

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

**Criminal Liability of Organizations**

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## CONTENTS

How to respond.....	1
About this issues paper .....	1
Acknowledgments .....	2
Information on the Tasmania Law Reform Institute .....	2
Executive Summary.....	3
Part 1: Current Law – traditional crimes .....	5
Part 2: Should Organizations be Liable for Traditional Crimes? .....	7
2.2 The aims of the criminal law.....	7
2.3 Workplace Health and Safety Offences .....	11
2.4 Civil Liability .....	12
2.5 Workers Compensation.....	13
Part 3: Need for reform.....	15
Part 4: Extent of Reform.....	21
Part 5: Options for reform .....	24
5.1 Specific offences in the Code.....	24
5.2 Reforming the Workplace Health and Safety Act .....	30
5.3 Specialised principles of criminal responsibility for organizations .....	38
Part 6: Sentencing options .....	44
6.1 Introduction.....	44
6.2 The Fine .....	46
6.3 Incapacitation .....	48
6.4 Community Service Orders.....	51
6.5 Probation Orders .....	51
6.6 Adjourment with conditions.....	53
6.7 Conviction.....	53
6.8 Adverse Publicity Orders .....	53
6.9 The Equity Fine.....	54
6.10 Punitive Injunction.....	55
6.11 Compulsory Compensation Orders.....	56
6.12 Sentencing under the <i>Workplace Health and Safety Act</i> .....	56
Appendix A .....	59
Appendix B.....	62
Appendix C.....	65
Appendix D .....	66

## How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this issues paper. Questions are contained within the paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by **1 August 2005**.

If possible, responses should be sent by email to: **law.reform@utas.edu.au**

Alternately, responses may be sent to the Institute by mail or fax:

address: Tasmania Law Reform Institute  
Private Bag 89,  
Hobart, TAS 7001  
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If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquires should be directed to Jenny Rudolf, on the above contacts, or by telephoning (03) 62262069.

This issues paper is also available on the Institute's web page at: [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform) or can be sent to you by mail or email.

## About this issues paper

This issues paper discusses reforming the law in relation to the criminal liability of organizations, particularly when they wrongfully cause the death or injury of a person. Any group or person is invited to respond to this issues paper. Following consideration of all responses it is intended that a final report will be published, containing recommendations. The topic for this law reform project was proposed by Benedict Bartl.

## **Acknowledgments**

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## **Information on the Tasmania Law Reform Institute**

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Mr Paul Turner (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney, (nominated by the Women Lawyers Association).

# Executive Summary

This paper considers the criminal liability of organizations. In particular, it is concerned with the criminal law that applies when corporations and other entities wrongfully cause the death or serious injury of a natural person. This is most likely to be relevant to workplace deaths and injuries or ‘public disasters’ (for example a gas explosion or a ferry sinking).<sup>1</sup> The law already allows corporations to be found guilty of criminal offences, however difficulties arise when considering traditional crimes like manslaughter or grievous bodily harm which have evolved to deal with the actions of moving, thinking, animate people. One issue in Tasmania is that manslaughter requires a homicide, which is defined as ‘the killing of a human being by another’, thus apparently excluding organizations. A broader issue is the method of attributing criminal liability to organizations given that they do not physically ‘do’ anything and do not have any ‘state of mind’. The common law has tried to circumvent this by attributing to the company the actions and state of mind of the person (or people) who can be said to be the ‘controlling mind’ of the company. This is known as the identification doctrine. However the practices of modern corporate decision making rarely fall within the doctrine, particularly in larger corporations, where decisions are by necessity taken at the branch, unit or middle management level.

The difficulties with the identification doctrine indicate a need to reform this area of law. Reform has already taken place on a federal level in Australia and Canada as well as in the Australian Capital Territory. A number of other jurisdictions including the United Kingdom, Victoria, South Australia, Queensland and New South Wales have also considered reform, or are in the process of doing so. Part 1 of this issues paper discusses three different types of reform that have been adopted or proposed in these jurisdictions –

- **Introducing a specific ‘industrial manslaughter’ offence to the Code:** This option has been considered by a number of jurisdictions, with the ACT becoming the first to implement the reform in 2004. The introduction of related specific offences (negligently causing serious injury and specific ‘senior officer’ offences) is also discussed.
- **Introducing reforms to the *Workplace Health and Safety Act 1995*:** This could include introducing:
  - manslaughter and grievous bodily harm provisions
  - breach of duty causing death or grievous bodily harm provisions
  - higher maximum penalties
  - a broader range of penalties
  - senior officer liability (in an effort to encourage organizational compliance)
- **Introducing specialised principles of criminal responsibility for organizations:** This option would involve amending the criminal responsibility chapter of the Criminal Code, so that it sets out how physical elements and mental elements can be proved when dealing with an organization.

Part 1 of this issues paper considers sentencing organizations. Currently, the type of sentence usually imposed on a corporation is a fine. In many instances a fine may be ill suited to achieving the aims of punishment such as denunciation and deterrence, particularly in relation to serious breaches of the law that cause death or serious injury. This paper argues that while traditional sentencing options may be effective in some instances, the potential flexibility of these options is not currently being realised, and furthermore, in many cases sentencing options more specifically designed to deal with organizations are required.

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<sup>1</sup> Other examples are infrastructure collapses, train crashes or chemical leaks. The most infamous example being the 1984 chemical leak from the Union Carbide plant in Bhopal, India that killed at least 3800 people and seriously injured tens of thousands of others. A more recent example was the death of four Australians when a pedestrian bridge collapsed at the Maccabiah Games in 1997. The public commission which followed the collapse found that the incident was caused by a ‘chain of failures involving the bridge’s planning and construction’ while the Australian Ambassador to Israel, Ian Wilcock, described the collapse as a ‘completely avoidable accident’. In an incident closer to home, a 12 year-old girl was killed when a 1- kilogram fragment of steel expelled during an implosion of the Royal Canberra Hospital struck her in the head. The victim was with her parents in a crowd estimated to be in excess of 100,000 spectators gathered on the foreshore of Lake Burley Griffin to watch the demolition. In his 657-page report on the implosion, ACT Coroner Shane Madden said the people who carried out the implosion were ‘inexperienced and incompetent’: <http://www.courts.act.gov.au/magistrates/dec/bender/Sect11.htm> (accessed: 5 January 2005).

### *Coverage of 'organization' rather than 'corporation'*

In Tasmania, section 35(1) of the *Acts Interpretation Act 1931* (Tas) provides that 'every provision of an Act relating to offences punishable upon indictment or upon summary conviction shall be construed to apply to bodies corporate as well as to individual persons'. However, specific legislation may impose liability on other types of bodies.<sup>2</sup>

Whilst the majority of organizations whose behaviour results in death or serious injury will be corporations,<sup>3</sup> there may be merit in extending criminal liability to other types of organizations, indeed this has been the approach in some other jurisdictions. This paper deliberately uses the term 'organization' to refer to the range of bodies (including corporations, partnerships, associations, joint ventures and government entities) capable of incurring criminal liability. The issue of exactly which types of entities should be subject to criminal liability is addressed in detail in Part 1.

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<sup>2</sup> See B Fisse, *Howard's Criminal Law 5<sup>th</sup> edition*, Law Book Company: Sydney, 1990, at 595.

<sup>3</sup> For the purposes of this paper, the term 'corporation' is used interchangeably with 'company'. In law however there is a subtle difference. Section 9 of the *Corporations Act 2001* (Cth) defines a company as one registered under the *Corporations Act 2001* (Cth). While under the *Corporations Act 2001* (Cth), s 54A a corporation is defined as a company, a body corporate or an unincorporated body capable of suing or being sued, or holding property in the name of a secretary or an officer of the body duly appointed for that purpose.

## Part 1

# Current Law – Traditional Crimes

1.1.1 In Tasmania traditional crimes like manslaughter and causing grievous bodily harm are defined in the Criminal Code. This Part sets out how these apply to organizations, and what must be proved for an organization to be found guilty of these crimes.

1.1.2 While section 35(1) of the *Acts Interpretation Act 1931* (Tas) makes it clear that natural persons and ‘bodies corporate’ alike can be found guilty of criminal offences, because traditional crimes like manslaughter or grievous bodily harm were specifically designed to deal with the actions of real people, the definitions of the crimes themselves are difficult to apply to entities. Generally, people are guilty of these crimes because they *do* the prohibited act with the requisite *state of mind*. Obviously corporations (and other entities) do not physically ‘do’ anything, and certainly they do not have any ‘state of mind’. The common law has tried to get around this problem by attributing to the company the actions and state of mind of the person (or people) who can be said to be the ‘controlling mind’ of the company. This is known as the identification doctrine.

### *The identification doctrine*

1.1.3 To explain it more fully, under the identification doctrine an individual who is an ‘embodiment of the company’ must be guilty of the offence for the company to be convicted.<sup>4</sup> A company can only be convicted when a sufficiently senior officer, who ‘is acting as the company’<sup>5</sup> is found guilty of an offence. Who is a sufficiently senior officer depends upon the facts of the case. However, it generally extends to company directors and senior managers. It excludes many persons who direct the day-to-day operations of corporations. The person or persons identified as the controlling mind within the corporation must also be acting within the scope of their employment or authority.<sup>6</sup>

### *Manslaughter*

1.1.4 In Tasmania it is doubtful whether a corporation could currently be found guilty of either murder or manslaughter. This is because both crimes require a culpable homicide, and ‘homicide’ is defined in the Code as ‘the killing of a human being *by another*’.<sup>7</sup> The same definition in the New Zealand Code has been held to prevent a corporation being guilty of manslaughter.<sup>8</sup>

1.1.5 This restriction aside, to find a person guilty of manslaughter by criminal negligence the following three elements must be proven beyond reasonable doubt:

1. That the defendant caused the death of a person.

Causation is proved by demonstrating that the person would not have died *but for* the defendant’s act or omission, and that that act or omission was *directly and immediately* connected with the death.<sup>9</sup> In cases where this cannot be shown (where the defendant’s act or omission was not the immediate or not the sole cause of death), section 154 of the Criminal Code provides that the defendant may still be deemed to have caused the victim’s death in certain instances, for example ‘where he causes bodily injury to the other which

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<sup>4</sup> *Tesco Supermarkets v Natrass* [1972] AC 153, 170.

<sup>5</sup> ‘...and his mind which directs his acts is the mind of the company’: *Tesco Supermarkets v Natrass* [1972] AC 153, 170.

<sup>6</sup> *Canadian Dredge and Dock v R* [1985] 1 SCR 662 at 701-14.

<sup>7</sup> s 153(1), emphasis added.

<sup>8</sup> *R v Murray Wright Limited* [1970] NZLR 476.

<sup>9</sup> Criminal Code (Tas), s 153(2).

requires surgical or medical treatment, and such treatment causes death, if such treatment is applied in good faith, and with reasonable knowledge and skill, but not otherwise'.<sup>10</sup>

2. That there was a breach of 'a duty tending to the preservation of human life'.

The duties 'tending to the preservation of human life' are contained in Chapter 16 of the Code. The most likely duties to apply to a workplace death or injury are:

Duty of persons doing dangerous acts:

149. ... it is the duty of a person who undertakes to administer surgical or medical treatment to another, or to do any other lawful act of a dangerous character which requires special knowledge, skill, attention, or caution, to employ in so doing a reasonable amount of such knowledge, skill, attention, and caution.

and the:

Duty of persons in charge of dangerous things:

150. It is the duty of every person who has anything in his charge or under his control, or who erects, makes, or maintains anything which, in the absence of precaution or care in its use or management may endanger human life, to take reasonable precautions against, and to use reasonable care to avoid, such danger.

3. That the breach of that duty amounted to *culpable negligence*.

'Culpable negligence' (also often called 'gross negligence' or 'criminal negligence') is negligence which shows such disregard for the life and safety of others as to be deserving of criminal punishment.<sup>11</sup> The standard of care required is an objective standard in that it is based on the concept of a 'reasonable person in the same situation as the accused'.<sup>12</sup> Whether or not an omission amounts to culpable negligence is a question of fact to be determined by the jury in the circumstances of each particular case;<sup>13</sup> the accused's state of mind is not relevant to the question of whether or not the negligence was culpable.<sup>14</sup>

### ***Grievous bodily harm and wounding***

1.1.6 When considering the liability of organizations for a serious injury, grievous bodily harm and otherwise wounding is the crime most likely to be relevant. Both crimes are found in section 172 of the Code. Grievous bodily harm is generally considered a more serious crime, as the injury is more severe. The Code defines grievous bodily harm as –

Any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health.

A 'wound' is not defined in the Code, but case law has defined it as essentially a cut, evidenced by free bleeding.<sup>15</sup>

1.1.7 In addition, it must be proved that the harm was caused with the required mental element: intention to cause grievous bodily harm or subjective recklessness.<sup>16</sup> Subjective recklessness means that the defendant must have foreseen the likelihood of the harm, yet proceeded (with their act or omission) regardless.

<sup>10</sup> Section 154(a).

<sup>11</sup> *Bateman* (1925) CR App R 8 at 11; *Nydam v The Queen* [1977] VR 430, at 445.

<sup>12</sup> *Nydam v The Queen* [1977] VR 430 at 439-446 rejecting a subjective standard referred to by Smith J in *R v Holzer* [1968] VR 481.

<sup>13</sup> Code s 156(3).

<sup>14</sup> *R v Adomako* [1995] 1 AC 171.

<sup>15</sup> *Devine* [1982] 8 A Crim R 45.

<sup>16</sup> *Valance* [1961] Tas SR 51; *Bennett* [1990] Tas R 72. The Institute is aware of at least three cases in which it was accepted that a person could be guilty of grievous bodily harm on the basis of criminal negligence, however, the Institute is currently of the opinion that this is contrary to the leading authorities cited.

## Part 2

# Should Organizations be Liable for Traditional Crimes?

### *Introduction*

2.1.1 Some commentators have argued that only real flesh-and-blood people should be held liable for traditional criminal offences – blame should be found among the directors, managers or employees of an organization. On the other hand it is argued that an organization is more than just the sum of its parts. Organizations create cultures capable of generating both action and inaction in any number of areas including work ethic, professionalism and enthusiasm for the task. Similarly, organizations are capable of systemic violations of the law. In such an environment, the law should recognise organizational blameworthiness. For example the New Zealand Royal Commission, which investigated the Mount Erebus disaster,<sup>17</sup> held that the crash resulted primarily from the failure of the flight operations centre at company headquarters to communicate the correct navigational co-ordinates to the flight crew.<sup>18</sup> However, the Commission was not prepared to blame the personnel in the flight operations centre. Rather, criticism was directed at ‘the incompetent administrative airline procedures, which made the mistake possible’.<sup>19</sup> Air New Zealand (as an organization) had failed to demonstrate the navigational standards expected of an international airline.

2.1.2 This Part examines the aims of traditional criminal laws. These goals include retribution, denunciation, deterrence and rehabilitation. It is argued that effectively attributing criminal responsibility to organizations is vital to meeting these aims. It then looks at some other areas of law that are likely to be relevant when an organization causes the death or serious injury of an employee or member of the public, such as civil law, workers compensation law, or workplace health and safety law, and discusses why these do not meet the aims of the criminal law.

## 2.2 The aims of the criminal law

2.2.1 Traditional criminal laws provide for state punishment of offenders. The existence of the criminal justice system that imposes these penal punishments is justified by a number of desirable goals that include: the public condemnation or denunciation of acts of wrongdoing; imposing retribution upon offenders for their wrongdoing (retribution), deterrence of future wrongdoing by both deterring the particular offender (specific deterrence) and others (general deterrence); and the rehabilitation of offenders.

### *Condemnation and Denunciation*

2.2.2 Wrongful acts that cause death or serious injury should be condemned. This condemnation is reflected by criminal laws forbidding such conduct and the relatively severe sanctions imposed upon conviction for murder, manslaughter, grievous bodily harm, wounding and even assault.<sup>20</sup> If an organization causes the wrongful death or serious injury of a person it is important that they, like any other person, be publicly condemned for doing so. This public condemnation reaffirms the value that our community places

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<sup>17</sup> In 1979 an Air New Zealand DC 10 crashed near Mount Erebus, Antarctica killing all 257 people on board.

<sup>18</sup> New Zealand, *Report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft Operated by Air New Zealand*, paragraph 392.

<sup>19</sup> New Zealand, *Report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft Operated by Air New Zealand*, paragraph 393.

<sup>20</sup> For a comprehensive range of data on the sentencing of persons convicted of murder, manslaughter, grievous bodily harm, wounding and assault see K Warner, *Sentencing in Tasmania*, The Federation Press: Sydney, 2002, at 267-329.

on human life and the respect that we demand for it. Allowing a wrongful death or serious injury to go unpunished in cases where the actor is not a natural person treats the loss of life or limb as unimportant. Furthermore, by characterising the killing or injury as an ‘accident’ and allowing it to remain unpunished, we can be seen to turn a blind eye to the possibility that an employer or organization was to blame for the conditions which allowed the so-called accident to occur. The high value that our society places on life means that we must denounce any wrongful act that results in death or injury, regardless of whether the ‘person’ whose wrongful conduct caused that outcome is an organization or a natural person. This denunciation is most effectively achieved through the stigma attached to a traditional criminal conviction.

2.2.3 In the context of deaths or injuries to workers or members of the public caused or contributed to by organizations, the role of the criminal law in effectively denouncing the actions (or inactions) of the organization may be particularly important. The civil law, workers compensation law and quasi-criminal health and safety laws may well be more effective than traditional criminal laws in compensating victims and preventing unsafe work places and practices through education, standard setting and monitoring compliance. But when it comes to demonstrating public condemnation there seems little doubt that this can be most effectively achieved by more traditional criminal laws.

2.2.4 The need to denounce wrongful conduct that results in these harms cannot be overstated. The significant presence and highly visible role that organizations play in our society makes it all the more important that they are not seen to be above the reach of the law. If organizations seek to create a positive public image or persona for their own profitable ends, as many organizations do, it is essential that they be publicly condemned when they are responsible for breaking the law.<sup>21</sup> These organizations and employers are vital to society, but this does not mean that they need not abide by its rules. Denouncing and condemning their wrongful behaviour, just as we would denounce the conduct of any natural person who has wrongfully caused the death of another, can therefore be particularly significant.

## **Retribution**

2.2.5 Retribution is a rationale of criminal punishment that has many different adherents who give different accounts of its moral significance. In its simplest form, retribution is a philosophy of ‘just deserts’ that proclaims that an individual who has broken the law deserves to be punished, and insists that the punishment should be in proportion to the crime.<sup>22</sup> Human beings have a strong emotional and intellectual attachment to the notion of retribution, and an almost unshakeable need to believe in a just world ‘where people get what they deserve’.<sup>23</sup> The knowledge that the state has ensured that an offender has suffered a proportionate punishment can therefore be a source of some satisfaction both to victims and to many members of the community who feel powerless in the face of crime. Thus, punishment for a wrong done helps people to feel that justice has been served.

2.2.6 More recent accounts of the moral significance of retribution have stressed the expressive and communicative function of criminal punishment.<sup>24</sup> These theorists argue that the punishments imposed by the criminal law represent not only a communal expression of solidarity with the victims of criminal wrongdoing that reaffirms their moral value, but that they are also the means through which the community communicates its abhorrence of the crime to the wrongdoers, affirms the value of the norm of conduct broken by the wrongdoers, connects them again with proper values, and affords them an opportunity both to realise the enormity of their conduct and in some cases to repent and to make amends for that wrongful conduct. On this account, by allowing organizations to shield themselves from criminal responsibility and permitting corporations to hide behind the corporate veil, the state is also failing to affirm the value of the

<sup>21</sup> Friedman L, ‘In Defense of Corporate Criminal Liability’ (2000) 23 *Harvard Journal of Law and Public Policy* 833 at 847-852.

<sup>22</sup> An eighteenth century philosopher who defends this view of retribution is Immanuel Kant, *The Metaphysical Elements of Justice*, Cambridge University Press: New York, 1965, at 99-107. A more recent version appears in the philosophy of Michael S Moore, *Placing Blame*, Oxford University Press, 1997.

<sup>23</sup> Batson DC, ‘Justice Motivation and Moral Motivation’ in Ross M & Miller DT (eds), *The Justice Motive in Everyday Life*, (Cambridge University Press, 2002) at 91. See also Solomon RC, *A Passion for Justice: Emotions and the Origins of the Social Contract*, Addison-Wesley: New York, 1990.

<sup>24</sup> Hampton J, ‘Correcting Harms Versus Righting Wrongs: The Goal of Retribution’ (1992) 39 *University of California at Los Angeles Law Review* 1659; Duff RA, ‘Penal Communications: Recent Work in the Philosophy of Punishment’ in Tonry M (ed), *Crime and Justice: A Review of Research, Volume 20*, University of Chicago Press, 1996, 1.

victims, failing to stand up for the importance of our criminal laws, and failing to communicate to our corporate citizens and organizations that their conduct is deserving of blame.

2.2.7 Historically, organizations and artificial legal persons have not been subject to retribution in the same way as individual offenders, partly because it was thought that an organization ‘has no soul to be damned, and no body to be kicked’.<sup>25</sup> Whereas many organizational offenders are dealt with internally or through regulatory law, similar offences committed by natural persons generally lead to criminal conviction and punishment. However, it can no longer be argued that the public is ambivalent about imposing organizational criminal responsibility, and our criminal law should reflect these changing attitudes.<sup>26</sup> This raises two important issues based on the role of both distributive justice and retributive justice within our criminal justice system. The first argument is based on the proposition that an organization that acts as an entity (or is seen to act as an entity) should be held accountable for its actions in cases where those actions are legally wrongful. This argument is supported by our concept of distributive justice, which requires that like cases should be treated alike and that equally culpable actors should be responded to equally. If, as a community, we have a set of criminal laws that is designed to hold accountable those whose acts are wrongful, then any entity that acts in these ways should be held to be criminally responsible. The imposition of organizational criminal responsibility is also supported by a further argument based on distributive justice, namely, that if an organization like a corporation reaps any special *benefits* as a result of its incorporation and the construction of a new, separate legal entity that is allowed to conduct business within our community, it should not be entitled to avoid the *burdens* associated with the existence of that new legal entity and the conduct that it has engaged in. If an organization seeks to exploit the benefits that we have attached to organizational status in order to engage in a particular course of conduct within our community, it must accept the burdens of community life as well. It is distributively unjust if these organizations enjoy the positive benefits associated with their status, while at the same time avoiding the negative burdens – especially the burdens that other individual persons within the community are unable to avoid. Justice in the distribution of retribution therefore requires that the imposition of organizational criminal responsibility on all those persons and entities whose conduct wrongfully harms others.

## ***Deterrence***

2.2.8 Deterrence seeks to reduce further crime by the threat or example of punishment. The basic theory of deterrence is that, at least in some circumstances, the threat of punishment will lead people to choose to obey the law. There are two types of deterrence – general and specific. Specific deterrence is aimed at deterring the convicted criminal from committing further offences, while general deterrence seeks to deter the community as a whole (or some group within the community) from committing crimes (or particular types of crime).<sup>27</sup> For as long as it has been acknowledged that organizations could be held liable for their actions or failure to act, courts have expressed the view that the criminal law can deter corporations, as can be seen from the following statement by Denham CJ in 1846:<sup>28</sup>

There can be no effective means of deterring from an oppressive exercise of power, for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority.

2.2.9 Many factors will influence the effectiveness of both specific and general deterrence, such as –

- *Severity of punishment* - The threat of punishment must be sufficiently severe so as to outweigh any possible gain attributable to the crime. Corporations may be particularly susceptible to deterrence

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<sup>25</sup> J Coffee, ‘No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment’ (1981) 79 *Michigan Law Review* 386.

<sup>26</sup> For example on the release of former One Nation leader Pauline Hanson, a supporter claimed ‘She went to jail for peanuts’; ‘Look at the banker in Perth who stole \$19 million and only got five years’; or another supporter who added ‘Yeah, and what about the Ansett collapse’, see A McGregor, D McFarlane & A Wilson, ‘Pauline’s release: one happy family’, *The Weekend Australian* 8-9 November 2003, at 1.

<sup>27</sup> For a more detailed discussion of general and specific deterrence see the Tasmanian Law Reform Institute, *Sentencing Issues Paper No 2* August 2002 at 49-55.

<sup>28</sup> *Great North of England Railway Co* (1846) 9 QB 315 at 320.

because they tend to make decisions on a cost/benefit analysis.<sup>29</sup> The insufficiency of civil awards of compensation and sentences for breach of health and safety laws means that they are unlikely to operate as effective deterrents.

- *Characteristics of crime* - While deterrence may always be a difficult to achieve for some crimes (such as crimes of 'passion'), organizational criminal liability will generally be the result of a grossly negligent decision-making process rather than the actions of an angry, intoxicated or mentally ill offender. As such, deterrence should be readily achievable. As Braithwaite and Geis argue:<sup>30</sup>

[c]orporate crimes are almost never crimes of passion: they are not spontaneous or emotional, but calculated risks taken by rational actors. As such they should be more amenable to control by policies based on utilitarian assumptions of the deterrence doctrine.

- *Certainty of detection and punishment* - Where there is a good chance of the crime being undetected deterrence is less likely to be effective. If the law is reformed so that convictions could be secured in appropriate cases then the resulting increase in certainty of punishment should boost deterrence.

2.2.10 Adverse publicity resulting from a criminal conviction is another way in which deterrence is achieved. This is because 'the stigma of criminal conviction and punishment'<sup>31</sup> has a deterrent value in its effect on organizational prestige.<sup>32</sup> Organizations and their 'brand' require public support<sup>33</sup> and any tarnishing of this brand may result in a loss of public support and consequent sales that in turn jeopardises the entire corporation.<sup>34</sup> As Pulitzer has stated:<sup>35</sup>

There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice that does not live by secrecy. Get these things out in the open, describe them, attack them, ridicule them in the press, and sooner or later public opinion will sweep them away.

2.2.11 A final reason for utilising the deterrent effects of the criminal law against organizations and employers lies in the fact that that these organizations now pervade our society. Their activities are so widespread in scope that their conduct is capable of affecting the welfare of many individual citizens who look to the state for protection. Organizations may also be much more powerful than ordinary persons. These factors mean that the community needs the protection that deterrence based sanctions can offer. The greater capacity and the number of opportunities that organizations have to cause serious harm to others through their wrongful conduct points up the need to use the sanctions of the criminal law to deter that organizational wrongdoing.

## ***Rehabilitation***

2.2.12 Rehabilitation aims to improve the offender's character so that they are less inclined to commit offences.<sup>36</sup> While there has been dissatisfaction with the effectiveness of rehabilitation, this may relate to natural persons rather than corporations. A number of sentencing options may be able to achieve rehabilitation when applied to organizations, such as a specific order of organizational probation, injunction,

<sup>29</sup> For example, see the case study of the Ford Pinto motor vehicle at footnote 51. It is important to note however that there are organizations such as universities, churches and sports groups who do make profits but have as their central motivation non-monetary concerns.

<sup>30</sup> J Braithwaite & G Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28 *Crime and Delinquency* 292 at 305; see also J Braithwaite & G Geis, 'Developments in the Law - Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1979) 92 *Harvard Law Review* 1227 at 1235.

<sup>31</sup> B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141 at 1147.

<sup>32</sup> In an empirical study of the impact of adverse publicity crises on seventeen major corporations, it was observed that loss of corporate prestige rather than financial loss were of more concern to executives in all but two cases. As found in B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press: Albany, 1983 at 232.

<sup>33</sup> For example see 'New Branded World' in N Klein, *No Logo*, Harper Collins Publishing Great Britain, 2001.

<sup>34</sup> B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press: Albany, 1983, at 1.

<sup>35</sup> J Pulitzer, as quoted in B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press: Albany, 1983 at 1.

<sup>36</sup> N Walker, 'Punishing, Denouncing or Reducing Crime' in P Glazebrook, *Reshaping the Criminal Law* (1978) at 393.

community service orders and adverse publicity orders.<sup>37</sup> In some respects punishment may more effectively rehabilitate organizations than individuals. This is because punishment of individuals may often lead to those offenders feeling outlawed, possibly leading to greater deviant behaviour. On the other hand organizations are likely to react positively to punishment, in an attempt to minimise the damage done to their prestige and in order to regain standing in the community.<sup>38</sup>

### *Doing Justice in the Criminal Law*

2.2.13 Organizations and employers have traditionally been dealt with as a special case, but the rationale for continuing this special treatment has been doubted, both in Australia and internationally. Should we continue to treat these organizational actors in a different way, especially when they are so pervasive in their reach and so powerful that they can cause comparatively massive damage in our communities? Should we allow them to continue to reap the benefits of organizational status without incurring the burdens that all ordinary persons must accept and cannot avoid? This issues paper argues that if the criminal law aims to condemn harmful wrongdoing, it should also condemn corporations and organizations who wrongfully cause harm. To the extent that the criminal law aims to deter wrongdoing that causes harm, it should also aim to deter corporations and organizations whose enterprises wrongfully cause harm. If the criminal law is seen as creating incentives for individuals to avoid such harmful wrongdoing, it should also give those who organise, manage and own shares in corporations and organizations the same incentive. If the state aims to give wrongdoers their just deserts by imposing proportionate punishments that express the community's support for the value of the victims and our condemnation of all wrongful conduct, which, by breaching the community's legal norms, causes harm to others, is there any reason why it should not punish organizations whose wrongful conduct also causes harm?

## 2.3 Workplace Health and Safety Offences

2.3.1 In Australia, occupational health and safety legislation is primarily intended to reduce workplace deaths and injuries by imposing an overarching duty of care on employers,<sup>39</sup> setting standards to ensure as safe an environment as possible, monitoring compliance with these duties and standards, and creating offences for non-compliance in order to punish and deter. This is reflected in the long title of the *Workplace Health and Safety Act 1995* (Tas):<sup>40</sup>

An Act to provide for the health and safety of persons employed in, engaged in or affected by industry...

2.3.2 When an organization wrongfully causes the death or injury of an employee or when another person is killed or injured at an organization's workplace the organization may be guilty of a criminal offence under the *Workplace Health and Safety Act 1995*, such as breach of one of the employer duties set out in section 9. Some of the duties and obligations imposed on employers by section 9 are:

- to ensure, so far as is reasonably practicable, that employees are safe from injuries and risks to health;
- to provide a safe working environment and safe systems of work;
- to ensure so far as is reasonably practicable, that the health and safety of any person (other than an employee, contractor, etc) is not adversely affected as a result of the work carried on at a workplace;
- to not allow a contractor or person employed by a contractor to carry on work for the employer at the employer's workplace in a manner which the employer reasonably believes would place at risk the health or safety of any person.

<sup>37</sup> These are discussed in greater detail in Part 1.

<sup>38</sup> B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141 at 1154.

<sup>39</sup> A Hopkins, *Making Safety Work: getting management commitment to occupational health and safety*, Allen & Unwin: NSW, 1995, at 74.

<sup>40</sup> *Workplace Health and Safety Act 1995* (Tas) proclamation.

2.3.3 These general duties have been interpreted broadly by the courts, requiring duty holders to ‘be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace’.<sup>41</sup> Importantly, these are strict liability offences. This means that guilt is established simply by proving that the breach occurred (ie the physical act or failure to act which constitutes the breach of duty) – no guilty state of mind (such as specific intent, recklessness or negligence) needs to be established. These offences may be committed regardless of whether death or injury results from the breach. If death or injury does result, it may be a factor to be taken into account by the sentencing judge. Breach of these duties carries a maximum penalty in the case of a body corporate of \$150,000, or in the case of a natural person of \$50,000. Historically, these offences have been labelled ‘regulatory’ or ‘quasi-criminal’ offences, rather than being thought of as ‘proper’ crimes. This is probably reflected by the relatively low sentences usually imposed for breaches of the WHSA: the highest to date in Tasmania is \$40,000.<sup>42</sup> Convictions under the WHSA also appear to lack the social stigma attached to convictions for more traditional crimes. It is theorised that these factors combine to reduce the punitive or deterrent effect of the offences.

## 2.4 Civil Liability

2.4.1 The purpose of civil liability is to compel a wrongdoer to compensate a wronged person<sup>43</sup> for a loss they have suffered which was caused or contributed to by that wrongdoer. In the context of workplace injuries or deaths or injury or death to members of the public caused by an organization, civil liability may be established by demonstrating that the organization negligently caused or contributed to the death or injury.<sup>44</sup>

To bring a successful negligence action it must be established by the plaintiff:

- That the organization owed a duty or standard of care to the plaintiff;
- That the duty or standard of care was breached;<sup>45</sup> and
- That the breach resulted in damages suffered by the plaintiff.<sup>46</sup>

2.4.2 Some commentators<sup>47</sup> are of the view that civil (rather than criminal) liability could be reformed to deal with the crimes of organizations because there is a greater range of remedies available (including injunctions and damages); a less onerous burden of proof is applied; and finally, civil liability is ‘better able to calculate appropriate levels of damages to maximise deterrence in a cost-efficient manner’.<sup>48</sup> Essentially, these views are based on cost efficiency.<sup>49</sup> However, it is argued that cost efficiency should not dictate justice. Certainly cost efficiency does not seem to be an important factor in the decision to pursue, prosecute and punish the majority of criminals (who are natural persons).<sup>50</sup>

2.4.3 Furthermore, the compensatory nature of civil damages means that they are unlikely to have any significant punitive effect on an organization. The liability incurred may often be less than the cost of

<sup>41</sup> *WorkCover Authority of NSW (Insp Egan) v Atco Controls Pty Ltd* (1998) 82 IR 80 at 85.

<sup>42</sup> see Appendix A.

<sup>43</sup> Or, where the wronged person is killed, the relatives of the wronged person: *Fatal Accidents Act 1934* (Tas), s 4. Also see *Workers Rehabilitation and Compensation Act 1988* (Tas), s 25(1)(d).

<sup>44</sup> Additionally a person injured or the family of a person killed may be able to sue for breach of statutory duty or breach of contract.

<sup>45</sup> This standard is usually measured by what the ‘reasonable person of ordinary prudence would do in the circumstances’.

<sup>46</sup> If the defendant is the employer of the plaintiff the required level of impairment (30% whole body) must also be shown and the election to claim civil damages must be made within 2 years: *Workers Rehabilitation and Compensation Act 1988* (Tas) s 138AB.

<sup>47</sup> V Khanna, ‘Corporate Criminal Liability: What Purpose Does it Serve?’ (1996) 109 *Harvard Law Review* 1477; D Fischel & A Sykes, ‘Corporate Crime’ (1996) 25 *Journal of Legal Studies* 319; G Sullivan, ‘The Attribution of Culpability to Limited Companies’ (1996) *Cambridge Law Journal* 515; C Clarkson, ‘Kicking Corporate Bodies and Damning Their Souls’ (1996) 59 *Modern Law Review* 557.

<sup>48</sup> C Clarkson, ‘Corporate Culpability’ [1988] 2 *Web Journal of Current Legal Issues* - <http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html> (accessed 6 August 2004).

<sup>49</sup> For example, it is estimated that the cost of the proceedings following the acquittal of those charged with manslaughter brought about as a result of the Zeebrugge disaster in 1987 were about £10 million even before the defence had presented its side of the case. See D Bergman, ‘Recklessness in the Boardroom’ (1990) 140 *New Law Journal* 1496 at 1496.

<sup>50</sup> S Box, *Power, Crime and Mystification*, Tavistock, 1983, at 79.

avoiding the risk of harm,<sup>51</sup> particularly if the victim is killed and has no financial dependants.<sup>52</sup> Furthermore, liability is often covered by insurance – thus transferring the cost to the general insuring population. The impact of payment of a damages claim may therefore be minimal. In addition to compensation, where appropriate the court has the power to award punitive or exemplary damages, although they will usually only be awarded ‘against defendants guilty of contumelious disregard of plaintiffs’ rights’.<sup>53</sup> This may be difficult to show in the case of an organization,<sup>54</sup> and in any case the remote threat of them being awarded is unlikely to have any deterrent effect.

2.4.4 In addition, the lack of social stigma attached to civil liability, the fact that many claims are settled behind closed doors and out of court and the corresponding lack of media attention means that civil liability is rarely an effective vehicle for achieving public condemnation of an organization.<sup>55</sup> The well known cost (in time, stress and money) of civil litigation is also likely to deter many people from bringing a civil action, thus further reducing the potential of the civil law to deter or punish those who wrongfully cause death or injury. Even when a plaintiff is determined to see a defendant publicly exposed, it may be very difficult for a plaintiff to refuse reasonable or generous offers of compensation.<sup>56</sup>

2.4.5 Another difficulty facing any system of civil liability lies in the fact that it cannot always ensure that compensation occurs. Even in cases where legal liability is imposed by the courts, compensation of the victims does not always follow. This is because individuals and corporations who cannot pay their debts can go into bankruptcy and have their liabilities brought to an end. In cases of impecunious defendants, injured plaintiffs may not have any incentive to sue for damages and the wrongful conduct may never be brought to public light. If bankruptcy occurs after judgement is given in a civil case, successful plaintiffs may not be able to enforce payment of damages. Furthermore, even in cases where funds are available to pay damages, the amount can simply be passed on to the public as one of the costs of doing business. For these reasons, the criminal law and its punitive responses, which offer public condemnation of wrongful conduct that causes harm to individuals, may offer a more certain result.

## 2.5 Workers Compensation

2.5.1 When an employee is killed or injured at work they may be able to make a statutory claim for compensation from their employer in accordance with the *Workers Rehabilitation and Compensation Act 1988* (Tas). Employers must have insurance to cover the payment of such benefits.<sup>57</sup> The majority of workplace injuries are addressed through the workers compensation scheme. Due to the strict regime by which the amount of compensation is calculated,<sup>58</sup> in some instances, particularly where there is a fatality or serious injury, a worker may be better compensated through a successful civil claim. However, recent tort law reforms restricting the ability of injured workers to bring a civil action against their employer (see

<sup>51</sup> For example in the 1960s the Ford Motor Company put out the Ford Pinto motor vehicle. The car was found to have serious safety problems in its fuel tanks which meant that the Pinto had a tendency to explode in rear-end collisions. According to Ford’s estimates, the unsafe tanks would cause 180 burn deaths, 180 serious burn injuries, and 2,100 burned vehicles each year. It calculated that it would have to pay \$200,000 per death, \$67,000 per injury, and \$700 per vehicle, for a total of \$49.5 million. However, the cost of saving lives and injuries would cost even more: alterations would cost \$11 per car or truck, which added up to \$137 million per year. More than 500 people have since been killed in Ford Pinto’s. Figures received by Ford have since shown that the cost of fixing each car was a miserly \$1 not the \$11 originally claimed. See L Newton & D Schmidt, *Wake-Up Calls: Classic Cases in Business Ethics*, Wadsworth Publishing: California, 1996.

<sup>52</sup> As the victim’s claim for general damages does not survive their death: *Administration and Probate Act 1935* (Tas), s 27.

<sup>53</sup> J Fleming, *The Law of Torts 9th edition*, LBC Information Services: Sydney, 1998, at 257.

<sup>54</sup> J Fleming, *The Law of Torts 9th edition*, LBC Information Services: Sydney, 1998, at 257.

<sup>55</sup> This is particularly true of Tasmania with a recent newspaper article claiming that Tasmanians who sue for compensation for personal injuries are awarded less than their counterparts in the other States of Australia. See G Lower, ‘Lagging Tassie injury payouts’, *The Mercury*, 7 March 2005, at 11.

<sup>56</sup> This is particularly the case because of the rule that if the plaintiff refuses an out of court offer, and the defendant then pays that amount into court, if the court eventually awards a lesser amount, the plaintiff is liable to pay the legal costs of the defendant from the date that the offer was made: *Supreme Court Rules 2000*, r 289.

<sup>57</sup> *Workers Rehabilitation and Compensation Act 1988* (Tas), s 97.

<sup>58</sup> See Part VI – Amount of Compensation of the *Workers Rehabilitation and Compensation Act 1988* (Tas). Under section 69B of the *Workers Rehabilitation and Compensation Act 1988* (Tas) incapacitated workers are entitled to weekly payments of 100% for the first thirteen weeks of the period of incapacity, 85% for the period between 13 weeks and 78 weeks and 80% from 78 weeks to maximum of 9 years.

footnote 46) mean that workers compensation is now the only avenue for compensation available to most injured workers.

Workers compensation legislation is primarily concerned with rehabilitating and compensating the victims of workplace death or injury. No fault or negligence by the employer need be shown in order to bring a successful claim. Thus workers compensation legislation allows the injured worker (or dependants of a deceased worker) to be compensated,<sup>59</sup> even where fault cannot be proven on the balance of probabilities, or if there is some other reason why the victim cannot or does not wish to bring a civil claim.<sup>60</sup> Workers compensation legislation is not aimed at, and is unlikely to particularly serve the function of, punishing, denouncing or deterring organizations' unsafe workplaces or practices.<sup>61</sup>

## ***Conclusion***

2.5.2 While other areas of the law apart from traditional criminal law have an important role to play when an organization wrongfully causes a death or injury, the importance of the criminal law cannot be underestimated.<sup>62</sup> The fact that criminal laws are prosecuted by the state means that the expertise and resources of the state can be used to ensure that justice is done. Also important are the strong procedural protections provided to defendants within the criminal justice system (such as the high standard of proof: beyond a reasonable doubt). But it is the impact of state punishment that is most important. It can denounce behaviour, punish wrongdoing (by making the perpetrator suffer), allow victims and society to feel that justice has been done, deter further wrongdoings (both by the perpetrator and by others) and rehabilitate offenders.

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<sup>59</sup> To the extent provided by the legislation, *ibid*.

<sup>60</sup> For example the expensive, stressful and uncertain nature of civil proceedings, or that the claim may be of a minor nature.

<sup>61</sup> This is particularly so as insurance for liability is compulsory - thus it makes little financial difference to the employer whether a claim is made against them or not. It may however be likely that an increase in insurance premiums would over time be the outcome of a consistently unsafe workplace.

<sup>62</sup> V Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) 109 *Harvard Law Review* 1477 at 1492.

## Part 3

# Need for reform

3.1.1 Wrongfully causing the death or serious injury of another is a firmly established basis for criminal liability. This protects the right to life and physical integrity. There is no doubt that our society places great importance on these rights and it is appropriate that they are protected by the criminal law. Where life is wrongfully taken, it is appropriate that traditional criminal liability be found so that the criminal law can fulfil its functions of denunciation, punishment, deterrence and rehabilitation.<sup>63</sup> This also promotes public confidence in the criminal justice system.

### *The definition of homicide*

3.1.2 Although the matter has not been given judicial consideration in Tasmania, it is possible that, as discussed above (see para 1.1.4), the definition of homicide in the Tasmanian Code ('the killing of a human being by another': Code, s 153(1)) may prevent an organization being guilty of murder or manslaughter in Tasmania.<sup>64</sup> In the light of the conclusion in the previous Part that organizations should be liable for traditional crimes, and in the light of the recognition by many common law jurisdictions that it is and should be possible to find corporations and other organizations guilty of manslaughter, it is argued that this restriction is inappropriate and that the definition of homicide should be amended accordingly.

### **Question 1**

Should the definition of homicide in the Code be amended so that an organization can be criminally responsible for homicide?

### *Problems with the identification doctrine*

3.1.3 Even if the above restriction were removed, a more systemic problem remains, and that is with the currently accepted method of attributing criminal responsibility to organizations: the identification doctrine. This doctrine was explained above at para 1.1.3. It is argued that the identification doctrine does not *effectively* attribute liability to corporations (or other organizations).<sup>65</sup> The leading case on the identification doctrine is the decision of the House of Lords in *Tesco Supermarkets Ltd v Natrass* in which it was held that only those employees identified as being at the centre of the organization could be construed as 'the directing mind and will':<sup>66</sup>

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them.

<sup>63</sup> As discussed in Part 2.

<sup>64</sup> However, *Acts Interpretation Act 1931* (Tas), s 35(1), may overcome this, it provides 'Every provision of an Act relating to offences punishable upon indictment or upon summary conviction shall be construed to apply to bodies corporate as well as to individual persons'.

<sup>65</sup> This has led some commentators to argue that the criminal law is in a state of crisis because it is rooted in the 'ideology of individualism' and consequently is unable to deal with the very real responsibility of collectives: B Fisse & J Braithwaite, 'Accountability and the Control of Corporate Crime', in M Findlay & R Hogg (eds) *Understanding Crime and Criminal Justice*, The Law Book Company: Sydney, 1988. Also see C Wells, 'The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility' [1988] *Criminal Law Review* 788 at 799.

<sup>66</sup> [1972] AC 153 per Lord Reid at 171.

3.1.4 The identification doctrine is now subject to a growing level of criticism, primarily in relation to the limited application of the doctrine, in that only the actions and mental states of those individuals who constitute the ‘controlling mind’ of the organization can lead to organizational liability. It is argued that by tightly restricting the range of persons whose actions and state of mind can lead to the organization being found criminally liable the identification doctrine fails to reflect the ‘flatter’ structure and operation (such as the increasing delegation of responsibility to relatively junior officers) of modern corporations, particularly large corporations:

Corporate structure is becoming increasingly diffuse, with the day-to-day running of many larger corporations being devolved upon semi-autonomous division and lower level managers.<sup>67</sup>

3.1.5 It has been observed that the practices of modern corporate decision making rarely fall within the doctrine, particularly in larger corporations, where decisions are by necessity taken at the branch, unit or middle management level.<sup>68</sup> Morland J articulated this point in *National Rivers Authority v Alfred McAlpine Homes East* in which he claimed:<sup>69</sup>

In almost all cases the act or omission will be that of a person such as a workman, fitter or plant operative in a fairly low position in the hierarchy of the industrial, agricultural or commercial concern.

3.1.6 Few prosecutions against organizations for manslaughter have been brought before the courts. It seems likely that this is at least partly the result of the difficulty in securing a conviction using the identification doctrine, even in instances of gross negligence. All of the organizations that have been successfully prosecuted for manslaughter have been ‘small companies in which the directors took an active part in the day-to-day operations of the company’.<sup>70</sup> In fact, the Institute is aware of only three prosecutions of corporations for manslaughter in Australia,<sup>71</sup> only one of which was successful: *R v Denbo Pty Ltd*,<sup>72</sup> and in that case there was a plea of guilty. This case involved a small family construction company, with only two directors, and so the identification doctrine was readily applicable. In the UK the situation is similar, with only six small organizations having been convicted since 1992.<sup>73</sup> This means that it can be argued that in practice the law is discriminating against small businesses. Generally, with larger organizations, the fault stems from a lapse in safety standards and procedures, a failure that is often the result of a more general systemic problem rather than (as the identification doctrine requires) being traceable to ‘a directing mind and will’. For example –

- In the Victorian case of *R v A C Hatrick Chemicals Pty Ltd*,<sup>74</sup> the defendant company was charged with manslaughter and negligently causing serious injury following the explosion of a large vessel used to store gum resin. Applying the identification doctrine, Hampel J held that the company could not be liable unless there was criminal negligence on the part of an individual who could be identified as the directing mind and will of the company. As responsibility for the ‘accident’ lay with two employees<sup>75</sup> rather than anyone who could be construed as the ‘directing mind and will’ the defendant company was acquitted, with Hampel J concluding that if the doctrine for determining organizational criminal liability for manslaughter and negligently causing serious injury was to be modified, it was the responsibility of parliament, and not the courts, to change it.<sup>76</sup>

<sup>67</sup> T Woolf ‘The Criminal Code Act 1995 (C’t) – Toward a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Criminal Law Journal* 257.

<sup>68</sup> For example see G Williams, *Textbook of Criminal Law 2<sup>nd</sup> edition*, Stevens Publishing: London, 1983, at 973; B Fisse, ‘Consumer Protection and Corporate Criminal Responsibility: A critique of *Tesco Supermarkets Ltd v Natrass*’ (1971) 4 *Adelaide Law Review* 113; C Clarkson, ‘Kicking Corporate Bodies and Damning Their Souls’ (1996) 59 *Modern Law Review* 557.

<sup>69</sup> [1994] 4 All ER 286 at 298.

<sup>70</sup> J Clough & C Mulhern, *The Prosecution of Corporations*, Oxford University Press: Melbourne, 2002, at 175.

<sup>71</sup> *R v Dynamic Demolitions Pty Ltd* Unreported, Supreme Court of Victoria, Hampel J, 8 December 1997; *R v Denbo Pty Ltd* (1994) 6 VIR 157; *R v A C Hatrick Chemicals Pty Ltd* Unreported, Supreme Court of Victoria, Hampel J, 29 November 1995.

<sup>72</sup> *R v Denbo Pty Ltd* (1994) 6 VIR 157.

<sup>73</sup> Home Office (UK) *Corporate Manslaughter: The Government’s Draft Bill for Reform* March 2005, at 8 of the Introduction. The Bill is available on the Home Office website at: [http://www.homeoffice.gov.uk/docs4/con\\_corp\\_mans.html](http://www.homeoffice.gov.uk/docs4/con_corp_mans.html) (accessed 24 May 2005).

<sup>74</sup> *R v A C Hatrick Chemicals Pty Ltd* Unreported, Supreme Court of Victoria, Hampel J, 29 November 1995.

<sup>75</sup> The employees were the plant manager and safety co-ordinator, and the plant engineer.

<sup>76</sup> See generally K Wheelwright, ‘Corporate Liability for Workplace Deaths and Injuries – Reflecting on Victoria’s Laws in the Light of the Esso Longford Explosion’ (2002) 7 *Deakin Law Review* 323.

- Following a series of massive explosions at the Longford facilities of Esso Australia Pty Ltd,<sup>77</sup> which killed two workers and injured eight others, Esso Australia Pty Ltd was found guilty of 11 indictable offences under the *Occupational Health and Safety Act 1985 (Vic)* and fined \$2,000,000 (the largest fine for a workplace offence in Australian history).<sup>78</sup> A Royal Commission found that the ‘real causes’ of the explosion were the failure of Esso’s management systems to ensure there was proper assessment of the hazards associated with the plant, and to provide appropriate training and supervision of employees in operating procedures to deal with the disaster that transpired.<sup>79</sup> However no charge of manslaughter was laid.
- \*The English case of *R v Stanley and Others*<sup>80</sup> concerned the infamous Zeebrugge ferry disaster, in which a failure to ensure that the bow doors of a passenger ferry were securely closed before sailing out to sea resulted in water flooding the car decks, the ferry sinking and the death of 193 people on board. According to P&O management ‘responsibility lies squarely with those on board who had professional responsibility to ensure that the ship sailed safely’.<sup>81</sup> However, this view was not supported in the official inquiry<sup>82</sup> which held that the management of the ferry company, Townsend Car Ferries Limited (a subsidiary of P&O) had been jointly at fault in failing to ensure adequate standard operating procedures on board the ferry:<sup>83</sup>

All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.

A coronial inquest<sup>84</sup> resulted in the company, P&O European Ferries (Dover) Limited and seven individuals being prosecuted. However, the trial process was ultimately unsuccessful with the Judge ruling that there was insufficient evidence against any director or senior manager involved.<sup>85</sup>

### ***Meridian: a new approach?***

There have been some indications of a possible move away from the strictness of the identification doctrine when considering corporate liability for modern statutory offences. In *Meridian*<sup>86</sup> the Privy Council said that where an offence was intended by the legislature to apply to a company the courts should ‘fashion a special rule of attribution’ by interpreting how it was intended to apply. The interpretation of this intention should be done by ‘applying the usual canons of interpretation, taking into account the language of the [statute creating the offence] and its contents and policy’.<sup>87</sup> While the flexible approach taken by the Privy Council in *Meridian* shows a willingness to hold corporations liable for criminal offences, the decision has been criticised as not being based on good principle or precedent, and being too uncertain and complicated.<sup>88</sup>

<sup>77</sup> Esso Australia Pty Ltd, a subsidiary of the US Exxon Mobil Corporation, operates three gas plants at Longford in south-eastern Victoria to process gas from wells in Bass Strait.

<sup>78</sup> P Gregory and M Shaw, ‘Esso Fined a Record \$2M’ *The Age*, 31 July 2001, at 1.

<sup>79</sup> Report of the Longford Royal Commission, *The Esso Longford Gas Plant Accident* (1999).

\* Information and references provided are taken from, The Law Commission (of England and Wales), *Legislating the Criminal Code: involuntary manslaughter* (Report 237, 1996) at para 6.49, 6.50, 8.45 – 8.50.

<sup>80</sup> CCC No 900160, 19 October 1990.

<sup>81</sup> H Young, Where Does the Buck Stop? *Guardian Weekly*, 18 October 1987 at 1.

<sup>82</sup> *MV Herald of Free Enterprise*: Report of the Court (No 8074), Department of Transport (UK).

<sup>83</sup> *MV Herald of Free Enterprise*: Report of the Court (No 8074), Department of Transport (UK), at para 14.1.

<sup>84</sup> See *R v HM Coroner for East Kent, ex parte Spooner* (1989) 88 Cr App R 10.

<sup>85</sup> The jury were directed to acquit all accused: *R v Stanley and Others* CCC No 900160, 19 October 1990. The company was however held liable civilly for compensation to those injured and to the relatives of the victims who perished.

<sup>86</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

<sup>87</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507.

<sup>88</sup> For a detailed discussion of the application of the identification doctrine to traditional crimes, and criticism of the approach taken in *Meridian*, see J Clough & C Mulhern, *The Prosecution of Corporations*, Oxford University Press: Melbourne, 2002, at 94 –104.

## Tasmania

3.1.7 In Tasmania, while there have been successful criminal prosecutions against organizations responsible for breaches of the *Workplace Health and Safety Act 1995*, there has never been a prosecution for a traditional crime in the Criminal Code brought against an organization responsible for the death or serious injury of another. Thus no Tasmanian case has considered whether the identification doctrine applies to crimes in the Tasmanian Code. While *Meridian* suggests a move away from the strictness of the identification doctrine in relation to statutory offences, it seems likely that Tasmanian courts would apply the identification doctrine if a corporation were charged with a crime in the Criminal Code because –

- *Meridian* particularly dealt with statutory offences which the legislature intended to apply to corporations – this does not include the types of traditional crimes in the Criminal Code.
- There is a legislative trend to provide specifically for alternative methods of attributing a state of mind to a company, in the absence of such a provision, it should be assumed that the legislature intended the traditional identification doctrine to apply.
- One of the main themes of the criminal justice system is protecting defendants, particularly where they may be held liable for serious crimes (such as manslaughter), therefore any ambiguities should be interpreted in favour of a defendant. In the absence of a clear intention to the contrary, the stricter identification doctrine should apply.

3.1.8 The following are examples of incidents in Tasmanian in which a company may have been wholly or partly responsible for a death or injury. It is not suggested that traditional criminal prosecutions would have been appropriate in the following examples or that they involved criminal negligence. Rather, they are instances where prosecution for traditional crimes *might* have been appropriate.

- In July 2004 a 16-year-old boy was killed at Blue Ribbon Meats in Launceston when the forklift he was driving overturned.<sup>89</sup> The teenager who had only been working at the plant for three weeks was unlicensed for either a motor vehicle or forklift at the time of the incident and while he was working for a contractor on site, it is alleged he was receiving instructions from Blue Ribbon Meats employees.
- In February 2000 an employee was killed when there was an explosion in a tank on the work site. The employee at the time of the incident was working on top of the tank, welding a threaded sleeve to one end of a pipe to enable the installation of a new valve. The use of the equipment ignited gas inside the plant resulting in the explosion. The force of the explosion blew open a bolted manhole lid which hit the employee, causing him to be hurled four metres into the air and then land approximately eight metres away and five metres below where he had been working. The defendant company was charged with failing to ensure that an employee was safe from injury under section 9(4) of the *Workplace Health and Safety Act 1995* (Tas). It was fined \$30,000 and a conviction recorded.
- A 19-year-old who had only been working for eight days was killed at a cable logging operation when a 25 metre log which was being hauled in, swung around and struck the deceased in the chest and head region. The investigation revealed the log was attached in the middle region which caused it to swing, striking the uphill bank and subsequently the deceased. The deceased was not a safe distance away from the area. The defendant company was charged under section 9(2)(d) and section 9(2)(e) of the *Workplace Health and Safety Act 1995* (Tas). According to the Senior Inspector for Forestry, Pulp and Paper the cause of the accident was a ‘combination of fatigue and lack of specific training’. Interestingly, while section 4(2) of the *Industrial Safety, Health and Welfare (Forest Industries) Regulations 1990* provided that all personnel employed in the forest industry must be trained and accredited, exceptions were granted to cable logging and harvesting operations to defer accreditation ‘until such time as an approved course becomes available’. According to the Senior Inspector for Forestry, Pulp and Paper if training and accreditation had been available at the time of the incident, the incident ‘probably could have been avoided’.

<sup>89</sup> N Clark, ‘Boy, 16, killed while driving work forklift’, *The Mercury*, 13 July 2004, at 3. Also see N Clark, ‘Family wants answers in boy’s forklift death’, *The Mercury*, 14 July 2004, at 9.

- A Devonport steel fabrication company, had a metal punching, shearing and notching machine (known as a cropping machine) located within their work plant. In May 1996 while using the cropping machine an employee who had commenced work with the company three weeks earlier had the fingertips of two fingers severed. In evidence before the court it was discovered that the warning signs on the machine were written in German. The defendant company were charged under section 9(1)(a)(iii) of the *Workplace Health and Safety Act 1995* (Tas) for failing to ensure workplace health and safety. It was convicted and sentenced to a \$20,000 fine.
- In September 1999 an employee was injured when his right arm became caught in a crushing plant. The employee at the time was attempting to realign a conveyor belt on the tail drum by lubricating it with water and on standing up fell, catching his arm in the tail drum. The defendant company was charged with failing to provide a safe plant and failure to provide a safe system of work, failing to maintain plant in a safe condition and failure to give adequate training or supervision as found in sections 9(1)(a)(ii), 9(1)(a)(iii) and 9(1)(c) of the *Workplace Health and Safety Act 1995* (Tas). Magistrate Wilson heard evidence at the hearing that a Senior Inspector with Workplace Standards Tasmania, had investigated the tail drum prior to the accident and had pointed out the requirement for a guard and emergency stop switches to be placed around the tail drum. Following the workplace incident, the Senior Inspector had found ‘basically the same set up as... when he first saw it’. Magistrate Wilson found the company guilty of all of the charges finding a ‘high level of culpability by the company’ fining it \$15,000.<sup>90</sup>
- In May 1999 an employee was injured when he was splashed with chromic acid solution causing burns to the groin and eye. At the time the employee was standing below the chromic acid storage tank and attempting to transfer the acid to a storage tank by means of a portable pump and a length of pipe when the pipe fractured. The employee was then hit in the back of the neck by chromic acid solution escaping from the tank. The defendant company was charged with failing to provide a safe plant and failure to provide a safe system of work under sections 9(1)(a)(iii) and 9(1)(a)(ii) of the *Workplace Health and Safety Act 1995* (Tas). It was fined \$7,500 for failing to provide a safe plant and a conviction was recorded for failing to provide a safe system of work.<sup>91</sup>
- In January 1999 a 19-year-old temporary employee became caught in a conveyor belt and was trapped for three hours before he was found. The employee suffered extensive damage to his left shoulder requiring a muscular transplant, skin grafts and neuro-surgery on damaged nerves. The defendant company was charged with failure to provide information, instruction, training and supervision reasonably necessary to ensure that employees are safe from injury and risk to health, pursuant to section 9(1)(c) of the *Workplace Health and Safety Act 1995* (Tas). The defendant pleaded guilty to the charge. In handing down his decision, Magistrate Hill stated that the accident could have been prevented and fined the defendant company \$10,000.<sup>92</sup> Since the accident, the company has modified the plant to prevent a recurrence, and has introduced a ‘buddy system’ to enable workers to look after each other. They also conducted a safety audit and consequently upgraded the guards on conveyor belts.
- In September 1997 two contractors suffered electrical burns and shock whilst working in a high voltage sub-station at Bell Bay. In the Launceston Magistrates Court, Magistrate Wilson fined the defendant company \$40,000 for breach of section 9(4)(a) of the *Workplace Health and Safety Act 1995* (Tas). The defendant company was found guilty of the charge of failing to provide and maintain a safe working environment for its contractors. The Magistrate found that the two contractors were not qualified to work on live high voltage equipment and should not have been left to make a decision as to the need to have a person experienced in high voltage work present. This is the largest penalty ever handed down under this legislation.<sup>93</sup> The defendant company has since changed its safety procedures.

<sup>90</sup> ‘Fined over injury’, *The Advocate*, 1 November 2001, at 6.

<sup>91</sup> ‘Workplace fined’, *The Advocate*, 24 February 2001.

<sup>92</sup> ‘Company admits guilt’, *The Advocate*, 21 June 2000, at 5.

<sup>93</sup> G Hose, ‘\$40,000 fine imposed on Lend Lease’, *The Examiner*, 2 December 1999, at 12.

- In March 1999 an employee was carrying out repair work inside a calcine cooler. A boiler, located two floors above the cooler was having work done on it resulting in an inspection hatch being opened to allow the heated calcine to flow out on to a floor and out of a drainage hole. The employee working below suffered burns to his feet.<sup>94</sup> The defendant company was fined \$18,000 for a breach of section 9(4) of the *Workplace Health and Safety Act 1995* (Tas). Section 9(4) provides that employers must ensure that contractors and employees and others engaged by contractors are safe from injury and risks to health, and in particular that the employer must provide a safe working environment.

## Conclusion

3.1.9 As stated above, it is not suggested that any of these Tasmanian cases necessarily involved criminal negligence. Nevertheless, the point to be made is that the circumstances of many workplace deaths or injuries are indicative of negligence, and it is therefore difficult to believe that criminal prosecutions have never been appropriate. In relation to a similar situation in Western Australia, Laing wrote:<sup>95</sup>

A brief analysis of a series of cases, where prosecutions have been pursued by WorkSafe or Department of Mineral and Petroleum Resources indicates there is no recent record of charges under the Criminal Code in relation to workplace fatalities or serious injury where there is no immediate and direct link between the fatality and the senior executive. It is difficult to believe that in all of the fatalities in WA in recent years that here has not been a case of criminal neglect or culpability.

It is argued that the identification doctrine is ineffective, resulting in larger organizations being essentially free from all but strict criminal liability (i.e. crimes where no mental state, or guilty mind, is required). Reforming this area of the law could improve community confidence in the ability of the criminal justice system to adequately prosecute and punish organizations that wrongfully cause deaths or injuries, and may also improve attitudes towards workplace safety. The Institute is therefore of the preliminary view that this area of the law should be reformed.

### Question 2

Should the method of attributing criminal liability to organizations (the identification doctrine) be reformed?

<sup>94</sup> 'Pasminco fined \$18,000', *The Mercury*, 23 March 2004, at 12.

<sup>95</sup> R Laing, *Final Report, Review of the Occupational Health and Safety Act 1984* (2002) at 127.

## Part 4

# Extent of Reform

Currently in Tasmania only natural persons and corporations can be held liable for crimes in the Criminal Code. Likewise, the Commonwealth Criminal Code applies only to natural persons and bodies corporate. While the majority of organizations whose behaviour results in death or serious injury may well be corporations, the aims of the criminal law may be better met by extending criminal liability to other types of organizations, as has been the approach in some other jurisdictions. After all, other types of organizations may be equally as capable of causing the death or serious injury of a worker or member of the public, and it may be just as important to punish, denounce, deter, and rehabilitate them when they do so. Different jurisdictions have taken different approaches to this issue:

### *Victoria*

4.1.1 The Victorian Bill applied only to bodies corporate, but was not limited to non-government corporate bodies. The Attorney-General stated:<sup>96</sup>

the government sector should be treated no differently from the private sector... If a person is killed or seriously injured because of the gross negligence of a government statutory corporation, it makes no difference to the victim whether the corporation was a government or non-government corporation. By applying the offences to government statutory corporations, the government is demonstrating its commitment to improving health and safety in all situations and expects no more of private sector corporations than it expects of itself.<sup>97</sup>

While the application of the Bill to government bodies corporate was straightforward, the Government had also made the policy decision to apply the Bill to the whole of government, and for this reason gave a reference to the Victorian Law Reform Commission on how to impose criminal liability on public sector entities (excluding bodies corporate) such as 'agencies', 'offices' and 'public authorities'. In particular it was asked:

- (i) the way in which, and the basis upon which, such criminal liability should be attributed to the entity;
- (ii) the way in which sentences can be imposed on the entity;
- (iii) how personal criminal liability could be imposed on senior officers/employees of the entity, in circumstances where a negligent act or omission attributed to the entity causes death or serious injury to an employee or worker of the entity.

The Victorian Law Reform Commission recommended<sup>98</sup> that the Bill should provide that for the avoidance of doubt the Crown is a body corporate and that it is intended that the Bill should bind the Crown in all its capacities as far as is constitutionally possible and it is intended to make the Crown criminally liable and subject to criminal sanctions. These (and other) recommendations were introduced into the Bill.<sup>99</sup> The VLRC gave detailed consideration to the issue of how this liability should be imposed, making 38 recommendations in all. These are reproduced in Appendix B.

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<sup>96</sup> House of Assembly Victoria, *Hansard*, Attorney-General Rob Hulls, , 22 November 2001, at 1927.

<sup>97</sup> Section 12(1) of the proposed amendment therefore binds any body corporate that represents the Crown if the body corporate is established by or under an Act or is deemed or declared to be a body corporate by or under an Act.

<sup>98</sup> Victorian Law Reform Commission, *Criminal Liability for Workplace death and Serious Injury in the Public Sector Report 2002*.

<sup>99</sup> As sent to the Upper House in Autumn 2002. The Bill is available at:

[http://dms003.dpc.vic.gov.au/archive/Autumn\\_2002/bills/B01048/B01048S.html](http://dms003.dpc.vic.gov.au/archive/Autumn_2002/bills/B01048/B01048S.html) (accessed 8 June 2005).

## *United Kingdom*

4.1.2 In the United Kingdom the Government has released a draft Corporate Manslaughter Bill<sup>100</sup> that would apply to corporations and to government departments and bodies listed in a schedule. However, the proposed offence of corporate manslaughter does not apply to things done 'in the exercise of an exclusively public function' this 'means a function that falls within the prerogative of the Crown or is, by its nature, exercisable only with authority conferred by the exercise of that prerogative or by or under an enactment.'<sup>101</sup> Thus, 'decisions involving matters of public policy are outside the scope of the offence'.<sup>102</sup> This is said to be justified on the basis that decisions involving matters of public policy are subject to other types of liability, such as public inquiries or reports.

## *The ACT*

4.1.3 The ACT's new industrial manslaughter offence applies to 'employers' rather than corporations. The term 'employer' is defined broadly: essentially as any person who engages a worker or who has an agent who engages a worker.<sup>103</sup> This was intended to include bodies such as schools, hospitals and other not-for-profit organizations as well as Government Departments and Government Business Enterprises. Penny Shakespeare, the Director of Work Safety and Labour Policy with the Chief Minister's Department stated:<sup>104</sup>

all organizations have to abide by the ACT occupational health and safety law. Anyone who has an employment relationship, who has workers, has to abide by the law of the territory.

However, the impact of the law may fall far short of this ideal. In the ACT the general principles of corporate criminal responsibility in their Criminal Code only apply to corporations. This means that the problems of the identification doctrine may persist<sup>105</sup> if a non-corporate body were prosecuted for the new industrial manslaughter offence.

Furthermore, the Commonwealth Minister for Employment and Workplace Relations Kevin Andrews has recently introduced a Bill that if passed will exclude Commonwealth employers and employees from the application of the ACT industrial manslaughter laws and any other similar industrial manslaughter law enacted by a State or Territory in the future.<sup>106</sup>

## *Canada*

4.1.4 In Canada the federal criminal law was recently altered to impose criminal liability on 'organizations'.<sup>107</sup> An 'organization' was defined to include a 'public body, body corporate, society, company, firm, partnership, trade union or municipality' as well as a less formal association of persons that is '(i) created for a common purpose, (ii) has an operational structure and (iii) holds itself out to the public as an association of persons'. The importance of all organizations - rather than just corporations - being subject to sanction was articulated in Canada by Paul Macklin, the Parliamentary Secretary to the Minister of Justice and Attorney General:<sup>108</sup>

There has been a great deal of creativity shown by corporate lawyers in developing new structures, for example, limited liability partnerships and joint ventures. Quite simply, we want to ensure the Criminal Code applies to every organization of persons without any artificial distinctions based on how these persons chose to structure their legal relations.

<sup>100</sup> Home Office *Corporate Manslaughter: The Government's Draft Bill for Reform* March 2005. The Bill is available on the Home Office website at: [http://www.homeoffice.gov.uk/docs4/con\\_corp\\_mans.html](http://www.homeoffice.gov.uk/docs4/con_corp_mans.html) (accessed 24 May 2005).

<sup>101</sup> Clause 4.

<sup>102</sup> Introduction to the Draft Bill, pg 11.

<sup>103</sup> *Crimes Act 1900 (ACT)*, s 49A.

<sup>104</sup> Legislative Assembly for the Australian Capital Territory, Standing Committee on Legal Affairs, (Reference: Crimes (Industrial Manslaughter) Amendment Bill 2002) at 21.

<sup>105</sup> Of course common law developments may occur, but given the clear intention of the Parliament to limit the application of the corporate criminal responsibility of their Code, it could be difficult for a court to find that the identification doctrine does not apply.

<sup>106</sup> *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005*.

<sup>107</sup> See Criminal Code SC 1985 c 21 s 22.1.

<sup>108</sup> Paul Macklin, Parliamentary Secretary to the Minister of Justice and Attorney General, C-45, Second Reading Speech.

## Tasmania

4.1.5 Although it may be arguable, it appears that under the current Tasmanian law only natural persons and bodies corporate can be held liable for traditional criminal offences such as manslaughter.<sup>109</sup> State owned companies are ‘bodies corporate’. Some well-known state-owned companies are Aurora, Metro, TT-Line Company Pty Ltd, and TOTE.<sup>110</sup> Government business enterprises (GBEs) are also liable as if they were corporations.<sup>111</sup> Some well-known government business enterprises are Forestry Tasmania, Hydro Tasmania, MAIB, Port Arthur Historic Site Management Authority and The Public Trustee.<sup>112</sup> Specific legislation can also impose criminal liability on different types of bodies, but must do so explicitly.<sup>113</sup>

4.1.6 If reforms to our Code applied only to bodies corporate, then they would not apply to partnerships, associations, government departments and other types of organizational structures. The Institute can think of no reason why such bodies should be exempt from the criminal law. The Institute is therefore of the view that criminal liability should be imposed on all organizations, including government bodies. The Institute prefers the simplicity of the Canadian approach to achieve this aim, however we also seek comment on whether it would also be appropriate to draw upon the detailed recommendations of the VLRC in relation to liability of the Crown.<sup>114</sup>

### Question 3

- (a) Should any reforms apply to all ‘organizations’?
- (b) Should the term ‘organization’ be defined broadly, in line with recent Canadian reforms?
- (c) Would it be appropriate/necessary to implement any of the recommendations of the VLRC in relation to liability of the Crown?
- (d) Do you favour an exception like that in the UK draft bill relating to things done ‘in the exercise of an exclusively public function’?

<sup>109</sup> Section 35(1) of the *Acts Interpretation Act 1931* (Tas) provides that ‘Every provision of an Act relating to offences punishable upon indictment or upon summary conviction shall be construed to apply to bodies corporate as well as to individual persons’, thus there is no doubt that corporations can be found criminally liable. However, it could be argued that section 35 is otiose because the Criminal Code and other statutes creating criminal offences such as the *Workplace Health and Safety Act 1995* (Tas) refer to ‘people’ or ‘a person’ when they define offences, and section 41(1) of the *Acts Interpretation Act 1931* (Tas) provides that ‘In any Act the expressions “person” and “party” respectively shall include any body of persons, corporate or unincorporate, other than the Crown’. What then is the combined effect of sections 35 and 41? Section 41 could have the effect of making any criminal offence that applies to a ‘person’ also apply to ‘any body of persons, corporate or unincorporate, other than the Crown’. However, it could also be argued that by expressly providing in section 35 that only corporations can be liable for criminal offences, it is implied that other bodies cannot (‘expressio unius est exclusio alterus’), and that section 41(1) does not therefore extend to provisions in any Act creating criminal offences. However, this latter interpretation would mean that unincorporated bodies, such as partnerships (as distinct from their members as individuals), are not criminally liable under the WHSA. This would seem to be contrary to the **purpose** of the WHSA (to deal with *all* employers). If this interpretation were not accepted, then it would appear that these unincorporated bodies may also be already able to be held liable under the Code. Whatever the correct interpretation, it would seem desirable to clarify the effect of sections 35 and 41 of the *Acts Interpretation Act* in relation to criminal offences.

<sup>110</sup> Others are: Burnie Port Corporation Pty Ltd, Hobart Ports Corporation Pty Ltd, Port of Devonport Corporation Pty Ltd, Port of Launceston Pty Ltd and Transend Networks Pty Ltd. The list is available at: [www.treasury.tas.gov.au](http://www.treasury.tas.gov.au) (accessed 20 December 2004).

<sup>111</sup> *Government Business Enterprises Act 1995*, s 6.

<sup>112</sup> Others are: Printing Authority of Tasmania, Rivers and Water Supply Commission, Southern Regional Cemetery Trust, Tasmanian International Velodrome Management Authority, Tasmanian Public Finance Corporation. List available at: [www.treasury.tas.gov.au](http://www.treasury.tas.gov.au) (accessed 20 December 2004).

<sup>113</sup> The Institute is not aware of any Tasmanian legislation doing so.

<sup>114</sup> These recommendations are reproduced in Appendix B.

## Part 5

# Options for reform

### *Introduction*

The problems with the identification doctrine outlined in Part 1 of this paper demonstrate a need to reform this area of law. Reform has already taken place on a federal level in Australia and Canada as well as in the Australian Capital Territory. A number of other jurisdictions including the United Kingdom, Victoria, South Australia, Queensland and New South Wales have also considered reform, or are in the process of doing so. This Part discusses the three different types of reform that have been adopted or proposed in these jurisdictions –

- **Introducing a specific ‘industrial manslaughter’ offence to the Code:** This option has been considered by a number of jurisdictions, with the ACT becoming the first to implement the reform in 2004. The introduction of related specific offences (negligently causing serious injury and specific ‘senior officer’ offences) is also discussed.
- **Introducing reforms to the WHSA:** This could include introducing:
  - manslaughter and grievous bodily harm provisions
  - breach of duty causing death or grievous bodily harm provisions
  - higher maximum penalties
  - a broader range of penalties
  - senior officer liability
- **Introducing specialised principles of criminal responsibility for organizations:** This option would involve amending the criminal responsibility chapter of the Criminal Code, so that it sets out how physical elements and mental elements can be proved when dealing with an organization.

## 5.1 Specific offences in the Code

5.1.1 This option for reform is to introduce a specific ‘corporate manslaughter’ provision into the Tasmanian Criminal Code. This would be a crime that would apply only to ‘corporations’ (or ‘organizations’ or ‘employers’, depending on how the offence was defined). The following discussion outlines how the ACT, Victoria and the UK have undertaken or proposed this type of reform.<sup>115</sup>

### *Australian Capital Territory*

5.1.2 In late 2003 the Australian Capital Territory became the first Australian jurisdiction to introduce a specific offence of industrial manslaughter. The *Crimes (Industrial Manslaughter) Amendment Act 2003* followed widespread consultation including a Standing Committee Report into the proposed reforms.<sup>116</sup> The

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<sup>115</sup> Queensland and NSW have also considered the introduction of this type of specific offence. In Queensland a brief government discussion paper considered the introduction of a provision of ‘dangerous industrial conduct’ resulting in death or grievous bodily harm: Queensland Government, Department of Justice and Attorney-General, ‘Discussion Paper: Dangerous and Industrial Conduct’ 2000. The discussion paper included little critical assessment of reforms proposed or introduced in other jurisdictions. Although the discussion paper called for submissions to be made by October 2000, no further report appears to be available. In NSW the Final Report of the Legislative Council General Purpose Standing Committee No 1 (May 2004) *Serious injury and death in the workplace* recommended ‘as a matter of urgency’ that the offences of ‘corporate manslaughter’ and ‘gross negligence by a corporation causing serious injury’ be enacted in the *Crimes Act 1900* (NSW) (Recommendation 26), however the report did not include a detailed discussion of this issue, and NSW has since introduced a draft Bill which would amend the *Occupational Health and Safety Act 2000* (NSW), which is the second type of reform considered in this Part, see para 5.2.3.

<sup>116</sup> Legislative Assembly for the Australian Capital Territory, Standing Committee on Legal Affairs (Reference: Crimes Industrial Manslaughter) Amendment Bill 2002).

crime of industrial manslaughter is essentially comprised of recklessly or negligently causing death to an employee in the course of their employment. Section 49C of the *Crimes Act 2003* provides:

An employer commits an offence if—

(a) a worker of the employer—

- (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or
- (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and

(b) the employer's conduct causes the death of the worker; and

(c) the employer is—

- (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or
- (ii) negligent<sup>117</sup> about causing the death of the worker, or any other worker of the employer, by the conduct.

In what way then does this differ from normal manslaughter? The crime of industrial manslaughter is restricted to employers and employees. The restriction means that where a non-employee is killed, as for example in the Canberra building explosion,<sup>118</sup> the new laws will not apply.

5.1.3 Of course such manslaughters could already have been prosecuted under the existing crime of manslaughter. Why then create this duplication? Two reasons were articulated by the ACT Minister for Industrial Relations: the desire to be seen to be sanctioning corporations in appropriate circumstances, and to counter a possible reluctance by juries to convict companies of manslaughter where the death occurs in the workplace.<sup>119</sup> Are these legitimate goals? It can be argued that the creation of a specific industrial manslaughter offence is unnecessary window dressing, which could inhibit or detract from more appropriate reform, and give the impression that workplace manslaughter is less serious than normal manslaughter. The introduction of an 'industrial manslaughter' provision in the ACT can be seen as similar to the offence of 'dangerous driving causing death' which was introduced in jurisdictions throughout Australia in an effort to counter the perceived reluctance of juries to convict for manslaughter.<sup>120</sup> The 'reform' of offences, by giving the same offence a less stigmatising label in order to make them more palatable has been subjected to sustained criticism,<sup>121</sup> with McSherry and Naylor summarising<sup>122</sup> –

There certainly seems to be no valid justification for having a separate offence of culpable driving causing death given the scope of negligent manslaughter and the need to address any existing tolerance for dangerous driving.

5.1.4 It should be noted that in addition to this new offence of industrial manslaughter, the ACT has also introduced the third type of option for reform, namely specialised principles of criminal responsibility for corporations. These new principles would operate in the prosecution of a corporation (but not other organizations) for any offence, including the new offence of industrial manslaughter. These reforms are discussed in more detail below.

<sup>117</sup> This requires culpable negligence: 'negligence' is defined by the Criminal Code (ACT), s 21 in accordance with the common law definition of culpable negligence; this definition is part of the general principles of criminal responsibility in the Code that apply to all offences in the ACT (Code, s 7).

<sup>118</sup> A 12 year-old girl was killed when a 1-kilogram fragment of steel expelled during an implosion of the Royal Canberra Hospital struck her in the head, see footnote 1.

<sup>119</sup> Legislative Assembly Australian Capital Territory, *Hansard*, Mr Simon Corbell, 12 December 2002, at 4382 – 4.

<sup>120</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Discussion Paper, Chapter 5, *Fatal Offences Against the Person* (June 1998), at 163.

<sup>121</sup> Law Reform Commission of Victoria, *Death Caused by Dangerous Driving*, Discussion Paper No. 21, July 1991, at para 22; P Alldrige, 'Manslaughter and Causing Death by Driving Recklessly' 44 (1980) *Justice of the Peace* 569, at 571; and MCCOC Chapter 5, *Fatal Offences Against the Person* Discussion Paper (June 1998), at 161.

<sup>122</sup> B McSherry and B Naylor *Australian Criminal Laws – Critical Perspectives*, Oxford University Press: Melbourne, 2004, at 124.

## United Kingdom

5.1.5 Following widespread condemnation of a series of prominent disasters including the Zeebrugge ferry disaster that killed 187 people and the Kings Cross fire in which there were 31 fatalities<sup>123</sup> the English Government promised to introduce an offence of corporate killing in 1997.<sup>124</sup> Following Home Office reports and Government proposals, the Government has now released a draft Bill<sup>125</sup> and seeks comments on the Bill by June 2005. The Bill essentially enacts and expands the identification doctrine. Clause 1(1) of the Bill creates the offence; it provides –

An organisation to which this section applies is guilty of the offence of corporate manslaughter if the way in which any of the organisation's activities are managed or organised by its senior managers –

- (a) causes death, and
- (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

Subclause 3(1) defines a “gross” breach of duty as conduct falling far below what can reasonably be expected of the organization in the circumstances. This basically enacts the common law definition of criminal negligence. However subclause 3(2) then states that in deciding whether there has been a gross breach of duty the jury must consider whether the evidence shows that the organization failed to comply with any relevant health and safety legislation or guidance, and if so –

- (a) how serious was the failure to comply;
- (b) whether or not senior managers of the organization –
  - (i) knew, or ought to have known, that the organization was failing to comply with that legislation or guidance;
  - (ii) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;
  - (iii) sought to cause the organization to profit from that failure.

This type of guiding provision may be particularly useful in the context of corporate criminal offences because juries may have limited experience of the standard of care that corporations may normally exercise.

5.1.6 The Explanatory Notes for the draft Bill state that elements for the new offence are:

- The organisation must owe a duty of care to the victim that is connected with certain things done by the organisation. The relevant duties of care are set out in clause 4.<sup>126</sup>
- The organisation must be in breach of that duty of care in the way its senior managers manage or organise a particular aspect of its activities. This introduces an element of “senior management failure” into the offence that is considered below.
- This management failure must have caused the victim's death. The usual principles of causation in the criminal law will apply to determine this question.
- The breach of duty must have been gross. Clause 3 explains this further and sets out a number of factors that the jury must take into account when considering this issue.

The Explanatory Notes go on to state –

The “senior management failure” aspect of the new offence attributes liability to a corporation in a different way from that used for corporate liability for gross negligence manslaughter and focuses

<sup>123</sup> Rail disasters included Clapham (1998), Southall (1997), Paddington (1999) and Hatfield (2000). Other disasters included the sinking of the Marchioness (1989) and the Pipa Alpha explosion (1988).

<sup>124</sup> At the 1997 Labour Party conference: George Monbiot, ‘The Business of Killing’ *The Guardian*, 29 March 2005, citing Jack Straw, quoted in *The Guardian*, 3 October 1997.

<sup>125</sup> Home Office *Corporate Manslaughter: The Government's Draft Bill for Reform* March 2005. The Bill is available on the Home Office website at: [http://www.homeoffice.gov.uk/docs4/con\\_corp\\_mans.html](http://www.homeoffice.gov.uk/docs4/con_corp_mans.html) (accessed 24 May 2005).

<sup>126</sup> Clause 4(1) provides:

“relevant duty of care”, in relation to an organisation, means a duty owed under the law of negligence by the organization –

- (a) to its employees as such,
- (b) in its capacity as occupier of land, or
- (c) in connection with –
  - (i) the supply by the organisation of goods or services (whether for consideration or not), or
  - (ii) the carrying on by the organisation of any other activity on a commercial basis, otherwise than in the exercise of an exclusively public function.

on the way in which an activity was managed or organised by its senior managers. This adopts the general approach recommended by the Law Commission in its 1996 report: that liability should lie in the system of work adopted by the organization for conducting a particular activity. This looks at how in practice managers organised the performance of a particular activity, rather than focussing on questions of individual culpability, and enables management conduct to be considered collectively as well as individually. However, the draft Bill attributes liability to the organisation only for failures by an organisation's *senior managers*. This is intended to focus the offence on the overall way in which an activity was being managed or organised by an organisation and to exclude more localised or junior management failings as a basis for liability (although these might provide evidence of management failings at more senior levels).

5.1.7 Unlike the ACT's industrial manslaughter offence then, the UK's proposed corporate manslaughter is a significantly different offence to the existing crime of manslaughter by criminal negligence. In some ways the offence is narrower than traditional manslaughter because it requires that the negligence be a 'senior management failure' and relate to specified duties (although these are fairly broad). On the other hand the offence is expanded because the Bill expands upon the identification doctrine by defining senior officers broadly.<sup>127</sup> Furthermore, the proposed UK offence is not restricted by the requirement that the defendant be an employer of the victim.

### **The Victorian Bill**

5.1.8 Following recommendations at a departmental level<sup>128</sup> the Victorian Government introduced the *Crimes (Workplace Deaths & Serious Injuries) Bill* in 2001. The Bill was passed by the House of Assembly but did not pass the Legislative Council. Although the Victorian Government now has a majority in both Houses they have not re-introduced the Bill, although they have undertaken reform of the *Occupational Health and Safety Act 1985* (Vic) (which is discussed in more detail below).

5.1.9 The Victorian Bill proposed the insertion of a number of new sections to the *Crimes Act 1958* (Vic). There were three new offences: corporate manslaughter (s 13), negligently causing serious injury (s 14) and senior officer offences (s 14C). Section 13 provided:

#### 13. Corporate manslaughter

A body corporate that by negligence kills –

(a) an employee in the course of his or her employment by the body corporate; or

(b) a worker in the course of providing services to, or relating to, the body corporate –

is guilty of the indictable offence of corporate manslaughter and liable to a fine not exceeding 50,000 penalty units.

5.1.10 Thus essentially to be guilty the body corporate must negligently kill an employee in the course of his or her employment or a worker in the course of providing services. So the offence is restricted by the requirements that the offender be a body corporate and that the victim be an employee acting in the course of his or her employment or a worker in the course of providing services to the body corporate. And of course, in common with the existing crime of manslaughter, the negligence had to be criminal (or gross).<sup>129</sup> The

<sup>127</sup> Clause 2 states –

A person is a "senior manager" of an organization if he plays a significant role in –

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

<sup>128</sup> In October 2000, the Victorian Department of Justice, the Victorian Department of Treasury and Finance, and the Victorian Workcover Authority published papers calling for the introduction of a *Crimes (Industrial Manslaughter) Bill*. See Department of Justice, Department of Treasury and Finance, and Victorian Workcover Authority, *Workplace Health and Safety: Proposals for a Crimes (Industrial Manslaughter) Bill – Explanatory Memorandum* (Victoria 2000) at 13.

<sup>129</sup> Clause 14B of the Bill set out the standard of care –

(1) For the purposes of section 13, the conduct of a body corporate is negligent if it involves –

- (a) such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances and
  - (b) such a high risk of death or really serious injury –
- that the conduct merits criminal punishment for the offence.

proposed section 14 (negligently causing serious injury) was almost identical to section 13 except that it referred to ‘causes serious injury’ rather than ‘kills’, and provided for a lesser penalty. The proposed senior officer offences are discussed below.

5.1.11 The Bill also set out how criminal liability could be established against a corporation charged with these offences:

- **Physical elements:** in order to establish that the body corporate committed the physical elements of the offence, clause 14A of the Bill stated that –
  - the conduct of an employee, agent or senior officer of a body corporate acting within the actual scope of their employment, or within their actual authority, must be attributed to the body corporate.
- **Negligence:**
  - Aggregation of conduct:** subclause 14B(4) provided that in determining whether a body corporate was negligent, the conduct of the body corporate as a whole had to be considered. Subclause (5) provided that the conduct of any number of the employees, agents or senior officers of the body corporate could be aggregated and regard could be had to the negligence of any agent in the provision of services (but that negligence must not be attributed to the body corporate).
  - Evidence of negligence:** subclause 14B(6) then provided that negligence of a body corporate could be evidenced by the failure of the body corporate –
    - (a) adequately to manage, control or supervise the conduct of one or more of its employees, agents or senior officers; or
    - (b) to engage as an agent a person reasonably capable of providing the contracted services; or
    - (c) to provide adequate systems for conveying relevant information to relevant persons in the body corporate; or
    - (d) to take reasonable action to remedy a dangerous situation of which a senior officer has actual knowledge; or
    - (e) to take reasonable action to remedy a dangerous situation identified in a written notice served on the body corporate by or under an Act.

## Conclusion

5.1.12 The advantage of introducing these types of specific offences is that they can be clearly defined and targeted, perhaps easing prosecution and maximising the deterrent effect of the legislation. On the other hand the creation of specific provisions could give the impression of being ‘out to get’ big business, with organizations perhaps rightfully questioning why laws should apply to them that do not apply to other ‘people’. The Law Society of NSW for example argued in their submission to the NSW Legislative Council Standing Committee on Serious Injury and Death in the Workplace that the creation of a specific industrial manslaughter offence would ‘offend the long standing principle of the Criminal Law pertaining to equal justice and equal punishment. The fact that a death occurs at work should not mean that the accused is treated in a more or less favourable way than had for example the crime of manslaughter been committed in a non-industrial context’.<sup>130</sup>

*Note: questions relating to the preferred type of reform appear at the end of this part.*

## Senior officer offences

5.1.13 As well as the creation of a specific industrial manslaughter offence, the ACT has introduced to its *Crimes Act* a specific ‘senior officer offence’. Senior Officer offences were also proposed in the Victorian Bill. Both jurisdictions defined ‘senior officer’ fairly narrowly.

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In essence this appears to be the same as the common law test of gross or criminal negligence which already applies in Victoria (and Tasmania). The proposed clause 14B(3) also made it clear that the breach of this standard of care had to relate to an existing duty of care.

<sup>130</sup> NSW Legislative Council Standing Committee Report, *Serious Injury and Death in the Workplace*, 2004, at para 12.48.

## The ACT

5.1.14 Following on from the ACT's offence of industrial manslaughter, section 49D of the *Crimes Act 1900* (ACT) creates an offence where the death is caused by the conduct of a senior officer of an employer. The section provides:

A senior officer of an employer commits an offence if –

(a) a worker of the employer –

- (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or
- (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and

(b) the senior officer's conduct causes the death of the worker; and

(c) the senior officer is –

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

5.1.15 Like the ACT's new crime of industrial manslaughter, the definition of this offence appears to be essentially the same as the definition of traditional negligent manslaughter, except that it applies only to senior officers and the victim must be an employee. This means that any senior officer who would be guilty of this new senior officer offence would also have been guilty of the traditional crime of negligent manslaughter, and so could have been prosecuted under the existing law. Thus the creation of this offence seems to be another instance of window dressing by the ACT government, and so can be criticised in the same way as their new industrial manslaughter offence (see discussion above). While there are occasions when window dressing can serve a useful purpose, this may not be one of them, particularly considering the possible negative impact of this type of window dressing, such as concern that the introduction of this type of offence would 'result in individuals being reluctant to take such a position'.<sup>131</sup> In Australia, Senator Amanda Vanstone stated that it is not 'in our interest to have corporations bereft of talent because people who do have talent will not take the risk'.<sup>132</sup>

## Victoria

5.1.16 The former Victorian Government's concern that 'currently a company may be convicted of an offence but then go into liquidation, leaving nobody accountable'<sup>133</sup> led to the inclusion of senior officer offences in their earlier Bill.<sup>134</sup> The elements of the proposed offences were –

- a body corporate committed corporate manslaughter [or negligently causing serious injury];<sup>135</sup> and
- the senior officer was organizationally responsible<sup>136</sup> for the conduct (or part of the conduct); and
- in performing or failing to perform his or her conduct the senior officer contributed materially to the commission of the offence; and
- the senior officer knew that their conduct created a substantial risk that the body corporate would engage in conduct that involved a high risk of death or really<sup>137</sup> serious injury to a person; and

<sup>131</sup> A Edgar, 'Corporate Manslaughter is just around the corner' [2001] *International Company and Commercial Law Review* 117 at 119.

<sup>132</sup> Australian Senate, *Senate Hansard*, 25 August 1994, at 349.

<sup>133</sup> House of Assembly Victoria, *Hansard*, Attorney-General Rob Hulls, 22 November 2001, at 1925.

<sup>134</sup> Crimes (Workplace Deaths and Serious Injuries) Bill 2001.

<sup>135</sup> Although the jury must find that the body corporate has committed the offence it is not necessary that there be a prosecution or conviction against the body corporate (cl 14C(5)). However it may have been envisaged that in practice body corporate and senior officer offences would often be jointly tried.

<sup>136</sup> Subclause 14B(3) of the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 set out some matters which could be considered in determining this.

<sup>137</sup> The words 'death or really' do not appear in the senior officer offence where liability is derived for the body corporate being guilty of negligently causing serious injury.

- having regard to the circumstances known to the senior officer, it was unjustifiable to allow that substantial risk.

Thus the mental element was one of knowledge (that their conduct would create the required substantial risk). The last element – that the risk was unjustifiable – appears to have been objective (ie could be judged on a reasonable person test), although subjective matters (the circumstances known to the senior officer) were to be taken into account.<sup>138</sup>

### Conclusion

5.1.17 The Institute is of the preliminary view that a specific senior officer offence should not be introduced to the Criminal Code. If specific offences are to be created for senior officers, it seems more appropriate for them to be contained in other specialised legislation, such as the WHSA. This option is discussed further below at 5.2.18.

#### Question 4

(a) Should a specific ‘senior officer’ type offence be introduced to the Code?

If so,

(b) What should the elements of such an offence be?

(c) How should the term ‘senior officer’ be defined and should the definition extend to volunteers?

### Causing serious injury

5.1.18 The Victorian Bill also proposed a specific corporate offence of ‘negligently causing serious injury’ however one was not created in the ACT nor is one proposed by the UK draft Bill. This offence was essentially the same as the proposed corporate manslaughter offence except that it referred to ‘causes serious injury’ rather than ‘kills’, and provided for a lesser penalty.

5.1.19 Currently in Tasmania it is not an offence for any person to cause serious injury by criminal negligence.<sup>139</sup> The offences in the Criminal Code dealing with causing injury (eg. grievous bodily harm, wounding, assault) all (except for dangerous driving causing grievous bodily harm: Code, s 167B) require that the conduct that caused the injury be accompanied by specific intent to cause the harm or at least foresight as to the likelihood of the harm being caused.<sup>140</sup> The Institute is therefore of the preliminary view that such a crime should not be introduced in relation to organizations alone. However, it may be appropriate to consider broadening the scope of the general offence of wounding and causing grievous bodily harm, and to accompany such reform with a similar offence specifically applicable to organizations. This matter may be considered as part of a possible future law reform project on murder, manslaughter and related offences.

## 5.2 Reforming the Workplace Health and Safety Act

This section considers reforming the WHSA by introducing some or all of the following –

- manslaughter and grievous bodily harm provisions
- breach of duty causing death or grievous bodily harm provisions

<sup>138</sup> This type of mixed subjective and objective test is not unique in the criminal law. See for example *Bouhey* (1986) 65 ALR at 627, and self defence (Criminal Code (Tas), s 46).

<sup>139</sup> As stated above, the Institute is aware of at least three cases in which it was accepted that a person could be guilty of grievous bodily harm on the basis of criminal negligence, however, the Institute is currently of the opinion that this is contrary to leading authorities.

<sup>140</sup> In relation to grievous bodily harm see discussion above, para 1.1.7. In relation to assault, see the definition of assault: Code, s 182 and *Wilkinson* Unreported Serial No 43/1985.

- higher maximum penalties
- a broader range of penalties
- senior officer liability

### *Manslaughter and causing serious injury provisions*

5.2.1 As the title suggests, the *Workplace Health and Safety Act 1995* is the primary piece of Tasmanian legislation dealing with health and safety issues in Tasmanian workplaces. This Issues Paper is considering the criminal liability of organizations, particularly for wrongfully causing deaths or injuries. The topic is not restricted to deaths or injuries in the workplace, although some of the options for reform considered so far have been so restricted. This reflects the fact that the criminal liability of an organization for a death or injury will most often arise in a workplace environment. The WHSA's stated purpose is to reduce workplace deaths and injuries.<sup>141</sup> It aims to do this by imposing duties and standards of safety, rather than by trying to deter deaths and injuries with the threat of criminal sanctions for manslaughter or assault. One possible option for reform then is to introduce such specific provisions into this Act. This option would probably be best considered as an alternative to introducing a specific industrial or corporate manslaughter provision to the Code.

5.2.2 Introducing specific new manslaughter and related offences (eg grievous bodily harm) to the WHSA is a type of reform that has been proposed in South Australia, where Nick Xenophon, an Independent member of the Upper House, has tabled a Bill entitled the Occupational Health, Safety and Welfare (Industrial Manslaughter) Amendment Bill 2004.<sup>142</sup> This Bill proposes the introduction in the *Occupational Health, Safety and Welfare Act 1986* (SA) of a specific offence of 'industrial manslaughter', which would apply to both employers and senior officers. The legislation is modelled on the ACT industrial manslaughter laws (discussed above), and includes the substance of the provisions on corporate criminal responsibility from the Model Criminal Code (in Part 2.5 of Chapter 2) setting out how recklessness or negligence can be proved against a body corporate (these are discussed below). This Private Members Bill has not yet been debated. The South Australian Government has introduced the Occupational Health, Safety and Welfare (SafeWork SA) Bill 2004 and Nick Xenophon moved amendments to this Bill to incorporate the industrial manslaughter offence provisions, however this did not have the support of the house.<sup>143</sup> The Government's Bill is due for debate in June and July 2005.

5.2.3 The NSW government has released a draft consultation Bill<sup>144</sup> that would create a new offence in their *Occupational Health and Safety Act 2000* (NSW). The offence is not referred to as 'manslaughter', rather the offence has a long title that neatly summarises the basic elements of the offence: 'reckless conduct causing death at workplace by person with occupational health and safety duties'. More specifically, the mental element is that the person must be 'reckless as to the danger of death or serious injury' that arises from their conduct (which includes omissions). This mental element means that this offence is more serious than negligent manslaughter, as recklessness is traditionally seen as a more culpable (or blameworthy) mental element than criminal negligence. In fact the offence is more akin to murder, which in NSW can be committed by an act or omission done with 'reckless indifference to human life'.<sup>145</sup> In a statement to the NSW Legislative assembly the Minister for Industrial Relations, Mr John Della Bosca stated:<sup>146</sup>

The Bill strikes a balance between culpable people being punished and ensuring that people whose conduct was not reckless do not face the risk of prosecution under the new provisions. Make no mistake – if you are indifferent to occupational health and safety, if you have no concern for the consequences of that behaviour and a workplace death results – you will face the consequences.

<sup>141</sup> The proclamation of the *Workplace Health and Safety Act 1995* (Tas) states that the Act is 'An Act to provide for the health and safety of persons employed in, engaged in or affected by industry...'.  
<sup>142</sup> Introduced into the South Australian Legislative Council on 8 December 2004.

<sup>143</sup> Legislative Council South Australia, *Hansard*, 2 June 2005. The Government's Bill will establish a new advisory committee 'SafeWork SA', which it appears would be likely to look into this issue.

<sup>144</sup> Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005. This follows the release of an earlier consultation draft bill, the Occupational Health and Safety Amendment (Fatalities Deaths) Bill 2004, in which the required mental element for the offence was recklessness or culpable negligence.

<sup>145</sup> *Crimes Act 1900* (NSW), s 18(1)(a).

<sup>146</sup> 'Ministerial Statement' available <http://www.workcover.nsw.gov.au/workplace+death.htm>, accessed 16 May 2005.

However, unlike Nick Xenophon's South Australian Bill, the NSW draft Bill makes no provision for how criminal responsibility is to be proved when dealing with corporations, presumably leaving the matter to the common law, and hence to the identification doctrine. The problems already outlined with the identification doctrine may be particularly apparent in a prosecution under the proposed NSW offence where the mental element appears to be subjective (recklessness or indifference) rather than objective (culpable negligence).

5.2.4 A significant restriction to this type of reform is that the offence is necessarily restricted to workplaces, yet experience demonstrates that organizations may be responsible for wrongfully causing death beyond the workplace. Furthermore, introducing specific manslaughter offences to workplace health and safety legislation arguably gives and/or reiterates the impression that workplace deaths are less serious or less blameworthy than other deaths because offences in workplace health and safety legislation tend to be viewed as 'quasi crimes' or merely 'regulatory offences' and generally do not result in heavy penalties. This could possibly reduce the potential deterrent and retributive aims of such a law.

5.2.5 On the other hand, it can be argued that the WHSA is the ideal location for a 'corporate manslaughter' provision for a number of reasons:

- the WHSA is intended and designed to deal with workplace safety issues;
- the WHSA is intended and designed to deal with defendants that are not natural persons;
- the offences could require negligence in relation to the duties under that the WHSA, such as the duty to provide a safe workplace, which are a more modern and accurate statement of the duties borne by employers than those in Chapter 16 of the Code;
- offences in the WHSA will never be treated as other than 'quasi crimes' if 'serious' crimes are deliberately left out of the Act. Thus the inclusion of a serious crime like manslaughter in the WHSA could also reverse the perception that workplace offences generally are not 'real crime' and over time could boost levels of community condemnation following conviction for any workplace offence – thus promoting workplace safety generally;
- having the offences within the jurisdiction of Workcover inspectors could allow for better acceptance, promotion, and education about the new laws.

## *Conclusion*

5.2.6 The Institute is of the preliminary view that the introduction of specific 'industrial manslaughter' offences to the *Workplace Health and Safety Act 1995* would fail to challenge the current perception that workplace deaths and injuries are somehow less serious or less blameworthy than other deaths and injuries. Another reason this option is not preferred is that it is inappropriately limited to the occurrence of *workplace* deaths and injuries.

*Note: questions relating to the preferred type of reform appear at the end of this part.*

## ***Breach of duty causing death or grievous bodily harm***

### *Separate offences*

5.2.7 Another option (which could be implemented independently or alongside other reform options considered in this paper) is to introduce new offences to the WHSA centred around breaching a duty under the WHSA, but which also require that the breach of duty causes some harm. If such offences are strict liability (i.e. no mental element is required to be proved), they could appropriately cover the current gap between serious offences such as manslaughter or grievous bodily harm and the less serious offence of breach of duty under the WHSA (s 9). This gap exists because of the high requirements of manslaughter or grievous bodily harm (death or grievous bodily harm must be caused, and recklessness or criminal negligence must be present) and the low requirement of breach of duty under the WHSA (there must simply be a breach of duty, it is irrelevant to guilt whether anybody was harmed). So a new strict liability offence in the WHSA of breach of duty causing death or serious injury would fall in between these two types of offences – requiring serious harm and breach of duty, but applying regardless of the presence of a 'guilty

mind' (such as specific intent, recklessness or criminal negligence). Having a wider variety of offences may mean that charges (and sentences) can more appropriately reflect the gravity of the offence. So, where an employer breaches a duty but no-one is harmed the appropriate charge would be breach of duty (WHSa section 9); where an employer breaches a duty and someone is harmed the appropriate charge would be the new offence of either breach of duty causing death or breach of duty causing serious harm (in the WHSA); and where and an employer recklessly or negligently breaches a duty and someone is killed or harmed the appropriate charge would be manslaughter or grievous bodily harm under the Code. It is also important to consider the appropriate maximum penalty for such offences and whether they should be tried by summons (in the Magistrates Courts) or upon indictment (in the Supreme Court). Ordinarily, offences resulting in death or grievous bodily harm are regarded as so serious as to make them indictable and thereby giving rise to trial by jury and the maximum penalty under the Code of 21 years imprisonment. However, it is possible for different maxima to be provided.

### *Higher penalties for breach of duty where death or injury is caused*

5.2.8 An alternative, but similar option, is to amend the current offences under our WHSA to provide for different maximum penalties depending on the result of the breach. An example of this can be found in section 24 of the Queensland *Workplace Health & Safety Act 1995* –

#### **Discharge of obligations**

- (1) A person on whom a workplace health and safety obligation is imposed must discharge the obligation.

Maximum penalty –

- (a) if the breach causes multiple deaths – 2000 penalty units or 3 years imprisonment; or
- (b) if the breach causes death or grievous bodily harm – 1000 penalty units or 2 years imprisonment; or
- (c) if the breach causes bodily harm – 750 penalty units or 1 year imprisonment; or
- (d) if the breach involves exposure to a substance likely to cause death or grievous bodily harm – 750 penalty units or 1 year imprisonment; or
- (e) otherwise – 500 penalty units or 6 months imprisonment.

Thus the offence charged would be the same (eg. failure to provide a safe workplace under s 9 of the WHSA), but the maximum penalty would vary depending on whether death or injury was caused by the failure (breach of duty).

5.2.9 A NSW consultation draft bill, Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004 was to similar effect, proposing increased penalties where a person was guilty of an occupational health and safety offence and their contravention caused the death of a person. This draft Bill included maximum penalties for corporations that had previously offended of \$1,650,000. However, the Government withdrew *this* draft Bill in April 2005 (they have released a new draft – discussed at para 5.2.3).

5.2.10 A criticism that can be made of both introducing new offences of breach of duty causing death or injury (as discussing at 5.2.7) and having higher penalties for breach of duty depending upon the outcome of the breach (as under s 24 of Queensland's WHSA) is that it is somewhat unjust in that the maximum penalty reflects the outcome of the breach rather than the moral blameworthiness of the offender, thus the penalty may be more affected by chance matters (whether someone happened to be injured or killed) than by the seriousness of the breach or state of mind of the defendant (i.e. the degree of negligence or recklessness). On the other hand such situations are already accepted within the criminal law, for example, there is no difference in the required mental elements of dangerous (or reckless) driving<sup>147</sup> and dangerous driving

<sup>147</sup> *Traffic Act 1925* (Tas), s 32(1).

causing death,<sup>148</sup> the latter does not require any intention to cause death or recklessness as to death being caused, yet the maximum penalties for the two offences are vastly different.<sup>149</sup>

5.2.11 This criticism is somewhat avoided by Victoria's new *Occupational Health and Safety Act 2004* which, apart from the usual workplace safety offences, provides in section 32 that it is an offence to 'recklessly engage in conduct that places or may place another person who is at a workplace in danger of serious injury'.<sup>150</sup> Thus the more serious offence has a more culpable mental element.<sup>151</sup>

### Question 5

- (a) Would you support the introduction of two new strict liability offences in the WHSA: breach of duty causing death, and breach of duty causing grievous bodily harm?
- (b) Should such offences be indictable?
- (c) If not, what should the maximum penalty for the offences be?
- (d) Or, do you prefer the Queensland approach of introducing different maximum penalties depending on the result of the breach?

### *Higher maximum penalties*

5.2.12 As already stated in Part 2, the Institute is not aware of any prosecution under the Criminal Code of an organization for causing a workplace death or injury in Tasmania, however, when a worker is killed or injured at work employers are sometimes prosecuted under the WHSA for offences such as failing to provide a safe workplace (section 9). This offence is concerned with *breach of the duty* – not the death or injury that resulted – and the sanctions imposed for the offence must reflect this, however, the fact that the breach of duty caused death or injury is a legitimate factor to be taken into account in sentencing if that death or injury was foreseeable.<sup>152</sup> Despite this, sentences to date imposed for breaches of the WHSA (Tas), even where those breaches resulted in serious injury or death, have been low, the highest being \$40,000.<sup>153</sup>

5.2.13 The maximum penalty under the WHSA for a corporation is 1,500 penalty units (\$150,000) and for a natural person is 500 penalty units (\$50,000). No offences under the WHSA are indictable offences (thus they are all summary offences heard in the magistrates courts) or punishable by imprisonment. The maximum penalty available for an offence is intended to reflect the seriousness with which the legislature views the prohibited conduct. It is suggested that this relatively low maximum does not indicate to the courts or to the public that breaches of the Act are 'heinous' crimes.

5.2.14 Actual sentences imposed and legislative reforms in some jurisdictions indicate a desire to impose more severe penalties for these breaches. For example in England, in *Attorney General's Reference 2/99*,<sup>154</sup> Great Western Trains were fined £1.5 million for failing in its general duty under section 3(1) of the *Health and Safety at Work Act 1974* (UK), and the Thames Train health and safety prosecution relating to the Paddington rail crash resulted in a £2 million fine against the company for failing in its duties to adequately

<sup>148</sup> Code, s 167A.

<sup>149</sup> The penalty for dangerous driving in breach of s 32(1) of the *Traffic Act 1925* is 4 years imprisonment; causing death by dangerous driving under s 167A of the Code is punishable by a maximum of 21 years imprisonment (Code, s 389(3)).

<sup>150</sup> The maximum penalties for the offence are the same as those for other breach of duty offences (eg ss 21 and 23) but it is additionally punishable by 5 years imprisonment.

<sup>151</sup> However this is somewhat confused by the fact that the physical element of the offence is also more serious than other breach of duty offences.

<sup>152</sup> *Inkson* (1996) 6 Tas R 1.

<sup>153</sup> See Appendix A. The situation appears to be similar in other jurisdictions. For example in *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 the Court of Appeal commented: 'Disquiet has been expressed in several quarters that the level of fine for health and safety offences is too low. We think there is force in this and that the figures with which we have been supplied support the concern.' In Victoria between 1990 and 1992 twenty cases involving workplace deaths in corporate contexts were heard in Victoria. The fines issued against the defendant corporations ranged between \$1000 and \$16,000 often resulting in community outrage, and a bitter response from victims families: A Hopkins, 'Death at Kellogg's' in P Grabosky and A Sutton (eds), *Stains On a White Collar: Fourteen Studies In Corporate Crime or Corporate Harm*, The Federation Press: Sydney, 1989, at 182.

<sup>154</sup> [2000] 3 All ER 182.

train the train driver whom they employed and whose actions it was held contributed directly to the disaster.<sup>155</sup> Closer to home, in Victoria, Esso Australia Pty Ltd were fined \$2 million for 11 breaches of the *Occupational Health and Safety Act 1985* (Vic) in 2001 following the Longford plant explosions, the largest ever fine in Australia for breach of OH&S laws.<sup>156</sup> In May 2004 Leighton Contractors were fined \$325,000 for 2 breaches of the *Occupational Health and Safety Act 1985* (Vic) that resulted in a death and serious injuries to a number of workers.<sup>157</sup> Since then Victoria's *Occupational Health and Safety Act 2004* has come into effect.<sup>158</sup> This new Act introduces the maximum penalty of \$920,250 for corporations (\$184,050 for natural persons) for some breach of duty offences (ss 21 and 23) and for the offence of recklessly engaging in dangerous conduct (s 32).

5.2.15 The NSW *Occupational Health and Safety Act 2000* provides maximum penalties of \$825,000 in the case of a corporation being a previous offender, \$550,000 in the case of a corporation not being a previous offender, \$82,500 for an individual who is a previous offender and \$55,000 for an individual who is not a previous offender (s 12). If introduced, the Government's Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005 would increase these maximum to \$1.65 million for corporations and \$165,000 and 5 years imprisonment for individuals.

5.2.16 The maximum penalties in the *Workplace Health and Safety Act 1995* (Qld) have also been recently increased. As discussed above, section 24 makes provision for different maximum penalties to be imposed for a failure to discharge workplace health and safety obligations depending on the result of the breach. Section 181B(3) of the *Penalties and Sentences Act 1992* (Qld) also provides that if a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to 5 times the maximum fine for an individual. Imprisonment is also provided for. Thus the maximum fines for breach of duty under section 24 of the Queensland *Workplace Health and Safety Act* are:

- (a) if the breach causes multiple deaths – 2000 penalty units [\$750,000 for a corporation or \$150,000 for a natural person] or 3 years imprisonment; or
- (b) if the breach causes death or grievous bodily harm – 1000 penalty units [\$375,000 for a corporation or \$75,000 for a natural person] or 2 years imprisonment; or
- (c) if the breach caused bodily harm – 750 penalty units [\$281,250 for a corporation or \$56,200 for a natural person] or 1 year imprisonment; or
- (d) if the breach involves exposure to a substance likely to cause death or grievous bodily harm – 750 penalty units [\$281,250 for a corporation or \$56,200 for a natural person] or 1 years imprisonment; or
- (e) otherwise – 500 penalty units [\$187,500 for a corporation or \$37,500 for a natural person] or 6 months imprisonment.

### Question 6

- (a) Should maximum penalties under the WHSA be increased?
- (b) If so, what should the maximum be?
- (c) Should any offences under the WHSA be indictable or punishable by imprisonment?

### *A broader range of sentencing options*

5.2.17 It may be desirable to introduce a broader range of sentencing options for offences under the WHSA, tailored with the organizational offender in mind. This issue will be considered in Part 1: Sentencing Options.

<sup>155</sup> See: [http://www.guardian.co.uk/uk\\_news/story/0,3604,1186592,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,1186592,00.html) (accessed 2 June 2005).

<sup>156</sup> *DPP v Esso Australia Pty Ltd* [2001] VSC 263.

<sup>157</sup> *The Queen v Leighton Contractors Pty Ltd* [2004] VCC. There were 4 breaches in all. This case is discussed further below.

<sup>158</sup> Effective from 21 Dec 2004.

## *Senior officer liability*

5.2.18 Although this issues paper is concerned with the criminal liability of organizations, the potential for officers of an organization to be held criminally liable in a personal capacity, may give those officers an incentive to ensure their organization complies with criminal laws.

5.2.19 In 5.1.17 above, the Institute expressed the preliminary view that it would not be appropriate to introduce a ‘senior officer offence’ to the Code, and that the WHSA may be a more appropriate location for any such offence. The primary reason for this view was that when considering very serious traditional crimes, such as manslaughter or causing grievous bodily harm, the same law should apply to all people.

5.2.20 Of course it is important for senior officers, like all other people, to be able to be held criminally liable for their actions or negligence. Where a particular senior officer is responsible for a death or injury it may be appropriate that they be personally charged with manslaughter or grievous bodily harm. In other instances they may simply have contributed towards their employer committing the crime. The potential to find senior officers criminally liable in such cases may motivate senior officers to work towards compliance by their organization.

5.2.21 The WHSA already provides that the directors of a body corporate can be found guilty of any offence under the WHSA that the body corporate is guilty of –

### 53. Offences by bodies corporate

- (1) If a body corporate contravenes or fails to comply with any provision of this Act, each director of the body corporate is taken to have contravened or failed to comply with the same provision unless the director satisfies the court that –
  - (a) the body corporate contravened or failed to comply with that provision without the director’s knowledge and that the director was not reasonably able to have acquired that knowledge; or
  - (b) the director used all due diligence to prevent the contravention or failure to comply by the body corporate.
- (2) A director may be proceeded against and convicted under a provision in accordance with subsection (1) whether or not the body corporate has been proceeded against or has been convicted under that provision.
- (3) Nothing in this section affects any liability imposed on a body corporate for an offence committed by the body corporate against this Act.

5.2.22 It could be argued that this section is too harsh to directors because of the reverse onus of proof and because it does not require any causal link between the director’s failure and the company’s contravention. It appears that no-one has ever been prosecuted under this section, let alone found guilty.<sup>159</sup> Reform of this section, in conjunction with one of the other options for reform, may therefore be appropriate.

5.2.23 In contrast, section 144 of the Victorian *Occupational Health and Safety Act 2004* provides:<sup>160</sup>

### 144. Liability of officers of bodies corporate

- (1) If the commission by a body corporate (including a body corporate representing the Crown) of an offence against this Act or the regulations is attributable to an officer of the body corporate failing to take reasonable care, the officer is also guilty of the offence and liable to a fine not exceeding the maximum fine for the offence that applies to a natural person.
- (2) In determining whether an officer of a body corporate is guilty of an offence, regard must be had to—
  - (a) what the officer knew about the matter concerned; and
  - (b) the extent of the officer’s ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned; and

<sup>159</sup> A brief summary of all safety related prosecutions under the WHSA appears in Appendix A.

<sup>160</sup> Section 145 is similar but relates to officers of partnerships or unincorporated bodies.

- (c) whether the commission of the offence is also attributable to an act or omission of any other person; and
- (d) any other relevant matter.
- (3) An officer of a body corporate may be convicted or found guilty of an offence in accordance with sub-section (1) whether or not the body corporate has been convicted or found guilty of the offence.
- (4) An officer of a body corporate (including a body corporate representing the Crown) who is a volunteer is not liable to be prosecuted under this section for anything done or not done by him or her as a volunteer.

Apart from not imposing any reverse onus of proof, this Victorian offence also applies to ‘an officer’ rather than being restricted to directors. The term ‘officer’ is defined (by s 5) as having the same meaning as it does under section 9 of the *Corporations Act 2001* (Cth), which provides –

*officer* of a corporation means:

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

*officer* of an entity that is neither an individual nor a corporation means:

- (a) a partner in the partnership if the entity is a partnership; or
- (b) an office holder of the unincorporated association if the entity is a n unincorporated association; or
- (c) a person:
- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
  - (ii) who has the capacity to affect significantly the entity’s financial standing.

5.2.24 In New South Wales a ‘fresh page’ approach to the issue of senior officer liability was recently recommended, involving<sup>161</sup>

- A Code of Practice with statutory force;
- A deeming provision creating liability;
- Provisions containing defence grounds (limited and circumscribed by the Code of Practice).

However, the NSW Government’s Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005 does not introduce these reforms.

### Question 7

(a) Should section 53 of the WHSA be reformed?

If so,

<sup>161</sup> Prof Ron McCallum et al, *Advice in relation to workplace death, occupational health and safety legislation and other matters*, report to Workcover Authority of NSW, June 2004, at 55, [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au) (28 February 2005).

- (b) Should the reverse onus of proof be removed?
- (c) Should reform be based on section 144 of the Victorian *Occupational Health and Safety Act 2004*?
- (d) To whom should the offence apply?

## 5.3 Specialised principles of criminal responsibility for organizations

5.3.1 This option involves introducing into the criminal responsibility chapter of the Criminal Code provisions setting out how criminal responsibility (including physical and mental elements) can be proved when dealing with an organization. This change would recognise the reality that organizations do not have minds or bodies and do not ‘think’ or ‘act’ in the way that natural people do, and so, when seeking to prove that an organization had a certain ‘state of mind’, it is necessary to look to different evidence from that generally used when establishing the state of mind of a natural person. Because this reform would be in the criminal responsibility chapter of the Code it would apply no matter what crime the organization was charged with.

5.3.2 This type of reform has been undertaken in Australia by adoption of Part 2.5 of the Model Criminal Code (MCC) by the Commonwealth and the Australian Capital Territory. Canada has also undertaken this type of reform, but by a different approach to that used in the Australian MCC.

### *The Model Criminal Code – Commonwealth and the ACT*

5.3.3 For over a decade the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) have been developing a national criminal code for Australian jurisdictions with the aim of increasing uniformity in the criminal law in Australia. Rather than introducing any specific corporate offences such as ‘corporate manslaughter’ the MCC approaches the problem of corporate liability in a very general way. Like Chapter 4 of the Tasmanian Code, Part 2 of the MCC sets out the general principles of criminal responsibility. This Part of the MCC includes a part setting out general principles of corporate criminal responsibility, namely, Part 2.5: ‘Corporate criminal responsibility’. In Part 2.5 the MCCOC sought to ‘develop a scheme of corporate criminal responsibility which as nearly as possible, adapted personal criminal responsibility to fit the modern corporation’.<sup>162</sup> The model attempts to impose liability where there is corporate *blameworthiness*.<sup>163</sup> The focus is on those express and implied policies of the corporation that influence the manner in which the corporation operates, and can therefore be considered to represent the ‘state of mind’ of the company. This model of corporate criminal liability has been described as ‘arguably the most sophisticated model of corporate criminal liability in the world’.<sup>164</sup>

5.3.4 It is worth noting that the MCCOC also made recommendations which would require substantial amendments to our Code in relation to murder and manslaughter and other offences against the person. For example it was recommended:

- that murder require an intention or recklessness to cause death;
- manslaughter require an intention or recklessness to cause serious harm (negligence would not suffice); and
- the introduction of an offence of ‘dangerous conduct causing death’ based on negligence relating to specified duties (similar to the duties in Chapter 16 of our Code).

Reforming the substantive law of murder and manslaughter in Tasmania is beyond the scope of this paper. The benefits that could be obtained by adopting the MCCOC approach to organizational liability do not depend on reforms to the substantive law of murder and manslaughter. However, given the simplicity of the

<sup>162</sup> Model Criminal Code Officers Committee (1992) *Chapter 2: General Principles of Criminal Responsibility, Report* at 109.

<sup>163</sup> J Clough & C Mulhern, *The Prosecution of Corporations*, Oxford University Press: Melbourne, 2002, at 138.

<sup>164</sup> J Clough & C Mulhern, *The Prosecution of Corporations*, Oxford University Press: Melbourne, 2002, at 138.

MCCOC approach, and in the light of the criticisms that have been made of the murder, manslaughter and related provisions of the Tasmanian Code, the Institute may consider undertaking a law reform project on this topic in the future.

### *General principles*

5.3.5 Part 2.5 of the Model Criminal Code was introduced (without modification) in the Commonwealth Criminal Code Act 1995<sup>165</sup> and has also been enacted in the Australian Capital Territory's Criminal Code 2002, although with some fairly minor modifications and re-phrasing. The following discussion uses the section numbers of the Commonwealth and Model Codes. Part 2.5 is reproduced in full in Appendix C.

5.3.6 Section 12.1 of the MCC states the general principles of Part 2.5 –

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

These general principles offer guidance and flexibility in the interpretation and application of the rest of Part 2.5 and the Code.

### *Physical elements' and 'fault elements'*

A central aspect of the MCC is the splitting up of the elements of an offence into 'physical elements' and 'fault elements'.

5.3.7 The MCC defines the term 'physical elements' to include conduct (which means an act, an omission to act as well as a state of affairs), a circumstance in which conduct occurs, or a result of conduct. Thus essentially the 'physical elements' of a crime are what must be physically *done* or what circumstances must exist to commit a crime. For example to be guilty of murder or manslaughter your action (or omission) must cause the death of the victim; to be guilty of assault, your action must 'apply force to the body of another',<sup>166</sup> and so on. Although the term 'physical element' is not used within the Tasmanian Code, it is the usual terminology in this state, and has the same meaning as the definition in the MCC.

5.3.8 'Fault elements' are akin to mental elements, that is, the 'guilty' state of mind that must be proven to exist at the time of the offence.<sup>167</sup>

### *Attribution and aggregation of physical elements*

However, what is most instrumental in relation to corporations is that Part 2.5 makes specific provision for how both the physical elements and the fault element of an offence can be proven when dealing with a corporation – how they can be *attributed* to the corporation. An important element of this is the ability to aggregate the conduct of a company's employees, so that the conduct of more than one employee can be attributed to the company when assessing the company's liability. This ability to aggregate the conduct of all the employees of the company and view the company's conduct as a whole 'takes cognisance of the complex nature of the corporate decision-making process and the diffusion of responsibility within corporations, and

<sup>165</sup> In Australia, the criminal jurisdiction of the Federal Government is restricted to crimes against the Commonwealth and Commonwealth employees and organizations e.g. espionage and environmental pollution. The states have primary responsibility for the criminal law with respect to offences against private individuals e.g. manslaughter and assault.

<sup>166</sup> This is somewhat of a simplification, for a full definition of assault see sections 182 and 184 of the Criminal Code (Tas).

<sup>167</sup> The MCC defines the fault elements of intention, recklessness, knowledge and negligence. The Tasmanian Code relies on case law for the meaning of the mental elements. It is beyond the scope of this paper to consider adopting the MCC definitions of these different fault elements in our Code, as this would have an effect well beyond organizational liability, however, this may be an appropriate matter for a future law reform project.

acknowledges that it may sometimes be simplistic to merely correlate the culpability of certain individuals with the culpability of the corporation, without an investigation of the entire corporate structure.<sup>168</sup>

5.3.9 In relation to the physical elements of an offence, the MCC and Commonwealth Criminal Code provide in section 12.2<sup>169</sup> that –

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

While this may seem a somewhat strict approach, as these actions may not truly represent the actions of the corporation,<sup>170</sup> it has the appeal of simplicity, and its strictness is naturally tempered by two things: first, the requirement that the employee be acting within the scope (actual or apparent) of their employment or authority; and secondly, by the fault element of an offence. Thus the MCCOC stated ‘this does not impose vicarious liability because liability depends also on fault’.<sup>171</sup>

### *Attributing fault elements other than negligence*

5.3.10 Section 12.3<sup>172</sup> sets out how fault elements other than negligence,<sup>173</sup> such as intention, knowledge or recklessness, are to be attributed to a body corporate. In the Tasmanian Code these fault elements (or mental elements) are necessary to prove guilt for many crimes, such as murder, manslaughter, wounding, causing grievous bodily harm and assault. Although introducing this type of reform would theoretically allow organizations to be found guilty of these types of crimes, it is important to realize that the nature and activities of organizations mean that they will rarely be guilty of crimes requiring mental elements other than negligence. An example of the type of organizational activity that might appropriately result in a finding that the organization had knowledge that death would be caused or was reckless as to death being caused is the Ford Pinto case (see footnote 51).

Section 12.3(1) provides –<sup>174</sup>

If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

Thus *authorising* or *permitting* the commission of the offence is equated with, and therefore in practice can *replace* the requirement of intentionally, knowingly or recklessly carrying out the offence.

### *Authorisation or permission*

5.3.11 The section then goes on to set out four means by which authorisation or permission may be established (although these are not exclusive):<sup>175</sup>

(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

<sup>168</sup> T Woolf, ‘The Criminal Code Act 1995 (Cth) – Toward a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Criminal Law Journal* 257 at 259.

<sup>169</sup> Section 50 of the ACT amendment is to the same effect, although reworded.

<sup>170</sup> See discussion in T Woolf, ‘The Criminal Code Act 1995 (Cth) – Toward a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Criminal Law Journal* 257 at 260-261.

<sup>171</sup> Model Criminal Code Officers Committee (1992) *Chapter 2: General Principles of Criminal Responsibility, Report* at 111.

<sup>172</sup> Section 51 in the ACT Code, with some re-phrasing.

<sup>173</sup> In fact the section only refers to the three fault elements of intention, knowledge or recklessness. Presumably the section could be used by courts in attributing other fault elements to bodies corporate, this is implied by the very general heading of the section ‘Fault elements other than negligence’, and also by the general principle in section 12.1 (1): ‘This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.’ See further discussion in I Leader-Elliott *The Commonwealth Criminal Code: A Guide for Practitioners*, Commonwealth Attorney-General’s Department, 2002, at 307.

<sup>174</sup> See *Criminal Code Act 1995* (Cth), s 12.3(1), and *Criminal Code 2002* (ACT), s 51(1).

<sup>175</sup> See *Criminal Code 1995* (Cth), s 12.3(2).

- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in<sup>176</sup> 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.<sup>177</sup>

5.3.12 There are a number of points to be made about this provision –

First, it is an inclusive rather than exclusive definition, meaning that authorisation or permission (and thereby intention, knowledge or recklessness) may also be proved by means other than those set out.

Secondly, it enacts the identification doctrine (by providing that a company authorises or permits conduct that the board of directors intentionally, knowingly or recklessly carried out) but also extends the doctrine in a number of ways –

- by attributing the relevant fault element (mental state) where the Board expressly, tacitly or impliedly authorises or permits the commission of the offence.
- by attributing the relevant fault element where a ‘high managerial agent’ engaged in the conduct with the relevant fault element or expressly, tacitly or impliedly authorised or permitted the commission of the offence: s 12.3(2)(b). ‘High managerial agent’ means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy: s 12.3(6). This is clearly intended to include a much broader group of people than could be said to represent the ‘mind’ of the company under the identification doctrine. However, it is important to note that paragraph (b) does not apply if the body corporate proves that it exercised due diligence<sup>178</sup> to prevent the conduct or the authorisation or permission: 12.3(3).

Thirdly, it introduces the notion of ‘corporate culture’, and the idea that this can be likened to the state of mind of a company. Subsection (6) states that:

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

Subsection (4) also states that factors relevant to paragraph (2)(c) or (d) (which refer to corporate culture) include:

- (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
- (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

This notion of ‘corporate culture’ is significant as it ‘focuses on blameworthiness at an *organizational level* [in a] detailed and tenable way’.<sup>179</sup> According to MCCOC in its Final Report corporate culture would allow:<sup>180</sup>

<sup>176</sup> The Institute can think of no distinction between ‘carried out the relevant conduct’ in (a) and ‘engaged in the relevant conduct’ in (b), and accordingly proposes that these paragraphs be merged.

<sup>177</sup> These are further qualified in sections 12.3(3) – (5) of the *Commonwealth Criminal Code 1995*.

<sup>178</sup> ‘Due diligence’ is not defined in the Code, however section 12.5(2) provides that –

A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

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

<sup>179</sup> M Wilkinson ‘Corporate Criminal Liability – The Move Towards Recognising Genuine Corporate Fault’ (2003) 9 *Canterbury Law Review* 142 at 174.

<sup>180</sup> Model Criminal Code Officers Committee (1992) *Chapter 2: General Principles of Criminal Responsibility*, at 111-113.

The prosecution to lead evidence that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees who know that if they do not break the law to meet production schedules (eg by removing safety guards on equipment) they will be dismissed. The company would be guilty of intentionally breaching safety legislation.

Bucy says that the key factors in determining corporate culture are:<sup>181</sup>

- The structure of the corporation
- The goals of the corporation
- The training and education of employees
- The means by which compliance within the corporation is monitored
- The nature of the offence
- The reaction of the corporation to past misdemeanours<sup>182</sup>

5.3.13 Therefore section 12.3 makes significant advancements on the identification doctrine by, particularly by introducing the concept of corporate culture.

### *Negligence*

5.3.14 While there may be some circumstances where the fault of an organization equates to intention, knowledge or recklessness, in most instances of death or injury caused by organizations criminal negligence would be the relevant fault element to be proven (as an element of negligent manslaughter, or a new offence of negligently causing a wound or grievous bodily harm).

Criminal negligence by corporations is dealt with in section 12.4<sup>183</sup> of the MCC and the Commonwealth Criminal Code *Act 1995*. Subsection (1) provides that the test for negligence for a body corporate is that set out in section 5.5. Section 5.5 is based on the common law definition of criminal negligence<sup>184</sup> which already applies in Tasmania:<sup>185</sup>

The essence of manslaughter by criminal negligence is a great falling short of the standard of care which a reasonable person would have exercised, involving such high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

Although the *test* for negligence by a corporation is the same as it is for any other person, it is 'implicit in the provisions [of the MCC] that the *standard* against which the defendant corporation is to be judged is the standard expected of a reasonable *corporate* actor'<sup>186</sup> rather than a reasonable natural person.

5.3.15 Section 12.4(2) and (3) then provide<sup>187</sup> –

(2) If –

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

<sup>181</sup> P Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095 at 1128-46.

<sup>182</sup> Also see *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161 at 185 in which the court had to establish that a city 'had exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of that system'. In determining this, the court looked at factors including previous legislative or regulatory compliance; the preventative systems in place; the foreseeability of the effect and the alternative solutions available; as well as efforts made to address the problem, in particular the actions of officials.

<sup>183</sup> *Criminal Code 2002* (ACT), s 52.

<sup>184</sup> This is also made clear by the MCCOC commentary: Model Criminal Code Officers Committee (1992) *Chapter 2: General Principles of Criminal Responsibility*, Report at 29.

<sup>185</sup> *R v AC Hatrick Chemicals Pty Ltd* Unreported, Supreme Court of Victoria, 29 November 1995 per Hampel J at 5-6.

<sup>186</sup> Emphasis added, I Leader-Elliott *The Commonwealth Criminal Code: A Guide for Practitioners* (Commonwealth Attorney-General's Department: 2002) at 327. Leader-Elliott elaborates: 'There are two significant grounds for the implication: (a) corporate negligence can be imposed in the absence of negligence by individual employees, agent or officers (section 12.4(2)) and (b) corporate negligence can be proved by establishing absence of adequate "corporate management, control or supervision" and "failure to provide adequate systems for conveying relevant information to relevant persons within the body corporate": section 12.4(3). These criteria require reference to standards of appropriate *corporate* behaviour.'

<sup>187</sup> Note that subsection (3) is omitted from the *Criminal Code 2002* (ACT), s 52.

(b) no individual employee, agent or officer of the body corporate has that fault element;  
that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

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

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

5.3.16 In relation to negligence, it was the MCCOC's intention to focus on the blameworthiness of the corporation itself:<sup>188</sup>

Where negligence is the requisite fault element, it is not necessary to establish that any one employee, etc was negligent. If the conduct of the company when the acts of its servants, agents, employees and officers, viewed as a whole, is negligent, then the corporation is deemed to be negligent. In some cases this may involve balancing the acts of some servants against those of others in order to determine whether the company's conduct as a whole was negligent.

### *Mistake of Fact, Due Diligence, and Intervening conduct or event*

5.3.17 Part 2.5 of the MCC also sets out when a body corporate may rely on the defence of mistake of fact, due diligence or intervening conduct or event, these provisions are set out in full in Appendix B.

## **Conclusion**

5.3.18 Introducing this type of reform to the criminal responsibility chapter of the Criminal Code, would address the problems with the identification doctrine by introducing a modern and comprehensive way of proving that organizations are criminally responsible for crimes. This option for reform has the attraction of fairness and simplicity – new criminal laws (like 'industrial manslaughter') would not need to be introduced for organizations, but rather the *same* law would apply to all 'people', there would simply be a different way of proving the physical and mental elements when dealing with organizations. Another attraction of this type of reform is that it would apply no matter what crime the organization was charged with.

### **Question 8**

- (a) Which of the three broad types of reform do you prefer:
1. a specific 'industrial manslaughter' offence to the Code;
  2. reforms to the WHSA; or
  3. specialised principles of criminal responsibility for organizations?
- (b) If you prefer the first or third types of reform, would you also support one or more of the following reforms to the WHSA?
- manslaughter and grievous bodily harm provisions
  - breach of duty causing death or grievous bodily harm provisions
  - higher maximum penalties
  - senior officer liability

<sup>188</sup> Model Criminal Code Officers Committee (1992) *Chapter 2: General Principles of Criminal Responsibility, Report* at 115.

## Part 6

# Sentencing options

## 6.1 Introduction

6.1.1 So far this issues paper has mainly focused on improving ways of attributing criminal liability to organizations. With liability comes sentence. The sentence imposed after a finding of guilt is the outcome of the whole process. To make the process worthwhile the sentence should go some way to achieving some or all of the goals of criminal justice system that were discussed in Part 3: denunciation, retribution, deterrence and rehabilitation. The New South Wales Law Reform Commission's Report No 102: *Sentencing: Corporate Offenders* (June 2003) provides a comprehensive examination of this topic and is highly recommended as a source of further detail and discussion of many of the issues and sentencing options discussed in this Part; it is available online at: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r102toc>.

6.1.2 This paper has been particularly focused on the criminal liability of organizations for causing death or serious injury. If a natural person is guilty of manslaughter or grievous bodily harm a sentence of imprisonment is usually imposed.<sup>189</sup> All Australian jurisdictions recognise that a corporation cannot be imprisoned. Instead, the type of sentence usually imposed on a corporation is a fine. In many instances a fine may be ill suited to achieving the aims of punishment such as denunciation and deterrence, particularly in relation to serious breaches of the law that cause death or serious injury. This issues paper argues that the range of sentencing options available for sentencing organizations in Tasmania should be expanded to allow these goals to be better met.

6.1.3 Organizations are not real people, and of course this is, and must be, taken into account when they are being sentenced for a crime. Ideally, the sentence will achieve some or all of the purposes of punishment, will not result in spill-over effects (see below) to *genuinely* innocent parties, and will avoid the 'deterrence trap' (see below). This paper argues that while traditional sentencing options may be able to achieve these goals in some instances, the potential flexibility of these options is not currently being realised, and furthermore, in many cases sentencing options more specifically designed to deal with organizations are required.

6.1.4 At the Commonwealth level, and in various other jurisdictions, a broader range of sentencing options fashioned specifically for organizations is available.<sup>190</sup> According to Fisse, a broader range of sentencing options:<sup>191</sup>

[A]re promising because they increase the variety of deterrent, retributive and rehabilitative measures available against corporations and in so doing circumvent some of the major limitations of monetary sanctions... [T]he anatomy of corporate crime is so diverse that effective sentencing requires a range of sanctions.

### 'Spill-over'

6.1.5 'Spill-over' occurs when the punishment imposed upon one person has an effect upon other people. 'Spill-over' is inevitable when punishing an organization, because the legal person that is the

<sup>189</sup> K Warner, *Sentencing in Tasmania, second edition*, The Federation Press: NSW, 2002, at 275 and 287.

<sup>190</sup> For example, new sanctions have recently been introduced into the *Trade Practices Act 1974* (Cth). These include community service orders, probation orders and publicity orders. See sections 86C(2)(a); 86C(2)(b); 86C(4) and 86D.

<sup>191</sup> B Fisse, 'Sentencing Options Against Corporations' (1990) 1 *Criminal Law Forum* 211 at 249.

organization is made up of other ‘real’ people. Thus a punishment imposed on an organization may affect shareholders, employees, creditors, consumers and so on.<sup>192</sup>

6.1.6 The punishment of a real person may also have a large or small spill-over effect, for example the imprisonment of an offender may have a significant impact upon their family, employer, friends and so on. In the context of offenders who are real people, the courts have traditionally been reluctant to take such spill-over effects into account when deciding upon the appropriate sentence –<sup>193</sup>

Hardship to the offender’s family is usually given very little weight as a mitigating factor; it is regarded as part of the price to be paid for committing a crime. So in *Sullivan*,<sup>194</sup> it was stated that where the public interest requires a prison sentence, substantial or otherwise, that sentence must be imposed despite the regrettable hardship which innocent members of the family will suffer. But exceptional hardship other than financial may be relevant, and where the offender is a single parent or the imprisonment of both parents would leave children without parental care, courts have adopted a more sympathetic attitude. The circumstances, however, must be truly extreme or exceptional.

6.1.7 In the corporate context, the spill-over effect is not only inevitable, it may often be immediate, and is perhaps least likely to affect the corporation’s decision makers (who are perhaps responsible, in accordance with the identification doctrine, for the corporation incurring the liability in the first place). More likely, the sanction will be internally dealt with through a reduction in dividends, or if externally applied could result in the imposition of a product price rise. Other spill-over effects include the likelihood of job losses, reduced tax revenue and the liquidation of the corporations’ assets often at grossly inadequate prices. In short ‘when the corporation catches a cold, someone else sneezes’.<sup>195</sup> It is perhaps for these reasons that it is often argued that these spill-over effects should be given particular consideration when deciding upon the appropriate penalties for organizations.

6.1.8 On the one hand, it is easy to understand the inclination to try to reduce the spill-over to innocent parties. On the other hand, it must be recognised that these people may not always be so innocent. Shareholders, for example, may have been reaping the rewards of increased profits due to corner cutting in safety measures; consumers and employees may have been similarly benefiting. Thus it can be argued that where a corporation has been convicted of a serious criminal offence there may be no real spill-over effect because the corporation may have been unfairly and unjustly enriched through illegal activity. Consequently, it can be argued that any apparent ‘spill-over’ is merely the righting of a wrong through enforced levelling procedures – restoring the corporation to the position it would have held prior to the illegality. In the end, the wider public interest in fulfilling the purposes of punishment (denunciation, retribution, deterrence and rehabilitation) should prevail over fears of ‘innocent’ parties being affected by the organization’s punishment.

### ***The ‘deterrence trap’***

6.1.9 Another difficult issue when sentencing organizations is the ‘deterrence trap’. The deterrence trap is quite simply ‘the situation where the only way to make it rational to comply with the law is to set penalties so high as to jeopardise the economic viability of corporations’.<sup>196</sup> Whereas a minimal sanction imposed upon an individual offender (such as a fine or community service order) can be assured through the threat of imprisonment, this is simply impossible against corporations who cannot be imprisoned. Thus if a corporation is heavily fined and becomes insolvent, the fine may not be recovered, and perhaps few of the purposes of punishment will be met (particularly if the company rises again as a phoenix company, as happened in the case of *Denbo*<sup>197</sup>).

<sup>192</sup> See J Coffee, ‘No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment’ (1981) 79 *Michigan Law Review* 386 at 400-405.

<sup>193</sup> K Warner, *Sentencing in Tasmania, second edition*, The Federation Press: NSW, 2002, at 115 (some footnotes omitted).

<sup>194</sup> Serial No 9/1975.

<sup>195</sup> J Coffee, ‘No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment’ (1981) 79 *Michigan Law Review* 386 at 401.

<sup>196</sup> B Fisse & J Braithwaite, *Corporations, Crime and Accountability*, Cambridge University Press: Cambridge, 1993, at 136.

<sup>197</sup> See discussion below at 6.3.7.

## Current sentencing options

6.1.10 In Tasmania, the range of sentencing options that may be imposed following a finding of guilt is set out in the *Sentencing Act 1997*, s 7 –

7. A court that finds a person guilty of an offence may, in accordance with this Act and subject to any enactment relating specifically to the offence –
  - (a) record a conviction and order that the offender serve a term of imprisonment; or
  - (b) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended; or
  - (c) record a conviction and, if the offender has attained the age of 18 years and the offence is punishable by imprisonment, make a community service order in respect of the offender; or
  - (d) with or without recording a conviction, make a probation order in respect of the offender if the offender has attained the age of 18 years; or
  - (e) record a conviction and order the offender to pay a fine; or
  - (ea) in the case of a family violence offence, with or without recording a conviction, make a rehabilitation program order; or
  - (f) with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender; or
  - (g) record a conviction and order the discharge of the offender; or
  - (h) without recording a conviction, order the dismissal of the charge for the offence; or
  - (i) impose any other sentence or make any order, or any combination of orders, that the court is authorised to impose or make by this Act or any other enactment.

6.1.11 This Part considers the capacity of current sentencing options to appropriately punish organizations, as well as possible new sentencing options, such as the imposition of dissolution and disqualification orders, punitive injunctions and equity fines.

## 6.2 The Fine

6.2.1 The fine remains the most common sentence imposed against organizations in all Australian jurisdictions.<sup>198</sup> The fine has some advantages over other forms of sanctions including that it is an administratively cheap option. There is also some evidence that it is more effective in curbing recidivism than imprisonment.<sup>199</sup> In Tasmania, section 4 of the *Sentencing Act 1997* defines a fine<sup>200</sup> and section 7(e) grants the courts the power to fine offenders for both summary and indictable offences. A fine cannot be imposed unless a conviction is recorded.<sup>201</sup> If a corporation is convicted for a breach of the WHSA, the maximum fine is set out in that legislation. This paper has already discussed the low levels of fines usually imposed for breaches of the WHSA, and has proposed increasing these maxima.<sup>202</sup> If an organization is convicted of a crime in the Criminal Code, the maximum penalty of 21 years imprisonment is of little relevance, as an organization cannot be imprisoned. However the Code provides (in s 389(3)) that punishment may also be by fine, and no limit is placed on the amount of such a fine, it is simply as the judge thinks fit in the circumstances of each particular case. While it may be desirable in the interests of certainty to introduce maximum penalties for the crimes in the Code, such a proposal would be well beyond the scope of this issues paper. In any case, having no maximum affords flexibility, meaning that the level of fine

<sup>198</sup> New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102, June 2003, at 88. Also see the Tasmania Law Reform Institute, *Sentencing*, Issues Paper No 2, August 2002, at 35 where, with specific reference to the Tasmanian jurisdiction, it is pointed out that fines are imposed in 60% of all offences.

<sup>199</sup> A Ashworth, *Sentencing and Criminal Justice third edition*, Butterworths: London, 2000, at 272.

<sup>200</sup> A fine is defined as 'the sum of money payable by an offender under an order of a court made on the offender being convicted of an offence and includes a sum of money payable as costs, a restitution order and a compensation order'.

<sup>201</sup> *Sentencing Act 1997* (Tas), s 7(e).

<sup>202</sup> See discussion at page 34.

imposed on an organization is, in theory, able to be varied so that it may meet the goals of punishment by adjusting to the circumstances of the particular case. The level of a 'fine should reflect not only the gravity of the offence but also the means of the offender, and this applies just as much to corporate defendants as to any other.'<sup>203</sup> A \$20,000 fine may be a very real deterrent to a small struggling organization, while going virtually unnoticed in a large successful organization. If the larger organization is instead fined \$2 million, it may be able to effectively deter further breaches of the law. As the Institute is aware of no prosecutions of a corporation under the Criminal Code it is not known to what extent the Supreme Court would utilise this unlimited fining capacity.

6.2.2 There is no specific provision in Tasmanian legislation dealing with the fining of corporations. In contrast, the *Crimes Act 1914* (Cth) recognises that fining corporations is a different matter to fining natural people, and so provides in section 4B that where a corporation is convicted of a Commonwealth offence, the court may, if the contrary intention does not appear and the courts think fit, impose a fine not exceeding an amount five times the amount of the maximum fine that could be imposed on a natural person convicted of the same offence. As there is no maximum fine for any crimes in the Tasmanian Code, such an approach would have no effect in relation to the traditional crimes contained in the Code.

6.2.3 However, even given the ability to set very high fines, if a fine is the only sentencing option imposed, then imposing the appropriate level of fine seems to require a difficult balancing act – on the one hand the disadvantage of committing the wrong has to sufficiently outweigh the advantage of non-compliance to have any hope of achieving deterrence, but on the other hand if a fine is too high it may result in unintended spill-over effects or lead to the organization becoming insolvent and so no fine being recovered at all (note discussion above at 6.1.5 to 6.1.9). Case studies continue to demonstrate that in relation to corporations, the imposition of a fine is generally inadequate.<sup>204</sup> For example in the recent case of *Director of Public Prosecutions v Esso Australia Pty Ltd*<sup>205</sup> in which two workers were killed and eight others seriously injured, the defendant corporation was fined \$2,000,000 the largest for a workplace offence in Australian history.<sup>206</sup> However, when it is acknowledged that the defendant corporation earns a similar figure *each day* from its Bass Strait operations<sup>207</sup> and its parent company reported a net income in the year 2000 of just under US\$18 billion,<sup>208</sup> the fine appears insignificant or as one commentator expressed 'a drop in the bucket for the company'.<sup>209</sup> In the case of *Workcover Authority of NSW (Inspector Ankucic) v McDonald's Australia*<sup>210</sup> the defendant company and its subsidiary were fined \$120,000 and \$150,000 respectively, for breaches of the occupational health and safety law following the death of an employee. The fine was minimal when compared with the maximum fine allowed of \$500,000 and was less than one per cent of profit earned by the two companies in the year of the offence.<sup>211</sup>

6.2.4 In an attempt to counter this problem, clause 14D of the Victorian Bill provided that the court must impose on a body corporate a fine proportional to the size of the body, taking into account factors such as the number of employees and workers as well as gross operating revenue and gross assets.

6.2.5 A different approach that was taken by section 18 of the *Criminal Justice Act 1991* (UK) which provided that where two offenders have committed an identical crime, differing penalties could be imposed

<sup>203</sup> *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 at 255 per Scott Baker J.

<sup>204</sup> For example a study commissioned by the NSW Judicial Commission on the fines imposed for fatalities in the workplace under the NSW *OH&S Act 1983* found that in 23 per cent of cases, defendants were fined 5 per cent or less of the maximum penalty; in 48 per cent of cases, defendants were fined 10 per cent or less of the maximum penalty; and in 75 per cent of cases, defendants were fined 20 per cent or less of the maximum penalty. According to the Commission only 9 per cent of cases attracted 50 per cent or more of the maximum penalty and there were no cases that attracted 80 per cent or more of the maximum penalty. As found in 'Serious Injury and Death in the Workplace', NSW Legislative Council Standing Committee Report (2004) at 109-110.

<sup>205</sup> [2001] VSC 263.

<sup>206</sup> P Gregory and M Shaw, 'Esso Fined a Record \$2M' *The Age*, 31 July 2001 at 1.

<sup>207</sup> P Gregory and M Shaw, 'Esso Fined a Record \$2M' *The Age*, 31 July 2001 at 1.

<sup>208</sup> Exxon Mobil Annual Report, 2000.

<sup>209</sup> See J Gobert, Controlling Corporate Criminality: Penal Sanctions and Beyond. As found at <http://webjcli.ncl.ac.uk/1998/issue2/gobert2.html> (Accessed 20 January 2004).

<sup>210</sup> (2000) 95 IR 383.

<sup>211</sup> The fine was 0.19 per cent of McDonald's Australia's gross operating revenue of \$774,000,000, while for the subsidiary it was 0.57 per cent of the gross operating revenue of 209,000,000. Figures were obtained from respective Financial Statements for 2000. Another example is that of British Petroleum (as it was then known) which was fined £750,000 for safety violations, in a year in which it reported a profit of £1,391,000,000. Again, less than one percent of the company's profit.

in circumstances where the offenders had different ‘disposable weekly incomes’.<sup>212</sup> An alternative applied in the competition law provisions of the European Union provides that fines totalling 10 per cent of the company’s previous year’s global turnover can be assessed,<sup>213</sup> a result which in the price-fixing case of *Re Polypropylene*<sup>214</sup> saw a fine of over £35,000,000 imposed.

6.2.6 Other reasons why a fine alone may be inadequate when an organization causes a death or serious injury are that:

- relatives and friends of the victim or victims of corporate manslaughter are unlikely to regard the imposition of a fine as adequate punishment for the crime committed.<sup>215</sup>
- fines generally fail to rehabilitate, as they do not explicitly compel reform of internal procedures or a review of management structure.<sup>216</sup>
- reliance on a monetary sanction diminishes the significance of the harm caused, resulting in the belief that the commission of an offence can be bought for a price.<sup>217</sup>

Furthermore, fines may be particularly inappropriate when dealing with non-corporate organizations such as the Crown and charities.

### Question 9

- (a) Do you think that a fine is likely be an effective and/or appropriate punishment in most cases of organizations wrongfully causing death or injury?
- (b) When imposing a fine on an organization, should courts be required to impose a fine in proportion to the organization’s size, revenue and assets?
- (c) If so, how should information about these matters be established by courts?

## 6.3 Incapacitation

6.3.1 Incapacitation by imprisonment is a punishment of last resort reserved for the most serious crimes and consequently the most culpable offenders. It is only imposed in instances where a non-custodial sentence is inappropriate.<sup>218</sup> One of the aims of incapacitation is to deprive individuals of their liberty and thereby guarantee that the crime by the offender (at least while they are imprisoned) is not committed again. While a corporation cannot be imprisoned, incapacitation can be achieved through a number of alternative sentencing options including disqualification and dissolution.<sup>219</sup>

### *Disqualification*

6.3.2 Disqualification prevents an organization from carrying out certain activities or denies it the right to enter into certain contracts.<sup>220</sup> In short, disqualification involves a restraint of business and is a moderate form of punishment when contrasted with dissolution. There are a number of different forms a

<sup>212</sup> This was subsequently repealed (section 65 of the *Criminal Justice Act 1993* (UK)) following ridicule for some exorbitant fines imposed. For example one conviction for littering resulted in a £1000 fine. See General Note to Part VI, *Criminal Justice Act 1993* (UK).

<sup>213</sup> See E.C. Council Art. 15 of Regulation 17.

<sup>214</sup> [1988] 4 CMLR 347.

<sup>215</sup> J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety*, (State University of New York Press: Albany 1985) at 3.

<sup>216</sup> For example in one study on the rehabilitation of corporations following fines, the author found that in approximately 40 per cent of cases studied, companies convicted did not institute any significant organizational reform. See A Hopkins, *The Impact of Prosecutions under the Trade Practices Act*, Australian Institute of Criminology: Canberra, 1978.

<sup>217</sup> B Fisse, ‘Sentencing Options Against Corporations’ (1990) 1 *Criminal Law Forum* 211 at 220.

<sup>218</sup> *Bell v Lowe* [1988] Tas R (NC 2); *Underwood v Schiwy* [1989] Tas R 269.

<sup>219</sup> For example section 96 of the *Sentencing Act 1997* (Tas) states that a person subject to a sentence of imprisonment exceeding two years is incapable of holding public office. While section 51 of the *Firearms Act 1996* (Tas) grants the Commissioner of Police the power to cancel a firearms licence if a person is convicted of a crime involving violence.

<sup>220</sup> New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102, June 2003, at para 8.2.

disqualification order may take including a restraint of trade for a particular period; disqualification from a particular geographical area; the revocation of a particular licence; and a disqualification from tendering for particular contracts (such as government contracts).

6.3.3 An advantage of disqualification is that it may sometimes reward otherwise law-abiding organizations by decreasing their competition.<sup>221</sup> Some commentators have suggested that disqualification could exist ‘for a term to which an individual would have been sentenced for the same offence’.<sup>222</sup> However, in some extreme cases disqualification could result in the dissolution of the corporation particularly in instances where the restraint of trade ensured that there was no work for the corporation and consequently no reason for its existence.<sup>223</sup> Other criticisms of disqualification are that it focuses on deterrence, without a corresponding focus on rehabilitation, and that it has potential spill-over effects, particularly on employees and shareholders.<sup>224</sup> Following a detailed consideration of the use of disqualification orders in relation to corporations, the New South Wales Law Reform Commission (NSWLRC) stated that while they supported such orders ‘in principle, [they] should be invoked only in extreme cases’.<sup>225</sup>

6.3.4 There are already provisions existing in Tasmanian legislation dealing with disqualification, though not as a sentencing remedy, for example section 34(2) of the *Fair Trading Act 1990* (Tas) provides that:

...an injunction granted under that subsection may be, or include, an injunction restraining a person from carrying on a business of supplying goods or services (whether or not as part of, or incidental to, the carrying on of another business) –

- (a) for a specified period; or
- (b) except on specified terms and conditions.

6.3.5 In the United States broader provisions allow corporate offenders to be disqualified from entering into government contracts. The United States’ *Federal Acquisition Regulations* provide that contractors may be excluded if they have been convicted of fraud, embezzlement, theft, forgery, bribery, tax evasion, receiving stolen property and ‘any other offence indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor’.<sup>226</sup>

## Question 10

Should disqualification orders be an additional sentencing option?

## Dissolution

6.3.6 Deregistration is another word for dissolution<sup>227</sup> and is applied in instances where ‘it would remove from the community an organization which has flagrantly violated the rules of society’.<sup>228</sup> As such, it is a more severe sanction than disqualification. Dissolution can be achieved either through the actual dissolution of an organization<sup>229</sup> or indirectly through the imposition of a large fine that effectively strips the

<sup>221</sup> Australian Law Reform Commission, *Sentencing: Penalties*, Discussion Paper 30, 1987, at para 293.

<sup>222</sup> S Yoder, ‘Criminal Sanctions for Corporate Illegality’ (1978) 69 *Journal of Criminal Law and Criminology* 40 at 54. Also see D Miester, ‘Criminal Liability for Corporations that Kill’ (1990) *Tulane Law Review* 919 at 946.

<sup>223</sup> F Rush, ‘Corporate Probation: Invasive Techniques for Restructuring Institutional Behaviour’ (1986) 21 *Suffolk University Law Review* 33 at 83.

<sup>224</sup> D Miester, ‘Criminal Liability for Corporations that Kill’ (1990) *Tulane Law Review* 919 at 946.

<sup>225</sup> New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102, June 2003, at 120.

<sup>226</sup> *Federal Acquisition Regulations* §9.406-2.

<sup>227</sup> The term ‘dissolution’ was replaced by ‘deregistration’ under section 601AD(1) of the *Corporations Act 2001* (Cth).

<sup>228</sup> Australian Law Reform Commission, *Sentencing: Penalties*, Discussion Paper 30, 1987, at para 292. Also see *Corporations Act 2001* (Cth), s 490.

<sup>229</sup> This can be achieved by placing the organization’s assets in receivership (liquidation) or government (nationalisation): New South Wales Law Reform Commission, *Sentencing: Corporate s*, Report 102, June 2003, at para 8.19, citing J Braithwaite and G Geis, ‘On theory and action for corporate crime control’ [1982] *Crime and Delinquency* 292 at 307.

organization of all assets. There are substantial spill over effects involved in dissolving an organization, and consequently the sanction should only apply to the most serious cases of improper conduct.<sup>230</sup>

6.3.7 One potential problem is that dissolution does not necessarily ensure incapacitation as members of dissolved organizations can create a new ‘phoenix’ organization – that is an organization with a new name, but which carries out the same activities.<sup>231</sup> For example, in the only successful Australian prosecution of a company for manslaughter, *Denbo*<sup>232</sup> was in liquidation and owed its secured creditors over \$2,000,000 at the time of the conviction the company. The company was wound up six months before sentencing and never paid the fine of \$120,000. However soon after the sentence, another company, Tooronga Constructions was formed, registered to the same address as that to which the defendant company had been registered, and commenced operations similar to those of its predecessor.<sup>233</sup>

6.3.8 There has also been some suggestion that dissolution is a more appropriate sanction for small organizations where the impact on members, shareholders, volunteers and employees is more confined.<sup>234</sup> Dissolution of large organizations on the other hand would have a spill-over effect many times larger than that experienced with smaller organizations and so is unlikely to be a sentence proportionate to the crime. Liquidation allows for some protection of third parties as assets can be sold off and creditors paid. Liquidation could also see the corporation bought either by a parent organization or by an interested outsider, in which case many of the third parties interests will be protected – although some of the purposes of the punishment may therefore not be fulfilled. The threat of liquidation would also prove a deterrent to management fears of a take-over.<sup>235</sup>

### *Potential inconsistency with Commonwealth corporations law*

6.3.9 Legislation giving courts the power to sentence a corporation by dissolution has the potential to be inconsistent with Commonwealth corporations law. In relation to this potential the New South Wales Law Reform Commission has stated –<sup>236</sup>

A question arises whether the inconsistency provisions of the Commonwealth *Constitution* would operate to render a New South Wales provision for the winding up of a corporate offender invalid. The interaction between the Commonwealth’s corporations legislation and State law is dealt with expressly by the *Corporations Act 2001* (Cth). First, the Commonwealth legislation is not intended to “exclude or limit the concurrent operation of any law of a State or territory” [*Corporations Act 2001* (Cth) s 5E(1)]. Secondly direct inconsistencies are dealt with by limiting the operation of the Commonwealth legislation so that Commonwealth provisions relating to the external administration of a corporation do not apply to any winding up or administration carried out in accordance with a State provision and furthermore any New South Wales provision enacted after the commencement of the *Corporations Act* must be declared to be a “Corporations legislation displacement provision” in order to displace a Commonwealth provision [*Corporations Act 2001* (Cth) s 5G].

#### RECOMMENDATION 7

A provision relation to the dissolution of corporations should contain a statement to the following effect: “to the extent necessary to do so, this provision is declared a Corporations legislation displacement provision”.

<sup>230</sup> F Rush, ‘Corporate Probation: Invasive Techniques for Restructuring Institutional Behaviour’ (1986) 21 *Suffolk University Law Review* 33 at 87.

<sup>231</sup> See B Fisse, Responsibility, prevention and corporate crime (1973) 5 *New Zealand Universities Law Review* 250 at 253. Also have a look at J Clough, ‘Sentencing the corporate offender: the neglected dimension of corporate criminal liability’ (2003) 1 *Corporate Misconduct eZine*. As found at <http://www.lawbookco.com.au/academic/Corporate-Misconduct-ezine/html-files/index.asp> (accessed 20 April 2005).

<sup>232</sup> *R v Denbo Pty Ltd* (1994) 6 VIR 157.

<sup>233</sup> S Perrone, ‘Workplace Fatalities and the Adequacy of Prosecutions’ (1995) 13 *Law in Context* 94. It is however interesting to note that according to section 600AA of the *Corporations Act 2001* (Cth) a company can only be deregistered in instances where it is not a party to legal proceedings, a provision that remains unhelpful where the organization deregisters before criminal charges are laid.

<sup>234</sup> E Lederman, ‘Criminal law, perpetrator and corporation: rethinking a complex triangle’ (1985) 76 *Journal of Criminal Law and Criminology* 285, at 335.

<sup>235</sup> J Coffee, ‘No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment’ (1981) 79 *Michigan Law Review* 386 at 412 and 418.

<sup>236</sup> *Sentencing: Corporate s*, Report 102, June 2003, at para 8.28.

The Institute adopts this analysis.

### Question 11

Should dissolution of a corporation be an additional sentencing option?

## 6.4 Community Service Orders

6.4.1 Community service orders require an offender to participate on a volunteer basis in community projects, under the direction of a probation officer or supervisor<sup>237</sup> and are usually tailored to the offenders' area of expertise.<sup>238</sup> The ability of community service orders to tap into the existing expertise of an offender may make them a particularly attractive sentencing option when dealing with organizations. The organization could be required to supply its expertise to a community project or its labour force. It is also often thought that by participating in a community service order, the offender is able to atone for the crime committed as well as benefit the community in a way that more traditional forms of punishment (such as incapacitation or fining) do not address.<sup>239</sup> In other words, a community service order has a restorative element. Other positive features of community service orders are their relatively low cost; they reduce possibly unwarranted spill-over effects; and can be used to a restitutive, compensatory and/or reconciliatory effect.

### Question 12

Should community service orders be a sentencing option for organizations?

## 6.5 Probation Orders

6.5.1 Probation orders oblige an offender 'to be supervised by and to obey the reasonable directions of a probation officer'.<sup>240</sup> In Tasmania, probation orders are defined in the *Sentencing Act 1997* as:<sup>241</sup>

an order of a court that the offender in respect of whom it is made be of good behaviour during the period of the order or do or refrain from doing such things as are specified in the order.

The primary aim of a probation order is to rehabilitate through supervision.<sup>242</sup> Section 37(1) of the *Sentencing Act 1997* (Tas) specifies mandatory conditions to which probation orders must comply:

- (a) during the period of probation the offender must not commit any offence punishable by imprisonment;
- (b) the offender must report within a specified time of the making of the order to the designated supervisory officer;
- (c) during the period of the probation the offender must submit to the supervision of the supervising officer.
- (d) during the period of probation the offender must report as required to the supervising officer;
- (e) during the period of probation the offender must not leave or stay outside Tasmania without the permission of a probation officer;

<sup>237</sup> *Sentencing Act 1997* (Tas), ss 4 and 7.

<sup>238</sup> For example in one American case, a convicted corporate officer was ordered to help design a rehabilitation programme for ex-offenders: *United States v Mitsubishi International Corporation* (1982) 677 F 2d 785. In another example, convicted bakeries were required to supply fresh baked goods to needy organizations for a twelve-month period without charge: *United States v Danilow Pastry Co* (1983) 563 F Supp 1159.

<sup>239</sup> Community service orders thereby address the twin goals of deterrence and retribution. For example the United States Sentencing Guidelines provides that community service is to be 'reasonably designed to repair the harm caused by the offence': section 8B1.3.

<sup>240</sup> K Warner, *Sentencing in Tasmania, second edition*, The Federation Press: NSW, 2002, at 202.

<sup>241</sup> *Sentencing Act 1997* (Tas), s 4.

<sup>242</sup> *Sentencing Act 1997* (Tas), ss 7(f) and 59.

- (f) during the period of probation the offender must comply with the reasonable and lawful directions of the supervising officer;
- (g) the offender must notify the supervising officer within a specified time of any change of address or employment.

6.5.2 If probation orders were to be made available when sentencing organizations, it may also be desirable to introduce conditions tailored to organizations. Section 732.1 of the Canadian Criminal Code *Act 1985* for example provides that:

- (3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:
  - (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
  - (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
  - (c) communicate those policies, standards and procedures to its representatives;
  - (d) report to the court on the implementation of those policies, standards and procedures;
  - (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
  - (f) provide, in the manner specified by the court, the following information to the public, namely,
    - (i) the offence of which the organization was convicted,
    - (ii) the sentence imposed by the court, and
    - (iii) any measures that the organization is taking - including any policies, standards and procedures established under paragraph (b) - to reduce the likelihood of it committing a subsequent offence; and
  - (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.
- (3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

An important characteristic of section 732.1(3.2) (above) is the recognition that courts may not be the appropriate supervisory body, particularly if the organization is already subject to extensive regulation by government bodies such as *Workplace Standards*.

6.5.3 Probation orders offer many attractions as a sentencing option. Probation orders may be particularly suited to organizations because of their potential for rehabilitation. Probation orders also largely avoid spill-over,<sup>243</sup> and their inherent flexibility means that they can be tailored to the individual case. A possible disadvantage of imposing probation orders on organizations is that the intervention could 'stifle innovation and reduce competitiveness'.<sup>244</sup> There is also the possibility that a probation order will cost the state an excessive amount, although this may be able to be reduced through the imposition of costs on the offending corporation.<sup>245</sup>

### Question 13

(a) Should the imposition of a probation order be an additional sentencing option for organizations?

If so,

<sup>243</sup> 'spill-over' is explained above, at 6.1.5.

<sup>244</sup> M Jefferson, 'Corporate criminal liability: the problem of sanctions' (2001) 65 *Journal of Criminal Law* 235 at 252.

<sup>245</sup> S Box, *Power, crime and mystification*, Tavistock Publications: London, 1983, at 72.

- (b) Should legislation list organizational specific conditions?
- (c) Should a section based on section 732.1(3.2) of the Canadian Code be included?

## 6.6 Adjourment with conditions

6.6.1 Section 7(f) of the *Sentencing Act 1997* (Tas) gives courts the power to adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender. This can be done with or without recording a conviction against the offender. So long as the conditions are satisfied, then at the expiry of the adjournment period or upon the further hearing of adjourned proceedings, the offender will be discharged or the charge will be dismissed, depending upon whether a conviction has or has not been recorded.<sup>246</sup> Non-compliance with the conditions of the undertaking may expose the offender to being re-sentenced for the original offence as well as to being fined for the breach.<sup>247</sup> The flexibility in the types of conditions attached to such an order<sup>248</sup> can be used to great effect in relation to organizations, as was demonstrated in a recent Victorian case (see 5.2.14).

## 6.7 Conviction

6.7.1 A further sentencing option available under the *Sentencing Act 1997* (Tas) is a conviction. The stigma attached to a criminal conviction can act as an important punishment and deterrent when sentencing organizations – conviction ‘cannot simply be written off as a business cost or passed on to others’.<sup>249</sup>

## 6.8 Adverse Publicity Orders

6.8.1 Criminal sanctions are publicised in a way that is lacking with other forms of conduct. Generally however, corporate criminal sanctions are inadequately reported when contrasted with more traditional crimes, often due to the perceived ‘technicality’ involved in the proceedings or simply because they are not considered sufficiently newsworthy. However, denunciation is an important aim of the criminal justice system, and one way the courts have sought to ensure denunciation (or ‘shaming’) is by making adverse publicity orders.<sup>250</sup>

6.8.2 The purpose of an adverse publicity order is to force the convicted offender to inform others of the offence committed. Adverse publicity orders could mean the taking out (at offending organization’s expense) of ‘advertisements’ in newspapers or the writing of a letter to shareholders or consumers of the convicted corporation’s product.

6.8.3 An adverse publicity order will usually be in addition to any other sanction imposed by the court. For example under section 36 of the *Fair Trading Act 1990* (Tas), which is not connected with sentencing, the court may make either or both of the following orders:

- (a) an order requiring that person or a person involved in the contravention to disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that last-mentioned person has access;

<sup>246</sup> *Sentencing Act 1997* (Tas), ss 60 and 61.

<sup>247</sup> *Sentencing Act 1997* (Tas) ss 60(4), 62(4)(c) and 62(5).

<sup>248</sup> Although the order should be reasonable: *Keur* (1973) 7 SASR 13; and have some pertinence to the offence committed: *Isaacs v McKinnon* (1949) 80 CLR 502; *Bantick v Blunden* Serial No 19/1981 [1981] Tas R (NC 9).

<sup>249</sup> B Fisse, ‘Sentencing Options Against Corporations’ (1990) 1 *Criminal Law Forum* 211 at 229.

<sup>250</sup> D Skeel, ‘Symposium norms and corporate law: shaming in corporate law’ (2001) 149 *University of Pennsylvania Law Review* 1811.

(b) an order requiring that person or a person involved in the contravention to publish, at his own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

6.8.4 Similar adverse publicity order provisions are contained in other Tasmanian and Australian legislation.<sup>251</sup> Adverse publicity orders may be a powerful shaming tool particularly as corporations often go to great lengths to protect their brands.<sup>252</sup> The possibility of the weakening of this brand could well have a greater deterrent effect than any fine.<sup>253</sup> The public on receipt of this information may well choose to boycott the corporation and its products in future.<sup>254</sup> A potential problem with the adverse publicity order is that its effect can be described as a 'loose cannon',<sup>255</sup> in that the impact of the order is unclear. The inherent ambiguity of the order could result in a substantial spill-over effect or alternatively result in negligible impact.<sup>256</sup> This in turn could result in job losses or alternatively increased profits. It is also possible that counter-publicity could be employed, although the effect of this is unclear.<sup>257</sup> However, it should be noted that generally, courts will take into account the impact of adverse publicity already incurred (eg from publicity surrounding the court case) in assessing the appropriate penalty.<sup>258</sup>

### Question 14

Should sentencing courts be able to impose adverse publicity orders on organizations?

## 6.9 The Equity Fine

6.9.1 Share dilution of a convicted corporation through the imposition of an 'equity fine' is an alternative sentencing option:<sup>259</sup>

[W]hen very severe fines need to be imposed on the corporation, they should be imposed not in cash, but in the equity securities of the corporation. The convicted corporation should be required to authorize and issue such number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity. The fund should then be able to liquidate the securities in whatever manner maximizes its return.<sup>260</sup>

6.9.2 The equity fine has some advantages over other forms of sanction including a minimisation of the spillover effect on employees and consumers. Indeed, the only materially disadvantaged group from the

<sup>251</sup> For example see *Food Act 2003* (Tas), s 117; *Income Tax Assessment Act 1936* (Cth), s 14; *Customs Act 1901* (Cth), s 265; and *Trade Practices Act 1965* (Cth), 105.

<sup>252</sup> One commentator has recommended that a state-sanctioned 'corporation journal' be created in which details of corporate convictions be published. Another commentator has suggested that companies' wrongdoings be broadcast over the Internet on a dedicated World Wide Web page entitled 'Punitive Damages Awards'. See B Fisse, 'The Use of Publicity as a Criminal Sanction Against Business Corporations' (1971) 8 *Melbourne University Law Review* 107; A Curcio, 'Painful Publicity – An alternative punitive damage sanction' (1996) 45 *DePaul Law Review* 341.

<sup>253</sup> For example one study found that of seventeen corporations that had had experienced extensive negative publicity following conviction, in all but two instances, the corporate executives believed that the adverse publicity had resulted in a drop of corporate prestige. See B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press: Albany, 1983, at 289.

<sup>254</sup> For example negative publicity received after the ExxonValdez oil spill in 1989 resulted in thousands of consumers returning their Exxon credit cards. See A Curcio, 'Painful Publicity – An alternative punitive damage sanction' (1996) 45 *DePaul Law Review* 341 at 369.

<sup>255</sup> J Coffee, 'No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386 at 427.

<sup>256</sup> In the only successful conviction of corporate manslaughter in Australia (*R v Denbo Pty Ltd* (1994) 6 VIR 157) the \$120,000 fine was never paid, as at the time of conviction the company was in liquidation and owed its secured creditors over \$2,000,000. The company was wound up six months before sentencing and never paid the fine. Neither did it suffer from the adverse publicity that flowed from the case. See *The Age*, 15 June 1994 at 7.

<sup>257</sup> B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press: Albany, 1983, at 295-298.

<sup>258</sup> *Dawson v World Transport Headquarters Pty Ltd* (1981) 53 FLR 455 at 478 per Fisher J.

<sup>259</sup> J Coffee, 'No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386 at 413.

<sup>260</sup> Alternatively, the equity shares can be provided directly to the victims, thereby allowing them the choice of either retaining the shares and thereby being granted some influence over corporate policy or selling them.

imposition of an equity fine are the shareholders whose value in the company is reduced. However, it is these very same shareholders who have failed in their duty to adequately supervise management as well as being unjustly enriched. It is therefore likely that the imposition of an equity fine could well spur shareholders to take a more pro-active role in the management of the company, and ensure that transgressions do not happen again.

6.9.3 Equity fines also allow for much greater punishment than a monetary fine, as the market value of corporations will generally exceed the capital available to the corporation if a fine were to be imposed.<sup>261</sup> Further, additional income may be earned in instances where the corporation were to exceed expected revenue, for example in companies with high growth potential.

6.9.4 However, the dilution of shares through the imposition of an equity fine may place the corporation at threat of a hostile take-over.<sup>262</sup> Another problem with the equity fine is that it ultimately lends itself to a cost-benefit analysis,<sup>263</sup> and is not ultimately concerned with rectification of defective procedures or policies. As such, equity fines share a similar shortcoming to that experienced with other forms of fines.

6.9.5 Another limitation of the equity fine is that it would generally be restricted to sentencing companies which have share capital.

6.9.6 The New South Wales Law Reform Commission did not recommend the introduction of equity fines in that state.<sup>264</sup> Their primary criticisms of equity fines were:

- Unfair burden on shareholders
- Insufficient deterrence or rehabilitation
- Gravity of corporate crime not reflected
- Difficulties in administration
- Limited application

6.9.7 The Institute is also of the preliminary view that equity fines should not be introduced.

### Question 15

Should equity fines be an additional sentencing option?

## 6.10 Punitive Injunction

6.10.1 A punitive injunction is similar to a probation order in seeking to ensure that an offending corporation improves the internal controls that lead to the offence/s, however the difference lies in its punitive approach. According to the Australian Law Reform Commission, a punitive injunction is:<sup>265</sup>

[a]n order which requires the convicted corporate offender to introduce specific court-ordered internal-controls, at the risk of a further punishment for failure to do so.

6.10.2 The punitive injunction has been described as ‘both punishment and super-remedy’<sup>266</sup> as it requires a defendant to introduce preventative procedures as well as possibly requiring the development of innovative techniques. The punitive injunction as a sanction is therefore able to rehabilitate through ‘forcible restraint

<sup>261</sup> As Underwood J pointed out in *Chugg v Stanford* [2000] TASSC 93 ‘[t]he capacity of an offender to pay a fine is not measured by reference only to his or her circumstances at the moment the fine is imposed’.

<sup>262</sup> In general however, the equity fine would have to be quite substantial for a serious takeover to be a risk. There is a chance that the threat of a takeover could well provide a catalyst for corporations to ensure effective internal compliance systems. See B Fisse, ‘Sentencing Options Against Corporations’ (1990) 1 *Criminal Law Forum* 211 at 232.

<sup>263</sup> B Fisse, ‘Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions’ (1983) 56 *Southern California Law Review* 1141 at 1234.

<sup>264</sup> *Sentencing: Corporate Offenders*, Report 102, June 2003, Chapter 7.

<sup>265</sup> Australian Law Reform Commission, *Sentencing: Penalties*, Discussion Paper 30, 1987, at para 298.

<sup>266</sup> B Fisse & J Braithwaite, ‘The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability’ (1988) 11 *Sydney Law Review* 469 at 501.

upon corporate decision-making'.<sup>267</sup> Moreover the deterrence trap is avoided as it avoids the imposition of harsh fines commensurate with the severity of their offence, while at the same time ensuring that the more serious the offence, the 'greater the justification for imposing stringent monitoring of the company's future activities'.<sup>268</sup> It has also been suggested that with regards to a fine, the spill-over effect could be reduced through prohibiting the corporation from passing the costs onto consumers.<sup>269</sup>

The Law Commission of England and Wales recommended as one of the sentencing options for a new offence of 'corporate killing' a type of punitive injunction. The Commission proposed that courts be able 'to order the corporation to take such steps, within such time, as the order specifies for remedying the failure in question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death'.<sup>270</sup>

A type of punitive injunction is already provided for in section 87B of the *Trade Practices Act 1974* (Cth), but not in the sentencing context. Enforceable undertakings are monitored by the Australian Securities and Investment Commission and are enforceable in a court.<sup>271</sup> A disadvantage of enforceable undertakings is their emphasis on 'correcting' wrongdoing rather than seeking to punish. However, as long as any proposed amendment to the *Sentencing Act* provided for an enforceable undertaking to be one of a number of possible sanctions, there is no reason why an enforceable undertaking could not be imposed along with sanctions which have a punitive element.

### Question 16

- (a) Should the imposition of a punitive injunction be an additional sentencing option?
- (b) If so, on what model should it be based?

## 6.11 Compulsory Compensation Orders

6.11.1 Section 68 of the *Sentencing Act* allows a sentencing judge to make compensation order against a person found guilty of an offence and the court finds that another person has suffered injury, loss, destruction or damage. Furthermore, s 68(1)(a) requires such an order to be made if the defendant is guilty of certain offences (burglary, stealing and injury to property). While there are problems with mandatory compensation orders (in particular that orders are often adjourned indefinitely, or if they are made they are often never paid)<sup>272</sup>, in the light of the different nature of organizational offenders, it may be desirable to consider their introduction in relation to organizations found guilty of a crime in the Code.

### Question 17

Should the *Sentencing Act* require the sentencing judge to make a compensation order where an organization is found guilty of a crime in the Code?

## 6.12 Sentencing under the *Workplace Health and Safety Act*

6.12.1 Offences under the WHSA are punishable by a maximum of 1,500 penalty units (\$150,000) in the case of a corporation, and 500 penalty units (\$50,000) in the case of a natural person. To date, all convictions

<sup>267</sup> B Fisse, Sentencing Options Against Corporations (1990) 1 *Criminal Law Forum* 211 at 237-238.

<sup>268</sup> B Fisse & J Braithwaite, *Corporations, Crime and Accountability*, Cambridge University Press: Hong Kong, 1993, at 83.

<sup>269</sup> M Jefferson, 'Corporate criminal liability: the problem of sanctions' (2001) 65 *Journal of Criminal Law* 235 at 256.

<sup>270</sup> England and Wales, Law Commission, *Legislating the Criminal Code: involuntary manslaughter* (Report 237, 1996) at para 8.76.

<sup>271</sup> Also see *Australian Securities and Investments Commission Act 2001* (Cth), s 93AA(1).

<sup>272</sup> See further discussion in K Warner & J Rudolf, 'Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice' (2003) 36 *The Australian and New Zealand Journal of Criminology* 60.

under the WHSA (even those that resulted in death or serious injury) have been punished by way of fine, except two against natural persons, one being placed on a good behaviour bond and one only having a conviction recorded.<sup>273</sup> While some breaches of the WHSA may not deserve a punishment more severe than a fine, others may do – particularly where they result in death or serious injury. Furthermore, there may be instances where the imposition of a fine is unhelpful to all parties.

6.12.2 In May 2004, Judge Gebhardt in the Victorian County Court imposed significant and imaginative penalties for four breaches of the *Occupational Health and Safety Act 1985*(Vic) that resulted in a death and serious injuries to a number of workers.<sup>274</sup> The fines for the first two counts totalled \$325,000. The third count was adjourned with conviction subject to the special conditions that the company pay \$70,000 to two charities and \$90,000 to the trusts funds of the deceased worker's children. The fourth count was adjourned with conviction subject to the special conditions that the directors meet with Victorian Worksafe representatives three times a year, that Leighton contribute \$40,000 to the funding of a training programme, and that Leighton approach the Universities of Monash, Melbourne and Deakin to discuss the enhancement of the training of engineers in safe systems of work associated with the design of temporary structures (falsework) for bridge construction.

6.12.3 While the potential for Tasmanian judges and magistrates to make similar orders may exist,<sup>275</sup> it is not being utilised. Therefore, it may also be desirable to expand the sentencing options currently available when sentencing an organization for an offence against the WHSA.

6.12.4 The general trend to expand the range of penalties available upon conviction of a workplace safety offence can be seen in the Occupational Health, Safety and Welfare (SafeWork SA) Bill 2004, which is currently before the South Australian Parliament. This Bill (due for debate in June/July 2005) proposes introducing additional non-monetary penalties for breaches under the *Occupational Health, Safety and Welfare Act 1986* (SA) by inserting the following section:<sup>276</sup>

60A—Non-pecuniary penalties

- (1) If a person is convicted of an offence against this Act, the court may, after taking into account any submissions and other relevant matters, in addition or in substitution for any penalty that it may impose—
  - (a) order the convicted person to undertake, or to arrange for one or more employees to undertake, a course of training or education of a kind specified by the court;
  - (b) order the convicted person to carry out a specified activity or project for the general improvement of occupational health, safety and welfare in the State, or in a sector of activity within the State;
  - (c) order the convicted person to take specified action to publicise the offence, its consequences, any penalty imposed, and any other related matter;
  - (d) order the convicted person to take specified action to notify specified persons or classes of persons of the offence, its consequences, any penalty imposed, and any other related matter (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the convicted person's conduct).
- (2) The court may, in an order under subsection (1), fix a period for compliance and impose any other requirements the court considers necessary or expedient for the enforcement of the order.
- (3) If the person to whom an order is directed under subsection (1) fails to comply with the order, that person is guilty of a further offence.

<sup>273</sup> See Appendix A.

<sup>274</sup> *The Queen v Leighton Contractors Pty Ltd* [2004] VCC.

<sup>275</sup> That is, to attach varied conditions to an adjournment with or without conviction under section 7(f) of the *Sentencing Act 1997*.

<sup>276</sup> Clause 25 of the Bill would insert section 60A to the Act.

**Question 18**

- (a) Do you think that the range of sentencing options currently available when sentencing an organization for an offence against the Workplace Health and Safety Act should be expanded?
- (b) If so, what additional sentencing options do you think should be available?

## Appendix A

Sentences for convictions under the Workplace Health and Safety Act 1995, sections 9, 14, 16, 20, 47 and 48.<sup>277</sup>

Date of Conviction	Defendant	Section	Brief Details	Penalty	Maximum Penalty
12/04/1996	Individual: PRB	Section 16(a)	The defendant partially felled a tree. The following day a fellow worker was hit by the tree while working nearby. No warning was given.	\$2,000	\$10,000
8/04/1997	Individual: IDY	Section 9(a)(I)(ii) & Section 9(b)	An employee was injured while working near 20,000 volt overhead power lines. He received third degree burns and the amputation of several toes.	\$10,000	\$50,000
9/04/1997	MRP Pty Ltd	Section 47	An employee fell through an unguarded floor, falling 2.4 metres below. Received fractures to neck, back and ribs.	\$1,000	\$5,000
19/06/1997	DF Pty Ltd	Section 9(2)(d) Section 47	An employee was injured when his shirt caught alight while undertaking foundry duties causing extensive burns.	\$3,500 \$500	\$150,000 \$5,000
10/09/1997	TS Pty Ltd	Section 9(1)(a)(ii)	An employee was turning the flitch on a saw when he came in contact with it, receiving severe injuries. Eventually, his arm had to be amputated.	\$8,000	\$150,000
19/09/1997	Individual: ALC	Section 16(a)	The defendant placed a corrosive chemical in a milk carton for the purpose of playing a prank on an employee, resulting in a potentially life threatening situation.	\$3,500	\$10,000
3/10/1997	WSE Pty Ltd	Section 9(4)	An employee of a sub contractor fell through a roof approx 8.5 m causing a fracture to right elbow and right leg.	\$7,000	\$150,000
31/10/1997	AN Pty Ltd	Section 9(1)(a)(iii)	An employee whilst using a cropping machine had the fingertips of two fingers severed. The warning signs on machine were written in German.	\$20,000 Company had a previous conviction	\$150,000
1/12/1997	Individual: RME	Section 37(1)(a)	Obstructing an Inspector	84 hours' community service	\$20,000
26/02/1998	TP Pty Ltd	Section 9(2)(f)(I)	Change in procedure in relation to isolation from power supply to conveyor.	\$8,000	\$150,000
24/08/1998	B Pty Ltd	Section 47(b) ISH&W Regulations 1979 38(2)	Failing to give notice of serious incident. Failing to maintain electrical equipment. An employee using vacuum cleaner received electrical shock and suffered burns and associated injuries.	Conviction recorded. No fine	\$5,000
24/08/1998	Individual: JBF, Managing Director of B Pty Ltd	Sec 47(b) Sect 48(1)	Failing to give notice of serious incident. Failing to maintain electrical equipment. An employee using vacuum cleaner received electrical shock and suffered burns and associated injuries.	Conviction recorded. No fine	\$2,000
17/11/1998	Individual: PJZ	Section 16(a)	The defendant, a crane driver, lifted a porta loo with a boom crane into an unsafe proximity with overhead power lines. As a result two workers who were guiding the porta loo by hand received severe bodily injuries to hands and feet as electricity passed through them to the ground.	\$3,000	\$10,000
22/03/1999	PA Ltd	Section 9(4)	The defendant, the principal contractor failed to provide a safe working environment when hot liquid calcine was spilt onto two persons who were sub-contractors on the site, resulting in second degree burns to feet, full thickness burns to ankles and superficial burns to neck region.	\$18,000	\$150,000
25/03/1999	PF Pty Ltd	Section 9(1)(a)(ii)	An employee of the defendant received facial injuries when he was struck by an exploding float he was pressure testing at the time.	Conviction recorded	\$150,000
9/06/1999	Individual: MGD	Section 16(a)	A 12-year-old boy was injured when his trouser leg came into contact with an unguarded power take off shaft which attached to a Grasslands roller mill on one end and a blue Ford 5000 tractor at the other end. Later, the boy's leg was amputated.	\$2,000	\$10,000

<sup>277</sup> The data that follows was obtained from the following sources:

- *Lactos Pty Ltd v Kent* [2003] TASSC 82, Annexure A;
- The *Workplace Issues* (GB064) Magazine (this is a quarterly publication produced as a joint initiative of Workplace Standards Tasmania and the WorkCover Board. The Magazine is available at: [www.workcover.tas.gov.au](http://www.workcover.tas.gov.au); and
- Personal communications with Mr Phil Hickey (Senior Policy Adviser, Workplace Standards Tasmania), 16 and 17 March 2005.

Date of Conviction	Defendant	Section	Brief Details	Penalty	Maximum Penalty
8/07/1999	M Pty Ltd	Section 9(2)(d) Section 9(2)(e)	A 19-year-old was killed when a 25-metre log (cable logging operation) which was being hauled in, swung around and struck the deceased in the chest and head region. The investigation revealed the log was attached in the middle region which caused it to swing, striking the uphill bank and then the deceased. The deceased was not a safe distance away from the area.	\$35,000	\$150,000
27/08/1999	Boral Resources (Tas) Pty Ltd	Section 20(b)	The defendants initiated a blast at its quarry; the purpose was to widen an access road. Several pieces of fly rock were ejected from the area into the sawmill next door.	\$7,500	\$50,000
21/09/1999	P Ltd	Section 9(1)(a)	Two employees of the defendant were leaning into the skip container and the skip moved with both employees sustaining injury. The skips had not been isolated prior to entering the lower level of the mine. Also there was a lack of guards and barriers and there was inadequate warning signs.	\$5,000	\$150,000
1/12/1999	LL Pty Ltd	Section 9(4)(e)	Two contractors of the defendant suffered electrical burns and shock whilst working in a high voltage sub-station.	\$40,000	\$150,000
18/02/2000	Individual: DER, Director of R Pty Ltd	Section 9(1)(a)(iii) Section 47(a)	An employee of the defendant, whilst in the process of removing onions from a top and tail machine had her hand caught between the rollers in the machine. The accident necessitated the amputation of four fingers on her right hand and damage to the palm of the hand. There was no guard on the machine.	\$5000 \$250	\$50000 \$2000
28/03/2000	Individual: DD	Section 20 (C)	The defendant sprayed and ignited CRC through a vent hole in a toilet door at a workplace as an employee was sitting on the toilet, causing burns to the sleeve area of the person's overalls.	good behaviour for 12 months.	\$25,000
2/05/2000	D Pty Ltd	Section 9 (1)(a)(i)	Two employees who were cleaning the inside of a cool room using a forklift truck received carbon monoxide poisoning.	\$2,500	\$150,000
20/06/2000	ACH Pty Ltd	Section 9 (1)(c)	A young worker had his arm caught in a running conveyor system and was not discovered until some 3 hours after the accident.	\$10,000	\$150,000
31/07/2000	T Pty Ltd & Individual: JRV	Section 9 (1)(c)	A log truck driver was struck with a log during unloading.	\$10,000 \$4,000	\$150,000 \$50,000
15/11/2000	Individual: CAD	Section 13	The prosecution involved a fatality during a tree felling.	\$5,000	\$50,000
23/11/2000	FFP Pty Ltd	S 9(1)(a)(ii) S 9(1)(iii) S 9(1)(c). S 47	The prosecution followed an incident in which an employee whilst attempting to clean out the water jets of a potato washing machine slipped and fell into the machine causing his right arm to be crushed.	\$4,000	\$150,000
21/02/2001	DH Pty Ltd	Section 9(1)(a)(iii) Section 9(1)(a)(ii)	An employee of the defendant received acid burns to the groin area, feet, hands, forearms and left eye when a PVC pipe fractured whilst transferring chromic acid from a holding tank to a service tank.	\$7,500	\$150,000
21/02/2001	Individual: JJW, (Managing Director) of DH Pty Ltd	Section 9(1)(a)(iii) Section 9(1)(a)(ii)	An employee of the defendant received acid burns to the groin area, feet, hands, forearms and left eye when a PVC pipe fractured whilst transferring chromic acid from a holding tank to a service tank.	\$1,000	\$50,000
2/05/2001	TA Pty Ltd	Section 9(4)	An employee was fatally wounded whilst working at the workplace of TA Pty Ltd. The employee was at the time employed by SE Pty Ltd, who was engaged by TA Pty Ltd to carry out in part welding of a threaded sleeve to a pipe work connected to a tank.	\$30,000	\$150,000
28/06/2001	Individual: KRM	Section 9(1)(a)(ii) & Section 48	An employee was cutting tops out of 44-gallon drums with an oxyacetylene torch when there was an explosion and fire. The employee sustained injuries from the incident.	\$3,500 global fine	\$50,000 \$2,000
9/08/2001	B Pty Ltd	Section 14	The erection of a scaffold was not safe for use and the scaffolder failed to inspect the scaffold prior to passing it safe for use.	\$10,000	\$150,000
9/08/2001	Individual: PGDM	Section 16	The erection of a scaffold was not safe for use and the scaffolder failed to inspect the scaffold prior to passing it safe for use.	\$3,000	\$10,000

Date of Conviction	Defendant	Section	Brief Details	Penalty	Maximum Penalty
16/10/2001	W Ltd	Section 9(1)(a)(iii)	An employee who was employed at a walnut farm was working on the back of a hopper attached to a tractor for the purposes of injecting gypsum into the soil. The hopper was unguarded and bolts, which had protruding heads, were fastening the augur to the drive shaft. Later the employee's jumper became caught in the augur bolts, which caused severe damage to his left arm.	\$4,000	\$150,000
31/10/2001	WQ Pty Ltd	S 9(1)(a)(ii), 9(a)(iii), 9(1)(c)	The defendant plant was experiencing problems and when the employee attempted to fix the problem his right hand became trapped in the drum of the conveyor belt of the crushing plant.	\$15,000	\$150,000
10/07/2002	Individual: GJH	Section 20(c)	An employee whilst working at the BPC Pty Ltd was filling a LPG cylinder and left it unattended for approx 3 hours, the LPG escaping into the atmosphere.		
05/03/2003	L Pty Ltd	Section 9(1)(a)(ii) & (c)	Employee's leg caught when conveyer belt not turned off during cleaning. Systems failure as two employees both responsible for ensuring it turned off – each assumed other would do so. No "lock-out tag-out system" installed.	\$30,000	\$150,000
18/03/2003	GM Pty Ltd	Section 9(1)	Forklift with faulty brake pivoted around, pinning employee against building. Employee not qualified to drive forklift, and employer failed to provide instruction and training in the use of the forklift.	\$5,000	\$150,000
18/03/2003	Individual: BAD	Section 9(1)		\$2,500	\$50,000
07/04/2003	WS Pty Ltd.	Section 9(4)	Employee's finger amputated by hamburger machine.	\$5,000	\$150,000
28/05/2003	CM Pty Ltd	Section 9(1)	Employee pruning trees with hydraulic shears while on mobile elevated work platform. Limb he was pruning contacted power line, resulting in severe electric shock.	\$8,000	\$150,000
18/06/2003	T Pty Ltd	S 9(1)(a)(i)	A mine worker was thrown back several metres in an electrical explosion when the bucket of an excavator that he was working nearby came into contact with an underground power-line.	\$4,500	\$150,000
18/06/2003	S Pty Ltd	Section 9(1)(a)(i)		\$4,500	\$150,000
22/07/2003	NL Pty Ltd	Section 9(1)	Employee injured when the jaws of a machine crushed him as he was carrying out routine maintenance of a processing plant.	\$5,000	\$150,000
23/09/2003	Individual: BAJ	Section 38(1):	Section 38(1) -failure to comply with a direction of an inspector; also 3 counts of regulation 101(2) (using unregistered plant).	\$2,000 (global fine)	S 38(1): \$20,000*
23/12/2003	VP Pty Ltd	Section 9(1)	Employee injured while operating a packaging plant. His left hand caught in the assembly head of the machine, resulting in the lost of the end of the thumb and two fingers. It was alleged that VP failed to ensure that plant was properly guarded.	\$5,000	\$150,000
29/03/2004	SE Ltd	Section 9(1)(c)	Employee of SE. (working at C recycling factory) cleaning paper from roller at the head of a conveyer belt (owned by C).	\$25,000	\$150,000
29/03/2004	C Pty Ltd	Section 9(4)	Conveyer restarted and employee's arm pulled through maintenance plate and over the top of roller. Arm had to be removed. Employee was a new employee and not sufficiently instructed by SE. C's conveyer belt did not comply with safety standards.	\$25,000	\$150,000
28/04/2004	Individual: WBL	Section 9(1)	Employee instructed by employer to use forklift truck to lift Land Rover to remove parts, this contrary to standards. Also employee did not have forklift licence and not properly instructed of dangers. Rover moved, killing employee.	\$25,000	\$50,000
08/07/2004	Individual: BDJ	Section 16(a)	Defendant did not adhere to industry tree falling standards, had a 'cavalier attitude'. Limb fell and impaled him in the chest.	\$2,000	\$10,000
13/08/2004	PBV Ltd	Section 9(4)	Employee was cleaning out tank, climbed ladder lifting 20lt container of caustic solution, as lifted bucket, it hit tank and tipped over his face and head, causing severe damage to his eye, which was later removed.	\$20,000	\$150,000
16/11/2004	H Pty Ltd	Section 9(4)	Employee drove forklift down inclined road, brakes did not work, crashed.	\$10,000	\$150,000
09/12/2004	G Ltd	Section 9(4)	An employee, undertaking clearing of a blockage in a feed duct at G's fish meal plant at Cambridge, had part of a finger severed when it came into contact with a rotating valve in the equipment being cleaned.	\$7,500	\$150,000

\* plus a daily fine of \$2,000 – he had not complied for over 150 days, so he could have been fined over \$300,000); Max for reg 101(2): \$5,000 on each charge. Total max: \$345,000

## Appendix B

Victorian Law Reform Commission *Criminal Liability for Workplace Death and Serious Injury in the Public Sector Report, 2002*

### Recommendations

#### Chapter 1 Introduction

##### Preliminary Questions

1. The Crimes (Workplace Deaths and Serious Injuries) Bill 2001(hereafter, the Bill) should provide that for the avoidance of doubt the Crown is a body corporate.
2. It is intended that the Bill should bind the Crown in all its capacities as far as is constitutionally possible and it is intended to make the Crown criminally liable and subject to criminal sanctions.

#### Chapter 3 Imposing Criminal Liability on 'Public Sector Entities'

##### Agencies and Offices under the *Public Sector Management and Employment Act 1998*

3. The Bill should provide that the Director of Public Prosecutions may prosecute the Crown for an offence under the *Public Sector Management and Employment Act 1998*.
4. The Bill should provide that the Crown should be the defendant in cases involving negligent conduct occurring within agencies and section 16 offices.
5. The Bill should provide that, in determining whether the Crown is negligent, the conduct of the Crown as a whole can be considered.
6. Proposed section 14B(5), which permits the aggregation of the conduct of any number of employees, agents or senior officers of a body corporate should apply to the conduct of employees, agents, or senior officers of the Crown, even if they are working in different agencies or offices.

##### Corporations Sole Representing the Crown

7. Where an employee of the Crown is a corporation sole, the Crown, rather than the corporation sole, should be the defendant in prosecutions under the legislation.
8. In determining whether the conduct of the Crown as a whole is negligent, the conduct of a corporation sole which represents the Crown should be capable of being aggregated with the conduct of any number of employees, agents or senior officers of the Crown.
9. In determining whether the conduct of the Crown as a whole is negligent, the provisions of the Bill allowing the conduct of an agent providing services to be aggregated with the conduct of employees or senior officers, should apply to agents providing services to a corporation sole representing the Crown. The conduct of such agents should be capable of being aggregated with the conduct of any number of employees, agents or senior officers of the Crown. The fact that a person works in or provides services to a unit headed by a corporation sole should not prevent the aggregation of his or her conduct with the conduct of employees, agents or senior officers working outside that unit.

##### Public Authorities

10. For the avoidance of doubt, it should be made clear that a person acting in the capacity of a corporation sole representing the Crown is to be treated as an employee of the Crown, so that the Crown may be criminally liable if that person is killed or seriously injured as the result of negligence.
11. The Crown, rather than a body corporate representing the Crown, should be the defendant in criminal proceedings involving the conduct of a body corporate. When the conduct of a body corporate representing the Crown is relied upon in a prosecution against the Crown, the body corporate should not be separately prosecuted.
12. Employees, agents or senior officers of a body corporate representing the Crown should be treated as employees, agents, or senior officers of the Crown for the purposes of proposed section 14B(5) of the Bill.
13. The aggregation principle should permit the aggregation of the conduct of employees, agents or senior officers of a body corporate representing the Crown with the conduct of employees, agents or senior officers of the Crown working outside the incorporated body.
14. The Bill should list specified bodies corporate to which Recommendation 11 does not apply. In such cases, the body corporate rather than the Crown would be the defendant in criminal proceedings.
15. Where a body corporate is specified as the appropriate defendant, the conduct of employees, agents or senior officers of the Crown would not be capable of aggregation with the conduct of employees, agents or senior officers of the body corporate.

16. The definition of an ‘employee of the Crown’ should include a member of an unincorporated body being a board, council, committee, subcommittee or other body which is:
  - established by or under an Act for the purposes of advising a Minister or under the control of a Minister; or
  - performing functions connected with an agency or under the control of an agency or a person performing the function of an agency head.
17. Unincorporated private sector bodies which receive public funds or perform services under contract with government should not, solely by reason of this, be deemed to be part of the Crown.
18. The definition of ‘employee of the Crown’ should include employees, agents or senior officers of unincorporated bodies falling within Recommendation 17 above.
19. The aggregation principle should permit aggregation of the conduct of a member, employee, agent or senior officer of such a body, with the conduct of other employees, agents or senior officers of the Crown (a somewhat analogous provision is contained in the *Freedom of Information Act 1982* s 5(2)).
20. Recommendation 17 should not apply to the conduct of members of unincorporated bodies exercising quasi-judicial functions.

### Particular Employment Relationships

21. Delegates, who are carrying out functions delegated to them by a Minister, agency head or any public sector employee who has the statutory power of delegation should be deemed to be employees of the Crown.
22. The behaviour of any delegate who is carrying out functions delegated to him or her by a Minister, agency head or any public sector employee should be capable of being aggregated with the behaviour of other Crown employees.
23. Volunteers who are under the direction of an entity that is part of, or represents, the Crown should be deemed to be employees of the Crown for the purposes of the Bill.
24. Employees who are on secondment to an entity should be deemed to be employees of that entity.
25. Parliamentary officers should be deemed to be employees for the purposes of the Bill.
26. For the avoidance of doubt, the Parliament of Victoria is to be regarded as part of the Crown for the purposes of the Bill.
27. For the avoidance of doubt, the Supreme Court, County Court, Magistrates’ Court and Children’s Court should be regarded as part of the Crown for the purposes of the Bill.
28. For the avoidance of doubt, judicial members of the Supreme Court, County Court, Magistrates’ Court and Children’s Court should be deemed to be ‘workers’ for the purposes of the Bill.
29. For the avoidance of doubt, judicial employees under Part 9 of the *Public Sector Management and Employment Act 1998* should be deemed to be employees of the Crown for the purposes of the Bill.
30. The principle of aggregation should not apply to the conduct of judges or members in the exercise of their judicial functions.

### Penalties

31. Administrative arrangements should be made to ensure that fines for corporate offences under the Bill are borne by the appropriate agency. These should be formal arrangements.
32. Proposed section 14D should be varied to require the public sector entity which is responsible to publicise the event and its consequences.

## Chapter 4

### Application of Senior Officer Offences to Senior Employees

#### Senior Officer Offences

33. The Bill should be amended to include a definition of ‘senior officer’ applicable to bodies which are part of the Crown, to bodies that represent the Crown and to other public sector entities.
34. A senior officer of the Crown should be defined to include an agency head under section 4 of the *Public Sector Management and Employment Act 1998*, the head of an office under section 16 of the Act or the head of a department under the *Parliamentary Officers Act 1975*. The agency head may be a senior officer, even if the agency head is, in that capacity, a corporation sole.
35. A senior officer of the Crown should be defined to include:
  - a person employed as an executive under Part 3 of the *Public Sector Management and Employment Act 1998*, who makes, or participates in making, decisions that affect the whole, or a substantial part of the functions or activities of an agency under section 4 of the Act or office under section 16;
  - a person employed as an executive under Part 3 of the Act with responsibility for the management of a distinct activity or program within an agency or office; and
  - a person employed as an executive under Part 3 of the Act as a senior officer even if the person is, in that capacity, a corporation sole.
36. A senior officer of an incorporated statutory authority should be defined to include:
  - a statutory office holder who has responsibility for managing the functions or activities of a body corporate under an Act, or who makes or participates in making decisions that affect the whole or a substantial part of the functions or activities of the body corporate;

- an employee of the body corporate, who has responsibility for managing the functions or activities of a body corporate under an Act or who makes, or participates in making, decisions that affect the whole, or a substantial part of the functions or activities of the body corporate;
  - a person employed as an executive under Part 3 of the *Public Sector Management and Employment Act 1998*, who has responsibility for managing the functions or activities of a body corporate under an Act or who makes or participates in making decisions that affect the whole or a substantial part of the functions or activities of the body corporate.
37. A senior officer of an unincorporated statutory body should be defined to include a statutory appointee or an employee who makes or participates in making decisions that affect the whole or a substantial part of the activities or functions of the unincorporated statutory body.
38. For the avoidance of doubt, the Bill should make clear that ‘senior officers’ cannot avoid, or limit, their responsibility under the Bill by delegating their powers and functions to other employees or persons.

## Appendix C

Criminal Code Act 1995 (Cth), Division 12 (Part 2.5 of the Model Criminal Code):

### 12.1

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

### 12.2

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

### 12.3

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:
 

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

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

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

### 12.4

- (1) The test of negligence for a body corporate is that set out in section 5.5.
- (2) If:
  - (a) negligence is a fault element in relation to a physical element of an offence; and
  - (b) no individual employee, agent or officer of the body corporate has that fault element;
 that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

### 12.5

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

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
  - (b) the body corporate proves that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.
- 12.6
- A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

## Appendix D

### Criminal Code (Canada)

"organization" means

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
  - (i) is created for a common purpose,
  - (ii) has an operational structure, and
  - (iii) holds itself out to the public as an association of persons;

"representative", in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;

"senior officer" means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer;

#### Section 22.1

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

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

#### Section 22.2

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

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