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Shielded by the complex corporate structure: Unmasking the ineffectiveness of corporate manslaughter legislation

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Abstract

The limited liability company is a ubiquitous feature of modern life, however, as their presence in society grows, so does the potential for corporations to inflict harm on natural persons. In recent years, tragic events resulting in work-related deaths bring the topic of corporate manslaughter and by extension, corporate criminal liability, back into the spotlight. The concept of corporate criminal liability has been problematic since its inception. Legal doctrines have inadvertently granted large corporations immunity from criminal prosecution by enabling those who control the company to be shielded within the corporations complex structure.

This paper questions whether corporate manslaughter legislation is effective and, therefore, warranted in New Zealand. The aim of corporate manslaughter legislation in the Australian Capital Territory, Canada and the United Kingdom was to facilitate the attribution and thus, prosecution of medium and large corporations following work-related deaths. This paper is concerned with the nature and potential of these prosecutions and the perceived deterrent effect of maximum penalties. The paper concludes that corporate manslaughter legislation in the jurisdictions examined are yet to achieve their purpose. The legislation is largely symbolic. This paper analyses why New Zealand's Health and Safety at Work Act 2015 is efficient in holding large corporations liable for work-related deaths and suffices to many aspects of corporate manslaughter legislation. As such, this paper favours attempting to "recriminalise" work health and safety legislation rather than introducing an unworkable corporate manslaughter regime.

Keywords: *Corporate manslaughter, corporate criminal responsibility, attribution, identification doctrine, health and safety*

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I Introduction

The corporate body as a separate and distinct legal entity is a fundamental feature of commercial law.[1] Corporations are an omnipresent feature of modern life and are of significance to the economy. However, corporations often engage in conduct in a manner that harms natural persons. There is increasing international recognition of the extensive harms caused by large corporations and the seeming absence of attributing criminal liability to those organisations.[2] Corporate criminal liability for negligent manslaughter has been a prominent issue on the agenda for law reformers internationally, particularly in comparable jurisdictions such as Australia, Canada and England and Wales. Despite the ubiquity of international corporate criminal liability regimes, law reform in New Zealand has been limited. This is despite the "continuing concern" that New Zealand companies "lack [criminal] culpability" for the deaths they cause.[3] It is in this context that there has been the greatest momentum for reform, with increasing calls by the public to introduce an offence of corporate manslaughter in New Zealand.[4]

Unlike most Commonwealth jurisdictions, New Zealand faces a lacuna in the law that corporations may not be charged with manslaughter for work-related fatalities.[5] The purpose of this paper is to question whether companies[6] in New Zealand ought to be subject to a more extensive criminal liability regime, particularly through an offence of corporate manslaughter. To answer this question, this paper undertakes a comparative analysis of the manner in which the Australian state Australian Capital Territory, Canada and England and Wales have legislated reform. This paper evaluates the efficacy of corporate manslaughter legislation using the criteria for which the offences were introduced – to circumvent the procedural deficiencies when prosecuting large corporations. This paper will demonstrate that thus far, the law has not

[1] *Salomon v A Salomon & Co Ltd* [1987] AC 22 (HL).
[2] Penny Crofts "Three Recent Royal Commissions: The failure to prevent harms and attributions of organisation liability" (2020) 43(4) Syd Law Rw 395 at 395.
[3] Kate Nicol-Williams "Are you waiting for another disaster? Pressure mounts of Government to introduce corporate manslaughter law" *1 News* (online ed, Auckland, 26 May 2018).
[4] See generally "Calls for corporate manslaughter misguided?" *Scoop Politics* (online ed, 29 April 2013), "Charge of corporate manslaughter could be debated" *New Zealand Herald* (online ed, 15 November 2012), Nicol-Williams, above n 3.
[5] *R v Murray Wright Ltd* [1970] NZLR 476 (CA). Work-related fatalities are deaths that occur as a result of injury from work and includes employees and third parties such as members of the public who die as a result of someone else's work activity.
[6] Many types of organisations can be charged with manslaughter in Commonwealth jurisdictions, but the focus of this paper is on the commercial company. Accordingly, the terms companies and corporations and are used synonymously throughout this paper.

succeeded in its principal rationale to enable prosecutors to secure convictions of large companies.

This introduction forms Part I of the paper. Part II explains the theoretical underpinning of corporate criminal liability and its historical development which first granted corporations immunity from the criminal law. Part III provides an overview of the methods that attribute criminal liability to a corporation. Prior to corporate manslaughter legislation, corporations faced prosecution under the common law offence of gross negligence manslaughter. Corporations were attributed elements of the offence through the identification doctrine. This method of attribution views the company as a fictional entity. The doctrine locates the culpability of the company in the narrow class of natural persons who are considered its "directing mind and will". Part IV analyses how this emphasis on individuals poses practical problems in large modern corporations, where the complexity of the corporate structure raises issues over the allocation of responsibility. It is these difficulties that offences of corporate manslaughter sought to overcome.

Part V examines and evaluates key reform taken in Australia, Canada and England and Wales. In particular, the "radical" statutory model of corporate criminal liability in Australia. The offence of criminal negligence causing death in Canada and corporate manslaughter in England and Wales are also contrasted. The analysis concludes that current restrictions within the legislative schemes render the paradigm shift in corporate criminal liability less radical than it appears. The offences are merely symbolic. The legislation, when applied to large corporations, is likely to face similar procedural difficulties to the identification doctrine.

Part VI discusses whether corporate manslaughter is warranted in New Zealand. A key consideration in enacting an offence of corporate manslaughter necessitates an examination of the Health and Safety at Work Act 2015, which regulates work-related fatalities. Therefore, the interrelationship between regulatory offences, criminal law and companies are assessed. The methods of attribution and maximum penalties in health and safety law are contrasted with corporate manslaughter offences. In addition to the unworkable manslaughter provisions, other significant barriers that undermine the use of corporate manslaughter legislation are examined. In all jurisdictions, health and safety legislation remains the legislative vehicle of choice for work-related deaths.

This paper concludes that Australia, Canada and England and Wales may have succeeded in making a symbolic statement about corporate criminal liability. However, they have struggled to fulfil it in practice. Perhaps the greatest value of a corporate manslaughter offence lies in symbolism – an unmistakable recognition of the grievous hurt that corporations may collectively inflict. Symbolism, however, appears to lie in the mere existence rather than the use of the law. As such, this paper cautions against enacting an offence of corporate manslaughter in New Zealand that is modelled off the jurisdictions examined. An offence that has not demonstrably achieved its aim should not be enacted.

II The development of corporate criminal liability

A company, although recognised as a separate legal personality that is distinct from its shareholders, is an abstract entity. The persons behind the company following incorporation cannot in law be identified with the company.[7] The key conceptual problem of corporate criminal liability is forging the link between an individual response and the realities of the corporate form – a fabric of human actors.[8] As Lord Reid stated:[9]

> A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person.

Historically, the common law considered corporations as beyond the reach of the criminal law. As early as 1612, it was noted that corporations "cannot commit treason, not be outlawed, nor communicate, for they have no souls, neither can they appear in person, but by attorney."[10] The doctrine of ultra vires further inhibited an expansion of corporate criminal liability.[11] As a creature of the law, a company could only do such acts as it was legally empowered to do. Thus, any crime would be ultra vires. Following a Privy Council decision that rejected the doctrine of ultra vires in tort law,[12] the rejection was extended to corporate criminal law.[13]

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[7] *Salomon*, above n 1.
[8] Allens Arthur Robinson "Corporate Culture" as a basis for the criminal liability of corporations" (February 2008) Media Business Human Rights <www.media.business-humanrights.org> at 1.
[9] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL) at 177.
[10] *Suttons Hospital Case* [1612] 10 Co Rep 23A.
[11] Meghan Wilkinson "Corporate criminal liability: The move towards recognising genuine corporate fault" (2003) 9 Canta LR 142 at 143.
[12] *Citizens Life Assurance Company v Brown* [1904] AC 423, 427.
[13] *Harker v Britannic Assurance Co Ltd* [1928] 1 KB 766.

Additionally, "persons" was considered inapt to include a corporation.[14] This, however, was rectified by legislation. The definition of "persons" now includes an incorporated body of persons.[15] Despite this legislative recognition, the courts struggled to attribute the mens rea element of an offence to a corporate body.[16] As an artificial entity, a corporation has no "mind" similar to that of a natural person. They are therefore incapable of forming the mens rea required to satisfy the fault element of an offence.[17]

Disputes concerning the criminal liability of a corporation reflect broader ontological debates about how the law conceptualises a corporation.[18] In other words, whether the corporation is viewed as a collective of individuals (nominalist theory) or whether the corporation is regarded as an autonomous legal agent (realist theory).[19] The nominalist approach reflects the nexus of contracts theory. It asserts that corporations serve as a nexus for contracting relationships amongst individuals. Thus, a company is merely a way of referring to the conduct and culpability of the individual members of the collective.[20] Conversely, the realist approach views a company as more than just the sum of its parts. [21] Corporate bodies are seen as having a separate existence that is not dependent on its members. Thus, corporations may be held criminally liable without relying on an individual's fault to establish that liability.[22] The nominalist theory currently dominates corporate criminal liability.

The general position today is that a corporation may be convicted of crimes requiring mens rea, akin to a natural person. There are few crimes a corporation cannot be charged with. Firstly, those by which their nature cannot be committed by an artificial person such as bigamy and rape.[23] Secondly, those for which the punishment could not be passed on to a company i.e. because the presumptive minimum sentence is imprisonment.[24]

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[14] Andrew P Simester and Warren Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, New Zealand, 2019) at 287.
[15] Crimes Act 1961 s 2 and Interpretation Act 1999, s 30.
[16] Law Reform Commission of Ireland *Regulatory Powers and Corporate Offences* (LC R119 2018) at [8.18].
[17] Law Reform Commission of Ireland, above n 16, at [8.18].
[18] Eric Colvin, "Corporate Personality and Corporate Crime" (1995) 6(1) Criminal Law Forum 1 at 2.
[19] Crofts, above n 3, at 404.
[20] Neil Cavanagh "Corporate Criminal Liability: An Assessment of the Models of Fault" (2011) 75 JCL 414 at 414.
[21] Cavanagh, above n 20, at 415.
[22] Cavanagh, above n 20, at 415.
[23] *R v ICR Haulage Ltd* [1944] 1 KB 551.
[24] See for example Sentencing Act 2002, ss 102-104.

Unlike other Commonwealth jurisdictions, corporate bodies in New Zealand cannot be charged with manslaughter. This was determined as a matter of statutory interpretation: under the Crimes Act 1961, homicide is defined as the killing of a human being by another.[25] The Court of Appeal accepted the definition of "by another" excluded the possibility of a legal person being liable as a principal for manslaughter.[26]

III How are corporations held criminally liable?

The corporate body's lack of mental and physical facilities is overcome by the development of methods of attribution. As Lord Walker NPJ explained in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue*:[27]

> Attribution means, in this context, the process of legal reasoning by which the conduct or state of mind of one or more natural persons (that is, human beings) is treated as that of a non-natural person (that is, a company) for the purpose of determining the company's … criminal liability.

To evaluate the efficacy of corporate manslaughter legislation, it is first necessary to examine the range of attribution methods available. Where an attribution provision is not provided in legislation, the matter is to be determined by the common law methods of attribution. The common law identification doctrine is of particular importance. The deficiencies present in the doctrine are what corporate manslaughter legislation sought to overcome.

A Legislation

Rules of attribution may be contained in the relevant legislation. These methods of attribution are generally vicarious. The provisions enable the state of mind of an employee or agent of any seniority level to be attributed to the company. For example, s 90 of the Commerce Act 1986, stipulates:

> (1) In proceedings under this Part in respect of conduct engaged in by a person other than an individual (person A), if it is necessary to establish the state of mind of person A it is sufficient to show that a director, employee, or agent of person A, acting within the scope of the director's, employee's, or agent's actual or apparent authority, had that state of mind.

[25] Crimes Act 1961, s 158.
[26] *Murray Wright Ltd*, above n 5.
[27] *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2004) 17 HKCFAR 218 at [61].

Statutory methods of attribution are designed to eliminate the necessity to apply the divergent and sometimes various tests of the common law.[28] This is achieved by the wide scope of persons whose actions may be attributed to the company. A similar method, known as the TPA method, is prevalent in Australia. The TPA method applies to 88% of legislation applicable to corporations in Australia.[29] In New Zealand, these methods of attribution are generally reserved for regulatory offences. It may be considered inappropriate to use these methods of attribution for "true" crimes, such as corporate manslaughter, as the liability net is cast wide.

B Common law methods

1 The Identification Doctrine

The governing principle of the identification doctrine is that those who control the affairs of a company are regarded as the "directing mind and will" of the corporation.[30] As the individuals and the company are merged into one entity, the corporation will also be considered liable because such people "are" the company.[31]

The doctrine is paradoxical in that it views a corporation as having a directing mind and will of its *own*, but that directing mind and will must be derived from individuals. The doctrine originated in the civil case *Lennard*'s *Carrying Co Ltd v Asiatic Petroleum Co Ltd.*[32] Viscount Haldane LC described "the directing mind and will" as "the very ego and centre of the personality of the corporation."[33]

The doctrine was expounded in a criminal context in the leading English case *Tesco Supermarkets Ltd v Nattrass*.[34] In that case, the corporation Tesco was offering a discounted product as advertised on posters displayed in the store. Once the stock ran out an employee began to replace it with regularly priced stock without removing the posters. The company was prosecuted for offering goods at a price less than that at which they were offered.[35] In

[28] *Murphy Toenies v Family Holdings Pty Ltd as trustee for the Conway Family Trust* [2019] WASC 423 [95].
[29] Australian Law Reform Commission "Corporate attribution – principled simplicity" (27 November 2019) <www.arlc.gov.au>.
[30] *HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159 at 172.
[31] Susan Watson *The Law of Business Organisations* (5th ed, Palatine Press, Auckland, 2008) at 49.
[32] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.
[33] At 713.
[34] *Tesco*, above n 9.
[35] Trade Descriptions Act 1968, s 11(2) (UK).

terms of Tesco's organisational structure, the store manager was responsible for overseeing that the proper goods were on sale. In this respect, he had failed.

The House of Lords ruled Tesco had not committed the offence.[36] The store manager, who had no policy-related decision-making within the corporation's hierarchy was unable to be considered the directing mind and will of the company.[37] The precise definitions of who could be identified as embodying the "directing mind and will" differed between all the Lords, but their Lordships speeches make clear that those who can represent the directing mind and will are limited. All agreed it would include the board of directors collectively, while some thought it may include the managing director.[38] The identification doctrine was adopted in New Zealand in *Nordik Industries Ltd v Regional Controller of Inland Revenue.*[39]

2 Rules of Attribution

The "rules" of attribution were emphasised by Lord Hoffman in *Meridian Global Funds Asia Ltd v Securities Commission.*[40] According to his Lordship, any proposition about a company's purported criminal action involves reference to a set of rules which determine what acts and/or knowledge of certain employees are attributable to the corporation.[41] There are three categories of rules of attribution: primary, general and special. Special rules move away from the blanket application of the identification doctrine towards a more critical examination of the legislation in question.[42]

(a) Primary and General Rules

Primary rules of attribution may be contained in the company's constitution. The company documents may allocate power and responsibility by including terms such that the "decisions of the board in managing the company's business shall be the decision of the company" or "a majority vote of shareholders will be regarded as a decision of the company".[43] A company

[36] At 140.
[37] At 146.
[38] See Lord Reid at 171 and Lord Morris at 180.
[39] *Nordik Industries Ltd v Regional Controller of Inland Revenue* [1976] 1 NZLR 194 (HC).
[40] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).
[41] Stephanie Earl "Ascertaining the Criminal Liability of a Corporation" (2007) 13 NZBLQ 200.
[42] Inhouse Layer "Legal Briefing – Establishing the criminal liability of corporations" (November 2012) <www.inhouselawyer.co.uk>.
[43] *Meridian,* above n 40, at 12.

builds upon primary rules by rules of general application, which apply to natural and legal persons alike. For instance, the law of agency[44] and vicarious liability.[45]

In a practical sense, the application of primary rules and general rules to large companies is limited. In large companies, most operational decisions are taken by senior management. Relatively few decisions are made by way of a formal board or shareholder resolution.[46] Nor could it be reasonably expected for every act to be the subject of such a resolution. Additionally, most Commonwealth jurisdictions have rejected vicarious criminal liability for offences that require proof of mens rea.[47] Where a corporation is vicariously liable there is no pretence that the act or omission is the fault of the company itself.[48] Rather, the company is made liable simply for the fault of another and at times where the company may not be considered "culpable". Therefore, attributing criminal liability to a corporation vicariously is seen as violating the precepts of criminal law.[49]

(b) Special Rules

Where an offence is intended to apply to a company and application of primary and general rules are excluded, *Meridian* fashioned "special rules" to attribute a fault element to a corporation. *Meridian* is a New Zealand case heard by the Privy Council under its then jurisdiction as the final court of appeal for New Zealand. Section 20 of the Securities Amendment Act 1988 required formal disclosure by a person who became a substantial security holder in a publicly listed company as soon as they knew, or ought to have known, of their position. Through Meridian's chief investment manager, Koo, and senior portfolio manager, Ng, Meridian acquired a beneficial interest in Euro-National Corporation Ltd.[50] Although it was clear that Meridian had acquired an interest within the meaning of the Act, it was not so clear that it *knew* of the acquisition.[51]

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[44] Companies Act 1993, s 18.
[45] Ross Grantham "Attributing Responsibility to Corporate Entities: A Doctrinal Approach" (2001) 19 Company and Securities Law Journal 168 at 175.
[46] *AWA Ltd v Daniels (Deloitte Haskins & Sells)* [1992] 7 ACSR 759 at 832.
[47] Rebecca Rose "Corporate Criminal Liability: A Paradox of Hope" (2006) 14 Wai L Rev 52 at 60.
[48] Wilkinson, above n 11, at 146.
[49] Canada Department of Justice "Corporate Criminal Liability – Discussion Paper" (March 2002) <www.justice.gc.ca> at 1(a).
[50] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1994] 2 NZLR 291 (CA) at 297.
[51] Ross Grantham "Corporate Knowledge/Identification or Attribution" (1996) 59 MLR 732 at 733.

Relying on the identification doctrine, the New Zealand Court of Appeal held that the chief investment manager was the "directing mind and will" of the company.[52] Therefore, Koo's actions could be treated as the acts and knowledge of the company itself. Meridian appealed, arguing that neither Koo nor Ng were identified as being part of the directing mind and will in its constitutional instruments.[53]

The Privy Council upheld the decision, but on conceptually distinct grounds. Taking a contextual approach to attribution, Lord Hoffman held attribution is a question of whether the person's act and state of mind is fairly attributable to the company given the terms and purpose of the legislation in question.[54] Therefore, the approach in which liability will be attributed to a corporate body, according to his Lordship, is an exercise of statutory interpretation:[55]

> [G]iven that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as an act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

The premise of Lord Hoffman's judgment was that there is no overarching theory stipulating which acts will be considered those of the company. In the context of s 20 of the Securities Act 1988, to require only the knowledge of a senior employee or board member (as strict application of the identification doctrine requires) would frustrate the policy of the Act. It would place a premium on people paying little attention to the activity of the investment managers.[56]

3 Tesco vs Meridian – What attribution method prevails?

The principles derived from *Meridian* are often described as "marking a departure from the identification doctrine".[57] As *Meridian* provides a more expansive application of the identification doctrine, the scholarly reaction was generally positive and the development welcomed. However, the ambition was short-lived.

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[52] *Meridian,* above n 50, at 302.
[53] *Meridian,* above n 40, at 14.
[54] *Meridian,* above n 40, at 16.
[55] *Meridian,* above n 40, at 12.
[56] G R Sullivan "The Attribution of Culpability to Limited Companies (1996) 55 CLJ 515 at 521.
[57] *Meridian,* above n 40.

Despite Lord Hoffman's judgment in *Meridian*, subsequent judicial treatment regarding corporate criminal liability has maintained a strong commitment to attribution via the identification doctrine.[58] *Meridian* is more accurately described as a supplement, which does not necessarily set aside the doctrine of identification. As stated in *Attorney-General's Reference (No 2):*[59]

> [We] did not think that the common law principles as to the need for identification have changed … the primary "directing mind and will" rule still applies although it is not determinative in all cases. In other words, [Lord Hoffmann] was not departing from the identification theory but re-affirming its existence.

The view of the Australian Law Reform Committee is that "in New Zealand, corporate criminal liability relies exclusively on the common law identification doctrine as an attribution method."[60] However, the view of some scholars is that "[New Zealand] remain[s] under the guidance of *Meridian,"*[61] suggesting the starting point of criminal attribution to a corporate body will be to examine the legislative scheme.

The District Court recently summarised the relevant principles of criminal attribution to corporations in New Zealand, as follows:[62]

(a) The starting point of attribution is the "controlling mind" or directors of the company are those whose actions are attributable to the company.
(b) The "controlling mind" presumption is particularly strong for offences which require a full mens rea.
(c) Where applying the "controlling mind" presumption would defeat the purpose of the legislative scheme, the Court must fashion a special rule of attribution.
(d) In determining whose acts are intended to be counted as those of the company, the Court should look to the legislative scheme giving rise to the offence and its policy.

[58] *The Serious Fraud Office v Barclays* [2018] EWHC 3055 (QB), [2020] 1 CR App R 28.
[59] *Attorney General's Reference (No 2)* [2000] QB 796 (CA) at 816.
[60] Australian Law Reform Commission *Corporate Criminal Responsibility* (LC DP87, 2019) at 110.
[61] Jennifer Hill "Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?" (2003) 1 JBL 1 at 17.
[62] *Ministry for Primary Industries v Amaltal Fishing Co Ltd* [2020] DCR 453 at [42].

The proposition that the identification doctrine is the starting point of attribution in New Zealand is supported by the 2015 Supreme Court decision *Cullen v R.*[63] The approach is consistent with the United Kingdom. Lord Justice Davies recently confirmed that it is presumed the identification doctrine applies and can only be displaced if applying it would *defeat* the legislative scheme.[64] An analysis of the limited case law in New Zealand concerning corporate criminal liability demonstrates that the *Meridian* approach is often used in cases where the offence is regulatory.[65]

IV Criticisms of the current common law methods of attribution

There is extensive literature on the flaws in derivative methods of attribution. The stringency of the identification doctrine, when applied to the common law offence of gross negligence manslaughter, resulted in no prosecutions against large corporations. In the United Kingdom, 34 prosecutions under the common law offence of gross negligence manslaughter were sought prior to the enactment of the Corporate Manslaughter and Corporate Homicide Act ("CMCHA").[66] Of these, seven were successful.[67] No cases involved a large corporation. The following analysis examines why the identification doctrine and by extension, derivative models of corporate attribution, found few successful prosecutions. In particular, the doctrine fails to reflect the reality of corporate decision-making and the delegation of the conduct that makes those decisions manifest.

A The modern corporate body and an uncertain search for one individual

Since the identification doctrine was first set out in 1915,[68] there has been an "evolution in the complexity and structure of corporate bodies."[69] Strict application of the identification doctrine provides that knowledge can be imputed to the company onlu if the individual can be traced directly to the upper levels of the corporate hierarchy.[70] This does not envisage corporations with decentralised business units or being too large for a small group of people to run.

[63] *Cullen v R* [2015] NZSC 73, 1 NZLR 715.
[64] *Serious Fraud Office,* above n 58.
[65] *Cullen,* above n 63, at [37]. See also *Linework Ltd v Department of Labour* [2001] 2 NZLR 639.
[66] Allens Arthur Robinson, above n 8, at 20.
[67] Allens Arthur Robinson, above n 8, at 20.
[68] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co* [1915] AC 705.
[69] Law Reform Commission of Ireland, above n 16, at [8.55].
[70] Vicky Comino "'Corporate Culture' is the 'New Black' – its possibilities and limits as a regulatory mechanism for corporations and financial institutions? (2021) 44(1) UNSW Law Journal 296 at 301.

In the late 19th and 20th centuries, companies were used as a tool for enterprise, often owned and operated by one entrepreneur.[71] The simplistic nature of the identification doctrine was suitable for such a plain corporate structure. As the Supreme Court of Ireland recently noted in *DPP v TN*,[72] however, company structures have significantly changed. It is no longer true to say that decision-making within modern companies rests with those at the very top of the management hierarchy.[73]

The nature of modern corporate structures provides ownership of the company by its shareholders is completely divested from the company's day-to-day running. As a matter of corporate governance, delegation is a practical necessity. The daily management of any large corporation is unlikely to be carried out by a single "entrepreneur" who can be considered the directing mind and will. Rather, decision-making authority takes place at lower levels of management and is shared through a range of individuals – all enjoying significant authority but limited to the sphere of the company's operation for which they have responsibility.[74]

The move towards decentralised organisational structures is driven by a range of factors, such as corporate efficiency and competitive advantage.[75] As markets evolve, they become more complex and require specialised skills. Organisations compartmentalise knowledge and subdivide elements of operations into smaller components, allowing for greater corporate efficiency.[76] These organisational hierarchies mean that decisions and their implementation may be separated, not always documented, and often opaque.[77]

Kraakman notes that corporate structure techniques may also be used to purposely insulate directors and managers, encouraging them to turn a blind eye to the wrong-doing.[78] This further

[71] Jennifer Quaid "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1998) 43 McGill LJ 67 at 77.
[72] *DPP v TN* [2020] IESC 26.
[73] At [113].
[74] James Gobert and Maurice Punch *Rethinking Corporate Crime* (London, Butterworths, 2003) at 65.
[75] Law Reform Commission of Ireland, above n 16, at [8.57].
[76] Thomas Malone "Making the Decision to Decentralize" (29 March 2004) Harvard Business School <www.hbswk.hbs.edu>.
[77] Australian Law Reform Commission *Corporate Criminal Responsibility* (LC R136, 2020) at 229.
[78] Reinier Kraakman "Corporate Liability Strategies and the Costs of Legal Controls" (1984) 93 Yale LJ 857 at 860.

disincentivises internal reporting of suspected illegality to senior management and potentially encourages poor corporate decision-making.[79]

The pillar of the identification doctrine is, therefore, too simplistic against diffused decision-making in a large corporation, let alone a multinational enterprise. The doctrine can result in the "mind or will" being sheltered from liability.[80] Consequently, the doctrine renders large companies with widely devolved management less exposed to criminal prosecution than small companies.[81]

The difficulties of applying the identification doctrine to large corporations are by no means a recent issue. The practical difficulties can be illustrated by the 1979 MS Herald Free Enterprise capsize in the United Kingdom. Moments after leaving the Belgian port of Zeebrugge with the bow doors open, the ferry flooded and capsized killing 193 passengers and crew. The immediate cause of the flooding was due to the negligence of the boatswain, who was asleep in his cabin when he was meant to be closing the bow door.[82] The gross negligence manslaughter charges against the company failed. There was insufficient evidence to prove that a senior officer of the company, who could be identified as the company, committed the offence.[83]

The practical difficulties of the identification doctrine are still prevalent in the United Kingdom today. In 2020, two charges of conspiracy to commit common fraud were brought against Barclays Plc and its wholly-owned subsidiary, Barclays Bank.[84] During the 2008 financial crisis, Barclays did not seek state financial aid. Rather, it raised £11 billion in funds from private investors. The Serious Fraud Office ("SFO") alleged that four men made secret deals with various entities and offered a higher commission and greater discount than was offered to other investors.[85] Thus, the SFO alleged the agreements falsely represented that the same discounted share price was offered to all its investors. The SFO sought to attribute the conduct

[79] HM Revenue & Customs "Tackling tax evasion: legislation and guidance for corporate offence of failure to prevent the criminal facilitation of tax evasion" (17 April 2016) <www.assets.publishing.service.gov.uk>.
[80] Celia Wells, 'Corporate Liability and Consumer Protection: *Tesco v Nattrass* Revisited', 57 Modern Law Review 817.
[81] *The Serious Fraud Office*, above n 58, at [67].
[82] Department of Transport "Herald of Free Enterprise: Report of Court No 8074 – Formal Investigation" (1987) <www.assets.publishing.service.gov.uk> at [10.1].
[83] The jury were directed to acquit all accused: *P&O European Ferries (Dover) Ltd* [1991] Crim LR 695.
[84] *The Serious Fraud Office*, above n 58.
[85] At [28].

of four senior executives, two of whom were the CEO and CFO, to the company. Applying the identification doctrine, Lord Justice Davies held that Barclays was not criminally liable, as the CEO and CFO did not represent the directing mind and will.[86] He further concluded that a special rule of attribution was not justified. The case emphasises it is impossible to apply any broad-brush assumption that a director or senior manager, in this case, the CEO, is the directing mind and will of a company for all purposes.[87]

Tesco further illustrates the anomaly as to how an offence could ever be successfully attributed to a large corporate body. Section 11(2) of the Act required erecting a misleading advertising poster. The control required to commit the offence clearly rested around the level of the store manager.[88] Where a firm has numerous branches, as Tesco did, it is naive and unrealistic to assume the board of directors would exercise the function of erecting poster displays in individual stores.[89]

The practical issues of the identification doctrine were thought to be settled following the *Meridian* decision. This is because *Meridian* is focused on how a provision under scrutiny is intended to work – rather than on generalised explanations of how companies operate.[90] Nevertheless, as examined above, the identification doctrine remains the prominent method of attribution. The *Meridian* approach of a 'special rule', however, is not without its flaws. Applying a special rule for each provision in question leaves wide scope for judicial discretion. This undermines certainty which is problematic for corporations and runs contrary to the principle of legality.[91] Companies require clarity from judicial rulings to create policies that ensure legal compliance.[92]

B Failure to capture organisational fault

The merging of the legal (corporation) and natural (directing mind) person is a fiction necessary to facilitate the nominalist methods of attribution. However, as Fissee and Braithwaite note, to prove fault on the part of one managerial representative of the company is not to show that the

[86] *The Serious Fraud Office*, above n 58.
[87] Herbert Smith Freehills "No 'directing mind and will' found in SFO prosecution Barclays" (05 May 2020) <www.hsfnotes.com>.
[88] Trade Descriptions Act 1968 (UK).
[89] Law Reform Commission of Ireland, above n 16, at [8.85].
[90] Earl, above n 41, at 203.
[91] Law Reform Commission of Ireland, above n 16, at at [8.108].
[92] Law Reform Commission of Ireland, above n 16, at [8.108].

company was at fault but merely that one representative was.[93] The statement represents the realist theory of corporations, which view companies as culpability-bearing agents themselves.[94] According to the nominalist theory, a corporation's corporate rules, culture, policies and operational procedures can also exhibit the elements of an offence.[95] This is known as organisational fault.

Organisational fault can be illustrated by the findings of the New Zealand Royal Commission into the Mount Erebus disaster.[96] The disaster concerns the Air New Zealand flight that crashed near Mount Erebus, Antarctica, killing all 257 people on board. It was identified that the crash was the result of the flight operations centre who omitted to tell the aircrew the correct navigational coordinates.[97] Yet, the Commission found the mistake as directly attributable to the "incompetent administrative airline procedures, which made the mistake possible," rather than to the persons who made it.[98] In other words, Air New Zealand as an organisation failed.

Therefore, according to the realist perspective, the identification doctrine and special rules of attribution fail to conceptualise that criminal fault may be sourced within the corporation.[99] Organisational theories are a unique way of capturing the liability of large corporations. They should not, however, be the sole source of corporate criminal liability. It is artificial to search for liability in a corporation by reference to rules and procedures as if they were somehow independent of the natural persons who formulated and implemented them.[100] Organisational models of corporate criminal liability are well-canvassed in the literature. Contrarily, they are yet to be successfully incorporated into structures of corporate criminal law. An organisational model of fault is examined in detail in Part V.

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[93] Brent Fisse and John Braithwaite *Corporations, Crime and Accountability* (Sydney, Cambridge University Press, 1993) at 47.
[94] Tahnee Woolf "The Criminal Code Act 1995 (Cth) – Towards a Realist Vision of Corporate Criminal Liability" (1997) 2 Criminal Law Journal 257 at 264.
[95] At 264.
[96] Peter Mahon *Report of the Royal Commission to inquire into The Crash on Mount Erebus Aircraft Disaster* (1981).
[97] At [393].
[98] At [393].
[99] Fisse and Braithwaite, above n 93, at 47.
[100] Earl, above n 41, at 207.

C A prohibition against aggregation

The application of derivative models of liability is further frustrated by a general resistance against aggregation of mens rea.[101] Corporations are efficient aggregators of resources and people. As examined above, decision-making is generally the accumulation of many individuals dispersed throughout the organisational structure of the corporate body. Consequently, various elements of an offence may reside in multiple people. To enable aggregation would allow the acts and state of mind of multiple people to be collectively attributed to the organisation.

Aggregating conduct has been accepted in corporate manslaughter legislation in all three jurisdictions examined below. Aggregating mens rea has been rejected at common law in the United Kingdom[102] and Australia.[103] It is rejected on the ground that it is contrary to the interests of justice and runs the risk of turning multiple innocent actions into acts of a criminal character.[104]

There is an obvious tension between the resistance towards aggregation and notions of organisational fault by realists. If a corporation is to be autonomous in its own right, then considering the acts and knowledge of *various* people, rather than one individual, is a necessary part of assessing fault.[105] Aggregation is, therefore, typically seen as the "middle ground" between nominalist and realist theories.

Notwithstanding the doctrine's rejection, the doctrine fails to provide a panacea to corporate criminal attribution. It is palpable that similar difficulties, such as *whose* knowledge can be aggregated, will continue to arise. Implicit in the judgment of Bingham LJ in *R v HM Coroner for East Kent*, is that it could only be the knowledge of those who represent the directing mind and will.[106]

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[101] *P&O European Ferries (Dover) Ltd*, above n 83; *Attorney General's Reference,* above n 59, at 816; and Wilkinson, above n 11, at 15 for discussion.
[102] *R v HM Coroner for East Kent* (1989) 88 Cr App 4 10.
[103] *R v Hattrick Chemicals Pty Ltd* (Court of Appeal, Victoria (No 1485 of 1995).
[104] Rose, above n 47, at 76.
[105] Australian Law Reform Commission, above n 60, at [5.90].
[106] *HM Coroner for East Kent*, above n 102, at 16-17; Jonathan Clough and Carmel Mulhern *The Prosecution of Corporations* (Oxford University Press, Melbourne, 2002) at 107.

V How have existing difficulties been reconciled or resolved in other jurisdictions?

Evidently, there is strong sense of dissatisfaction amongst academic writers and the public regarding how the law holds large corporations criminally accountable.[107] Specific offences of corporate manslaughter have been enacted to address the problems inherent in the identification doctrine. The legislation has sought to achieve this, by creating new legislative methods of attribution. The following analysis will examine the efficacy of corporate manslaughter legislation in capturing the liability of large companies in Australia, Canada and England and Wales. It concludes that the inherent deficiencies are yet to be fully resolved and appear to be largely symbolic legislation.

A Industrial Manslaughter – Australian Capital Territory

Australia was the first of the three jurisdictions to enact laws that attempt to deal with organisational failings leading to deaths. Although there is no unified statutory manslaughter law throughout Australia,[108] the position within individual states varies. Australian Capital Territory, Northern Territory, Queensland and Victoria have implemented their own offence.[109] The legal position in Australia is that it is a Federal system. Each state operates a mix of legal systems – some of which are wholly codified and others that rely on the common law.[110] Each has its own Parliament and courts. At a constitutional level, lies the overarching Commonwealth Criminal Code Act 1995 ("Criminal Code") which codifies methods of attribution relevant to corporate criminal liability.

Section 12.1 of the Criminal Code states that a corporation may be guilty of "any offence". "Any offence", however, refers to federal legislation and industrial manslaughter is a state provision.[111] Therefore, the methods of attribution contained in the Criminal Code are relevant to criminal offences only where the individual state has adopted the federal law. The aim of the Federal Government in implementing the Criminal Code was for all states and territories

[107] Earl, above n 41, at 200.
[108] In 2004 there was a failed attempt to create a new offence of corporate manslaughter in Commonwealth legislation. See Alexandra Dobson "Corporate Manslaughter: International Perspectives" (2020) 2(3) Int J Manag 51 for discussion.
[109] Ciara Donnelly "Industrial Manslaughter Laws in Australia" (21 January 2020) <www.marsh.com>.
[110] Dobson, above n 108, at 55.
[111] See Criminal Code Act 1995 (Cth), s 2; Lincoln Crowley "The Basics of Commonwealth Crime" (13 March 2007) <www.criminalcpd.net.au> at 24.

to adopt the Act to ensure uniformity.[112] Despite this, the Australian Capital Territory (ACT) is the only state that has adopted the provisions.[113] Therefore, the methods of attribution contained in the Criminal Code are relevant only to ACT's industrial manslaughter offence.[114]

ACT's industrial manslaughter offence is currently contained in the Crimes Act 1900.[115] Industrial manslaughter is defined as causing the death of a worker while being either reckless or negligent about causing serious harm or the death of a worker.[116] ACT's offence is different to other jurisdictions in that it includes reckless conduct causing death as an alternative to negligent conduct.[117] At the time of writing, there is an amending Bill before Parliament to move the offence to the ACT's Work Health and Safety Act 2011.[118] The provisions remain similar, though drafted in broader terms. It now requires that a person conducting a business or undertaking ("PCBU") has a duty under the Work Health and Safety Act 2011.[119] The new offence will also enable the death of a third person, such as a member of the public, to lead to an industrial manslaughter conviction. As currently enacted in the Crimes Act, the offence is limited to the death of a "worker".[120] Under the new law, the maximum penalty for a body corporate convicted of the offence is $16.5 million – more than 10 times the current maximum penalty as contained in the Crimes Act 1990.[121] The amending Bill is currently awaiting notification and is scheduled to take effect 3 months after the notification date.[122]

This section will examine how corporations are attributed the elements required to commit industrial manslaughter in ACT, pursuant to the Commonwealth Criminal Code.[123] The provisions contained in the Criminal Code are unique in that its provisions enable a realist approach to corporations. In other words, the offence allows the prosecution to capture independent organisational fault, as opposed to exclusively deriving fault from an individual.

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[112] Section 7A of the Crimes Act 1990 (ACT) which provides s 49C is to be read in conjunction with the Criminal Code 2002 (ACT) which is modelled on the Criminal Code 1995 (Cth).
[113] Criminal Code 2002 (ACT).
[114] Australian Law Reform Commission, above n 77, at [2.10].
[115] Crimes Act 1900, Part 2A (ACT).
[116] Section 49C (ACT). Note that although offence applies to 'employers' rather than corporations, s 49A defines 'employer' broadly as any person who engages a worker or who has an agent who engages a worker.
[117] Section 49C(c)(i)-(ii).
[118] Work Health and Safety Amendment Bill 2021, s 34A (ACT).
[119] Section 34A(1)(a) (ACT).
[120] Section 34A(e)(iii) (ACT)
[121] Section s 34A(1)(b) (ACT). The maximum penalty for industrial manslaughter in the Australian Capital Territory as currently enacted in the Crimes Act 1990 is $1.62 million.
[122] ACT Government "New industrial manslaughter laws to better protect workers" (5 August 2021) <www.cmtedd.act.gov.au>.
[123] Criminal Code 2002, pt 2.5 (Cth)

As such, the provisions have been influential in framing statutory manslaughter in Canada and England and Wales. Therefore, the provisions are deserving of analysis.

1 Attribution in the Commonwealth Criminal Code

It is clear that corporate activity may be the result of the collective efforts of many people, rather than the work of any one individual. Therefore, the significant deficiency of the derivative approaches to corporate liability is its dependence on individual liability – unless an individual has committed the relevant offence, attribution cannot arise.

Part 2.5 of the Commonwealth Criminal Code was drafted with the view that the identification doctrine "was no longer appropriate as a basis for corporate criminal liability, given the flatter structures and greater delegation to junior offices in modern corporations".[124] Therefore, the Criminal Code aimed to develop a scheme that would fit the modern corporation. The model is distinctive in that it applies elements of the identification doctrine, vicarious liability, aggregation and organisational fault as tests of corporate criminal liability.[125] Of particular interest are ss 51(2)(c)-(d).[126] The provisions draw liability from a range of factors constituting a "corporate culture" that leads to, tolerates, contributes or encourages criminal offences. These provisions are discussed in detail below.

2 Physical Elements

The Code attributes the actus reus element of industrial manslaughter vicariously if the physical element is committed by a servant, agent, employee or officer acting with the actual or apparent scope of his or her employment, or within their actual or apparent authority.[127] Section 12.2 demonstrates an element of aggregation. It enables acts performed by different individuals to be attributed to the company where a single offence has multiple physical elements.[128] It does not, however, allow for aggregation to establish a sole physical element.[129]

[124] Allens Arthur Robinson, above n 8, at 1.
[125] Olivia Dixon "Corporate Criminal Liability: The Influence of Corporate Culture" (2017) 17(14) Legal Studies Research Paper Series 1.
[126] Criminal Code 2002 (ACT).
[127] Criminal Code 2002, s 50 (ACT).
[128] Australian Law Reform Commission, above n 77, at [2.39].
[129] Australian Law Reform Commission, above n 77, at [2.39].

3 Fault Elements

The offence of industrial manslaughter may be caused by recklessness.[130] Recklessness "must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence." The authorisation or permission may be established inter alia by:[131]

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

By virtue of ss 51(2)(a)-(b), liability is established through methods parallel to the identification doctrine. These focus on the conduct and fault of agents at the apex of the corporation's managerial structure. The utility of s 51(2)(a) is limited by the obvious difficulty in proving that the board has such a fault element. As Spiegel J stated, "criminal acts are not usually made the subject of voices of authorisation or ratification by corporate boards of directors."[132]

A "high managerial agent" includes "an employee, agent or officer of the body corporate with duties of such responsibility that their conduct may fairly be assumed to represent the body corporate's policy."[133] The Australian Law Reform Committee recognises that the definition suggests that a level of seniority is required, parallel to the identification doctrine.[134] Accordingly, it is likely to face similar practical obstacles as the identification doctrine.

[130] Crimes Act 1990, s 49C(c)(i) (ACT).
[131] Criminal Code 2002, s 51 (ACT)
[132] *Commonwealth v Beneficial Finance Co* 275 NE 2d 33 [1971] at 82.
[133] Crimes Act 1900 Section 51(6).
[134] Australian Law Reform Commission, above n 60, at [6.83].

The offence of industrial manslaughter may also be caused by negligence.[135] The Criminal Code provides that where negligence must be proven, the corporation's conduct may be aggregated to the corporation collectively by any number of employee's, agents and officers.[136]

(a) "Corporate Culture" Provisions

When the ACT passed the Crimes (Industrial Manslaughter) Amendment Act, it incorporated the Criminal Code concept of corporate culture in s 51.[137] These provisions refer to the culture of a corporation in its own right. They have been described as "truly innovative, [extending] the breadth of Australia's corporate liability regime far beyond any other jurisdiction".[138] This part of the Code sought to jettison nominalist methods of attribution. The provisions emphasise collective responsibility embodied in the corporation. There is no level in the corporate hierarchy beneath which attribution of liability to the corporation is impossible.[139]

"Corporate culture" is defined as an "attitude, policy, rule, course of conduct or practice existing within the body corporate.[140] The expansive definition invites the court to delve into corporate operations. The court can be expected to examine factors such as patterns of compensation, rewards for behaviour, management structure and whether it is organised in a way that encourages non-compliance and seeks to insulate certain individuals from responsibility.[141] Furthermore, a corporation may be liable for a culture that is limited only to a relevant section of the company, rather than the company as a whole.[142]

Organisational theories such as corporate culture provisions may provide an incentive for adequate communication between divisions of the corporation. Additionally, the model may be "more effective" than directors duties.[143] Under the provisions, liability inevitably becomes closely integrated at an operational level into corporate governance. As directors are ultimately accountable for their corporation's culture, it may create a corresponding obligation to monitor diligently.[144]

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[135] Crimes Act 1990, s 49C(c)(ii) (ACT).
[136] Criminal Code 2002, s 52 (ACT).
[137] Dobson, above n 108, at 58.
[138] Dixon, above n 125, at 2.
[139] Wilkinson, above n 11.
[140] Section 51(6) (ACT).
[141] Clough and Mulhern, above n 106, at 143.
[142] Section 51(6).
[143] Hill, above n 61, at 17.
[144] Hill, above n 61, at 17.

3 How successful is the offence and application of the Criminal Code?

The offence as currently contained in the Crimes Act 1900 has had no successful prosecutions since its introduction in 2003. This is somewhat unsurprising, as the effectiveness of the legislation was largely negated following the introduction of subsequent law that exempted the Commonwealth of Australia' employers and employees from its provisions.[145] Approximately 80% of ACT's employers and employees are government departments and public servants, respectively.[146] As Sarre further points out, ACT is home to a small amount of the Australian population, has no heavy industry and a small commercial quota.[147]

Despite the Australian corporate culture regime being described as a "leading example,"[148] there have been *no* reported cases – since the model's introduction in 1995 – that employ the corporate culture provisions to attribute criminal liability to any offence.[149] ***R v Potter & Mures Fishing Pty Ltd***[150] is the only case to ever discuss the provisions; Blow CJ merely noted the difficulties with the definition of corporate culture.[151]

The lack of demonstrated operation of Part 2.5 of the Criminal Code is largely due to the fact that it is expressly excluded from 65% of Commonwealth legislation.[152] It is difficult to discern any clear explanation concerning why Part 2.5 applies to some Acts, but not others.[153] The view of the Australian Law Reform Committee is that had the provisions not suffered "statutory marginalisation, any perceived limitations may have been resolved."[154]

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[145] Occupational Health and Safety (Commonwealth Employment) (Employee Involvement and Compliance) Bill 2004 (Cth).
[146] Australian Bureau of Statistics "Employment and Earnings, Public Sector, Australia" (12 November 2020) <www.abs.gov.au>.
[147] Rick Sarre "Sentencing those convicted of industrial manslaughter" (2010) ALRS 1.
[148] Law Commission for England and Wales *Legislation the Criminal Code: Involuntary Manslaughter Report* (LC R237, 1996) at 199.
[149] Australian Law Reform Commission "Corporate Criminal Responsibility – the Case for Reform" (31 December 2020) <www.alrc.gov.au>.
[150] *R v Potter & Mures Fishing Pty Ltd* (Transcript, Supreme Court of Tasmania, Blow CJ, 14 September 2015).
[151] At 464-465.
[152] Jones Day Law "The Future Direction of Corporate Criminal Responsibility in Australia" (October 2020) <www.jonesday.com> at 3.
[153] Part 2.5 is expressly excluded from many areas where corporations are the main offenders. For example, it is excluded in the Environment Protection and Biodiversity Conservation Act 1999 (Cth), National Consumer Credit Protection Act 2009 (Cth), Telecommunications Act 1997 (Cth), Taxation Administration Act 1953 (Cth) and the Fair Work Act 2009 (Cth).
[154] Australian Law Reform Commission, above n 77, at [6.109].

Part 2.5, therefore, tends to be of theoretical interest than practical utility.[155] It is not certain how the provisions work in practice. The provision's limited application may be due to the uncertainty the concept imports into an already unsatisfactory area of the law. Corporate culture is an amorphous concept that is likely to vary significantly, not only between different corporations but within the sub-culture of the corporation itself. The definition of corporate culture does not adequately capture the broader and more complex understanding of culture in a corporation. Corporate cultures are a *combination* of a functionalist and interpretive approach.[156] The former theory, provides organisational cultures take a "top-down" approach of which senior management can, and should, manipulate the organisational culture. In contrast, the latter takes a "bottom-up" approach. It argues a culture emerges that all members of a company contribute to and no single group controls.[157] Furthermore, any "corporate culture" used by the prosecution must relate to the physical act and be evidenced at the point in time that act took place. While the primary source of a corporation's culture is likely to be written, it seems highly unlikely that any corporate policy would disclose anything but a mandate to act in accordance with the law.[158]

Among other challenges faced in attempts to draw upon culture is the uncertainty as to how the Code will engage with companies of multinational enterprises. For example, when a corporation has an international presence, the corporate culture set by the parent company in one country may foster the commission of an offence by an overseas subsidiary. Where a subsidiary of a parent company engages in criminal conduct, there can arguably be no liability against the parent company unless that conduct can be directly attributed to the parent through the parent's conduct (and the conduct of its employee's and agents).[159]

While the ACT's legislation is dynamic due to the ability to prosecute for corporate culture, there is little to learn from it in practice as the demographics of workplace deaths are rare.[160] Although ss 51(2)(c)-(d) refer to the corporate culture in its own right, they are merely grounds on which it can be established that a corporate body *authorised or permitted* the commission

[155] Clough and Muhern, above n 106, at 148.
[156] Kristen Wong "Breaking the Cycle: The development of corporate criminal liability" (LLB (Hons) Dissertation, University of Otago, 2012) at 39.
[157] Alice Belcher "Imagining how a Company thinks: What is Corporate Culture? (2006) Deakin Law Review 1.
[158] Dixon, above n 125, at 1.
[159] Simon Bronitt and Zoe Brereton "Response to the proposed amendment to create a new corporate offence of failing to prevent foreign bribery" (May 2017) <www.ag.gov.au>.
[160] Dobson, above n 108, at 60.

of an offence. It is unclear whether it may be necessary to first establish the conviction of an individual offender.[161] Regardless, the existence of methods of attribution consistent with the identification doctrine in addition to the corporate culture provisions ought to be an indication that an organisational approach is not sufficient on its own.[162] The absence of practical demonstrations as to how the corporate culture provisions operate, despite being in place for over a decade, are self-explanatory. Its complexity is likely to continue to deter prosecutors from using it.[163] It has significantly hindered ACT's bold attempt to modernise corporate criminal liability and capture the criminality of large corporations.

B Criminal negligence causing death – Canada

The Supreme Court of Canada accepted the identification doctrine, with modifications, in 1985.[164] Prior to reform, the approach was called the delegation theory.[165] It was viewed as striking a middle ground between strict application of the doctrine and vicarious liability. In an attempt to recognise the complexity of corporate structures, the court held that extensive delegation of authority and geographical decentralisation will not be enough for the company to avoid liability for the actions of its key decision makers.[166] The doctrine could be applied where the Crown demonstrated that the action taken by the directing mind was (a) within the field of operation assigned to him; (b) not totally in fraud of the corporation; (c) was by design or result partly for the benefit of the company and (d) the directing minds could exercise decision-making authority on corporate matters.[167]

The reform of corporate criminal liability in Canada was driven by the Westray mine disaster in 1992. An official inquiry into the disaster, which killed 26 miners, identified profound "stupidity and neglect" on the part of the owners.[168] Intriguingly, the report drew attention to corporate culture factors, including the failure of management to instil a safety mentality in its workforce.[169] The culture exhibited instances of hazardous and illegal practices encouraged or

[161] Clough and Mulhern, above n 106, at 144.
[162] Earl, above n 41, at 209.
[163] Law Reform Commission of Ireland, above n 16, at [8.233].
[164] *Canadian Dredge and Dock Co v The Queen* [1985] 1 SCR 662.
[165] Canada Department of Justice, above n 49.
[166] Canada Department of Justice, above n 49.
[167] *Canadian Dredge and Dock Co,* above n 164, at [66].
[168] K Peter Richard "The Westray Story: A Predictable Path to Disaster: Report of the Westray Mine Public Inquiry" (1997) Westray Mine Public Inquiry <http://www.gov.ns.ca>
[169] K Peter Richard, above n 168, at "Summary".

condoned by management.[170] Warnings and concerns of the miner's safety were ignored in the promise of increased employment, profits and political rewards. All attempts to prosecute the company and its officials failed.[171]

Following the Westray mine disaster, it took ten years to introduce reform via Bill C-45. Bill C-45 represents a direct legislative response to the pragmatic inability of the law to achieve corporate liability under strict application of the identification doctrine.[172] The drafters of Bill C-45 were asked to consider criminal liability on the basis that an organisation had a culture that made for wrongdoing i.e. an organisational approach of liability similar in nature to Part 2.5 of the Australian Criminal Code.[173] The Canadian Government rejected importing notions of corporate culture during reform. They considered the provisions too vague and out of step with notions of individual responsibility.[174] Moreover, adopting a corporate culture approach would not simplify the factual investigation necessary to determine whether there had been a breach of the offence.

Bill C-45 amended the Criminal Code to permit organisations and by extension, corporations, to be more readily charged and convicted of criminal negligence causing death or bodily harm. The reform represents three purposes. Firstly, new duties were imposed for workplace health and safety. Secondly, it allows for the aggregation of conduct in cases involving negligence. Thirdly, the scope of persons whose acts and mind could be attributed (as previously reliant on the identification doctrine) was extended. The provisions aimed to provide a more expansive approach on the apex of a corporate structure by expanding the class of persons whose conduct may be attributed to an organisation. However, it did not entirely fulfil the ambitions of reformers. As Bittle points out, the reform did not introduce fundamental change.[175]

[170] K Peter Richard, above n 168, at "Summary".
[171] Canadian Labour Congress "Mourn the dead: fight for the living" (5 May 2021) <www.canadianlabour.ca>.
[172] Rose, above n 47, at 70.
[173] Harry Glasbeek "Missing the targets – Bill C-45: reforming the status quo, to maintain the status quo" (2013) 11(2) Policy Practi Health and Saf 9 at 13.
[174] Glasbeek, above n 173, at 13.
[175] Steven Bittle "Cracking down on corporate crime? The disappearance of corporate criminal liability legislation in Canada" (2013) 11(2) Policy Pract Health Saf 45.

1 The offence

Corporate manslaughter is not specifically recognised as an offence in Canada.[176] The Criminal Code does, however, have several provisions that when viewed together can result in a corporation being found criminally liable for the death of an employee. These provisions are as follows:

(i) A duty is imposed on anyone with the authority to direct how another person works, to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.[177]

(ii) Section 220 provides that anyone who, by criminal negligence, causes the death of another person is guilty of an indictable offence.

(iii) A person is criminally negligent where in doing an act or omission, shows "wanton or reckless disregard for the lives or safety of other persons".[178]

An organisation will be a party to an offence of criminal negligence causing death where: (a) the organisation's representatives acting within the scope of their authority perform the negligent act, and (b) the senior officer or senior officers collectively responsible for the organisation's activities in question departed markedly from the standard of care expected to prevent a representative of the corporation from being a party to the offence.[179] A "substantial departure" is judged objectively.[180]

In the case of a company, a senior officer includes a chief executive officer, chief financial officer and a director.[181] Although a "senior officer" appears to be a narrow class similar to the directing mind and will, the Canadian Department of Justice maintains the focus is on the function of the individual, not any particular title.[182] Both limbs of criminal negligence require the "representative" or "senior officer" to act within the scope of their authority. The company cannot plead that the representative or senior officer acted outside of their authority as a

[176] Mark Morrison and others "Business crime and investigations in Canada" (1 February 2020) Thomson Reuters Practical Law <www.uk.practicallaw.thomsonreuters.com> at 1.
[177] Criminal Code RSC 1985 C-46, s 217.1
[178] Criminal Code RSC 1985 C-46, s 219.1.
[179] Criminal Code RSC 1985 C-46, s 22.1-22.2.
[180] *R v JF*, 2008 SCC 70.
[181] Criminal Code RSC 1985 C-46, s 2.
[182] Department of Justice (Canada) "Criminal Liability of Organizations – A Plain Language Guide to Bill C-45" (2003) <www.justice.gc.ca> at 5.

defence.[183] Accordingly, a corporation may not avoid liability by stipulating in contracts with their representatives or senior officers that they are not to engage in criminal acts.[184]

2 Penalties

Where a successful conviction of criminal negligence is obtained against a company, there is no maximum quantum of the fine.[185] Factors to be considered when sentencing a corporation include the impact the sentence would have on the economic viability of the organisation and the continued employment of its employees.[186] Despite there being no maximum quantum for a fine, the level of the fine in two successful convictions[187] against corporations demonstrates the courts' unwillingness and reluctance to impose high fines. In *R v Transpavé Inc,* a safety device was purposely disabled, causing a machine that stacked concrete stones onto wooden pallets to trip and crush the worker to death.[188] Despite there being no maximum quantum of a fine, in accepting the corporation's guilty plea to criminal negligence causing death, Transpavé was fined only $100,000 CAD.[189] In *R v Metron Construction Corporation,* further discussed below, the Ontario Court of Justice imposed a fine of $200,000 CAD.[190] Following public outrate regarding the monetary fine,[191] the case was appealed.

The Court of Appeal increased the penalty to $750,000 CAD – an amount equal to over three times the net earnings of the company in its last profitable year.[192] This fine was imposed despite it being agreed during sentencing proceedings that Metron had taken several positive steps to ensure the safety of its workers. This included requiring an engineering inspection before commencing work, performing weekly job site inspections, conducting periodic meetings and fall protection training.[193]

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[183] Morrison and others, above n 176, at 3.
[184] Morrison and others, above n 176, at 3.
[185] Criminal Code RSC 1985 C-46, s 735(1)(a).
[186] Criminal Code RSC 1985 C-46, s 718.21.
[187] *R v Metron Construction Corporation* [2013] ONCJ 541 at [49]; and *R v Transpavé Inc* [2008] JQ No 1857.
[188] *Transpavé Inc* [2008], above n 187.
[189] Approximately $112,400,000 NZD at the time of writing.
[190] *Metron Construction Corporation,* above n 187, at [49].
[191] Cheryl Edwards, Jeremy Warning and Daniel Mayer "Corporate Criminal Convictions as Corporate Death Sentence? Court says companies can be fined into bankruptcy for workplace accidents" (13 September 2013) Workplace Wire <www.workplacewire.ca> at 1.
[192] *Metron Construction Corporation,* above n 187.
[193] *Metron Construction Corporation,* above n 187, at [6].

Particularly concerning is the courts' suggestion that smaller employers stand a greater risk of being subject to a penalty that threatens the viability of the business, than larger, more active employers:[194]

> In the case of a corporation that is a significant employer and whose viability is seriously threatened by the imposition of a fine, the quantum of the fine may be reasonably affected. In contrast, a corporation that has no or few employees, the impact of a fine on the corporation's economic viability may be of little consequence. If appropriate, the prospect of bankruptcy should not be precluded.

The passage is yet to be refined or clarified. An approach that courts will treat large employers more favourably should be cautioned against. It perpetuates the privilege granted to large corporations, that reform has sought to end. The courts' guidance differs from that in the United Kingdom. There, the sentencing guidelines provide the court should consider, inter alia, the effect on the employment of the innocent[195] – making no distinction between the sizes of the employer.

3 How effective is the scheme?

Despite being in effect since 2004, there have been only two convictions against corporations,[196] of which one entered into a guilty plea.[197] The companies were SME's.[198] As such, there remains limited jurisprudence on the working of the law against large corporations. Despite limited demonstrations of how the law operates, *R v Metron Construction Corporation*[199] has been described as a remarkable case, but not for all positive reasons.

In *Metron*, a construction company was charged with negligence causing death after four construction workers fell to their death due to faulty scaffolding. An investigation revealed the deaths were enabled by the site supervisor who permitted six workers to work on the swing stage, knowing that only two lifelines were available.[200] The Court accepted that the site

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[194] At [103].
[195] Sentencing Council "Corporate Manslaughter" (1 February 2016) <www.sentencingcouncil.org.uk> at "Step 6".
[196] *Metron Construction Corporation*, above n 184; *Transpavé Inc* [2008], above n 187.
[197] *Transpavé Inc* [2008], above n 187.
[198] Bittle, above n 175, at 52.
[199] *Metron Construction Corporation*, above n 187.
[200] Barry Kwasniewski "Company fines $750,000 for criminal negligence causing death" (29 October 2013) Charity Law Bulletin No 322 <www.carters.ca>.

supervisor was a "senior officer".[201] Consequently, the organisation's liability was not hindered by the hierarchical position of the criminally negligent individual.

While some have viewed this as a positive development, others believe it sets a dangerous precedent for businesses.[202] The site supervisor was an independent contractor, who did not directly work for Metron. As such, there is concern that *Metron* sets an inappropriate precedent that enables the behaviour of a low-level official to impose liability on the corporation, receiving a fine that would ordinarily make a company insolvent. By extending liability to lower-level officials, it blurs the distinction between vicarious and direct liability.

Moreover, a number of prosecutions under Bill C-45 have been sought, only to have their charges changed to occupational safety and health law offences.[203] The case *R v Fantini*[204] is instructive in this regard. The small construction company was charged with one count of criminal negligence causing death. The home-owner had instructed the on-site supervisor to slope the excavation trench at a 45 degree angle, to prevent a collapse.[205] The trench was not sloped, thus collapsed and killed an employee. The criminal negligence charges were dropped when the corporation pleaded guilty to health and safety offences.[206] The Crown has often withdrawn charges and declined to proceed with criminal charges, despite recommendations to the contrary by provincial regulator WorkSafe and local police.[207] Enforcement (or lack thereof) of Bill C-45 offers an indication of the state's interest to criminally charge and convict corporations.

This lack of enforcement appetite to prosecute companies under criminal negligence is largely attributable to the fact that Bill C-45 was introduced within the context of well-established workplace safety regulations.[208] Regulatory health and safety offences in Canada require it to be proven that a corporation has breached a relevant duty.[209] By contrast, criminal negligence requires it be proved beyond reasonable doubt the conduct by a representative was a gross

[201] At [16].
[202] Edwards, Warning and Mayer, above n 191.
[203] Glasbeek, above n 173, at [13.15].
[204] *R v Fantini* [2005] OJ No 3261.
[205] Ryan Morasiewicz and Paul Devine "Bill C-45 and Criminal Liability for Workplace Accidents" (May 2007) Miller Thomson <www.millerthomson.com> at 10.
[206] Morasiewicz and Devine, above n 205, at 10.
[207] Bittle, above n 175, at 53.
[208] Bittle, above n 175, at 54.
[209] Canadian Centre for Occupational Health and Safety "OH&S Legislation in Canada – Due Diligence" (1 October 2021) <www.ccohs.ca>.

departure of the accepted standard of care and the senior officer (or group of them) failed to take steps to avert the violating conduct. The task under Bill C-45 is, therefore, much harder for prosecutors.

Although the range of offences in Canada allows a corporation to be held liable, the reality is that the law is rarely used. The legislation has a poor enforcement record, largely due to the dominance of health and safety legislation. The offence continues to derive liability from a narrow class of persons and is likely to suffer similar evidentiary difficulties as under the common law. Accordingly, commentators have noted that of the very few successful prosecutions, they are "not exactly" what critics had in mind when pointing to the limits of the identification doctrine.[210]

C Corporate Manslaughter – England and Wales

The genesis of the Corporate Manslaughter and Corporate Homicide Act 2007 ("CMCHA") can be traced back to 1994 following a lack of company prosecutions in the wake of public disasters.[211] Although companies could be held liable for gross negligent manslaughter prior to the CMCHA, the aforementioned issues within the identification doctrine founded few successful prosecutions.

The road to reform is conceptually confusing. During reform consultation in 1996, the Commission considered a company to be a metaphysical entity only.[212] Furthermore, the stated objective of the Act is to *remove* the legal requirement under the present law to identify *individuals* within the company whose conduct is to be attributed to the company itself.[213] The Act, however, clearly defines the class of persons to whose conduct reference can be made. The focus of the Act "very much on the behaviour of those responsible for the decision making."[214]

[210] Bittle, above n 175, at 54.
[211] Henry Hearle "Corporate Manslaughter/Corporate Homicide" (BSc Environment Health (Hons) Dissertation, University of the West of Scotland, 2015).
[212] Law Commission for England and Wales, above n 148, at [6.4].
[213] Law Commission for England and Wales, above n 148, [8.4].
[214] Earl, above n 41, at 211.

1 The offence

Section 1 of the Act provides:[215]

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

a) causes a person's death, and

b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

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

a) a corporation

…

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

(4) For the purposes of this Act –

…

c) "senior management" in relation to an organisation, means the persons who play

significant roles in –

(i) the making of decisions about how the whole or substantial part of its activities are to be manager or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities.

A breach of duty will be "gross" where the conduct falls far below what can reasonably be expected of the organisation in the circumstances.[216] The Act perpetuates the same evidentiary stumbling blocks that frustrated prosecutions under the identification doctrine. It returns the

[215] Corporate Manslaughter and Corporate Homicide Act 2007 (UK).
[216] Section 1(4)(b).

focus to the evaluation of the relative contribution of individuals, as opposed to the systemic failings of the corporation.[217] As the United Kingdom Law Commission stated, under this Act, if a company has failed to notice what a competent company would have recognised "perhaps because the way it was structured" then the company would not be found guilty under this offence.[218]

The Act appears to accept some concept of aggregation in limited form by its reference to senior management constituting the persons who "play significant roles" (note the use of the plural). It nonetheless remains undetermined whether wrongful acts of employees can be amalgamated to the wrongful acts of senior managers in determining whether a management failure has occurred.

Section 4(c)(ii) allows account to be taken of the corporations management and any systematic shortcomings while assessing the negligence of the body as a whole. Additionally, the court is permitted to consider organisational factors such as attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure or to have produced tolerance of it.[219] In this respect, the Act incorporates concepts of organisational (realist theory) fault.

However, the organisational assessment is qualified by the requirement that a substantial element of the breach must be due to the way senior management managed or organised activity. The term "senior management" rather than "corporate failure" is an indication that the concept is a refinement of the "directing mind" doctrine. In other words, the law is still looking for decisions made by a person high within the corporate hierarchy in order to find the corporation primarily liable**.** The requirement of a "substantial" contribution flowing from senior management perpetuates the paradox that flows from the identification doctrine – that smaller companies remain easier to prosecute than large ones.[220] Despite the intention for the CMCHA to overcome the problems of the identification doctrine by including a new route to attribution and a different definition of culpability,[221] the Act simply applies a gloss upon the

[217] Lucy Hooper "Are Corporations free to kill? Rethinking the law on Corporate Manslaughter to better reflect the artificial legal existence of corporations" (2019) Plymouth Law and Criminal Justice Review 150.
[218] Law Commission for England and Wales, above n 148, at [3.8].
[219] Section 8(2)(3)(a)).
[220] Law Reform Commission of Ireland, above n 16, at [8.212].
[221] Rose, above n 47, at 73.

identification doctrine in the form of the "senior management test". Incidentally, the advice of the Crown Prosecution Service is:[222]

> When considering a prosecution under the Act, it is essential to obtain an organogram of the organisation in order to identify senior management and to use that information to determine whether a substantial element of the breach was at senior management level.

It should be noted that under the CMCHA, personal liability is excluded. The Act does not apply to directors or other individuals with a senior role in the company. Accordingly, s 18 provides an individual cannot be guilty of aiding, abetting, counselling, procuring, encouraging or assisting the commission of the offence of corporate manslaughter.

2 Penalties

Penalties under the CMCHA include fines, remedial orders and publicity orders. Remedial orders require the organisation to remedy the management failure.[223] A publicity order requires the organisation to publish the conviction in a specified manner. This could include any remedial steps taken, the particulars of the offending or the amount of the fine.[224]

Where a fine is imposed, the advice of the Sentencing Council is that it ought to be large enough to have a real economic impact that would "bring home to an organisation the importance of operating in a safe environment."[225] Therefore, fines are intended to be punitive and significant. The United Kingdom Sentencing Council guidelines, reformed in 2015, provide comprehensive steps to consider when sentencing companies for corporate manslaughter. A range of factors are considered including the foreseeability of serious injury; how far short of the appropriate standard the offender fell; and whether the breach was isolated or common and the number of deaths that occurred. Companies are expected to provide comprehensive accounts for the last three years, to enable the court to assess the corporation's status. According to the Sentencing Council, particular attention ought to be paid to turnover, director's remuneration and profit before tax.[226]

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[222] Crown Prosecution Service "Corporate Manslaughter – Legal Guidance" (16 July 2018) <www.cps.gov.uk> at "Senior Management".
[223] Health and Safety Executive "Corporate Manslaughter FAQ's" <www.hse.gov.uk>.
[224] Health and Safety Executive, above n 223.
[225] Sentencing Council for England and Wales "Definitive Guideline: Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences" (2015) <www.sentencingcouncil.org.nz> at 10.
[226] At 6.

The guidelines provide that a micro organisation (0-9 employees) with a turnover of up to £2,000,000 may be fined between £180,000 and £540,000, with a suggested starting point of £300,000. Conversely, a large organisation (250+ employees) with a turnover exceeding £50,000,000 convicted with a high level of culpability may be fined between £4,800,000 and £20,000,000. A scaling of fines avoids the deterrence trap i.e. where a fine is too low it provides no deterrent. Conversely, too high and it will send a company into an insolvent state where no fine is likely to be recovered at all.[227] The guidelines do, however, indicate that in some cases it may be an acceptable consequence for a fine to put the corporation out of business.[228]

3 How successful is the regime?

Despite being enacted in 2007, the CMCHA did not see its first successful prosecution until 2011.[229] Although the offence was designed to capture large multi-faceted organisations, the vast majority of successful prosecutions under the CMCHA have been of micro or small organisations. As such, many commentators have stated the Act is "impotent" against large companies.[230] *R v CAV Aerospace* is the largest company convicted under the CMCHA to date.[231] The company at the time had 600 employees.[232] It is also the only case where a parent company has been indicted for the death of a worker caused by a subsidiary. The case concerned the death of an employee who was crushed by dangerously stacked heavy metal Airbus parts. *CAV Aerospace* is often referred to as "the most important case to date" suggesting that accusations that the Act is impotent against large corporations are incorrect.[233] This argument must be doubted.

Although CAV Aerospace is a large company,[234] its organisational structure was not complex. Prosecution of the parent company appeared to be the most appropriate course. The senior manager at the subsidiary, CAV Cambridge, reported to the parent company's sole director,

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[227] Tasmania Law Reform Institute *Criminal Liability of Organisations Final Report* (LC R09, 2007) at 58.
[228]United Kingdom Sentencing Council "Corporate Manslaughter" (1 February 2016) <www.sentencingcouncil.org.uk>.
[229] *R v Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337.
[230] S F Jones and L Field, 'Are Directors Getting Away with Manslaughter? Emerging Trends in Prosecutions for Corporate Manslaughter' (2014) 35 Business Law Review 158 at 163.
[231] *R v CAV Aerospace Ltd* (Central Criminal Court, 31 July 2015).
[232] Dobson, above n 108, at 66.
[233] Steve Tombs "The UK's Corporate Killing Law: Un/fit for purpose?" (2018) 18(4) Criminol Crim Justice 1 at 11.
[234] A large company in the United Kingdom is one which has 250 employees or more. See Matthew Ward "Business Statistics: Briefing Paper" (22 January 2021) House of Commons Library <www.researchbriefings.parliament.uk> at 5.

who was also a senior director of the subsidiary. The case was, therefore, relatively simple. The sole director of the parent company received "clear, unequivocal and repeated warnings" of the precise risk that lead to the subsequent fatality.[235] Moreover, prosecution of the parent company was appropriate to circumvent the emerging trend where small companies cease trading before sentencing. Indeed, CAV Cambridge closed operations prior to the trial.[236] Thus, any fine levied against them would not have been paid. Six years on, the case remains isolated.

Despite noble intentions, the stringency of the "senior management test" leaves the CMCHA with a narrow field of application limited to SME's. A large body of data supports this, particularly the fact that of the 26 prosecutions under the CMCHA, 25 of these are likely to have faced successful prosecution under the common law offence of gross negligence manslaughter and the identification doctrine.[237] The severe underutilisation of the CMCHA in large corporations reflects the difficulties arising from companies that can continue to obfuscate behind a large and complex corporate structure.[238]

VI New Zealand

Corporate criminal liability is a largely neglected topic in New Zealand. Events such as the Pike River Mine tragedy, the collapse of the Christchurch Television (CTV) Building and the White Island disaster resulted in numerous calls for a corporate manslaughter offence in New Zealand.[239] An offence of corporate manslaughter was considered during the reform of the Health and Safety at Work Act 2015 ("HSW Act").[240] The opinion of the Select Committee

[235] Simon Daniels *Corporate Manslaughter in the Maritime and Aviation Industries* (Taylor and Francis Ltd, London, 2016) at 93.
[236] Dobson, above n 108, at 67.
[237] Sharon Hartles "Unmasking ineffectiveness: The UK's Corporate Manslaughter and Corporate Homicide Act 2007" (2020) The BSC Blog <www.thebscblog.com>.
[238] Etsuko Lim "Piercing the Corporate Veil: Assessing the effectiveness of the Corporate Manslaughter and Corporate Homicide Act 2007 ten years on" (2017) Cambridge University Law Society <www.culs.org.uk>.
[239] Max Towle "Corporate manslaughter law considered" (24 June 2015) Radio New Zealand <www.rnz.co.nz>; MinterEllisonRuddWatts "Health and Safety Update – Justice Minister recommends corporate manslaughter provision" (26 June 2015) <www.minterellison.co.nz>.

was that increased fines under the HSW Act were sufficient to ensure employers would meet their duty of care.[241] Thus in their view, a corporate manslaughter offence was not necessary.[242]

There is clearly an overlap between corporate manslaughter and health and safety offences that cause death. Although New Zealand does not have a corporate manslaughter offence, a corporation may be held *criminally* liable under the HSW Act pursuant to the definition of "person" in s 16. The following analysis examines whether New Zealand's quasi-criminal regime suffices to corporate manslaughter legislation. The effect an offence of corporate manslaughter may have on business and foreign investment in New Zealand is considered. Finally, policy arguments for and against introducing an offence in light of experience in other jurisdictions is examined.

A Health and Safety at Work Act 2015

The HSW Act aims to secure the health and safety of workers, officers and third parties by imposing duties on persons conducting a business or undertaking (PCBU).[243] A breach of a duty attracts a criminal sanction.[244]

Duties are divided into three tiers, representing varying levels of culpability. Tier two and three-level offences are strict liability offences, obviating the need for proof of mens rea.[245] The maximum penalties for a corporation for tier two and three convictions are $1.5 million and $500,000, respectively.[246]

Section 47 is a "tier one" offence. It is the most serious offence for failure to comply with duties contained in the HSW Act. It involves reckless conduct in respect of a duty:[247]

> (1) A person commits an offence against this section if the person—
>
> (a) has a duty under subpart 2 or 3; and
>
> (b) without reasonable excuse, engages in conduct that exposes any individual to whom that duty is owed to a risk of death or serious injury or serious illness; and
>
> (c) is reckless as to the risk to an individual of death or serious injury or serious illness.

[241] Stephen Blumenfeld "Dying for Work – Workplace Safety and Corporate Liability" (21 May 2018) Victoria University of Wellington <www.wgtn.ac.nz> at 2.
[242] Blumenfeld, above n 241, at 2.
[243] Sections 36-46.
[244] Subpart 4, ss 47-49.
[245] Sections 48 and 49
[246] Subpart 4, ss 47-49.
[247] Section 47.

The maximum penalty for a breach of s 47 is $3 million for a corporation,[248] reflecting the severity of the offence. The penalties for breaches of health and safety duties were increased significantly following the enactment of the HSW Act 2015. The HSWA's statutory predecessor, the Health and Safety in Employment Act 1992, contained a significantly lower maximum penalty than those in other comparable jurisdictions. The monetary penalty for the most serious health and safety breaches was a maximum fine of $500,000.[249] Now, the maximum penalty for breaches of HSW Act in New Zealand are consistent with other jurisdictions. For example, the Australian state Queensland also imposes a maximum penalty of $3,000,000 AUD.[250]

B Contrasting New Zealand Health and Safety Law with Corporate Manslaughter

1 Systemic Failures

It is generally argued that breaches of corporate manslaughter involve systemic failures, thus, are necessary to provide liability in these scenarios where health and safety cannot.[251] For example, the United Kingdom Sentencing Guidelines provides that corporate manslaughter is committed where there is both a gross breach of a duty of care, and failings of senior management in the way that the business is run from a safety perspective.[252] Conversely, health and safety offences in the United Kingdom are committed where the accused company cannot show that it was not reasonably practicable to avoid a risk of injury or lack of safety.[253]

Under the HSW Act in New Zealand, however, companies can and have been held liable for systemic failures. For example, the Ports of Auckland were fined $540,000 following a "systemic failure" to maintain and monitor a culture of compliance by operating a bonus scheme that rewards productivity at the expense of safety.[254] Another charge brought against the Ports of Auckland which involved continuous harbour speeding breaches, was also described in court as a "systemic failure."[255]

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[248] Section 47(3)(c).
[249] Health and Safety in Employment Act 1992, s 49.
[250] Work Health and Safety Act 2011, s 31(1)(c) (Queensland, Australia).
[251] The Legal 500 Inhouse Lawyer "Sentencing guidelines for corporate manslaughter" (June 2010) <www.inhouselawyer.co.uk>.
[252] Above n 251.
[253] Above n 251.
[254] *WorkSafe New Zealand v Ports of Auckland Ltd* [2020] NZDC 25380 at [11].
[255] Chelsea Boyle and Sam Hurley "Leslie Gelberger tragedy: Ports of Auckland fined $424,000 for 'systemic failure' (24 July 2020) *NZ Herald* <www.nzherald.co.nz>.

2 Third Parties

In many jurisdictions, such as the Australian states Queensland and ACT, health and safety laws are only relevant to the death of a worker. [256] In other words, duties do not extend to third parties of the working relationship, including customers, clients, visitors and neighbours.[257] Corporate manslaughter charges are, therefore, considered necessary to apply in situations where third parties are involved, as health and safety law do not.[258] New Zealand's position on this can be distinguished from Australia. Following reform in 2015, New Zealand's HSW Act 2015 extends PCBU's duties to third parties and those affected by the work.[259] Thus, the necessity to extend liability to cover the deaths of third parties through a corporate manslaughter offence does not arise.

3 Attribution

New Zealand is a nation of small and micro-businesses. SME's represent 97.3% of all businesses in New Zealand.[260] MSB's and large enterprises, however, are the powerhouse of employment in New Zealand. Large entities constitute 34.8% of employment in New Zealand – despite only representing 0.5% of businesses in New Zealand.[261] Employment growth in the MSB sector is the strongest sector, increasing by 24% from 2014 to 2018.[262] MSB's represent just 2.2% of businesses in New Zealand.[263] These statistics demonstrate the need to protect workers, consumers and the general public from work-related deaths caused by corporations of *all* sizes.

It must be remembered that the rationale in enacting corporate manslaughter reform in all three jurisdictions examined was to expand the net of corporate criminal liability. This was to enable prosecutors to secure convictions of medium and large companies, which were unsuccessful under the pre-existing identification doctrine. Part V has demonstrated that the law thus far,

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[256] Safe Work Australia "Review of the Model WHS Laws Report: Final Report" (25 February 2019) <www.safeworkaustralia.gov.au>.
[257] Safe Work Australia, above n 256.
[258] Stephanie Bishop "Corporate manslaughter: Is it New Zealand's turn to introduce the Crime? (July 2014) Company and Securities Law Bulletin 59 at 62.
[259] Section 36(2).
[260] Ministry of Business Innovation and Employment "Small Business in New Zealand" (28 September 2020) <www.mbie.co.nz>.
[261] Ministry of Business Innovation and Employment, above n 260; Grant Thornton "The power and potential of the mid-size business: New Zealand mid-market report 2019" (September 2019) <www.grantthornton.co.nz> at 6.
[262] Thornton, above n 261, at 6.
[263] Thornton, above n 261, at 6.

has not succeeded in this purpose. SME's continue to bear the brunt of prosecution for corporate manslaughter offences. This is largely due to the fact that the methods of attribution in corporate manslaughter offences reflect a broader version of the identification doctrine, therefore, echoing familiar practical issues. This is prevalent in all the examined jurisdictions in this paper, which enable attribution from a certain class of persons, often a "senior officer".

Attribution in New Zealand's HSW Act retains a derivative approach. However, it extends attribution *significantly* wider than any manslaughter offences considered in this paper:[264]

> If, in any civil or criminal proceedings under this Act in respect of any conduct engaged in by a person other than an individual, being conduct in relation to which any provision of this Act or regulations applies, it is necessary to establish the state of mind of the person, it is sufficient to show that an officer, employee, or agent of the person, acting within the scope of his or her actual or apparent authority, had that state of mind.

Therefore, s 160 provides that the state of mind of even a low-level employee who satisfies the elements of an offence can be attributed to the corporation, without needing to establish the hierarchy of the individual.[265] As corporations evolve, they will continue to exhibit horizontal organisational structures as a matter of corporate efficiency and competitive advantage. The law must keep pace with these corporate structures – something corporate manslaughter legislation has failed to do.

Corporate manslaughter charges are intended to complement, rather than replace health and safety legislation.[266] Indeed, 20 of the corporate manslaughter convictions under the CMCHA have been brought concurrently with breaches of health and safety.[267] From 2008 – 2015, there were 63 successful prosecutions for work-related fatalities under the United Kingdom's Health and Safety at Work Act 1974.[268] Comparatively, there were only 12 convictions under the CMCHA during this period.[269] The data confirms that the CMCHA pales in comparison to other legislative vehicles for work-related deaths. The CMCHA very much remaining the

[264] Section 160.
[265] *WorkSafe New Zealand v Waste Management NZ Ltd* [2021] NZDC 12388 at [79].
[266] Phillip Youdan "Focus on Corporate Manslaughter" <www.crippspg.co.uk>.
[267] The Crown Prosecution Service "Figures regarding prosecutions of Corporate Manslaughter since Feb 2019" (5 March 2020) <www.cps.gov.uk>.
[268] Sarah Field and Lucy Jones "Is the Net of Corporate Criminal Liability under the Corporate Homicide and Corporate Manslaughter Act 2007 expanding?" (2015) 36(6) Bus Law Rev 215 at 217.
[269] The Crown Prosecution Service "Figures regarding prosecutions of Corporate Manslaughter since Feb 2019" (5 March 2020) <www.cps.gov.uk>.

vehicle of second choice.[270] This issue is also particularly prevalent in Canada, where Bill C-45 was introduced within the context of a well-established set of provincial workplace safety regulations.[271] In both jurisdictions, there is little incentive for the Crown prosecutors and police to get wrapped up in complex criminal proceedings when more streamlined methods for responding to workplace accidents already exist.[272]

In both jurisdictions, corporate manslaughter offences are often dropped in favour of guilty pleas for health and safety offences.[273] Glasbeek suggests that guilty pleas like this indicate that Crown prosecutors are willing to hold corporate manslaughter or equivalent charges over the heads of corporate executives as a means of securing regulatory convictions against them and/or the company.[274] Alternatively, the lack of willingness to prosecute and use corporate manslaughter law may be due to procedural difficulties in methods of attribution under corporate manslaughter legislation.

It is often argued that enacting corporate manslaughter legislation in New Zealand has the potential to improve community confidence.[275] However, the public must be confident that a model of corporate manslaughter will enable justice to be administered fairly and appropriately. To achieve this involves ensuring the law is effective in its ability to convict corporate defendants of *all* sizes. The lack of corporate manslaughter prosecutions and case law is a vibrant indication that the most complex large companies – which the offences intended to bring to account – remain untouched. Therefore, where death has occurred, proceedings under the HSW Act are likely to result in lower costs and faster remedies than an offence of corporate manslaughter.

4 Maximum penalties

There may be reduced incentives to prosecute a corporation under corporate manslaughter legislation if penalties were set at the same level as breaches of health and safety law. Thus, corporate manslaughter charges often have significantly greater maximum penalties. It does not follow, however, that convictions of corporate manslaughter attract a sentence that reaches

[270] Field and Jones, above n 268, at 217.
[271] Des Taylor and Geraldine Mackenzie "Staying focused on the big picture: Should Australia legislate for corporate manslaughter based on the United Kingdom model?" (2013) 37 Crim LJ 99.
[272] Bittle, above n 175, at 54.
[273] Taylor and Mackenzie, above n 271.
[274] Glasbeek, above n 173, at 16.
[275] Paul Almond "Regulation Crisis: Evaluating the potential legitimising effects of corporate manslaughter cases" (2017) 29(3) Law and Policy 421.

the putative maximum figure – or for that fact, minimum. The 2010 United Kingdom Sentencing Guidelines Council states that appropriate fines for convictions of corporate manslaughter will "seldom be less than £500,000."[276] Yet, of the 22 convictions secured to date under the CMCHA, a mere five convictions have attracted a sentence that reaches the putative *minimum.*[277]

Proponents of corporate manslaughter offences view the "harsh" maximum penalties as affording greater reason for compliance and deterrence.[278] This argument must be doubted. High maximum penalties are of little use if the actual fines imposed by the courts are small. Every successful prosecution under the CMCHA in the United Kingdom and criminal negligence in Canada has imposed a fine *below* the maximum penalty for breaches of health and safety in New Zealand.[279] In other words, no company in England and Wales or Canada has been fined more than the equivalent of $3,000,000 NZD – the maximum penalty for a breach of s 47 of the HSW Act.[280] The actual penalties imposed by courts are no "harsher" than the monetary penalties available under New Zealand's health and safety framework. Therefore, corporate manslaughter penalties are unlikely to provide any further deterrent effect than health and safety legislation.

In Canada and the United Kingdom, a charge of criminal negligence or corporate manslaughter, respectively, is almost always brought concurrently with relevant health and safety offences. Should New Zealand consider it warranted to enact an offence of corporate manslaughter, the possibility of significant maximum penalties from both legislative schemes must be considered through a unique New Zealand lens and reflect the potential pitfall for SME's who make up 97.3% of New Zealand's businesses.[281] Increasing fines will not make a difference to these businesses who will already struggle to pay.

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[276] Sentencing Guidelines Council "Corporate Manslaughter & Health and Safety Offences Causing Death – Definitive Guideline" (2010) <www.sentencingcouncil.org.uk> at [24].
[277] *CAV Aerospace*, above n 231*; Health and Safety Executive v Baldwins Crane Hire Ltd* (Preston Crown Court, 22 December 2015); *R v Bilston Skips Ltd* (Wolverhampton Crown Court, 16 August 2016); *Health and Safety Executive v Ozdil Investments Ltd* (Chelmsford Crown Court, 19 May 2017); and *Health and Safety Executive v Martinisation (London) Ltd* (Central Criminal Court, 7 July 2017).
[278] Lim, above n 238.
[279] The Crown Prosecution Service, above n 267.
[280] The largest fine imposed to date under the CMCHA is £1,200,000. See *Martinisation (London) Ltd*, above n 277.
[281] Anthony Harper "Leading lawyer's doubts about proposed corporate manslaughter law" (29 April 2019) Stuff <www.stuff.co.nz>.

It must be questioned whether the public interest is served by adding another fine under corporate manslaughter to penalties already imposed by a body such as WorkSafe. Punitive financial penalties imposed on corporations are likely to be passed to consumers through increased cost of goods and services. Alternatively, where a corporation can assimilate the loss by reducing labour costs, it is the innocent employees who pay. In these situations, penalties also risk a deterrence trap: where a certain monetary level is reached and the company becomes insolvent. In other words, any fine levied against the company is not paid at all. The United Kingdom has also seen a similar emerging trend where companies cease trading before corporate manslaughter sentencing, leaving the fine unpaid.[282] This issue was prevalent in New Zealand following the aftermath of the Pike River disaster.

Pike River Coal was convicted of nine breaches under the Health and Safety in Employment Act 1992.[283] Within a month of the disaster that killed 29 men, Pike River was put into receivership. The company was in a position where no assets would remain to pay out any further unsecured creditors. The company was not represented at trial – the representatives saw little point in attending due to their insolvent state.[284] Pike River Coal was sentenced to pay reparation of $3.41 million to victims' family members and fines of $760,000 to the government, despite their financial state.[285] The outcome, ultimately, was that no effective sanction was placed on the company. There were no prosecutions under s 56(1) of the Health and Safety in Employment Act 1992, which, if successful, may have resulted in the directors being personally liable for the payment of reparation.

Therefore, the argument that a new offence of corporate manslaughter is justified in New Zealand because the current penalties under the HSW Act are insufficient are not persuasive. Corporations in the United Kingdom and Canada have routinely been fined an amount already available under New Zealand's health and safety legislation.

[282] *CAV Aerospace*, above n 231; *Bilston Skips Ltd*, above n 272.
[283] *Department of Labour v Pike River Coal Mine* [2013] DCR 523.
[284] Alison Pavlovich and Susan Watson "Director and Shareholder liability at Pike River Coal" (2015) 21 Canta LR 1 at 4.
[285] At [41].

C The Regulatory Debate

A concern prevalent in the corporate manslaughter debate is that health and safety law is insufficient to deal with work-related fatalities because it is a regulatory scheme. Regulatory law is one in which a government department, by law, has been given the task of developing and enforcing standards of conduct in a specialised area of activity.[286] Regulatory proceedings do not require mens rea to be proven (the exception being tier one offences in New Zealand – which require recklessness on the part of the PCBU). As such, the argument is that health and safety legislation is devoid of the "publicity, condemnation and retribution" attached to a conviction for manslaughter.[287] Accordingly, while erring companies can be prosecuted for a range of regulatory offences under health and safety laws, "subsequent convictions do little to act as deterrents".[288]

It must be noted that breach of a duty by a PCBU under health and safety law *is* a criminal offence and monetary penalties apply to corporations. The Australian National Review into occupational health and safety law was also careful to emphasise that contraventions of the work health and safety statutes, and in particular the general duty provisions, were, and should be, criminal.[289]

The view of many corporate manslaughter advocates is that only a crime of corporate manslaughter carries a deterrent effect, one that health and safety legislation lack.[290] Yet, deterrence is also at the core of occupational health and safety legislation in New Zealand.[291] New Zealand courts and WorkSafe have made it clear that the primary purpose of health and safety law is the prevention of harm in the workplace. [292] Prevention is to be achieved by general deterrence during sentencing. [293]

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[286] United Kingdom Law Commission "Criminal Liability in Regulatory Contexts: A consultation Paper" (2019) <www.lawcom.gov.uk> at [1.9].
[287] S Griffin and J Moran "Accountability for Deaths Attributable to the Gross Negligent Act or Omission of a Police Force" (2010) 74 Journal of Crim Law 361.
[288] Dobson, above n 108, at 66.
[289] Richard Johnstone "Work health and safety and the criminal law in Australia" (2013) 11(2) Policy Pract Health Saf 25 at 36.
[290] Maxwell Smith "Corporate Manslaughter in NZ: Waiting for a Disaster?" (2016) 20(2) NZULR 402 at 431.
[291] David E Cantor and others "Technology, Firm Size and Safety: Theory and Empirical Evidence from the US Motor-Carrier Industry" (2016) 55 Transportation Journal 149.
[292] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.
[293] At [33] and [42].

Furthermore, many scholars have argued there is little evidence that manslaughter prosecutions have a deterrent effect.[294] Following the enactment of the CMCHA, the rate of work-related fatalities in the United Kingdom remain high but are nevertheless falling.[295] However, this is unlikely to be directly attributable to any perceived deterrent effect of corporate manslaughter law. The opinion of Field and Jones is that this is likely attributable to the upward trend in prosecutions initiated by the Health and Safety Executive for breaches of s 37 of the Health and Safety at Work Act 1974.[296] That provision provides directors and senior managers can be prosecuted if the breach was due to their consent, connivance or attributable to their neglect. Prosecutions under the s 37 provision have increased 400% over the last five years.[297] Thus, the fall in fatalities and deterrence effect is likely to be attributable to these policies, rather than any deterrence effect of corporate manslaughter laws. Indeed, legislation applicable to corporations is a greater deterrent when individual directors are targeted rather than the organisation itself.[298]

Nevertheless, corporate manslaughter laws ought to only be judged as an effective deterrent when there is a realistic risk of prosecution. Until at least one of the overseas jurisdictions successfully prosecutes a large company, any deterrent effect remains merely stronger in theory than in practice.[299]

D The wider picture – Businesses in New Zealand

The effect on businesses, foreign investment and the economic contributions of corporations must be considered when taking into account reform that affects corporations, such as introducing a corporate manslaughter offence. That is in no way to say that the economic contribution corporations bring to the economy suggests they should be subject to less stringent regulation. Rather, legislation that applies to corporations ought to be calibrated to ensure their effectiveness in achieving determined regulated behaviours for the health of the economy of New Zealand as a whole.[300]

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[294] F Haines and A Hall "The law and order debate in occupational health and safety" (2004) 20(3) Journal of Occupational Health and Safety: Australia and New Zealand 263.
[295] Field and Jones, above n 268, at 217.
[296] Field and Jones, above n 268, at 218.
[297] Field and Jones, above n 268, at 218.
[298] Ellis Whittam "Corporate manslaughter and director liability" (17 September 2021) <www.elliswhittam.com>.
[299] Jackie Brown-Haysom "Corporate Manslaughter: the case" (2012) <www.classic.safeguard.co.nz>.
[300] Australian Law Reform Commission, above n 60, at [1.10].

Proponents of corporate manslaughter offences argue that the offence may dissuade the establishment of business and foreign investment in New Zealand.[301] In other words, any benefits associated with these businesses including taxes, employment and the development of infrastructure would be negated because of the potential impact of having to comply with such laws. The fact that New Zealand's primary industries, which are more hazardous, make up a significant portion of New Zealand's gross domestic product adds weight to this argument.[302]

These concerns ought to be cautioned against. Although small businesses suffer disproportionately from compliance burdens due to resource constraints,[303] the answer is simply that if a company has systems of management control in place to meet current health and safety law, there will be little additional expenditure. It is unrealistic to assume that an offence of corporate manslaughter will deter the establishment of business. There is no evidence that businesses have been deterred from establishing operations in any of the jurisdictions examined. Whether a business will operate in a particular country depends on a range of factors such as the attractiveness of tax regimes.[304] What companies seeking to establish in new jurisdictions will look for, however, is legal certainty – something that corporate manslaughter legislation appears to lack.

E Where to now?

Should New Zealand consider it necessary to reform the law relating to corporations that cause death, there are, therefore, numerous considerations that must be examined. The net effect of the above observations is that corporate manslaughter legislation has failed to prove any more effective than health and safety legislation. The "senior management" tests perpetuate the familiar evidentiary issues that frustrated prosecutions under the identification doctrine in requiring the prosecution to identify certain individuals. Organisational liability, or corporate culture, inappropriately brushes aside accepted principles of the legal nature of the company. The lack of demonstrations as to how companies are held liable for their corporate culture is likely due to severe limitations of scope and evidential difficulties.

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[301] Smith, above n 290, at 428.
[302] Parliament of Australia "Workplace death and serious injury: a snapshot of legislative developments in Australia and overseas" (29 November 2004) <www.apo.org.au> at 2.
[303] John Kitching, Mark Hart and Nick Wilson "Burden or benefit? Regulation as a dynamic influence on small business performance" (2015) 33(2) Int Small Bus J 130 at 131.
[304] Taylor and Mackenzie, above n 271. 111.

There can be no doubt that the Health and Safety at Work Act 2015 provides for a simple and more effective mechanism to prosecute corporations, particularly large ones, for work-related fatalities. Perhaps rather than introduce unworkable new provisions for corporate manslaughter in New Zealand, work-related fatalities would be better served if regulators were to "rehabilitate the status" of health and safety law as imposing criminal liability.[305] This has been a key policy approach in Australia. The recently enacted Work Health and Safety Act in New South Wales, Queensland and South Australia institutionalise an approach that seeks to assert the criminality of work health and safety offences. This is achieved by imposing higher penalties for contravention, alternative non-pecuniary sanctions and ensuring reckless individuals may be imprisoned.[306]

Furthermore, imposing further liability on corporations in addition to their regulatory obligations does not ensure that the individuals within the company react to the threat of prosecution to ensure that the company meets its obligations.[307] This is particularly important where there are no legal mechanisms to ensure steps are taken by the company.[308] A more effective approach to ensure corporations meet their obligations ought to traced to conducting more workplace inspections. The 2020 review of Workplace Health and Safety in New Zealand confirms that the number of investigations conducted by WorkSafe is declining – the decline likely linked to resourcing issues.[309] Despite a reduced number of investigations, prosecutions rates have remained steady, suggesting that PCBU's under investigation face a higher risk of prosecution.[310]

An offence of corporate manslaughter in New Zealand is likely to remain an ongoing debate. This paper does not necessarily recommend against enacting corporate manslaughter law in New Zealand. However, the ineffective nature of corporate manslaughter laws can be seen in all three jurisdictions examined, particularly through the reluctance of prosecutors to use the law. Perhaps in all three jurisdictions, it is the symbolic effect of the law that is as important as the law itself. The very existence of the offence seems to carry a normative weight that currently, health and safety law appears to lack. Unfortunately, symbolism is difficult to

[305] M Appleby "Accounting for corporate killing – time for change" (2003) 14(2) Journal of Occupational Health Review 9 at 19.
[306] Johnstone, above n 289, at 40.
[307] Fisse and Braithwaite, above n 93, at 1.
[308] Fisse and Braithwaite, above n 93, at 2.
[309] MinterEllisonRuddWatts "Workplace Health and Safety: 2020 in review" (9 December 2020) <www.minterellison.co.nz>.
[310] MinterEllisonRuddWatts, above n 309.

quantify. In the absence of meaningful case law, it may be many more years before any of the examples of statutory manslaughter can be properly assessed.[311]

VII Conclusion

As the potential for corporations to cause harm has increased, the law has attempted to anthropomorphise corporations to bring them within the paradigm criminal law, designed to capture individual human defendants. While it is well-founded that corporate bodies generally have the capacity to commit a criminal offence – the historical theoretical obstacles remain. The enduring reluctance to hold corporations liable for "true" crimes has granted the large corporate body immeasurable enhanced rights in law due to its size.

This paper has sought to analyse whether corporate manslaughter laws are effective and, therefore, warranted in New Zealand. An examination of the legislative schemes has demonstrated that corporate manslaughter reform in Australia, Canada and England and Wales has merely constituted "more of the same". The "senior officer" tests fail to offer any clear indication as to who or what constitutes senior management. The reluctance to embrace Part 2.5 of the Commonwealth Criminal Code in Australia demonstrates dubiety as to whether an organisational approach to corporate criminal liability is viable. Regardless, organisational theories remove responsibility from its human agents, with whom the ultimate control of corporate decision-making remains with. Corporate manslaughter laws have failed to offer an effective tool for the prosecution of large corporations. As such, this paper has cautioned against introducing an offence in New Zealand modelled off the jurisdictions examined. Corporations in New Zealand can, and should, be held criminally accountable for their actions under health and safety law in an efficient manner, absent of perpetuating difficulties fraught in corporate manslaughter legislation.

[311] Dobson, above n 108, at 66.

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