his or her employment by the body corporate; or (b) a worker in the course of providing services to, or relating to, the body corporate – is guilty of the indictable offence of corporate manslaughter and liable to a fine not exceeding 50,000 penalty units.

94 Haines and John, above n 87, 9.

95 Clause 14A, Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic).

96 K Phillips, ‘“Finding the Fall Guy”, or “Turning the Principle of Criminal Intent on its Head”’, Commentary on the Victorian Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic) <<http://www.hrnicolls.com.au/nicholls/nichvo23/phillips2002.html>> at 13 March 2007 (per the Explanatory Memorandum).

97 Clause 14B, Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic). See also Sarre, above n 37.

98 Also per Clause 14B(4) & (5), Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic).

99 Clause 14B(6), Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic).

offence of ‘conduct endangering persons at a workplace’. This offence applies a civil rather than criminal test to establish negligence, and is punishable by a fine of up to \$920,000 for companies and \$184,000 for individuals, and/or jail terms of up to five years.<sup>100</sup>

## B Commonwealth: Criminal Code Act 1995 (Cth) Part 2.5

The Commonwealth *Criminal Code* attempts to give greater tangibility to the notion of corporate criminal liability<sup>101</sup> and to address the issue of true corporate blameworthiness.<sup>102</sup> Part 2.5 imposes vicarious liability for the *actus reus* elements of offences and recognises the corporation as a collective thereby capable of a culture<sup>103</sup> and corporate blameworthiness.<sup>104</sup> Corporations are rendered liable for serious criminal offences where it is established that a ‘corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provisions; or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision’.<sup>105</sup>

These provisions represent a significant step forward in that the references to ‘corporate culture’ appear to permit the aggregation of a range of corporate actions at different strata. A significant drawback however is that references to ‘corporate culture’ suggest a need to demonstrate systemic problems rather than a single causal process in relation to a given crime. Such a situation

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100 Similar to the maximum penalties under OHS legislation in the ACT and NSW. The Act also introduces a new provision for employee liability which provides that where an offence committed by a company is attributable to an employee failing to take reasonable care, the employee is also guilty of an offence. See L Brownling, ‘Companies Fighting Manslaughter in Workplace Laws’ (2005) (October) 76(9) *National Safety* 24, 26. Also see the Hon R J Hulls MP (Attorney General, Minister for Industrial Relations, Minister for WorkCover), ‘New Era of Workplace Health and Safety for Victoria: Media Release’ (2004) (November) Australian Labor Party (Victorian Branch), Melbourne.

101 T Woolf, ‘The *Criminal Code Act 1995* (Cth) – Towards a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Criminal Law Journal* 257.

102 B Fisse, ‘The Attribution of Criminal Liability to Corporations: A Statutory Model’ (1991) 13 *Sydney Law Review* 277.

103 ‘Corporate culture’ is defined in s 12.3(6) as 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 take place’.

104 These provisions also allow *mens rea* to be attributed to corporations which impliedly permitted the offence. The Commonwealth *Criminal Code Act 1995* (Cth) s 12.2 imposes vicarious liability upon corporations for the *actus reus* elements of an offence committed by an employee, agent or officer of a corporation within the actual scope of employment. (The Code classifies the elements of an offence into ‘physical elements’ (s 4.1) and ‘fault elements’ (s 5.1)). See Fisse, above n 102.

105 Commonwealth *Criminal Code Act 1995* (Cth) s 12.3. Also see Neal, above n 8, 41. Further s 12.3(1) allows the advertent fault (intention, knowledge or recklessness) to be attributed to a corporation that ‘expressly, tacitly or impliedly authorised or permitted the commission of the offence’. The means by which authorisation or permission are established are set out in s 12.3(2).



continues to provide extensive opportunities for corporations to avoid liability for workplace deaths by portraying them as isolated events rather than the outcome of a culture of non-compliance with standards. By requiring prosecutors to prove systemic failure rather than simply episodic failure, the range of matters requiring proof potentially becomes even more onerous. These provisions are yet to be tested in the corporate manslaughter context and the success of the Code's implementation is restricted by constitutional barriers. To overcome implementation problems, these model corporate culture provisions must be adopted in each State and Territory's respective criminal legislation.<sup>106</sup> The concept of 'corporate culture' addresses the problem of corporate blameworthiness but may yet fail to provide for aggregation of individual acts of negligence in relation to specific crimes.

### C *Commonwealth: Criminal Code Act 1995 (Cth) – Proposed Industrial Manslaughter Offence*

In August 2004 a Private Member's Bill, the Criminal Code Amendment (Workplace Death and Serious Injury) Bill 2004 (Cth), was introduced by Senator Kerry Nettle of the Australian Greens.<sup>107</sup> It contained similar provisions to the ACT's *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT), with its purpose to amend the *Criminal Code Act 1995* (Cth) to create new offences of industrial manslaughter and workplace injury.<sup>108</sup> It is unlikely that the Greens proposal will attract sufficient political support to be passed in the current Parliament.

### D *Australian Capital Territory (ACT): Industrial Manslaughter Offence*

In March 2003 the *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) came into effect. This was introduced into the *Crimes Act 1900* (ACT) to establish Australia's first 'industrial manslaughter' offence.<sup>109</sup> The aim of the legislation is to reinforce employers' roles in providing safe and healthy workplaces. Part 2A of the *Crimes Act 1900* (ACT) creates the offence of industrial manslaughter by finding an employer,<sup>110</sup> or senior officer of an employer,<sup>111</sup> guilty of industrial manslaughter if a worker of the employer dies in the course of their employment, or following injuries sustained in the

106 Sarre, above n 37.

107 Senator Kerry Nettle, 'Second Reading Speech: Criminal Code Amendment (Workplace Death and Serious Injury) Bill 2004' (2004) (August) *Senate Debates* 25660.

108 Haines and John, above n 87, 8.

109 J Varghese, 'Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005' (2004–5) (March) *Bills Digest* 13.

110 *Crimes Act 1900* (ACT) s 49C.

111 *Crimes Act 1900* (ACT) s 49D.

course of their employment.<sup>112</sup> Industrial manslaughter will also result if the employer, or senior officer was reckless or negligent about causing serious harm to a worker,<sup>113</sup> and such conduct caused death.<sup>114</sup>

Whilst these reforms clarify the liability of employer corporations and of senior officers they do not directly address the more substantial difficulties that attend to establishing *mens rea* at the corporate level. Corporate prosecution is to an extent simplified, particularly by the adoption of the Commonwealth's 'corporate culture' provisions outlined above, but as previously discussed, there is still a problem applying the idea of 'culture' to a single episode of organisational failure. A positive feature of the reforms is the inclusion of new specific remedies that can be used against a corporation including orders to publicise wrongdoing or perform community service (s 49E). The overall success of the *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) in securing prosecutions against corporations is yet to be tested.

Designing specific manslaughter offences for corporations has the potential to permit substantively different criminal liability tests in relation to corporate offenders that could assist the prosecution process and maximise deterrent effect.<sup>115</sup> From this discussion it is evident that statutory reform in Australia has been modest at best with the most effective reform in the ACT, with most of the States still in the proposal stage. The effectiveness of the ACT's industrial manslaughter offence is limited by its continued adherence to generic *mens rea* tests for criminal negligence. The 'corporate culture' provisions introduced in the Commonwealth *Criminal Code* are a significant step forward but only in relation to workplace deaths that can be demonstrated to have been caused by systemic rather than episodic corporate neglect.

## E *The Corporate Manslaughter and Corporate Homicide Act 2007 (UK)*

The United Kingdom Parliament has also been attempting statutory reform in this difficult area in recent years, and has now created a specific corporate homicide offence to replace the common law offence of manslaughter by gross negligence for corporate offenders.

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112 Senior officer includes, in corporate circumstances, an officer of the corporation.

113 Or any other employee of the employer.

114 Varghese, above n 12.

115 Tasmania Law Reform Institute, above n 6, 28; General Purpose Standing Committee No 1, Legislative Council of New South Wales, *Final Report: Serious Injury and Death in the Workplace* (2004) [12.48].

The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK), which came into force in April 2008, establishes a specific corporate manslaughter offence applicable only to corporations and other listed organisational types. Individuals cannot be charged under this legislation in their own right or as an accessory, but it is still possible for individual company officers to be charged separately for the traditional common law offence of manslaughter if the elements of the traditional charge are all present in relation to that individual.<sup>116</sup> The offence retains the ‘gross negligence’ element of manslaughter but seeks to locate this negligence in the way in which an organisation is managed rather than by analogy to the human mind. This formulation is likely to permit a more substantial aggregation of responsibility than previously possible in English common law.

Under section 1(1) the liability for the offence of corporate manslaughter is defined as follows:

**Section 1 The offence**

- (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—
  - (a) causes a person’s death, and
  - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased...

The reference to the ‘way in which its activities are managed or organised’ is likely to be a more flexible test than the concept of ‘corporate culture’ as used in the Commonwealth *Criminal Code* in that it is more able to encompass specific, even single, instances of organisational failure.

The legislation attempts to balance the potential width of section 1 by imposing a limitation in section 1(3) which provides:

**Section 1(3)**

An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

The definition of ‘senior management’ is further elucidated in section 1(4)(c) as follows:

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<sup>116</sup> B Barret, ‘Liability for Safety Offences: Is the Law Still Fatally Flawed?’ (2007) 37 *Industrial Law Journal* <<http://lexis.com/research/retrieve?>> at 17 March 2009.

### Section 1(4)(c)

‘senior management’, in relation to an organisation, means the persons who play significant roles in—

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

This new more general focus upon senior management represents substantial progress from the restrictive identification principle at common law and it is also potentially wider in scope than the ‘corporate culture’ provisions in the Commonwealth *Criminal Code*. Despite this progress however, the UK legislation still falls short of providing a basis for corporate liability wide enough to catch all instances of organisational failure, particularly those where the failures have resulted substantially from actions or omissions occurring below the stratum of senior management. It remains doubtful, for example, whether the UK legislation would yet provide an adequate basis for successful prosecution in any future factual scenarios similar to those presented in the Zeebrugge ferry disaster where the various acts and omissions contributing to the gross negligence occurred substantially but not entirely in the lower stratum of decision making.

Statutory reform both in Australia and in the more recent UK example remains incomplete and inadequate to address the full range of issues that currently impede prosecution of corporations for manslaughter. More comprehensive suggestions for reform are explained below.

## V SUGGESTIONS FOR REFORMING COMMON LAW PROCEDURAL DIFFICULTIES

The Gibbs Committee stated:

the common law, largely because of the emergence of large corporations in modern times, does not make appropriate provision for the criminal liability of corporations. Further, the change required in the law to accommodate this development is of such dimensions that legislative action, rather than reliance on evolution of the common law, is required.<sup>117</sup>

As mentioned above, the cause of the procedural difficulties is the incoherence of applying the common law *mens rea* template, which is written for natural

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<sup>117</sup> Gibbs Committee, Review of Commonwealth General Law 1990, *Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) 305.

persons, to a corporation. Corporations are not natural persons; they are private bureaucracies, limited by the actions of their agents and incapable of their own moral faculty. In applying the identification principle to find the *mens rea* of the most proximate person, the courts have too narrowly identified the relevant class of agents. Furthermore judicial reluctance to aggregate individual actions to recognise true collective organisational fault has further frustrated prosecutions. These difficulties have combined to perpetuate procedural difficulties in finding corporations liable for manslaughter and have effectively provided loopholes that sustain virtual corporate immunity for what is a fundamentally heinous crime. Whilst recent attempts in legislation in Australia and the UK to expand the range of corporate actors identified as responsible for corporate negligence represent positive change, the practical impact will still be limited. Neither the Australian nor UK legislation comprehensively tackles the core problems of aggregating fault at all layers of corporate activity or of substantially reforming the tests for negligence as they apply to corporations. There is undoubtedly a need for further reform.

The procedural difficulties inherent in prosecuting corporate manslaughter explored in this paper leads to the suggestion that effective reform could occur in one of two principal ways. The first would be to remedy the deficiencies in the common law by maintaining the *mens rea* negligence component, but allowing for the aggregation of individual actions and/or omissions, at any organisational level, to establish collective organisational failure and thereby gross negligence. This would bring corporations as single legal entities within the individualistic structures of the criminal law, by subjecting them to aggregated vicarious responsibility. The second approach would be to simply remove the problematic *mens rea* requirement of manslaughter altogether and apply a strict liability approach to manslaughter in a corporate setting. In either case appropriate corporate specific offences and sentences are vital and would almost certainly require legislative attention and reform. These two options are explored in more detail below.

### A *Removal of Identification Principle, Aggregate Corporate Actions*

Collective organisational failure does not always occur solely or even substantially at the level of directors or employers, or solely on one organisational level such as senior management, it is often the result of the accumulation of integrated components that comprise the corporate collective.<sup>118</sup> Aggregation

118 See generally, B Fisse and J Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468, 483, although they suggest a corporation may act negligently by failing to meet the standards expected of a 'reasonable' corporation, and many individuals may contribute to that negligence without being aware of its totality. By contrast, it is contended here that the reasonable corporation is inapplicable and impractical.

would remove procedural difficulties in finding and establishing *mens rea* in cases where deaths occur from the culmination of relatively minor instances of individual negligence which combine to produce gross criminal negligence on the part of the corporation as a collective. Cases such as *Spooner* involve true collective organisational failure of this kind. Aggregative approaches have been criticised for failing to consider the corporate culpability in its own right. However, it is contended that in a corporate setting, aggregation is at least an essential first mechanism for adequately determining the collectives' true fault. There is no reason in principle why an aggregation regime could not also be reinforced by provisions that construct whole-of-corporation blameworthiness in situations where the fault is seen to transcend even the sum of individual acts and omissions. An important caveat on any reform proposal involving aggregation of individual acts and omissions into a corporate act of gross negligence would have to be that the human actors are not themselves subjected to any form of aggregated (vicarious) liability for each other's actions. The rationale for such a reform is precisely that, whilst aggregation is a totally unacceptable means of establishing criminal fault for individuals, it is uniquely appropriate for legally recognised collectives.

## B *Removal of Mens Rea Requirement to a Strict Liability Offence*

An alternative pathway for reform is to remove entirely the problematic requirement of proving corporate *mens rea*, most probably through the creation of a separate corporate homicide offence. Removal of the *mens rea* negligence element of manslaughter would create a coherent, procedurally workable, strict liability offence whereby proof of the *actus reus* and relevant causation will suffice to prove corporate manslaughter. It will allow organisational failures of the collective, rather than 'directing mind and will' or 'senior management' to be analysed, and remove difficulties establishing *mens rea* elements like knowledge or recklessness. In effect corporate liability for manslaughter could be simply established by proving the remaining elements of *actus reus* and causation. The question of whether a given act or omission was an act of the corporation could be answered on the basis of ordinary agency principles. Such a formulation has the advantage of being clear and simple to enforce. The combination of ordinary agency principles to the *actus reus* element would produce a situation in which corporate liability was both strict and effectively vicarious.

The most obvious criticism of such a proposal would be its potential harshness upon defendant corporations. Such a criticism could be met by also establishing clear lines of defence such as due diligence, lack of causation,



and honest and reasonable error. It must be noted, however, that the argument for a harsher strict standard of liability for corporations is entirely appropriate given that the usual tenderness of the law towards the human defendant is not seriously invoked. Unlike natural persons, for whom *mens rea* is a meaningful concept, corporations lack the moral agency necessary to establish either malice or altruism. Secondly, concerns at the harshness of creating a 'strict' liability offence are less convincing when it is noted that corporations cannot be deprived of liberty in any case.

### C *The Need for Alternative Sentences for Corporate Manslaughter*

Meaningful change can only be achieved through judicious use of corporate and individual penalties which 'taken together, will provide just punishment, adequate deterrence, and incentives for organisations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct'.<sup>119</sup> While one can argue strongly that, imprisonment is just the sort of 'teeth' regulators need to do justice in circumstances that warrant it,<sup>120</sup> in reality it is impractical. Therefore the development of a harsh corporate specific regime is required.

This discussion has been concerned with establishing whole-of-corporation liability, but in situations where manslaughter has occurred due to the gross negligence of a specific individual there is no reason in law or principle why that agent cannot be prosecuted in their personal capacity in the traditional way. In such situations both the individual as well as the corporation itself could be found guilty.

In relation to corporation-specific penalties, financial penalties are the most common sentence used in Australian jurisdictions.<sup>121</sup> To achieve true deterrence, financial penalties must be sufficient enough to influence the future decisions of a corporation.<sup>122</sup> Given the variability in the financial positions of corporations it may be appropriate to base penalties on a percentage of the corporation's capital value, rather than profit. Notably, Victoria's proposed corporate manslaughter offence anticipated fines proportional to the size of the body corporate, taking into account factors such as the number of employees,

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119 Clough and Mulhern, above n 20, 9.

120 Sarre, above n 37, 17.

121 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders: Corporate Criminal Liability*, Report No 88 (2003).

122 A Coles, 'Corporate Killers: A "Republican" Alternative to Corporate Manslaughter Prosecutions' (1998) (October) Paper submitted for the Research Unit, Faculty of Law, the Australian National University 5.

gross operating revenue and gross assets.<sup>123</sup> Where subsidiary companies are used to conceal a corporation's true financial position, the pure criminality of manslaughter should facilitate lifting of the corporate veil. Finally, deterrents – including injunctive orders similar to civil Mareva Orders – may be required to preserve the status quo and prevent a corporation dissolving or winding up to avoid paying a financial penalty before a sentence is passed.<sup>124</sup>

Financial penalties may also be assisted if used in conjunction with alternative corporate specific penalties including disqualification. Disqualification may include a restraint of trade for a particular period, disqualification from a particular geographical area; revocation of a particular license; or disqualification from tendering for particular contracts.<sup>125</sup> Incapacitation may be appropriate where a corporation has flagrantly violated the rules of society;<sup>126</sup> however it has significant spill over effects to employees and shareholders. Incapacitation also solely focuses on deterring rather than rehabilitating and preventing crimes.<sup>127</sup>

Adverse publicity orders, similar to the power of an ACT court to order corporate offenders to publicise their crime and penalty,<sup>128</sup> may also be useful. Denunciation is an important aim of the criminal justice system,<sup>129</sup> which could be utilised to prevent corporations being seen as above the law. Adverse publicity orders could also act as a strong deterrent for corporations who rely heavily on their reputation and branding (brand name) to remain competitive.<sup>130</sup>

Alternative sentencing options can also include community service orders atoned to the crime committed. These benefit the community<sup>131</sup> and achieve

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123 See clause 14D Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic). Also note a similar idea in s 18 of the *Criminal Justice Act 1991* (UK) which allowed differing penalties for identical offences where the offenders have different disposable weekly incomes. However this has been subsequently repealed. See Note to Part VI, *Criminal Justice Act 1993* (UK).

124 See Perrone, above n 4, 94.

125 Section 34(2) of the *Fair Trading Act 1990* (Tas) contains a disqualification order. Also see Tasmania Law Reform Institute, above n 6, 31, 47.

126 Australian Law Reform Commission, *Sentencing: Penalties*, Discussion Paper No 30 (1987) [292]. Also see s 490 *Corporations Act 2001* (Cth).

127 D Miester, 'Criminal Liability for Corporations that Kill' (1990) 64 *Tulane Law Review* 919, 946.

128 *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) implemented into the *Crimes Act 1900* (ACT). See J Varghese, Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004 (Cth), *Bills Digest* No 135 (2003–2004) 2.

129 D Skeel, 'Symposium Norms and Corporate Law: Shaming in Corporation Law' (2001) 149 *University of Pennsylvania Law Review* 1811.

130 B Fisse, 'The Use of Publicity as a Criminal Sanction Against Business Corporations' (1971) 8 *Melbourne University Law Review* 107

131 In a way that traditional forms of punishment do not address. See Tasmania Law Reform Institute, above n 6, 51.

the goals of deterrence and retribution. Compulsory compensation orders may also be appropriate where death has caused the victim's family to suffer injury, loss, destruction or damage.<sup>132</sup>

A novel approach, and perhaps not as extreme as it may first appear, could be corporate 'execution'. For practical economic reasons this would need to be achieved as a hostile takeover of a corporation by a government regulator. All the shares issued or a specified percentage of shares could be seized and on-sold on the stock market. Whilst share seizures either total or proportioned would no doubt be criticised as unduly harsh upon shareholders, the idea does have merit. As a deterrent, it is highly effective. Ultimately directors would need to be able to assure nervous shareholders that mechanisms were in place in a company to avoid the likelihood of such regulatory intervention. The most appealing aspect of such a scheme is that it is one of the few means by which the seriousness of the crime can be addressed by a corporate penalty analogous in some real way to imprisonment (seizure) of capital.

## VI CONCLUSION

There is undoubtedly a need and desirability for corporations to be held responsible for their organisational failures which result in human death. A range of substantive and procedural difficulties arising from the incoherence of applying the common law *mens rea* template to corporations is preventing effective corporate prosecutions. Attempts to resolve this incoherence by applying the identification principle to the most proximate person have been flawed. Rather than establishing a comprehensive basis for corporate criminal liability, the identification principle has protected corporations, created loopholes and provided a template for corporations to avoid liability altogether. Whilst there have been statutory proposals and reforms that have attempted to resolve these difficulties, only the ACT's industrial manslaughter offence, and the Commonwealth's provisions relating to 'corporate culture' have been effectively implemented and these do not go far enough.

There is still a need for both procedural and substantive reform. It has been suggested that reform could occur in one of two main ways. The first approach requires the court or legislature to expand the identification principle to aggregate corporate actions in determining collective organisational failures and negligence. The second requires legislative action to remove the *mens rea* requirement and convert corporate manslaughter into a new strict liability offence. It is also suggested that the efficacy of reforms could be assisted by alternative corporate-specific penalties. There is no doubt that reform of this

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<sup>132</sup> Ibid 56.

area of the law is complex, but a continuation of current practices is unjust and unacceptable. At present, when it comes to corporate manslaughter, corporations are practically, if not formally, above the law.

Genuine reform requires two major paradigmatic shifts. The first is a recognition that corporations should not be seen as an analogue of the human defendant at all, but as a special type of collective entity (private bureaucracy), requiring the development of unique principles of criminal responsibility. The second is a willingness to explore solutions that may in some cases openly challenge key principles of criminal responsibility as they apply to human defendants. Whilst it remains vital to preserve the common law reluctance to impose strict or vicarious criminal responsibilities upon natural persons, it is equally important to explore exactly these forms of liability in the corporate context. The underlying common law values of respect for human moral agency, individual responsibility and liberty are more likely to be preserved and respected if corporate criminal liability is able to develop along its own separate trajectory.