Corporate Criminal Liability: A Paradox of Hope

By Rebecca Rose*

I. Introduction

> Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill.[1]

> Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?[2]

Corporate criminal liability emerged and developed as a product of the courts' struggle to overcome the difficulty of attaching criminal blame to fictional entities in a legal system based on the moral accountability of individuals.[3] Surprisingly, however, despite the ubiquity of international corporate criminal liability regimes, legislative and judicial statements and commentary regarding the raison d'être for corporate criminal liability are relatively limited.[4] New Zealand's current system of corporate criminal liability, based upon vicarious liability and the identification doctrine, is a reflection of the individualist conceptions of criminal law. The requisite characteristics for an actor to be treated as blameworthy, as well as the nature of the concepts of actus reus and mens rea, are accordingly based on a distinctly human model.[5] Consequently, through its non-recognition of corporate culpability – a free standing culpability that need not be derived from the faults

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1 Hazlitt (1821) 1901 cited in C Wells, *Corporations and Criminal Responsibility* (2nd ed) (Oxford: Oxford University Press, 2001) 1.

2 Attributed to Edward, First Baron Thurlow, cited in J Clough and C Mulhern, *The Prosecution of Corporations* (Melbourne: Oxford University Press, 2002) 183.

3 For a discussion and analysis of the historical development of the criminal liability of legal bodies see eg L H Leigh, 'The Criminal Liability of Corporations and Other Groups: A Comparative Overview' (1982) 80 Mich L Rev 1508; K Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) 60 Wash ULQ 393; C Wells, *Corporations and Criminal Responsibility* (Oxford: Oxford University Press, 1993) 94-122.

4 See D Fischel and A Sykes, 'Corporate Crime' (1996) 25 J Legal Stud. 319 at 320: 'the doctrine of corporate criminal liability has developed … without any theoretical justification'.

5 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (JCPC); *Tesco Supermarkets v Nattrass* [1972] AC 154 (HL).

of individuals – the current regime arguably fails in its ability to acknowledge the unique nature of corporate offenders.[6]

In recent years, corporate criminal liability has featured as a prominent item on the agenda for law reformers internationally, the dissatisfaction with the identification doctrine as traditionally applied within Commonwealth jurisdictions being starkly illustrated by proposals and legislative responses involving deliberate and sharp breaks from the structure of corporate liability fashioned by the courts.[7]

Having regard to the common law's unfalteringly 'nominalist' approach to corporate criminal liability, that is, an approach which treats the corporation as 'nothing more than a collection of individuals',[8] and the articulated resistance to moving radically beyond identification theory as a means of grounding liability in cases of serious crime,[9] this paper examines whether New Zealand companies[10] ought to be made subject to a more extensive and clearly defined criminal liability regime. In light of the recent legislative developments in Australia, England and Wales, and Canada, the question of whether introduction of a separate corporate homicide offence is desirable in New Zealand is explored as a secondary issue.

II. Ought Liability Attach to Companies as well as Individuals?

> … the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of a corporation as in the case of the natural person.[11]

The law speaks of a company as 'a legal entity in its own right',[12] as a subject of rights and duties capable of entering into contracts, owning real property and suing and being sued in its own name.[13] Nevertheless, much debate continues in terms of the social reality and legal status of

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6 See generally P A French, *Collective and Corporate Responsibility* (New York: Columbia, 1984) at 30-65: 'the structure and practice of decision-making in companies may constitute a distinctive form of corporate intentionality which is not reducible to the mental states, past and present, of human agents associated with companies'; A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (Oregon: Hart Publishing, 2000) 234-255. Indeed, in its holding of companies liable in the absence of organisational fault, the present system arguably runs contrary to the criminal law's general unwillingness to hold a person responsible for the actions of another person: *R v City of Sault Ste Marie* [1978] 2 SCR 1299 (SCC).

7 The Australian Criminal Code Act 1995 (Cth); Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organisations) (Canada); Law Commission (UK), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No. 237 (1996); *Corporate Manslaughter: The Government's Draft Bill for Reform* (2005) available at <www.home-office.gov.uk > viewed 12 October 2005 provide pertinent examples.

8 E Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Crim LF at 1-2.

9 See e.g. *Attorney-General's Reference (No 2 of 1999)* [2000] 3 All ER 182 (CA); *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 5.

10 This paper does not distinguish between 'companies' and 'corporations.' The two terms are used interchangeably. See *R v Church of Scientology at Toronto* (1997) 116 CCC (3d) 1 (Ont CA) at 69-73 emphasising that, generally, corporations other than companies will be held criminally liable in the same way as companies.

11 *Canadian Dredge and Dock Co Ltd v The Queen* [1985] 1 SCR 662 at 692 (SCC).

12 Companies Act 1993, s 15.

13 As *R v Murray Wright Ltd* [1970] NZLR 476 at 484 affirms, a company is considered a 'legal person' and may therefore in theory be criminally liable to the same extent as a natural person. See also *Salomon v Salomon* [1897] AC 22; *R v IRC Haulage Ltd* [1944] KB 551 at 556; *P & O Ferries (Dover) Ltd* (1991) 93 Cr App R 73; *S & Y Investments (No 2) Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1986) 85 FLR 285 at 306-307.

the corporation and what constitutes the 'essence' of that 'soulless' and 'bodiless'[14] entity.[15] In any discussion as to whether liability ought to attach to corporations in their own right, the recurrent dispute between nominalist[16] and realist[17] theories of corporate personality is inevitably engendered.

The comments of Clarkson[18] and Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission,*[19] favouring a more 'atomistic' view of the corporate entity – that is, treating the corporation simply as an aggregate of individuals,[20] are acknowledged. Nevertheless, it is argued that, particularly in light of the growing recognition of companies' 'distinct capacity for collective action'[21] and citizens' interpretation of firms as 'autonomous and distinctive collectives operating in the social world and orientated to risk',[22] it is theoretically proper and pragmatically justifiable for liability to attach to corporations as well as individuals.[23] Indeed, as the international authorities demonstrate,[24] increasingly, in many cases where serious harm has been caused, there is no individual alone who has committed a crime. Rather, the crime arises from intra-organisational defects such as sloppy practices or non-existent policies. Accordingly, prosecution ought to be directed at the real wrongdoer, namely the company. As Wells[25] notes, even where it is accepted that many criminal offences are individualistic in nature, the prosecution of

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14 J C Coffee, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich LR 386.

15 There is an extensive body of writing on this controversy. Some eminent works include: J Machen, 'Corporate Personality' (1911) 24 Harv L Rev 253; M Radin, 'The Endless Problem of Corporate Personality' (1932) Colum L Rev 643; H L A Hart, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37; M Dan-Cohen, *Rights, Persons and Organizations* (California: University of California Press, 1986); C Schane, 'The Corporation is a Person: The Language of a Legal Fiction' (1987) 61 Tul L Rev 563. See also R B Stewart, 'Book Review: Organizational Jurisprudence' (1987-88) 101 Harv L Rev 371 – reviewing Dan-Cohen's book and describing alternative normative conceptions of intermediate organisations.

16 Corporate nominalists believe that the company is a contractual association of individual shareholders whose legal personality is no more than an alternative way of writing their names together for legal transactions: Jeffrey S. Parker, 'Doctrine for Destruction: The Case of Corporate Criminal Liability' (1996) 17 Managerial & Decision Economics 381.

17 Corporate realists assert that the company is a full-fledged organisational entity whose legal personality is no more than an external expression of its real personality in the society: K Mann, 'Punitive Civil Sanctions: The Middleground Between Civil and Criminal Law' (1992) 101 Yale LJ 1795.

18 C M V Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 MLR 557 at 563: 'Crimes can only be committed by human, moral agents. One might wish to attribute their wrongdoing to a company, but ultimately it is the individual within the company who is the culpable agent deserving punishment.' See also G R Sullivan, 'Expressing Corporate Guilt' (1995) 15 OJLS 281.

19 *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 5 at 507: 'There is no such thing as a company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as a company as such'.

20 M Dan-Cohen, *Rights, Persons and Organizations* (California: California University Press, 1986) at 15.

21 G R Sullivan, above n 18.

22 N Lacey, 'Philosophical Foundations of the Common Law: Social not Metaphysical' in J Horder (ed), *Oxford Essays in Jurisprudence* (2000) 33.

23 Note J C Coffee, 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions' (1980) 17 Am Crim LR 415, 422; J Salmond, *Jurisprudence* (7th ed) (London: Sweet & Maxwell, 1924) 285.

24 *P & O European Ferries (Dover) Ltd*, above n 13; *Attorney-General's Reference (No 2 of 1999)*, above n 9.

25 Wells (2001), above n 1 at 14-16.

corporations remains appropriate, the law, in a broad sense, making a symbolic statement as to the acceptability of particular behaviours.[26]

In a similar fashion, the law's object of ensuring the safety of employees, the public and the environment provides additional justification for requiring that companies, as a counterweight to the liberty and ever-expanding rights which are conferred to them,[27] also assume responsibility for their serious transgressions.[28] Indeed, 'there is no single, broadly accepted theory of corporate blameworthiness that justifies the imposition of criminal penalties on corporations'.[29] However, as McConvill and Bagaric[30] have observed, the pervasive presence of corporations within contemporary society and the potential for their actions to impact on a much wider group of people than are affected by individual action, dictates that their ability to cause economic and physical harm is significant.[31] Consequently, the relevance of any distinction between criminal liability for harm perpetuated by natural persons and juristic persons is at best minimal, and it is both just and congruent with the principle of equality before the law[32] to treat companies like natural persons and hold such entities liable for offences they commit.[33]

Whilst it may be argued that the perceived benefit in prosecuting the company rather than the individuals concerned is illusory in the case of small, private companies,[34] it is well demonstrated that, in the context of corporations generally, to only prosecute individuals is unfair and inefficient.[35] Furthermore, concentrating liability on individuals does little to address 'society's interest

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26 See also W S Laufer and S D Walt, 'Why Personhood Doesn't matter: Corporate Criminal Liability and Sanctions' (1991) 18 Am J Crim L 263 at 276: 'Finding moral responsibility and criminal responsibility does not depend on first determining whether an entity is a person. … Rather, conditions for the ascription of both sorts of liability are needed. Liability is assigned to an entity when those conditions are satisfied. Personhood plays no part in the assignment'. Compare W H Jarvis, 'Corporate Criminal Liability – Legal Agnosticism' [1961-62] U West Ont LR 1.

27 *R v Wholesale Travel Group* [1991] 3 SCR 154 (SCC).

28 See generally, P Fauconnet, *La Responsabilité: Etude de Sociologie* (Paris: Librairie Félix Alcan, 1920), cited in J Quaid, 'The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis' (1998) 43 McGill LJ 67: 'Responsibility is commonly understood to be the capacity of a person to be legitimately subjected to punishment: usually, the terms *responsible* and *justly punishable* are synonymous'. Note also comments of C Wells (2001), above n 1 that in the aftermath of *P & O European Ferries (Dover) Ltd*, above n 13, the relatives of the 193 victims who died in the ship's capsize were more interested in a successful prosecution of P & O Ferries than the prosecution of the individuals involved.

29 Clough and Mulhern, above n 2 at 5. See also B Fisse and J Braithwaite, *Corporation, Crime and Accountability* (Cambridge: Cambridge University Press, 1993) at 122.

30 J McConvill and M Bagaric, 'Criminal Responsibility based on complicity among corporate officers' (2004) 16 AJCL 5.

31 The law's ability to impose at least a fine commensurate with the gravity of the harm caused when this might be out of proportion to the means of the individual(s) concerned is thus important.

32 P J Henning, 'The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions' (1996) 63 Tennessee LR 793.

33 See also R Edwards, 'Corporate Killers' (2001) 13 AJCL 231; G R Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 CLJ 515.

34 V S Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) 109 Harv L Rev 1477 at 1495; J Smith, *Smith & Hogan Criminal Law* (9th ed) (London: Butterworths, 1999) 186: in respect to all forms of corporate criminal liability, including regulatory law, 'the necessity of corporate criminal liability awaits demonstration'.

35 See generally G Stessens, 'Corporate Criminal Liability: A Comparative Perspective' [1994] 43 ICLQ 493; Quaid, above n 28 at 84-87; Clough and Mulhern, above n 2 at 6-9.

in eliminating dangerous and criminogenic corporate practice'.[36] Accordingly, it is submitted that the imposition of corporate liability is complementary to, and ought to attach at least in tandem with, individual liability.[37]

III. Ought Companies be Held Criminally Liable?

> There is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose.[38]
>
> Judge Learned Hand

That civil and criminal liability share many of the same features and that 'it is not clear that corporate criminal liability is the best way to influence corporate behaviour'[39] is a recurrent argument cited in support of eliminating criminal liability for corporations. The assertion that criminal liability is economically inefficient as a deterrent to unlawful acts is acknowledged.[40] However, it is submitted that adoption of such a standpoint, advocating civil liability's superiority in terms of social desirability solely on this ground, overlooks retribution as a normative basis for criminal liability and consequently neglects to properly appreciate the fact that, even in the corporate context, moral condemnation remains a valid object of the criminal law.[41] Indeed, as Wells emphasises, at a broad level, criminal laws can be viewed as 'either instrumental or symbolic', that is, criminal laws can be seen as existing to effect a purpose or to make a moral statement.[42] Furthermore, the attributes of contemporary corporations support the submission that such entities can, and should be, morally condemned where their actions violate the law.

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36 Individuals are expendable. Thus the potential for scapegoating is high. Structural flaws in an organisation will not disappear because a company member is brought to trial: J Gobert and M Punch, *Rethinking Corporate Crime* (London: Butterworths, 2003) 253-282. Note also that in many cases complex organisational structures will bury responsibility at many different layers within the corporate hierarchy, making it difficult, if not impossible, to determine where the true fault lies: Wells (2001), above n 1.

37 As the Australian Criminal Law and Penal Reforms Committee has observed: 'The aim of corporate criminal responsibility is not to provide a complete alternative to individual criminal responsibility but merely a complementary approach to cover situations where guilty personnel enjoy some sanctuary or where there has been some wrongdoing not attributable to individual fault': *The Substantive Criminal Law* (Fourth Report, 1978) 365.

38 *United States v Nearing* 252 F. 223 at 231 (SDNY, 1918).

39 V S Khanna above n 34 at 1478.

40 See generally, Khanna, ibid; Fischel and Sykes, above n 4; Mann, above n 17: 'Civil liability is efficient because it avoids criminal law's costly procedural protections, including the jury trial right and the beyond-reasonable doubt standard of proof'; civil liability is better because it imposes less stigma – 'an inherently wasteful means of inflicting disutility: no one receives the corporation's lost reputation, whereas someone (government or a private party) receives the fine'.

41 O Wendell Holmes, *The Common Law* (New York: Brown Publishers, 1881) 42 at 45: 'the fitness of punishment following wrong-doing [can be regarded as] axiomatic'. As H L A Hart has observed, even those who reject retribution as sufficient justification for punishment (eg Kant) accept retributionist arguments as a limitation on punishment. As criminal punishment is about blame, as opposed to harm, retributionist limitations are important: Hart, *Punishment and Retribution* (1968) 8-13.

42 C Wells (1993), above n 3 at 14. See also F Haines and A Hall, 'The Law and Order Debate in Occupational Health and Safety' (2004) 19 Journal of Occupational Health and Safety – Australia and New Zealand at 268.

In recent years, commentators have emphasised the criminal law's important socialising role as a system for moral education.[43] Undeniably, the stigmatic effects of criminal punishment have critical relevance in defining the criminal law's unique character.[44] Precisely for this reason, however, the criminal law should not be over-utilised.[45] Similarly, its moral nature should not be denigrated by permitting the criminal punishment of persons who cannot fairly be blamed for their actions.[46] Nevertheless, it is equally important to recognise that the definition of conduct as criminal has potential to advance as well as document social consensus regarding standards of appropriate behaviour.[47]

Whilst attaching criminal liability to corporations themselves inevitably instigates some difficulties for a theory of punishment grounded in morality and stigma, it is submitted that Cooter's[48] 'pricing'/'prohibiting' deterrence dichotomy provides compelling support for the proposition that corporations ought to be held criminally responsible. As Coffee[49] reasons, the difference between civil and criminal liability in terms of the law's deterrence function can essentially be seen as the difference between 'optimal'[50] and 'total' deterrence.

The imposition of civil liability effectively functions as a tax that brings public and private costs into equilibrium by forcing the actor to internalise the costs that that actor's activity imposes on others.[51] Criminal liability, by contrast, effects a significantly discontinuous increase in the expected cost of the relevant conduct with the intention of dissuading the actor from engaging in the conduct at all. Thus, through its identification of conduct wholly lacking in social value where the community is not prepared to accept a 'price' for that behaviour, the criminal law has a unique expressive retribution function.[52] Indeed, where the possibility of criminal liability is removed, the law's and society's ability to acknowledge the proper valuation of the relevant persons or property is lost.[53]

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43 See generally G Lynch, 'Crime and Custom in Corporate Society: The Role of Criminal Law in Policing Corporate Misconduct' (1997) Law & Contemp Prob 23; L Friedman, 'In Defence of Corporate Criminal Liability' (2000) 23 Harv JL & Pub Pol 833; D Kahan, 'Social Norms, Social Meaning and the Economic Analysis of Law: Social Meaning and the Economic Analysis of Crime' (1998) 27 J Legal Stud 609.

44 Lynch, ibid, 39.

45 Khanna, above n 34.

46 S Kadish, 'The Decline of Innocence' (1968) 26 CLJ 273.

47 Lynch, above n 43 at 44.

48 R Cooter, 'Prices and Sanctions' (1984) 84 Colum L Rev 1523.

49 J C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models and What Can be Done About It' (1992) Yale LJ 1875.

50 Optimal deterrence of corporate misconduct requires that the law 'offer incentives up to the point at which … marginal social cost would exceed the marginal social gain in the form of reduced social harm' from the unlawful activity: Fischel and Sykes, above n 4. See also S Shavell, *Economic Analysis of Accident Law* (Melbourne: Oxford, 1987) 147-148.

51 Coffee, 'Paradigms Lost', above n 49.

52 Where society desires not to proscribe an activity, but wishes only to reduce its level, the use of 'prices' is appropriate. Alternatively stated, 'The choice depends on whether it is less costly to determine the correct standard of behaviour or to determine the social costs caused by a departure from that standard': Cooter, above n 48. Note also L Batnitzky 'A Seamless Web? John Finnis and Joesph Raz on Practical Reason and the Obligation to Obey the Law' (Summer 1995) 15 OJLS 153; J C Coffee 'Does Unlawful Mean Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 Boston ULR 193.

53 W S Laufer and A Strudler 'Corporate Intentionality, Desert and Variants of Vicarious Liability' (2000) 37 Am Crim LR 1285.

Whilst a civil liability regime might declare a company negligent, or even reckless, ultimately, both the company and the community will eventually come to view pecuniary penalties simply as a cost of doing business.[54] Where such a liability regime parallels ordinary civil liability for individuals charged with the same wrongdoing, the absence of corporate criminal liability would allow companies to purchase exemption from moral condemnation. Consequently, the condemnatory effect of criminal liability on individuals in respect to similar conduct would be undermined, and the moral authority of the criminal law as a guide to rational behaviour, substantially diminished.[55]

In the context of corporate actors, the importance of certainty in the law additionally provides strong support for a proposition advocating the attachment of criminal liability to corporations. As Coffee has observed, 'in all common law countries, advance legislative specification today constitutes a fundamental prerequisite to criminal prosecution'.[56] It is suggested that identification of behaviours requiring 'total' deterrence is fundamentally a legislative task. Indeed, whilst the courts should be entitled to some discretion in pursing 'optimal' deterrence, such discretion is inappropriate in the context of deciding when to pursue 'total' deterrence, the decision that the benefits derived by the defendant are so immoral, perverse or otherwise unacceptable as to justify 'prohibition' requiring greater social consensus than a jury or judicial decision represents.[57]

Given the law's critical role in legitimising or illegitimising certain behaviour[58] and the recognised tendency to view corporate illegality treated civilly not as real crime,[59] but rather a regulatory offence, it is argued that the imposition of criminal liability is important in terms of clarifying the content of what society expects contemporary corporations to be responsible for, that is, what conduct will or will not be tolerated.[60] Whilst civil liability may have efficiency attractions, it is important to recognise that deterrence and efficiency are not the only interests underpinning liability regimes.[61]

Similarly, it is equally important to remember that criminal liability is just one aspect of the entire framework employed to regulate corporate behaviour. Indeed, as Fisse and Braithwaite acknowledge, regulation of corporate conduct is at its most effective when a 'dynamic and integrated approach to enforcement' is made available, that is, when a range of sanctions, civil and criminal, individual and corporate can potentially be applied.[62] Furthermore, acknowledging Khanna's conclusion that 'the purpose served by corporate criminal liability is almost none',[63] it is contended that, primarily due to legislatures' and the courts' piecemeal responses to specific areas of corporate activity, rather than focusing on corporations as a distinct class of offender, corporate criminal liability is arguably under-developed internationally.[64] Compensation does not ex-

54 Coffee 'Paradigms Lost', above n 49.

55 Friedman, above n 43 at 858.

56 Ibid.

57 Mann, above n 17.

58 Kahan, above n 43.

59 R Quinney, 'Class, State and Crime' in J Jacoby (ed), *Classics of Criminology* (New York: Waveland Press, 1994) 106-115 has argued that 'corporate crime is not seen as truly criminal because corporate practices are essential to developing a capitalist political economy'. Quinney's approach highlights that corporations are largely protected from scrutiny because they are central to the functioning of capitalist society.

60 Clough and Mulhern, above n 2 at 10-15.

61 Cooter, above n 48.

62 Fisse and Braithwaite, above n 29.

63 Khanna, above n 34 at 1534.

64 Mann, above n 17. See generally C Wells (2001), above n 1.

haust the purposes of criminal punishment.[65] Thus, whilst 'society's capacity to focus censure and blame is among its scarcest resources',[66] if moral force is the distinguishing feature of criminal law, criminal liability has an important and significant role to play in society's attempt to police corporate wrongdoing. Accordingly, as recognised by legislatures and the courts internationally, the availability of compensation outside the criminal justice system does not eliminate the need for criminal liability to attach to corporations.[67] Indeed, as Friedman states, if the law is to avoid sending the message that the right to engage in prohibited activities can be purchased, it is only the criminal law that can provide both the incentives necessary to prevent crime and a vehicle for the message that certain activities are prohibited and variances cannot be purchased.[68]

IV. What's Wrong with the Current Law?

> All that has been done thus far in the field amounts to little more than a superficial adaptation of existing principles of criminal law to corporations. The assumption underlying such an adaptation, that there is a direct analogy between the abstract concept called a corporation and the states of mind and actions of a natural human being, is a considerable and unhelpful oversimplification.[69]

Approaches toward the imposition of corporate criminal liability vary considerably between jurisdictions, the differences between common law and continental European jurisdictions being particularly dramatic.[70] Corporate criminal liability is widely accepted within the common law world, especially in the context of liability for regulatory infractions.[71] However, as international attempts at achieving a suitable level of organisational criminal accountability vis-à-vis corporate liability for true crimes make clear, important differences exist between common law jurisdic-

65 W Wilson, *Central Issues in Criminal Theory* (Oxford: Hart Publishing, 2002) 16-77; *US v Hilton Hotels Corp* 467 F. 2d 1000 (9th Circ, 1972); *DPP v Esso Australia Pty Ltd*, unreported, Supreme Court of Victoria , 30 July 2001; *P & O European Ferries (Dover) Ltd*, above n 13; *Attorney-General's Reference (No 2 of 1999)*, above n 9; Law Commission (UK) (1996), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No 237; D Goetz (2003), *Bill C-45: An Act to Amend the Canadian Criminal Code (Criminal Liability of Organisations): A Parliamentary Briefing*.

66 Coffee 'Paradigms Lost', above n 49 at 1877.

67 *US v Halper* 490 US 435 (1989) (USSC).

68 Friedman, above n 43.

69 Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, Fourth Report, (1978) at 355.

70 See generally G Stessens, above n 35 at 496-497; S Field and N Jörg, 'Corporate Liability and Manslaughter: Should we be Going Dutch?' [1991] Crim LR 156. The continental European systems' penal codes are based on findings of individual guilt. Consequently, the inclusion of corporate criminal liability into penal codes in these jurisdictions has received wide-ranging criticisms. Interestingly, whilst France had not recognised corporate criminal liability since the French Revolution, the new penal code in 1992 made specific reference to this concept, albeit with rather tight restrictions. Whilst the German approach does not take recourse to criminal law itself, an elaborate structure of administrative sanctions, including provisions on corporate criminal liability, is employed: § 30 Ordnungswidrigkeitengesetz – calling for the imposition of fines on corporations. Compare also Japanese position whereby 'corporate criminal liability is an integral part of Japanese law': I Kensuke, 'Criminal Protection of the Environment and the General Part of Criminal Law in Japan' International Review of Penal Law (1999) 65(3) 1043. Dutch law provides for a form of vicarious liability for the acts or omissions of an employee where the relevant act or omission belongs to a category of conduct that the company has accepted as part of its normal operations and that it has the power to control: S Field and N Jörg above.

71 Wells (2001), above n 1.

tions in terms of how such liability is recognised and its theoretical underpinnings.[72] Whilst the two major theories of vicarious liability and identification liability have attracted prominence in this regard, the appropriateness and adequacy of each model has been extensively criticised, particularly in recent years whereby an increasing incidence of serious and tragic accidents has been manifest and, in the eyes of the public, the ostensibly 'blameworthy' corporations have escaped any form of sanctioning.[73]

A. Vicarious Liability ('respondeat superior')

Applied to corporations, the doctrine of vicarious liability imposes accountability such that a company may be liable for the acts of its employees, agents, or other persons for whom it is responsible.[74]

In New Zealand and other Commonwealth jurisdictions, vicarious liability has generally been rejected in criminal law.[75] In the United States, however, corporate liability for criminal offences, including those requiring mens rea, is squarely grounded in vicarious liability, a company's criminal liability potentially arising by way of the criminal act of any employee – supervisory, menial or otherwise – acting within the scope of his/her employment and having the intention of benefiting the company.[76]

Vicarious liability is frequently criticised as a basis of corporate criminal liability on grounds that the doctrine is both under-inclusive in terms of being activated only through the criminal liability of a particular individual,[77] and over-inclusive in terms of corporate liability attaching upon the finding of individual liability despite a complete absence of corporate fault in some instances.[78]

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72 See generally Mann, above n 17, and compare Fauconnet's theory relying on a corporation's distinct legal personality: above n 28. Note also, P A French, above n 6, arguing that legal personality alone is inadequate and articulating a theory of a corporation as a moral/intentional actor; Fisse and Braithwaite, above n 29, and Wells (2001), above n 1, arguing in favour of organic theory and that it is unnecessary to frame corporate responsibility in terms of moral notions that apply to humans.

73 Ibid.

74 See generally *Alphacell v Woodward* [1972] AC 824 (HL). Note there is debate as to whether such individuals will bind the company when their actions are outside the scope of authority.

75 See for example, *Canadian Dredge & Dock Co Ltd v The Queen* [1985] 1 SCR 662 (SCC); Estey J provides a brief historical account of the importation of this common law doctrine, noting, inter alia, that 'the notion of vicarious liability is alien to criminal law'.

76 *New York Central and Hudson Ry v United States* 212 US 481 (1909); *United States v Hilton Hotels Corp* 467 F. 2d 1000 at 1007 (1972, 9th Circ). Note that some state courts, in contrast to their federal counterparts, have nevertheless preferred to base corporate criminal liability on the identification theory inspired by the English cases: *People v Canadian Fur Trappers Corp* 248 NY 159 (1928) (NYCA); Wells (1993), above n 3 at 116-120.

77 The doctrine is cited as being overly restrictive in so far as the requirement of a relationship of subordination between the company and the individual who committed the offence appreciably reduces the potential reach of the criminal law: B Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 Sydney LR 277 at 278; E Colvin, above n 8.

78 W S Laufer, 'Corporate Bodies and Guilty Minds' (1994) 43 Emory LJ 647. Because the respondeat superior standard focuses solely on the relevant individual's intent and automatically imputes that intent to the company, a company's efforts at preventing such conduct are irrelevant. Consequently, under this approach, all companies, honest or dishonest, good or bad, are convicted if the State can prove that even one maverick employee committed a criminal offence.

Indeed, as Colvin has observed, 'vicarious liability in criminal law … divorces the determination of liability from an inquiry into culpability'.[79]

Whilst vicarious liability is attractive in that it avoids identification theory's major problem, namely identification of a sufficiently senior employee that can be identified with the crime, it is submitted that vicarious liability, a principle 'borrowed' from the civil law of torts, seriously distorts the doctrine of *mens rea* and as such is incongruent with the fundamental precepts of a justice system based on the punishment of individual fault.[80]

That corporate criminal liability as it stands, whether based on 'respondeat superior'[81] or identification liability, necessarily implies some, albeit rather broad, application of the doctrine of vicarious liability is acknowledged, corporations only being able to act through the natural persons of whom they are comprised.[82] However, it is argued that recognition of the distinction between vicarious liability and direct liability remains important. Indeed, as Fisse states:

> The function of the notion of imputation or attribution is not to provide criteria for distinguishing between superior and inferior servants and agents of a corporation. Rather, it is to enable the imposition of liability upon a corporation in circumstances where this is considered to be desirable. The distinction attempts to find a compromise between ensuring that corporations are amenable to prosecution for regulatory offences, while not being unduly exposed to prosecution for offences that are truly criminal.[83]

Accordingly, given the growing recognition by commentators[84] and the Courts that vicarious liability is not only too broad in its attributing of the wrongdoings of any employee to the company,[85] but simultaneously also too narrow as it leaves little opportunity to explore company policies and as such is usually imposed for reasons of enforcement rather than blameworthiness,[86] it is submitted that the doctrine is arguably of limited value in its ability to serve as an adequate basis per se for corporate criminal liability in New Zealand law.

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79 E Colvin, above n 8.

80 *R v City of Sault Ste Marie* above n 6; Y Stern, 'Corporate Criminal Personal Liability – Who is the Corporation?' (1987) 13 J Corp L 125 at 126: 'It is axiomatic that individuals are responsible only for their own actions'; C Walsh and A Pyrich, 'Corporate Compliance Programmes as a Defence to Criminal Liability: Can a Corporation Save its Soul?' (1995) 47 Rutgers L Rev 605 at 641. Compare also C Wells 'Corporations, Culture, Risk and Criminal Liability' [1993] Crim LR 551 at 560 advocating that the identification doctrine (see below) 'ties the boundaries of corporate fault to notions of individual liability'.

81 'Let the principal answer.' As to history of this doctrine see K F Brickey, above n 3 at 416.

82 Clough and Mulhern, above n 2 at 100; *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 5; *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715 at 718-719.

83 B Fisse, 'The Distinction between Primary and Vicarious Corporate Criminal Liability' (1967) 41 ALJ 203 at 205. See also L Dunford and A Ridley, 'Corporate Liability for Manslaughter: Reform and the Art of the Possible' (1994) 22 Intl Jnl of the Sociology of the Law 309 at 314.

84 See for example, S Beale and A Safwat, 'White Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002: What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 Buff Crim LR 89.

85 Vicarious liability is not excluded even if management has expressly forbidden employees from engaging in the acts/omissions in question: *Coppen v Moore (No 2)* [1898] 2 QB 306. Consequently, a company may be deemed criminally liable for the conduct of one maverick employee even if it has taken reasonable steps to ensure compliance with the law: J Gobert 'Corporate Criminality: Four Models of Fault' (1994) 14 Legal Studies 393 at 398-399. To this extent, the doctrine's unfairness may impede the development of effective sanctions.

86 Clough and Mulhern, above n 2 at 80: 'Vicarious liability is accordingly generally only applied to offences characterised as 'regulatory in substance although criminal in form', for example, laws relating to consumer protection, fair trading and the environment.

B. The Doctrine of Identification

The doctrine of identification equates the corporation with the persons who constitute its 'directing mind and will'.[87] As such, the theory is attractive to those who assert that companies can neither act nor do anything otherwise than through their human agents.[88] Under the identification doctrine, the commission of an offence by a sufficiently senior individual or group of individuals who can be 'identified' with the company is treated as also constituting an offence by the company itself.[89] In this sense, a company's criminal liability, consistent with that of natural persons, is primary and not actually based on an application of vicarious liability theory.[90]

Tesco Supermarkets v Nattrass,[91] adopted into New Zealand law in *Nordik Industries Ltd v Regional Controller of Inland Revenue*,[92] authoritatively outlines the identification doctrine's application in English law. However, it is contended that it is *HL Bolton (Engineering) Co Ltd v TJ Graham & Son Ltd* which articulates the principle most clearly:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. *The state of mind of these managers is the state and mind of the company and is treated by the law as such* [emphasis added] … in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or managers will render the company itself guilty.[93]

Consistent with vicarious liability, identification theory requires that the individuals identified with the corporation must be acting within the scope of their employment or authority, that is, the

87 *HL (Bolton) Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172 (CA); *Tesco Supermarkets v Nattrass*, above n 5. 'It may well be inevitable that guilt of the directing mind is a condition precedent to corporate guilt, but this has yet to be stated judicially': *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11 at 686.

88 C M V Clarkson, 'Corporate Culpability' [1998] 2 Web JCLI 8 at 13. 'There is no fiction that a company is acting in its own right as an intelligent machine': G R Sullivan (1996), above n 18 at 518; *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713 (HL): 'a corporation is an abstraction. It has no mind of its own any more than it has a body of its own'.

89 A company cannot, however, be 'identified' with a crime committed by an individual lower down the corporate hierarchy. In such cases, his/her acts, even if within the scope of employment, will not be recognised as the company's acts and a prosecution can thus only be brought against the individual concerned: *Tesco Supermarkets v Nattrass*, above n 5; Sullivan (1996), above n 18 at 518. As Quaid, above n 28, observes, the issue of voluntariness does not arise in the corporate context as corporate liability is premised on individual action and the issue thus subsumed by the requirement for voluntary individual action.

90 A Foerschler, 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct' (1990) 78 Cal L Rev 1287 at 1290. Whilst the doctrine is not limited to regulatory or quasi-criminal offences and may apply to serious mens rea offences including homicide, the identification doctrine does not apply to OSH statutes: *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA); *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78; Clough and Mulhern, above n 2 at 75. Where such liability is in issue, the offence is personal to the organisation and requires no measure of mens rea: J Gobert and M Punch, *Rethinking Corporate Crime* (London: Butterworths, 2003) 55-59. As stated by the Court at para 45 in *Linework Ltd*, 'the analysis does not depend on [the foreman's] status within the employer company, nor upon concepts of agency of vicarious liability. It relies simply upon the proposition that once there has been a failure to take a practical step to ensure the employee's safety, the employer is responsible for that failure'.

91 [1972] AC 154 (HL).

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

93 *HL (Bolton) Engineering Co Ltd v TJ Graham & Sons Ltd*, above n 87.

relevant conduct must occur within an assigned area of operation despite the particulars being unauthorised.[94] Nevertheless, by way of variations in the accepted range of individuals from whom corporate liability can be derived, the form of identification liability differs among jurisdictions.[95] However, in Australia,[96] New Zealand, England and Wales,[97] the courts have generally taken a very narrow, and arguably unrealistic, approach in defining the parameters of which individuals' acts can be classified in law as acts of the corporation.[98]

It is accepted that in its narrowing of the scope of corporate liability by restricting the range of persons who can render the company criminally liable, the identification doctrine eliminates much of the over-inclusive effect of vicarious liability and, in the eyes of its proponents, more appropriately addresses culpability issues than does vicarious liability.[99] However, it is argued that in its linking of the company's liability to the wrongful acts of its senior officials, the identification doctrine is counterproductive as it inherently encourages those who control or manage company affairs to ensure that they are unaware of any doubtful practices by the corporation.[100]

In its focus on the conduct or fault of directors or high-level managers, it is similarly argued that the identification doctrine is insensitive to the diverse structures of contemporary corporations and the fact that many such companies now have 'flatter structures' with greater delegation being given to relatively junior officers and the consequence that offences committed on behalf of large corporations increasingly occur at the level of middle or lower-level management.[101] In this sense, a discriminatory rule is created in favour of larger corporations.[102] Indeed, particularly in light of the English Court of Appeal's recent rejection in *Attorney-General's Reference (No 2 of 1999)*[103] of the proposition that it is proper to aggregate the acts and states of mind of two or more controlling officers (none of whom could individually be criminally liable) so as to render the cor-

94 *Nordik Industries v Regional Controller of Inland Revenue*, above n 92; *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11.

95 Identification theory as traditionally applied by the Canadian Supreme Court adopted a middle course between the extremely broad principle of vicarious liability and the especially restrictive identity doctrine recommended by the English courts: *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11; *The Rhone v The Peter AB Widener* [1993] 1 SCR 497; *Tesco Supermarkets v Nattrass*, above n 5. Note, however, that Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organisations) 2003 changes the theoretical Canadian position somewhat. See discussion below. See also G Ferguson, 'The Basis for Criminal Responsibility of Collective Entities in Canada' in A Eser, G Heine and B Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Freiburg: Ius Crim, 1999).

96 Note Australia's legislative amendments to its federal Criminal Code 1995 specifically aimed at addressing the limitations of the identification theory of corporate liability. See below.

97 Note Law Commission Report No 237 *Legislating the Criminal Code: Involuntary Manslaughter* and Corporate Homicide Bill and potential consequences of proposed reforms. See below.

98 As Wells (2001), above n 1 notes at p101: 'The relatively narrow doctrine [identification] … had as its governing principle that only those who control or manage the affairs of a company are regarded as embodying the company itself'. For comment as to the doctrine's limitations in terms of establishing exactly which individuals can ground corporate criminal liability see G Forlin, 'Directing Minds: Caught in a Trap' (2004) NLJ 326. Note also P Cartwright, 'Corporate Fault and Consumer Protection: A New Approach for the UK' (2000) 21 Jnl of Consumer Pol. 71.

99 Ibid.

100 P H Bucy 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minnesota L Rev 1095 at 1104ff; C Wells 'Corporate Liability and Consumer Protection: *Tesco v Nattrass* revisited' (1994) 57 MLR 817. Note outcome in *P & O European Ferries (Dover) Ltd*, above n 13, for example.

101 Sullivan, above n 18.

102 J Freedman, 'Small Businesses and the Corporate Form: Burden or Privilege?' (1994) 57 MLR 555.

103 *Attorney-General's Reference (No 2 of 1999)*, [2000] 3 All ER 182..

poration liable, the identification doctrine insulates large corporations from liability for decisions made at branch or unit levels.[104] As Glasbeek writes:

> Often, distinct legal entities operate under the same general corporate umbrella, so that, in the end, a multitude of people – not always legally linked – play a role in the things and doing that, together, make up the corporate conduct that is the object of investigation. The authorities find it difficult to identify any one person, let alone the requisite senior person, as having had the legally required intention and hands-on participation.[105]

At a more fundamental level, it is suggested that the identification doctrine is arguably also problematic in its inability to acknowledge the essence of what constitutes corporate wrongdoing.[106] Indeed, as Sullivan has observed, in its drawing of a rather narrow association between corporate guilt and the guilt of a mere individual, identification theory has potential to obscure the fact that in some instances offences may be committed as a result of systemic or organisational pressure originating directly from the corporate context.[107]

Whilst *Meridian Global Funds Management Asia Ltd v Securities Commission*[108] represents a clear attempt to 'free-up' principles of corporate criminal liability and as such has been welcomed by numerous commentators[109] for its 'clarity and flexibility' in contrast to *Tesco,*[110] attention is drawn to the fact that in its failure to reflect corporate blameworthiness, the decision is defective as a theoretically sound statement of workable principle able to deliver social justice when applied to assess the culpability of contemporary corporations. Furthermore, as previously stated, identification of behaviour requiring 'total deterrence' is fundamentally a legislative task.[111] The un-

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104 W Brookbanks, 'Corporate Manslaughter: *Attorney-General's Reference (No 2 of 1999)* [2000] 3 WLR 195' (2000) 6 NZBLQ 228.

105 H Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (2002) at 147. Compare the comments of Morland J in *National Rivers Authority v Alfred McAlpine Homes East* [1994] 4 All ER 286 at 298 – a case dealing with pollution offences by larger companies and recognising the unlikeliness of senior managers actually committing the actus reus of an offence with the accompanying mens rea: 'In almost all cases the act or omission will be that of a person such as a workman, fitter or plant operative in fairly low position in the hierarchy of the industrial, agricultural or commercial concern. With offences that cause death or serious injury, it is even more unlikely that a senior official will directly have 'blood on his hands'.'

106 Sullivan, above n 18. See generally, Clough and Mulhern, above n 2.

107 Identification theory does not address the extent to which corporate policies or systems expressly, tacitly or impliedly permit the commission of the offence in question, for example, where a company has structured its business in a manner that exposes persons (employees and customers) or property to harm, or where the company's systems for controlling or monitoring its employees to ensure their compliance with relevant laws is adequate: ibid; *P & O European Ferries (Dover) Ltd*, above n 13. The above criticisms borrow from the works of social science researchers, which predominantly demonstrate that, to some degree, corporations have a personality of their own that transcends individuals: Wells (2001), above n 1. Accordingly, it is inappropriate to view corporations simply as the sum of their natural parts. Such criticisms take for granted that it is inappropriate to attempt to transpose the individual model to the corporate context – corporations having knowledge, a mode of operation, decision-making powers and processes that differ from those of natural persons: Mann, above n 17.

108 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (JCPC).

109 S P Robert-Tissot, 'A Fresh Insight into the Corporate Criminal Mind: *Meridian Global Funds Asia Management Ltd v Securities Commission*' (1996) 17 Co Law 99 at 100; C A Ong and R J Wickins, 'Confusion Worse and Confounded: The End of the Directing Mind Theory?' (1997) JBL 524; R Grantham, 'Corporate Knowledge: Identification of Attribution?' (1996) 59 MLR 732.

110 *Tesco Supermarkets v Nattrass*, above n 5.

111 See discussion above.

certainty and lack of clarity in the test articulated in *Meridian*[112] is accordingly unacceptable, not only running counter to the fundamental principles of criminal law, but also weakening the law's ability to serve as a system for moral education in terms of clearly defining social expectations as to the responsibility of modern corporations.[113]

The indiscriminate 'spillover'[114] effects of corporate sanctions on persons such as shareholders who are removed from the commission of the offence at issue is an additional recognised deficiency of identification liability and as such further strengthens the submission that corporate fault ought to be sought in a company's corporate culture.[115]

That *Attorney-General's Reference (No 2 of 1999)*[116] demonstrates that there is some resistance to moving radically beyond identification theory as a means of grounding corporate liability in cases of serious crime is acknowledged. However, given that it is impossible for any formulation of the identification doctrine to equate with the true culpability of corporations,[117] it is contended that development of independent schemes of corporate fault, which do not rely on the traditional notions of mens rea developed in order to determine the criminality of individuals, is imperative. Indeed, as Wells has observed, the greater interests of society in the creation of a corporate 'culture of safety' may well force such change.[118]

C. Manslaughter and OHS Offences: A Comparison

In recent years, a series of large-scale disasters have tested the present law regarding corporate manslaughter[119] and stimulated significant discussion internationally in terms of current approaches to the use of the criminal law in OHS regulation. Wells and other commentators have argued that the capsizing of the Herald of Free Enterprise off Zeebrugge, which saw the death of 193 passengers and crew, marked a fundamental shift in public perceptions in terms of the failure of current regulatory offences to sufficiently respond to the increased role of corporations in causing industrial injury or death and to ensure adequate accountability for, punishment and denunciation of, and prevention of harm.[120] Nevertheless, as *Attorney-General's Reference (No 2 of 1999)*[121] demonstrates, current judicial and legislative responses toward OHS breaches and corporate man-

112 *Meridian Global Funds Asia Management Ltd v Securities Commission*, above n 5.

113 Note Douglas (1985) as cited in C Wells (2001), above n 1 at 107: 'the cultural coding of responsibility is also the coding for perceived risks'.

114 *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11; L Friedman above n 43; E Colvin, above n 8.

115 See generally French, above n 6; Friedman, ibid; B Fisse and J Braithwaite, 'Accountability for Corporate Crime' (1988) 11 Sydney LR 468 at 485-486.

116 *Attorney-General's Reference (No 2 of 1999)*, [2000] 3 All ER 182 (CA).

117 A Hainsworth, 'The Case for Establishing Independent Schemes of Corporate and Individual Fault in the Criminal Law' (2001) 65 JoCL 420 at 424.

118 Wells (2001), above n 1; C Wells 'Corporate Criminal Developments in Europe' (2001) Law Society Jnl 62. See also F Haines and A Sutton, 'The Engineer's Dilemma: A Sociological Perspective on Juridification and Regulation' (2003) 39(1) Crime, Law and Social Change 1.

119 G Forlin and M Appleby (eds), *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (Melbourne: Oxford, 2003).

120 See generally Wells (2001), above n 1 and sources cited in Part II.

121 Above n 116.

slaughter offences do not reflect this alleged shift, such violations often continuing to be regarded as regulatory and 'not truly criminal' with the consequence that only small fines are imposed.[122]

Hall and Johnstone argue that, from a legal perspective, manslaughter offences differ markedly from regulatory OHS offences, particularly in terms of the requirement for evidence of criminal fault on behalf of the personality prosecuted, and also in terms of the elements of offences embodied in OHS statutes and in the crime of manslaughter.[123] Indeed, modern OHS standards are constitutive,[124] that is, they attempt to use legal norms to constitute structures, procedures and routines which are mandated to be adopted and internalised by regulated corporations so that such structures, procedures and routines become part of the Corporation's ordinary operating activities.[125] By contrast, manslaughter is a response to fatality and as such is outcome focused, with death, as opposed to the mode of behaviour leading to that death per se, being the central issue of concern.[126]

The identification doctrine has traditionally served as the relevant legal test in determining whether a company should be prosecuted for manslaughter, the critical question in any case being whether there is sufficient evidence of manslaughter performed by an individual who can be identified as the company's 'directing mind and will'.[127]

More recently, however, the doctrine's failure to achieve organisational accountability has been increasingly obvious. Recognition of the practical impossibility of prosecuting and achieving successful conviction of all but the smallest and structurally and organisationally simplest companies for corporate manslaughter[128] has provided an impetus for numerous proposals for legislative reform internationally.[129] Whilst some jurisdictions have made a clear attempt to pursue dramatic reform,[130] these changes have varied in effectiveness. Accordingly, should New Zealand consider that the serious gaps in, and legal barriers encountered under the current law justify a change the way in which corporate criminal liability is attributed to companies (and potentially also to other

122 The distinction between regulatory offences and 'truly criminal' offences was introduced by Wright J in *Sherras v De Rutzen* [1984] 3 All ER 577 at 588 and was subsequently cited by Scarman LJ in *Wings Ltd v Ellis* [1985] 1 QB 918 at 922: 'no sort of stigma attaches to their offence on the basis of its regulatory character.' See generally Hainsworth, above n 117.

123 A Hall and R Johnstone, 'Exploring the Re-Criminalisation of OHS Breaches in the Context of Industrial Death' (2005) 8 FJLR 57.

124 H Glasbeek, 'Occupational Health and Safety Law: Criminal Law as a Political Tool' (1998) 11 Australian Journal of Labour Law 95.

125 Ibid.

126 It is, however, recognised that a failure to manage OHS systematically provides some evidence of the kind of negligence that must be 'gross' enough to support a successful corporate manslaughter prosecution: Hall and Johnstone, above n 121 at 63.

127 The absence of such evidence was the major factor resulting in the prosecution's failure to secure a manslaughter conviction of the company in *P & O European Ferries (Dover) Ltd*, above n 13, and other high-profile public transport disasters.

128 For example, as the English Government's Draft Bill for Reform acknowledges, 'since 1992 there have been 34 prosecution cases for work-related manslaughter, but only six small organisations have been convicted'.

129 Hall and Johnstone, above n 123.

130 Australia, Canada, England and Wales for example.

organisations),[131] it is important that any such change goes beyond the 'mere tinkering'[132] of questionable effectiveness, which is evident in some jurisdictions. Furthermore, whilst the dangers of emphasising manslaughter prosecutions at the expense of the prosecution of regulatory criminal offences are acknowledged,[133] it is submitted that simply enhancing the role of OHS law in bringing companies to account for, and preventing, corporate-related deaths is insufficient if the objective of any reform undertaken is to provide sufficient incentives for larger companies to address questions of human safety.[134] Contemporary legislative responses aimed at allowing the criminal law to better achieve its objectives both in relation to corporate criminal liability generally and specifically in terms of introduction of a separate corporate manslaughter/corporate killing offence are examined below.

1. *Australia*

The Criminal Code Act 1995 (Cth) represents the starting point for Australian developments in the law of corporate criminal liability, Division 12[135] of the Code introducing a new basis for attributing criminal responsibility to the corporate entity and one that is fundamentally different from the common law.[136] The Code's approach hinges on the notion of 'corporate culture', or the policies and practices adopted by companies as their method of operation.[137] As such, the regime casts 'a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco*[138] principle'.[139] As Field and Jörg state, the rationale for holding companies liable on this basis is that:

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131 Particularly in light of the courts' view that the *Meridian* approach cannot be applied in manslaughter prosecutions: *R v AC Hatrick Chemicals Pty Ltd*, unreported, Supreme Court of Victoria, Criminal Division, 8 December 1995, Hampel J; *Attorney-General's Reference (No 2 of 1999)* [2000] 3 All ER 182 (CA). See also W Brookbanks, 'Corporate Manslaughter: *Attorney-General's Reference (No 2 of 1999)* [2000] 3 WLR 195' (2000) 6 NZBLQ 228.

132 H Glasbeek, 'More Criminalisation in Canada: More of the Same?' (2005) 8 FJLR 39, regarding perceived ineffectiveness of proposed changes in England and Wales under the Draft Corporate Manslaughter Bill considered to simply 'tinker' with the application of the identification doctrine and to likewise fail to provide sufficient incentives for large companies to address the question of human safety. See also D J Roberts, 'Westray Response Flawed Legislation' The Chronicle-Herald [Halifax], 24 June 2003, p B2.

133 Mann, above n 17.

134 Friedman, above n 43.

135 The Criminal Code Act 1995 (Cth) came into effect in the Commonwealth jurisdiction on 15 March 2000. For a helpful discussion of Division 12 and the Act generally see T Woolf, 'The Criminal Code Act 1995 (Cth) – Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 Crim LJ 257.

136 The provisions of the Code owe much to the work of Professor Fisse. See generally Fisse 'Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 S Calif L Rev 1141; Fisse 'Corporate Criminal Responsibility' (1991) 15 Crim LJ 166; Fisse, above n 77; Fisse and Braithwaite, above n 29. Note also T Woolf, ibid.

137 'Corporate culture' is defined in s 12.3(6) of the Criminal Code Act 1995 (Cth) 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 takes place'.

138 *Tesco Supermarkets v Nattrass*, above n 5.

139 Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992) *Model Criminal Code Chapter 2 – General Principles of Criminal Responsibility* (AGPS, Canberra). Section 12.2 provides that harm caused by employees acting within the scope of their employment is considered harm caused by the body corporate. Section 12.3 establishes new methods for establishing the mens rea of 'corporations' where the fault element is other than negligence; offences such as manslaughter by gross negligence which form the basis of corporate manslaughter prosecutions are covered under s 12.4.

> The policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the organisation.[140]

Like Canada,[141] the Criminal Code Act 1995 (Cth) attempts to steer a middle course between overly narrow and overly broad interpretations of corporate criminal liability. Whilst the new regime continues to lean heavily on identification theory since a company is prima facie liable for the commission of offences by high-level managerial agents,[142] the reforms expand the concept of fault through a collective notion of corporate culture but mitigate it through the defence of due diligence.

In their attempt to formalise a notion of genuine corporate fault, the Australian reforms clearly represent the most original and refined effort to adapt the general principles of criminal liability to the especially complex circumstances of contemporary corporations. Nevertheless, the Criminal Code Act 1995 (Cth) highlights a fundamental conceptual weakness in the notion of 'corporate fault'. Despite considerable efforts having been made to maintain a clear distinction between subjectively-assessed faults and negligence, it is argued that it is difficult to refrain from consistently returning to negligence as the true foundation for corporate criminal liability.[143] Whilst corporate culture can provide the basis for a company's criminal liability, any contention that a company's conviction of a crime of intention may be secured by establishing only that a deficient corporate culture led to the commission of the relevant offence, or that a company was defective in maintaining a corporate culture that encouraged respect for the law, surely cannot be supported.[144] Indeed, it must be proved that the prevailing corporate culture encouraged, instigated or influenced commission of the relevant offence, or that the failure to maintain a law-abiding milieu was deliberate.[145]

The provisions of the Criminal Code Act 1995 (Cth) indeed go some way to ensuring increased corporate accountability, and as such the legislation is positive in terms of developments in corporate criminal liability generally. However, the criticisms of theorists that under the 'corporate culture' approach rule breaking is both expected and condoned within companies as a consequence of ideals such as market efficiency must be noted.[146] Furthermore, restriction of the Code's application only to federal offences means that prosecution of the offence of industrial manslaughter is exceptionally difficult, States' and Territories' adoption of similar provisions into their own

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140 S Field and N Jörg, above n 70.

141 See discussion of Bill C-45 reforms below and note D L MacPherson, 'Extending Corporate Criminal Liability?' Some Thoughts on Bill C-45' (2004) 30 Man LJ 253.

142 In s 12.3(6), a company's board of directors is defined as 'the body exercising the corporation's executive authority, whether or not the body is called the board of directors'. Similarly, high managerial agent is defined as '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'.

143 See generally, A Boisvert, 'Corporate Criminal Liability' *Paper Presented at the Uniform Law Conference*, Montreal, Canada, (2003) available at <www.ulcc.ca > viewed 12 October 2005.

144 See generally R Sarre and J Richards, 'Responding to Culpable Corporate Behaviour – Current Developments in the Industrial Manslaughter Debate' (2005) 8 FJLR 93; Criminal Law Officers Committee of the Standing Committee of Attorneys-General, above n 139.

145 Ibid.

146 See for example A Norrie, *Crime, Reason and History: A Critical Introduction to the Criminal Law* (2nd ed) (London: Butterworths, 2001) at 105; Wells (2001), above n 1; Clough and Mulhern, above n 2.

criminal codes or legislation being a prerequisite for prosecution and potential conviction.[147] To date, notwithstanding various proposals for reform in numerous States/territories, it is only ACT, Australia's smallest territory, which has implemented such legislative change. A brief outline of models explored in selected States follows below.

(a) *Australian Capital Territory (ACT)*

In 2004, by way of the Crimes (Industrial Manslaughter) Act 2003, ACT became the first Australian jurisdiction to introduce an industrial manslaughter offence.[148]

> The Act defines 'industrial manslaughter' as causing the death of a worker whilst either being negligent about causing the death of that, or any other, worker; or being reckless about causing serious harm to that, or any other, worker.[149] Section 51 is particularly critical in its provision that: (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.

Whilst section 52[150] allows for a company's negligence to be attributed by aggregation, there is much conjecture as to how the new provisions will be interpreted and applied. The courts' considerable discretion in the imposition of sanctions upon convicted corporate offenders, inter alia including the ability to order that the company take specific remedial action and to publicise the violation, has been raised as an issue of significant concern.[151] The unique issues associated with the application of sanctions against corporate actors will thus need to be navigated cautiously.

(b) *Victoria*

The notion of 'corporate culture' and criminal responsibility has long been debated by the Victorian Government. In 2001, arguably as a response to the *Carrick* case,[152] the Crimes (Workplace Deaths & Serious Injuries) Bill was introduced into the Victorian Parliament. The Bill provided that where a company's conduct 'materially contributed' to a death or serious injury, liability of up to $5 million and $2 million would respectively attach. Additionally, the Bill allowed for the imprisonment of senior officers found party to the relevant offence for terms of up to five and two years respectively.

Persistent pressure from the Victorian Employers Chamber of Commerce and the Australian Industry Group saw the Upper House reject the Bill in 2002. The current Government has indicated an intention not to reintroduce the Bill and to instead focus on increasing regulatory penalties within current OHS legislation. The ability to aggregate negligent conduct rather than requiring proof of negligence on behalf of the company's 'directing mind' has received a positive

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147 B McSherry and B Naylor, *Australian Criminal Law: Critical Perspectives* (Melbourne: Oxford University Press, 2004); A Hall and R Johnstone, 'Exploring the Re-Criminalising of OHS Breaches in the Context of Industrial Death' (2005) 8 FJLR 57.

148 Note references to Criminal Code 2002 (ACT), particularly Chapter 2 which incorporates the Commonwealth Criminal Code and its notions of 'corporate culture': Crimes Act 1900 (ACT), s 7A.

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

150 Criminal Code 2002 (ACT), s 52.

151 See Workplace OHS, *OHS and Workers Compensation in 2004 – Part 1: Challenges* available at <www.ohsim.ocpe.sa.gov.au> viewed 28 August 2005; Sarre and Richards (2005), above n 144. Note that the Act provides for a maximum fine of $1 million for large companies; $200,000 for individual senior officers, or 20 years imprisonment, or both.

152 R Sarre and J Richards 'Criminal Manslaughter in the Workplace: What Options for Legislators?' (2004) 78 Law Institute Jnl 58.

response.[153] Accordingly, amendment of existing OHS legislation, as opposed to introduction of a new regime, may well be the direction pursued in Victoria.

(c) *South Australia*

OHS legislation review and reform is currently occurring in South Australia as part of an extensive review of employment law generally.[154] Results to date include the Stanley Report, significantly emphasising the primacy of safety as the dominant aim of the legislation.[155]

The Report notes a certain level of support among employee groups for the inclusion of an industrial manslaughter offence, but opines that in light of existing common law manslaughter provisions under the Criminal Law Consolidation Act 1935, any such creation of a new offence would merely create duplication. Accordingly, consistent with the Stanley recommendations, the Occupational Heath, Safety and Welfare (SafeWork SA) Bill attempts only to implement a more extensive range of non-pecuniary penalties designed to provide 'flexibility in sentencing, and to ensure that the penalty fits the circumstances of the offender'[156].[157]

(d) *New South Wales (NSW)*

Whilst the Crimes Amendment (Industrial Manslaughter) Bill 2004 proposed corporate culpability for offences of industrial manslaughter and gross negligence causing serious injury, the NSW Government has since ruled out criminalising industrial manslaughter.[158] Nevertheless, in situations where practical measures could have been taken to avoid an accident and the risks of injury or death were reasonably foreseeable, negligent employers may still be fined heavily and jailed for up to five years. Such liability is, however, established under existing OHS legislation.[159]

2. *Canada*

Like Australia and England and Wales, Canada has experienced politically discomforting outcomes in the aftermath of disasters involving neglect of, or indifference to, dangerous conditions by corporations and their associated actors.[160] C-45: An Act to Amend the Criminal Code (Criminal Liability of Organisations) 2003[161] represents a direct legislative response to the perceived and pragmatic inability to apply the criminal law and achieve corporate accountability under the

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153 Sarre and Richards (2005), above n 144. Note also Victorian Trades Hall Council, *Corporate Accountability Campaign Statement* (2003) available at <www.vthc.org.au > viewed 17 August 2005.

154 For further discussion see Sarre and Richards, ibid.

155 B Stanley, F Meredith and R Bishop *Review of the Occupational Health, Safety and Welfare System in South Australia Vol III* at 89 available at <www.workcover.com> viewed 6 August 2005.

156 Statement made by the Hon Michael J Wright, Minister for Industrial Affairs, during Question Time, SA House of Assembly, Monday 28 April 2003.

157 Significant, and arguably very positive, proposed non-pecuniary penalties include mandatory training programmes for employers (or responsible officers of a corporate offender) and an actor's publication of its breach(es) of the Act, eg by notifying shareholders.

158 T McLean, 'NSW: Govt to Introduce Tougher Laws for Negligent Employers' Australian Associated Press Report, 27 October 2004.

159 Liability for imprisonment for first-time offenders is restricted to two years. Pecuniary penalties are set at up to $1.65 million for corporate offenders and up to $165,000 for individual managers. For further discussion see generally Sarre and Richards (2005), above n 144.

160 See for example accounts of the Westray mining affair: S Comish, *The Westray Tragedy* (1993); H Glasbeek and E Tucker, 'Death by Consensus: The Westray Story' (1993) New Solutions 3 at 4; Justice K P Richards (1997) *The Westray Story – A Predictable Path to Disaster, Report of the Westray Mine Public Inquiry*.

161 Bill C-45 received the Royal Assent in November 2003 and was proclaimed on 31 March 2004.

identification doctrine as developed judicially,[162] use of the 'guiding mind' principle as a basis of liability being recognised as 'failing to reflect the reality of corporate decision-making and delegation of operational responsibility in complex organisations'.[163] Whilst the C-45 reforms do not discount the possibility of criminal liability attaching to companies for negligence resulting in employee death, significantly the Canadian Government has decided that a separate corporate manslaughter offence is unnecessary. Furthermore, in affirming that liability may attach to individual officers of the company, the Canadian reforms are also significant for their introduction of a separate sentencing regime unique to corporate offenders,[164] although imprisonment has not been included as a penalty.[165]

In addition to the traditional means by which companies may be held criminally responsible, that is, via vicarious and identification liability, the C-45 legislation imposes new criminal liabilities regarding workplace safety.[166] These liabilities are grounded in a specific set of new legal duties written into the Criminal Code. Thus, it may be stated that the Canadian reforms attempt to change the rules for attributing all forms of criminal liability to organisations whilst also utilising existing criminal offences such as murder and gross negligent manslaughter following for example an industrial death. The effectiveness of the reforms is yet untested.

Recognition that the Canadian reforms have particular significance for their attempt to steer a middle ground that moves away from the narrower, individualistic 'directing mind' principle but stops short of punishing a company which is not, in fact, morally blameworthy for the actions of its officers or managers, is important. On this point, it is accepted that the explicit legal duty on the part of those with responsibility for directing the work of others, requiring such individuals 'to take reasonable steps to prevent bodily harm arising form such work'[167] is positive, particularly in terms of fostering workplace 'cultures of safety'[168]. However, it is argued that, notwithstanding Government endorsement of an approach for negligence offences that permits the aggregation of the acts and omissions and state of mind of the company's representatives and senior officers in

162 Despite the identification doctrine having a somewhat wider application in Canada: *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11; compare *The Rhone v The Peter AB Widener*, above n 95: commentary and judicial statements make clear that the doctrine's inherent weaknesses continue to prevent adequate corporate accountability: G Ferguson, 'Corruption and Corporate Criminal Liability' (1998), *Paper presented at the International Colloquium on Criminal Responsibility of Collective Legal Entities*, Berlin, Germany, May 1998.

163 Department of Justice, Canada, *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights – Corporate Liability* (2002) available at <www.canada.justice.gc.ca > viewed 16 October 2005. Whilst ostensibly dramatic, the C-45 reforms are the product of discussions stemming back to at least 1976.

164 Canadian Criminal Code 1985, s 735(1)(a). Ten factors of mandatory consideration are specified. This inclusion is notable as Sarre and Richards emphasise, above n 144: 'even once the appropriate characterisation of criminal liability has been determined, the issue of a suitable penalty scheme invites an additional set of questions'.

165 The Government's position is that, given that individual directors, supervisors or managers whose conduct establishes the general offence of manslaughter were already able to be charged with and potentially convicted for that offence, such provision was also unnecessary. See generally, Department of Justice, Canada, *Corporate Criminal Liability: A Discussion Paper* (2002) available at <www.canada.justice.gc.ca > viewed 18 August 2005; R Sarre and J Richards 'Responding to Culpable Corporate Behaviour – Current Developments in the Industrial Manslaughter Debate' (2005) 8 FJLR 93. Whilst the structure includes non-pecuniary penalties similar to those being introduced in Australia, hefty fines, set at the court's discretion, nevertheless continue to provide the basis of the regime.

166 For a historical perspective, see generally H Glasbeek and S Rowland, 'Are We Injuring and Killing At Work Crimes?' (1979) 17 Osgoode Hall LJ 506.

167 Canadian Criminal Code, s 217.1.

168 See Wells (2001), above n 1.

fixing liability, the C-45 reforms do not go far enough in securing the criminal accountability of corporate directors and officers, the 'corporate culture' model[169] perhaps being prematurely dismissed.[170] Indeed, where bankrupt companies or actions against parent or successor corporations are at issue, the sentencing provisions are likely to be of limited value.[171] The C-45 reforms' raising of the threshold to convict a corporate accused by now allowing the company to argue that it was not intended to benefit from the criminal wrongdoing of its officers or representatives is also of concern.[172]

In a similar fashion, it is contended that it must be questioned whether, 'elaborate as they are and innovative as they seem',[173] the C-45 reforms actually change the substance of corporate criminal liability or proffer little more than a set of variants of the identification doctrine. Indeed, as Gobert argues, it is still necessary to identify one or more individuals who have committed a true criminal offence and such persons must be of the right status, albeit that this is now defined differently, to render it sensible to hold the company – the complex organisation – responsible.[174]

3. *England and Wales*

In 1994, the Law Commission, in accordance with statutory provision,[175] reviewed the law of manslaughter and found English law as it applied to corporations in need of dramatic reform.[176] In 1996, the Commission recommended the creation of a new offence of corporate killing based on management failure falling well below what could reasonably be expected of the company in the particular circumstances where death had ensued.[177] Despite articulated Government commitment to introducing such a law, it was only in March 2005, after nearly a decade of review and consultation,[178] that the draft Corporate Manslaughter Bill was finally published.[179] As the con-

169 This model is applied in Australia. For discussion, see above.

170 Compare Boisvert, above n 143.

171 See generally, Roberts, above n 132.

172 In this respect, the reforms make it more difficult for the prosecution to convict companies than did the common law, where *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11, prevailed as the relevant test – the defence to liability applying only if no benefit was conferred either by design or result. See generally, D L MacPherson, above n 141.

173 J Gobert, 'The Politics of Corporate Manslaughter – The British Experience' (2005) 8 FJLR 1.

174 J Gobert, 'Corporate Criminality: New Crimes for the Times' (1994) Crim LR 722; Gobert (2005), above n 173; Glasbeek (2005), above n 105.

175 Law Commissions Act 1965 (UK).

176 Law Commission, *Criminal Law: Involuntary Manslaughter*, Consultation Paper No 135 (HMSO 1994) Part IV.

177 Law Commission Report, *Legislating the Criminal Code: Involuntary Manslaughter*, Report No 237 (HMSO, 1996) Part VIII.

178 Much of the delay in introducing the new offence can be attributed to arguments about the extent to which there ought to be immunity carved out for the Crown: K Bridges, 'Corporate Manslaughter – the New Landscape', available at <www.pinsetmasons.com> viewed 8 October 2005. See also Gobert (2005), above n 173.

179 Draft *Corporate Manslaughter Bill* (Cm 6497). It is noted that, subsequent to this paper's writing, the Corporate Manslaughter and Corporate Homicide Bill was introduced into Parliament on 21 July 2006. The Bill, explanatory notes, the regulatory impact assessment, and other pertinent documents regarding the policy development of the Bill are available at: <www.homeoffice.gov.uk> viewed 12 September 2006. Whilst further discussion of the introduced Bill is outside the scope of this paper, the comments of the Home Office that the Bill is not expected to be enacted in the immediate future, and that it will be carried over to the next session of Parliament are noted: available at <www.homeoffice.gov.uk> viewed 12 September 2006.

temporaneously-released Government Consultation Paper[180] states, a critical part to the proposed reforms is 'striking the right balance between a more effective offence and legislation that would unnecessarily impose a burden on business'.[181]

(a) *The new offence*[182]

The Consultation Paper declares that the Draft Bill is primarily aimed at securing a broader range of cases in which a successful conviction can be achieved 'for a specific, serious criminal offence that properly reflects the gravity and consequences of the conduct involved'.[183] Accordingly, under the Draft Bill, an organisation[184] may be prosecuted if a senior manager's gross failure to take reasonable care for the safety of the organisation's employees or members of the public results in a fatality.[185]

> 1. The Offence[186]
> (1) An organisation to which this section applies is guilty of corporate manslaughter if the way in which any of the organisation's 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.
> (4) An organisation that is guilty of corporate manslaughter is liable on conviction on indictment to a fine.

As a specifically styled offence aimed at overcoming the problems of the identification principle by including both a different definition of culpability and a new route to attribution,[187] the proposed reform provides evidence of the movement away from wholly individualistic notions of organisational criminal liability and as such is positive for its recognition of the contemporary

180 Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform* (March 2005). Consultation on the draft bill closed 17 June 2005. Reactions have been mixed, and Government response is awaited: Gobert, above n 173; K Sutton, 'UK Corporate Killing' (2005) *Ethical Corporation Online* available at <www.ethicalcorp.com> viewed 22 September 2005.

181 Ibid, 6.

182 If implemented, the proposed Corporate Manslaughter Act 2005 (UK) will codify the law and in doing so abolish the common law offence of manslaughter by gross negligence in so far as it applies to operating corporations and deaths occurring within England and Wales. See also discussion of *R v Admako* [1995] 1 AC 171 (replacing 'recklessness' with 'gross negligence' as the mens rea of manslaughter) in J Gobert and M Punch, above n 90 at 92. It should be noted, however, that Scotland and Northern Ireland are currently active in reforming the law in those jurisdictions.

183 Ibid, 7.

184 The proposed offence applies not only to corporations, but also to Crown bodies, police, and perhaps somewhat draconically also to parent companies. Core public functions, bodies setting regulatory standards, unincorporated bodies and individuals are, however, exempted from the regime.

185 *Corporate Manslaughter: The Government's Draft Bill for Reform*, 'Introduction' at 6.

186 Clause 1 Corporate Manslaughter Bill 2005. Clauses 2-5 provide supplementary information on specific aspects of the offence, including the level of management responsibility at which it will operate, how an organisation's culpability is to be assessed and the sort of activities and functions to which it will apply. 'Senior manager', 'gross breach', 'relevant duty of care' and 'corporation' are each defined in cl 2-5.

187 Whilst gross negligence has been applied as the relevant fault element and encompasses failures to act to protect the health and safety of workers and members of the general public, compare the equally innovative reforms proposed regarding criminal offences where fault elements of intention and recklessness have been advocated: A Hall, R Johnstone and A Ridgway *Reflection on Reforms: Developing Criminal Accountability for Industrial Deaths* (2004) Working Paper No 33, Australian National Research Centre for Occupational Health and Safety, available at <www.ohs.anu.edu.au> viewed 20 October 2005.

and social symbolic importance of corporate accountability.[188] Nevertheless, the Draft Bill is not without its potential difficulties.

(b) *'Management Failure'*

An organisation's senior management is defined as a person who 'plays a significant role in' –

> (a) The making of decisions about how the whole or 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.[189]

Whilst the Draft Bill makes clear that senior management conduct is able to be 'considered collectively, as well as individually',[190] it is at least arguable that it remains possible for a company to delegate all its health and safety responsibilities to lower-level management and thereby avoid prosecution.[191]

The potential effects of the very wide drafting of the term 'management failure' are similarly of concern, notwithstanding the fact that the majority of people would generally support prosecution in especially egregious cases.[192] Furthermore, acknowledging that many companies already take their health and safety obligations particularly seriously, it is submitted that the proposed legislation has potential to undermine and weaken the extremely important place health and safety compliance has within efficient, well-run corporations.[193]

(c) *Sanctions*

The sanctions for violation of the proposed corporate manslaughter offence are largely analogous to those applicable for breach of present health and safety laws.[194] As Gobert observes, the absence of more stringent penalties clearly raises questions as to the effectiveness of a separate offence, particularly in terms of the level of actual deterrence likely to be achieved by prosecution under the new regime.[195]

188 See generally, Wells (2001), above n 1 at 122.

189 Draft *Corporate Manslaughter Bill* (Cm 6497).

190 Ibid.

191 The Consultation Papers' statement that the provision 'is intended to cover, for example, management at regional level within a national organisation, such as a company with a national network of retail outlets, factories or operational sites' is acknowledged as is the document's statement that the provision 'is targeting those responsible for the overall management of each division'.

192 See generally, R Baldwin and R Anderson, *Rethinking Regulatory Risk* (London: Sweet & Maxwell, 2002); P R Glazebrook, 'A Better Way of Convicting Businesses of Avoidable Deaths and Injuries' (2002) 61 CLJ 405.

193 R Baldwin, 'The New Punitive Regulation' (2004) 67 MLR 351 at 356-360; T Hill 'Directors' Duties – Safety First?' (Winter, 2003) Dickinson Dees Newsletter of the Commercial Disputes Group: available at <www.dickinson-dees.com > viewed 3 October 2005.

194 Health and Safety at Work Act 1974 for example. Note also Government's recent introduction of the Health and Safety at Work (Offences) Bill 2004, which is aimed at increasing current penalties for violations of Health and Safety legislation.

195 Gobert (2005), above n 173 at 34. See also S Simpson, *Corporate Crime, Law and Social Control* (2002) at 22-84.

V. How Might Existing Difficulties be Reconciled or Resolved?

> It is truly enough said that a corporation has no conscience; but a corporation of conscientious men is a corporation with a conscience.[196]
>
> Henry David Thoreau

The difficulties associated with assigning mens rea to corporate actors in criminal prosecutions have troubled the courts and commentators alike for many years. It is submitted that consideration of the aggregation/'collective knowledge' doctrine and 'corporate culture'/'corporate fault' models is most useful in evaluating whether a departure from, or a reconceptualisation of, the identification doctrine is beneficial, particularly in terms of furthering the criminal law's aims of deterrence, retribution and rehabilitation. An examination of such models accordingly follows below.

A. *Aggregation/'Collective Knowledge'*

The aggregation model extends the identification and vicarious liability doctrines by, in the face of culpable corporate conduct,[197] collectivising into one criminal whole the conduct of two or more individuals acting as the company (or for whom the company is vicariously liable) in order to attach corporate criminal liability to the corporation where the relevant individuals' acts combined establish that liability but each act per se is insufficient to do so.[198] Accordingly, where an offence requires a specific level of negligence or knowledge, this can be found in the collective by way of an aggregation of the negligence or knowledge of multiple individuals.[199]

Authority for the proposition that aggregation is a workable and effective model is provided by the 1987 decision of the United States First Circuit Court of Appeals in *United States v Bank of England*[200] where the Court stated:

> A collective knowledge is entirely appropriate in the context of corporate criminal liability. … 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. It is irrelevant whether employees administering one part of the operation know the specific activities of employees administering another aspect of the operation.

It is contended that the express inclusion of the aggregation principle in the Criminal Code Act 1995 (Cth),[201] notwithstanding the doctrine's rejection at common law in England[202] and Australia[203] on the ground that the principle is 'contrary to the interests of justice' in its supplying of guilt on behalf of the company where in fact there was not guilt on behalf of an individual or

196 H D Thoreau, *Civil Disobedience* (1983) 387.

197 Including, for example, a company's wilful blindness to factual information and legal requirements: A Simester and G R Sullivan, *Criminal Law: Theory and Doctrine*, above n 6 at 253.

198 E Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self Identity' (2000) 4 Buffalo Crim LR 641 at 662; E Colvin 'Corporate Personality and Criminal Liability' (1995) 6 Crim LF 1 at 18.

199 Colvin, above n 8 at 19.

200 *United States v Bank of England* 821 F.2d 844 (1987) (1st Circ).

201 Criminal Code Act 1995 (Cth), s 12.4(2).

202 *R v HM Coroner for East Kent* (1989) 88 Cr App R 10; *Attorney-General's Reference (No 2 of 1999)*, above n 9: 'The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such'. See also Law Commission, above n 177.

203 *R v Hatrick Chemicals Pty Ltd*, unreported, Court of Appeal, Victoria, (No 1485 of 1995) Hampel J, 29 November 1995; *R v Hatrick Chemicals Pty Ltd*, unreported, Supreme Court, Victoria, Criminal Division, 8 December 1995.

individuals who could satisfy the 'directing mind and will'[204] test, serves as a clear statement of the dissatisfaction with identification theory and provides more recent evidence of the aggregation model's growing acceptability.

Commentators and the courts have argued that the aggregation model is especially useful in negligence cases, a series of minor failings by relevant officers or agents of the corporation perhaps collectively constituting a gross breach by the corporate actor of its duty of care.[205] Furthermore, the doctrine is also positive in that it can deter companies from burying responsibility deep within their corporate hierarchy.[206]

Whilst it is accepted that it may be argued that the aggregation doctrine contains a fundamental weakness in its ignoring of the reality that the real essence of corporate wrongdoing is frequently the fact that the company had no organisational structures or policy to prevent the injury or death at issue,[207] it is suggested that where the principle is applied in tandem with that of 'corporate culture'/'corporate fault', corporate accountability for criminal wrongdoing is likely to be enhanced. Indeed, there is ongoing debate as to whether the aggregation principle applies to, and is an adequate test of, liability in those forms of corporate crime that require proof of intent or will.[208] Likewise, it is recognised that the aggregation doctrine provides no justification for the expansion of the identification and vicarious models of corporate criminal liability.[209] Nevertheless, it is submitted that such justification can be found in broader considerations of corporate blameworthiness or fault.[210]

B. 'Corporate Culture'/'Corporate Fault'

In contrast to other models of corporate criminal liability, the 'corporate fault' model attempts to discover a 'touchstone of liability' in the behaviour of the corporate actor per se rather than in the attribution to the company of the conduct or mental states of individuals within the firm.[211] The touchstone of liability is the blameworthy organisational conduct, the 'fault' of the corporation, for example, the failure to take precautions or to exercise due diligence to avoid committing a particular offence.[212] Determination of a corporate actor's liability requires a focus on the interplay between the relevant infringement and a company's structures, policies, practices, procedures and 'corporate culture', such elements representing the aggregate 'will' of the corporation.[213]

Bucy[214] has proposed a standard of corporate criminal liability that turns on whether there is a 'corporate ethos' which can be held to have encouraged the commission of crime. In such cases,

204 *Tesco Supermarkets v Nattrass*, above n 5.

205 T Hagemann and J Grinstein, 'The Mythology of Aggregate Corporate Knowledge: A Deconstruction' (1997) 65 Geo. Wash. L. Rev. 210. See generally, E Colvin, above n 8; Clough and Mulhern, above n 2; Lederman, above n 198.

206 Clarkson, above n 18. See also discussion above at Parts II, III and IV.

207 Compare *P & O European Ferries (Dover) Ltd v R* (1991) 93 Cr App R 73.

208 For a helpful discussion see Lederman, above n 198; Wells (2001), above n 1, and Wells (1993), above n 3.

209 A Ragozino, 'Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach' (1995) 24 Southwestern University LR 423.

210 Gobert and Punch, above n 90 at 82-86.

211 Ibid; D Stuart, 'Punishing Corporate Criminals with Restraint' (1995) 6 Crim LF 219.

212 Ibid.

213 See generally Fisse and Braithwaite (1993), above n 29; B Fisse (1991), above n 136.

214 P Bucy 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minn L Rev 1095.

the inquiry is not limited to whether the relevant actors were sufficiently high in the corporate hierarchy, but rather also delves into aspects such as company goals and practices, responses to previous offences, and the existence and adequacy of any compliance programmes.[215] Indeed, it is these views which are reflected in the Australian Criminal Code Act 1995 (Cth).

It is submitted that the corporate fault model is attractive for its recognition that companies possess collective knowledge, have a distinct public persona, and are capable of committing offences in their own right, that is, via the collective.[216] In its assumption that a company, particularly a larger firm, is not only 'a collection of people who shape and activate it', but also 'a set of attitudes, positions and expectations' which influence or determine the modes of thinking and behaviour of persons who operate the firm,[217] the 'corporate fault' model's basis for imposing liability is likewise attractive as it is better equipped to regulate and respond to the contemporary, and often decentralised, corporation. Indeed, as Gobert[218] has observed, harm from corporate offending frequently now has more to do with systems that fail to address problems of risk and less to do with the misconduct or incompetence of individuals.[219]

The legislative model of corporate fault contained in the Criminal Code Act 1995 (Cth), providing that if an offence requires fault, 'the fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence', marks a fundamental shift in the conception of corporate criminal liability, that is, the transition from derivative to organisational liability. As such it is therefore argued that the model adds much to the development of corporate criminal liability generally and provides further support for the proposition that corporate criminal liability should cease to be viewed merely as an offshoot of personal criminal liability,[220] attention instead directed to the development of separate principles to govern these legal entities.

VI. Penalties and Sanctions: Effective Means of Holding Companies to Account?

The issue of appropriate penalties and sanctions for corporate actors following conviction is an issue which has troubled commentators and the courts for much of the last century. Whilst the proliferation of considerations and material on the topic largely renders such issues outside the scope of this work, for completeness I offer a short comment on several of the more pertinent issues.

It is submitted that Fisse and Braithwaite's[221] pyramid framework of punishment, progressing from advice, warnings, fines and voluntary discipline or remedial investigation through to court-ordered disciplinary investigation, community service, corporate criminal sanctions and corporate capital punishment such as incapacitation or restraint, has particular value.[222] In the event that New Zealand elects to follow some of its comparative counterparts and implement a corporate

215 Ibid.

216 Stuart, above n 211.

217 A Amoroso, 'Organisational Ethos and Corporate Criminality' (1998) Campbell LR 17 at 22.

218 J Gobert, 'Coping with Corporate Criminality – Some Lessons from Italy' [2002] Crim LR 619 at 621.

219 Compare J C Coffee 'Beyond the Shut-eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response' (1977) 63 Virginia LR 1099.

220 Note discussion and references above at Parts II, III and IV.

221 Fisse and Braithwaite (1993), above n 29.

222 See generally discussion in Wells (2001), above n 1; Clough and Mulhern, above n 2.

manslaughter offence, it is suggested that clear definition in the Crimes Act 1961 or at least the Companies Act 1993 of the range of penalties and sanctions companies are potentially subject to is likely to become increasingly important.

Similarly, in terms of providing greater clarity and coherence to New Zealand's criminal law, it is contended that inclusion in the Sentencing Act 2002 of aggravating and mitigating factors that a Court is required to have regard for specifically in the context of corporations would be beneficial.[223] In this sense, such provisions would also provide acknowledgment of the fundamental differences between companies and natural persons.

VII. Conclusion and Recommendations

There are serious gaps in the way in which corporate criminal liability is currently attributed to companies in New Zealand. Accordingly, there is a clear need for New Zealand companies to be made subject to a wider, more comprehensive and flexible regime of criminal liability. This could perhaps be detailed within the Crimes Act 1961, or alternatively the Companies Act 1993. Whilst there are dangers associated with emphasising manslaughter prosecutions at the expense of the prosecution of regulatory criminal offences, it is important that any reforms undertaken do not simply constitute 'mere tinkering' with the current regime.

Retention of the identification doctrine or amendment of existing OHS statutes are clearly potential alternatives that remain available. Nevertheless, the significant legal barriers encountered in prosecuting and securing conviction of corporate offenders means that a decision to retain the status quo is likely to be viewed unattractive.

Whilst both the Australian Criminal Code Act 1995 (Cth) and the Canadian C-45 legislative reforms each represent positive developments in the law of corporate criminal liability generally, particularly in terms of their consideration and combination of the aggregation and corporate fault doctrines, blind adoption of any one particular scheme is undesirable should New Zealand decide legislative reform is appropriate. Indeed, as the controversy surrounding the recently published Draft Corporate Manslaughter Bill in England demonstrates, any decision to introduce a separate corporate manslaughter offence must be carefully considered.

The criminality of companies has largely been a neglected topic in New Zealand law. However, notwithstanding the *Meridian* decision, the difficulties inherent in the identification doctrine will almost certainly require that New Zealand give careful consideration to the introduction of a new regime of corporate criminal liability at some future point. Indeed, as Snider argues, the ongoing dialectic process regarding corporate criminal liability will continue to gradually transform society's expectations of what constitutes legitimate corporate behaviour.[224] Through the process the 'price of legitimacy' – the standards of corporate behaviour necessary to secure public acceptance – will be irreversibly raised.[225]

Recent international developments in the evolving ideological climate suggest that corporate conduct that results in serious injury or death is increasingly unlikely to be lightly tolerated.[226] Indeed, explanations that a workplace death is simply the result of misfortune, an 'act of God' or an 'unavoidable accident' are already becoming more tenuous. Whilst steps in the dialectic process

223 A range of 'aggravating' and 'mitigating' factors are currently specified in ss 8 and 9 of the Sentencing Act 2002.

224 L Snider 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1997) 9 Law and Policy 37.

225 Friedman, above n 43; Snider, ibid.

226 Gobert (2005), above n 173.

generally tend to be small and incremental, a fundamental reassessment of the crimogenic capacity of companies may well prove timely, a redefinition of what constitutes acceptable corporate conduct in turn affecting how company directors and other officials perceive and conceptualise workplace risk.[227]

The 'aggregation' and 'corporate fault' models may well provide a useful framework in attempts to reconceptualise the basis by which corporate criminal liability ought to attach to companies in New Zealand. Nevertheless, regardless of whether the New Zealand legislature elects to pursue general reform of the law of corporate criminal liability and the associated development of a corporate manslaughter offence, how the criminal law's aims of deterrence, retribution and rehabilitation can be furthered in the context of serious corporate wrongdoing is a question that will continue to require much careful consideration. Indeed, as Wells observes:

> There is no magic answer to corporate power, to issues of personal safety and their interrelationship with criminal law and justice. For, in truth, this debate tells us more about ourselves as human beings and citizens, with our fears and insecurities, than it does about criminal law.[228]

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227 See Baldwin and Anderson, above n 192.

228 Wells (2001), above n 1 at 168.