CHAPTER-VII

INTERNATIONAL PERSPECTIVE
OF CORPORATE CRIMINAL
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INTERNATIONAL PERSPECTIVE OF CORPORATE CRIMINAL LIABILITY

7.1 Introduction

Corporate criminal liability is not a universal feature of modern legal systems. Some countries, including Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognise any form of corporate criminal liability. Other countries, including Germany, Greece, Hungary, Mexico and Sweden, while not providing for criminal liability, nevertheless have in place regimes whereby administrative penalties may be imposed on corporations for the criminal acts of certain employees.

The countries that do impose criminal liability of some kind on corporations adopt varying approaches to the form and scope of this liability. The most common models could be characterised as involving 'derivative' liability, in which the corporation is liable for the acts of individual offenders. One common variant of this is vicarious liability, or respondeat superior, the model found in US federal criminal law and in South Africa. Under this model, the offences of individual employees or agents are imputed to the corporation where the offence was committed in the course of their duties, and intended at least in part to benefit the corporation. Another variant is the 'identification' model found in the United Kingdom and other British Commonwealth nations. Under this model, the offences of individual senior officers and employees are imputed to the corporation on the basis that the state of mind of these senior
officers and employees (and their knowledge, intention, recklessness or other culpable mindset) is that of the corporation. Who constitutes a senior officer or employee, however, varies between the jurisdictions applying this approach. In addition to 'identification' *simpliciter*, there is what could be described as the 'expanded identification' approach. Found primarily in continental Europe, this approach retains the focus on the actions of high level officers and employees, but also incorporates a duty of supervision, although whether that duty is owed by the corporation or its officers individually varies from country to country.

Recently, there has been increased focus on an alternative model of liability, focused on the acts or omissions of the corporation itself. Under this model, rather than the corporation being liable for the acts of individual offenders, a corporation is liable because its 'culture', policies, practices, management or other characteristics encouraged or permitted the commission of the offence. Australia is a prime example of this 'organisational' liability model. Of course, many countries draw on combinations of the various models. Moreover, concepts such as 'corporate culture' are used in different aspects of criminal law: in the US, while organisational liability is not the main form of liability, 'corporate culture' considerations are a major factor in the exercise of prosecutorial discretion to pursue corporations, and in sentencing.

It should be noted that this chapter focuses on the International perspective of criminal liability of corporations. There is no detailed consideration of the kinds of entities to which this liability would extend. In most cases, the laws discussed would apply to all entities that would be recognised as...
companies in the Anglo-American legal system. However, in many countries they also apply to partnerships, unincorporated associations and even governmental and municipal agencies.

7.2. Impetus for Changing Approaches under International Law

Changes to laws providing for corporate criminal liability have been triggered by both domestic and international developments. In the domestic sphere, particular accidents or disasters have focused attention on the need for stronger regulation of corporations, and driven legislative change. This is the case with, for example, the corporate manslaughter laws in the UK and the Australian Capital Territory.

In the international sphere, one significant factor motivating the growth in corporate criminal liability in civil law legal systems has been the increase in international instruments requiring such provisions. A typical example of this trend is the UN Convention against Transnational Organized Crime*, article 10(1) of which provides:

_Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention._

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Similarly, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention)\(^2\) requires States to establish the liability of legal persons. Article 2(1) states:

*Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.*

Two European instruments go beyond merely mandating the implementation of corporate liability to require a specific method of attribution. The operative language of article 18 of the Council of Europe's *Criminal Law Convention on Corruption, 1999*\(^3\) and article 3 of the European Union's *Second Protocol to the EU Convention on the Protection of the European Communities' Financial Interests, 1997*\(^4\) is almost identical. Parties and/or EU Member States are required to adopt measures to ensure that legal persons can be held liable for [the relevant offences] committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or

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an authority to exercise control within the legal person;

as well as for involvement of such a person as accessory or instigator in [the relevant offences].

Additionally, signatories of the relevant Convention must take steps to ensure that a legal person can be held liable where the lack of supervision or control by a [natural] person has made possible the commission of the criminal offences for the benefit of that legal person by a natural person under its authority.

Both Conventions are mandate what might be described as the 'expanded' identification approach which allows prosecution both for the acts of leading persons and for a 'lack of supervision or control', albeit in these formulations the lack of supervision or control must also be attributable to leading persons. It cannot consider that the requirements of either convention would prevent a party from taking a broader approach to corporate criminal liability. It is likely the articles are intended to set a minimum standard, rather than require a single uniform approach.

One significant difference between the two treaties is that the Second Protocol does not use the phrase 'natural person' in article 3. Potentially, the decision not to use 'natural person' might be taken to indicate that the article

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encompasses both legal and natural persons fitting the relevant description, e.g., if a parent company is a 'shadow director' of a subsidiary. It is unclear whether this is the case. The assumption that ‘person’ includes legal and natural persons is a statutory presumption in most common law countries, which is not necessarily replicated in civil law countries.

It should be observed, however, that none of these conventions go so far as to mandate corporate criminal liability. In three cases, either explicitly or implicitly, the convention seems to permit the signatory to implement criminal, civil or administrative liability regimes for legal persons. Pieth, in the context of the OECD Bribery Convention, suggests that there may be a trend in international instruments in favour of corporate criminal liability. He observes:

[More recent international legal sources are increasingly moving towards a primary requirement of corporate criminal liability. See for example the Revised Forty Recommendations of the [Financial Action Task Force], which merely allow for administrative corporate liability on a secondary level.]

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7. This statement may be open to debate, as the FATF Recommendations plainly indicate that corporate criminal liability is to be preferred to civil or administrative liability, but do
Furthermore, evaluation task forces give those countries favouring non-criminal liability a far more thorough screening, mainly because corporate liability might not be pursued with the same rigour as in criminal law. It may be assumed, therefore, that the pressure towards criminal liability in public international law will only grow further in the years ahead\(^8\).

It remains to be seen, however, whether this view is proven correct. It is worth noting that arguably the major international criminal instrument, the *Rome Statute of the International Criminal Court*\(^9\), does not allow for corporate criminal liability.

Article 25 of the Rome Statute is headed 'Individual Criminal Responsibility' and paragraph 1 provides 'The Court shall have jurisdiction over natural persons pursuant to this Statute.' Ambos observes that the principle of individual criminal responsibility in international criminal law predates the Rome Statute and appears in the jurisprudence of the Nuremberg Tribunal, where it was said: *Crimes against International Law are committed by men not...*

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by abstract entities, and only by punishing individuals who permit such crimes can the provisions of International Law be enforced.\textsuperscript{10}

Article 28 of the Rome Statute allows for the punishment of superiors for the acts of subordinates, both military, article 28(a), and civilian, article 28(b). Nothing in the text, however, seems to indicate that a corporation could be considered a superior for the purposes of the article\textsuperscript{11}. As such, it appears that a manager at a corporation could be held personally liable for offences under the Rome Statute, but the corporation itself may not be punishable.

Corporate Criminal Liability in Particular Legal Systems

7.3. Australia

7.3.1 Overview of Corporate Criminal Liability in Australia

Australia is a federal system in which the Commonwealth, under the Constitution, only has legislative power in respect of certain specified matters. These matters do not include general criminal law. Accordingly, most criminal law in Australia is State law, and federal criminal offences are confined to those enacted in relation to matters in respect of which the Commonwealth does have legislative power. State criminal law varies across the jurisdictions: some


\textsuperscript{11} Indeed, there are textual indicia to the contrary, e.g. the reference to crimes 'within jurisdiction' which would presumably be read subject to article 25 and the use of the phrase 'his or her' in the article itself, apparently excluding legal persons.
Australian States have comprehensive criminal codes and others rely upon a combination of statute and the common law.

In Australia, Courts initially relied on principles of vicarious liability, but have largely followed the identification approach since it was developed in the UK in the 1940s\(^\text{12}\). The most significant aspect of Australia's corporate criminal liability regime is the statutory provisions providing for organisational liability in relation to federal offences, including on the basis of 'corporate culture'. These provisions are 'arguably the most sophisticated model of corporate criminal liability in the world'\(^\text{13}\). There are also various provisions in individual statutes setting out models of corporate liability applying to particular offences\(^\text{14}\).

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\(^{14}\) See, e.g., Sec.84 of the *Trade Practices Act 1974* (Cth) (*TPA*): 1) Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 46 or 46A or Part IVA, IVB, V, VB or VC applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.

2) Any conduct engaged in on behalf of a body corporate:

a.by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or

b.by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the
Unlike the US, and despite having a nuanced model of organisational liability, Australia has not developed corresponding systematic principles of sentencing to deal with organisational liability. In 2006, the Australian Law Reform Commission (ALRC) recommended that the Government expand the range of possible penalties for corporations to include orders for corrective action, community service and publicisation of the offence committed. The ALRC also recommended that Section 16A(2) of the Crimes Act 1914 (Cth), which sets out factors to be taken into account in sentencing, be amended to include:

> the type, size, financial circumstances and internal culture of the corporation; [and]

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direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent; shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

15. Although such provisions do exist in particular statutes. For example, Sec.86C(2)(b) of the TPA allows for the making of 'probation orders' pursuant to which corporations can be required to: establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct;

...establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and

... revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.

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the existence or absence of an effective compliance program designed to prevent and detect criminal conduct\textsuperscript{16}.

The ALRC recommendations have not yet been implemented\textsuperscript{17}.

7.3.2 Genesis of Organisational Provisions

Australia's statutory organisational liability provisions were just one outcome of a long-term systematisation of the criminal law.

In July 1990, a Review of Commonwealth Criminal Law recommended that the statutory framework of Commonwealth offences be completely overhauled. A Model Criminal Code Officers Committee (MCCOC) was established under the Standing Committee of Attorneys-General to undertake broad consultation and draft a model law that came to be the basis of the \textit{Criminal Code Act 1995 (Cth)} (CCA).


\textsuperscript{17} Many civil regulatory regimes contain provisions stipulating that factors such as the deliberateness of the breach, the seniority of those involved, and the corporation's approach to compliance are relevant to the determination of an appropriate penalty; even where such provisions are not expressly applied, courts tend to take these factors into account. See, e.g., \textit{Trade Practices Commission v Dunlop Australia} (1980) 30 ALR 469 at 484-5; \textit{Trade Practices Commission v TNT Australia Pty Ltd} (1995) ATPR 41-375; Australian Competition and Consumer Commission \textit{v} Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 at 41-43; \textit{Environment Protection Authority \textit{v} Energy Services International Pty Ltd} (2001) NSWLEC 59 at [22]-[35]; \textit{Environment Protection Authority \textit{v} Middle Harbour Constructions Pty Ltd} (2002) 119 LGERA 440 at p.57-58.
The Explanatory Memorandum to the CC Bill restates much of the material in the MCCOC's Final Report:

The corporate culture provisions extend to the *Tesco Supermarkets v Nattrass*\(^{18}\) rule which recognises that corporations can be held primarily responsible for the conduct of very senior officers. The rationale for this primary responsibility is that such an officer is acting as the company and the mind which directs his or her actions is the mind of the company.

It extends the *Tesco* rule by allowing the prosecution to lead evidence that the company's written 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 (for example, by removing safety guards or equipment), they will be dismissed. The company would be guilty of intentionally breaching safety legislation. Similarly, the corporate culture may tacitly authorise reckless offending (for example, recklessly disregarding the substantial and unjustifiable risk of causing serious injury by removing the equipment guards). The company would be guilty of a reckless endangerment offence\(^{19}\).

The Senate Second Reading speech is to similar effect:

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The Code introduces the concept that criminal responsibility should attach to bodies corporate where the corporate culture encourages situations which lead to the commission of offences. The provisions make companies accountable for their general managerial responsibilities and policy. It provides that negligence may be proven by failure to provide adequate communication within the body corporate.

In speaking about this part I must stress that it is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate.

At the federal level this will need to occur in a number of important areas where corporations are the main players, such as environmental protection, where the potential harm of committing the offence may be enormous and the breach difficult to detect before the damage is done. For example, the Government is not planning to water down the requirements of section 65 of the Ozone Protection Act 1989 in regard to the matters covered by that act. Part 2.5 concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.

Section 12 has not been amended since the enactment of the Criminal Code Act (CCA).

7.3.3 Scope of Organisational Liability Provisions

Section 12.3 of the CCA sets out a form of organisational liability for corporations.

Section 12.3, in its current form, was part of the CCA as made. Section 12 applied to all offences in the CCA as of 16 March 2000, and to all other offences in federal statutes from 15 December 2001.

Despite applying to all Commonwealth offences, Section 12.3 is limited in scope (the bulk of criminal law is State law, and the CCA itself only contains a limited range of offences, including, for example, bribery of foreign public officials, offences against UN personnel, international terrorist activities and

21. Under sec 2 of the CCA as made, sec 12.3 was to commence, like the rest of the CCA, on a day to be fixed by proclamation or, if not earlier, within five years from the date of assent (15 March 1995). The Commonwealth fell behind its anticipated timetable for implementing the new Commonwealth criminal law, and in 2000 passed the *Criminal Code Amendment (Application) Act 2000*(Cth) (*Application Act*). The Schedule to the *Application Act* provided that s2.2(2) of the CCA was repealed and replaced, with the effect that it read: 2.2 Application

(1) This Chapter applies to all offences against this Code.

(2) Subject to section 2.3 [intoxication], this Chapter applies on and after 15 December 2001 to all other offences.

(3) Section 11.6 [interpretation of 'offences'] applies to all offences.

The effect of this amendment is not clear from the Explanatory Memorandum and Second Reading Speech of the Application Act, but appears to have been that Chapter 2 of the CCA applied to all offences in the CCA as of 16 March 2000, and to all other Commonwealth offences from 15 December 2001.
people-smuggling, and some federal statutes are specifically exempt from Section 12.3). Although the scope of Section 12.3 is limited by these factors, there is no conceptual barrier to the application of such organisational liability provisions to a broader array of offences.

7.3.4 Operation of Organisational Liability Provisions

Under Section 12, where an employee, agent or officer of a body corporate, acting within the actual or apparent scope of their employment, or within their actual or apparent authority, commits the physical element of an offence, the physical element of the offence must be attributed also to the body corporate (Section 12.2).

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 the body corporate if that body corporate 'expressly, tacitly or impliedly authorised or permitted the commission of the offence' (Section 12.3).

Authorisation or permission for the commission of an offence may be established on, inter alia, the four bases set out in Section 12.3(2):

22. For example, the consumer protection offences in the TPA (see sec 6AA(2)) and taxation offences in the Taxation Administration Act 1953 (Cth) (see sec 8ZD(3)).

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➢ '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';

➢ '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';

➢ 'a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance'; or

➢ 'the body corporate failed to create and maintain a corporate culture that required compliance'.

Sections 12.3(2)(a) and (b) (regarding the conduct of a corporation's board of directors or 'high managerial agents')23 essentially maintain the 'identification' approach (although the fact that the physical element of offences committed by any employee, agent or officer, rather than only a senior officer, is attributable to the corporation, is a departure from the identification approach as applied in the UK). Sections 12.3(2)(c) and (d), however, represent a new approach to corporate criminal liability, in that they are founded on the corporation's own wrongdoing, in the form of deficiencies in its 'corporate culture'.

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23. Defined as employees, agents or officers having 'duties of such responsibility that [their] conduct may fairly be assumed to represent the body corporate's policy': Section 12.3(6) CCA.
'Corporate culture' is defined as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'.

There are also specific provisions that apply where the fault element of an offence is negligence. Essentially, that fault element is the same for a corporation as it is for an individual. However, for the purposes of assessing whether a corporation was negligent: negligence may be evidenced by the fact that the commission of the offence was substantially attributable to 'inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers', or 'failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate' (Section 12.4(3)); and the corporation may be found to have the requisite fault element, even though no one individual had that fault element, by viewing the conduct of the corporation 'as a whole' (i.e., by 'aggregating the conduct of any number of its employees, agents or officers') (Section 12.4(2)).

7.3.5 Consideration of Provisions

The Australian organisational liability provisions have been noted with interest in many international commentaries24. Within Australia, the New South

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Wales Law Reform Commission has recommended that consideration should be given to adopting similar provisions into the law of the State of NSW

However, there are difficulties with the provisions. It may be that corporate liability cannot be established under the provisions unless there is also the conviction of an individual offender. Although Sections 12.3(2)(c) and (d) refer to the 'culture' of a corporation in its own right, they are merely grounds on which it can be established that a body corporate 'authorised or permitted the commission of [an] offence'.

Accordingly, in order for a corporation to be liable under these provisions it may first be necessary to establish that an individual has committed an offence. In circumstances in which it is difficult to prosecute an individual, either because the individual is not identifiable, or is out of the jurisdiction, or for some other reason, it is not clear how the provisions might operate.

The provisions have also been criticised for blurring the fault element of offences. Under the provisions, a corporation will be liable if it merely 'authorised or permitted' the offence.

'Authorising or permitting' an offence is different to the fault element of the offence itself as it would apply to an individual (for example, intention or recklessness). This is particularly problematic because Section 12 deals uniformly


with different fault elements (intention, knowledge and recklessness), reducing them all to the same 'authorised or permitted' threshold for corporations. However, this is an almost inevitable corollary of the fact that corporations do not have the mental capacities of natural persons, and the "corporate" state of mind is not amenable to the same distinctions.

Many aspects of how the provisions will operate in practice remain unclear. Areas of uncertainty include how 'corporate culture' is to be ascertained, and the scale on which 'corporate culture' will be assessed, particularly in circumstances in which the 'corporate culture' of a particular corporate group or entity was acceptable, but the culture in particular business divisions or office sites was deficient.

It may be very difficult to obtain evidence of a corporation's 'culture', and particularly to pinpoint the corporation's 'culture' at a particular moment in time.

As regards the scale of organisational deficiencies, 'corporate culture' is defined as attitudes, policies, rules and so on existing within the body corporate generally 'or in the part of the body corporate in which the relevant activities takes place'. Accordingly, the provisions of Section 12.3 leave the way open for corporations to be held criminally liable in circumstances where the corporation

27. Jonathan Clough and Carmel Mulhern, The Prosecution of Corporations (2002), at pp.145-46. However, see Section 12.3(5), which provides that: 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.
overall is law-abiding, but one aberrant business unit or site may be permitting the commission of offences. However, this is not necessarily problematic as a matter of legal principle. Liability could arise in similar circumstances under the vicarious liability approach taken in the US.

7.4. United Kingdom

7.4.1 Overview of Corporate Criminal Liability in the UK

The United Kingdom has, since the 1940s, dealt with corporate criminal liability on the basis of the doctrine of 'identification'. The doctrine had its origins in a civil case, *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*\(^\text{28}\), in which Viscount Haldane noted:

> [A] corporation is an abstraction ... its active mind and directing will must consequently be sought in the person ... who is really ... the very ego and centre of the personality of the corporation\(^\text{29}\).

In the 1940s, a series of cases under statutory offence provisions moved away from the then-current model of vicarious liability to find that corporations were directly liable for offences committed by employees. In 1971, the decision of the House of Lords in *Tesco Supermarkets Ltd v Nattrass (Tesco)*\(^\text{30}\) clarified that corporations would be directly liable for wrongdoing committed by persons sufficiently senior to constitute the corporation's 'directing mind and will', on the

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29. Ibid., at p.713.
basis that the actions and culpable mindset of such individuals were the actions and mindset of the company itself.

Since Tesco, there has been some shift in the scope of the class of persons considered sufficiently senior to constitute a corporation's 'directing mind and will'. In *Meridian GlobalFunds Management Asia Ltd v Security Commission*, the Privy Council held that, in the case of statutory offences, the language of the provisions, their content and policy, served to indicate the persons whose state of mind would constitute the state of mind of the corporation. Accordingly, in order to identify these persons, it is necessary to engage in a rather circular inquiry into whether they have 'the status or authority in law to make their acts the acts of the company'.

Although the identification doctrine remains the cornerstone of corporate criminal liability in the UK, the recently passed *Corporate Manslaughter and Corporate Homicide Act, 2007 (UK)* (*Corporate Manslaughter Act*) provides a form of organisational liability in relation to the offence of manslaughter.

### 7.4.2. Genesis of Organisational Liability Provisions

In 1994 the Law Commission published proposals for reforming the law on involuntary manslaughter, and in 1996 issued a report that recommended, inter alia, abolition of the existing offence of unlawful act manslaughter, its

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replacement by new offences of 'reckless killing' and killing by gross carelessness', and the institution of a new offence of 'corporate killing'.

The government did not introduce any legislation on the strength of the Law Commission's recommendations. Following a ruling in 1999 that the company whose negligence had led to the Southall train disaster, in which seven people had died, could not be convicted of manslaughter by gross negligence unless an individual who constituted a 'directing mind and will' of the company had the requisite mens rea, the Attorney-General referred to the Court of Appeal a question as to whether a non-human defendant could be convicted of manslaughter by gross negligence in the absence of evidence establishing the guilt of a known individual. The Court of Appeal held that the 'identification' model in Tesco v Nattrass still served as the basis for corporate criminal liability.

In May 2000 the government issued a consultation paper based on the Law Commission's recommendations (2000 Consultation Paper). The 2000 Consultation Paper accepted the thrust of Law Commission recommendations that liability should be based on failures in the management or organisation of a corporation's activities.

A draft Corporate Manslaughter Bill was published by the Government on 23 March 2005 (Draft Bill). It accepted the notion of failure in the management

34. Attorney-General's Reference (No 2 of 1999) [2000] 3 All ER 182.
or organisation of activities as a basis for liability, but inserted a requirement that these failures be preferable to senior management.

The Home Affairs and Work and Pensions Committees conducted an examination of the Draft Bill. The Committees made comments on a range of issues, but most relevantly they: took issue with removal of a clause clarifying the common law position on causation by providing that management failure could still be the cause of death regardless of whether the immediate cause was the act or omission of an individual;[35];

> advocated the removal of limitations to circumstances in which an organisation would owe a duty of care in negligence, and also limitations to certain specific duties owed;[36];

> commented that it ought to be possible under the Draft Bill to prosecute parent companies where a gross management failure in the parent company had caused a death in a subsidiary, and was concerned by evidence that it might not be possible to do this on the basis of the current law of negligence;[37]; and


37. Ibid, at p.31-32.
noted that although some witnesses advocated the Canadian or Australian 'corporate culture' approach, it was 'too late to start to consider an entirely new model', and recommended including 'corporate culture' as a separate factor that juries might consider when assessing whether there had been a gross breach of a relevant duty of care.\(^{38}\)

The Committees were concerned that inclusion of a 'senior management' requirement would:

- encourage delegation of Occupational Health and Safety (OHS) responsibilities to lower-level employees;
- reintroduce the practical obstacles to prosecution posed by the identification approach; and
- apply unevenly, such that a person performing a particular role (e.g., safety manager of a site) might count as a senior manager in a small company, but not qualify as a senior manager in a larger company, with several sites.\(^{39}\)

The Committees recommended that:

> *a test should be devised that captures the essence of corporate culpability. In doing this, we believe that the offence should not be based on the culpability of any individual at whatever level in the organisation but*

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38. Ibid, at p.35-36, 51.

should be based on the concept of a "management failure", related to either an absence of correct process or an unacceptably low level of monitoring or application of a management process.\footnote{Ibid, at p.44.}

In its response to the House of Commons Committee Report, the Government said that:

\begin{itemize}
  \item it was confident that the state of case law was such that courts would be able to hold that a management failure was a cause of death, even if the death was more directly caused by another phenomenon, including the acts or omissions of a particular individual;\footnote{Secretary of State for the Home Department,\textit{Draft Corporate Manslaughter Bill: Government Reply to the First Joint Report from the Home Affairs and Work and Pensions Committees Session 2005-06}, at p.8 <http://www.official-documents.co.uk/document/cm67/6755/6755.pdf> (accessed on 13 October 2012).}
  \item it would be undesirable to institute free-standing criminal liability without any point of reference for what organisations should have done, and too difficult to draft a new set of standards for the requisite standard of conduct, such that the best approach was to retain reliance on the common law duties of care identified in the Draft Bill;
  \item the liability of parent companies for deaths should be subject to the same test as that of any other company, notably the existence of a relevant duty of care (subject to the stipulation that parent companies will only owe duties to employees and customers of subsidiary companies in a narrow}

\end{itemize}
group of circumstances')\textsuperscript{42}, and a death both referable to senior management and resulting from a gross breach of the relevant duty of care.

\begin{itemize}
\item 'corporate culture' was potentially a useful factor to which a jury should be directed in determining whether there had been a gross breach of a relevant duty of care; and
\item the Draft Bill moved away from the identification doctrine in that it focused on the way in which a corporation managed or organised its activities, and the 'senior management' limb was necessary to ensure that the Draft Bill did not have the effect of holding organisations liable in circumstances where failings had really only occurred at a low level.
\end{itemize}

7.4.3 Scope of Organisational Liability Provisions

The Corporate Manslaughter Act, 2007 comes into force on 6 April 2008. Obviously, the organisational liability provisions contained in the statute apply to only the particular offence of manslaughter. However, they might theoretically be adopted in relation to other offences.

7.4.4 Operation of Organisational Liability Provisions

Prior to the enactment of the Corporate Manslaughter Act, the offence of involuntary manslaughter by gross negligence required:

\begin{itemize}
\item \cite{Ibid, at p.11.}
\end{itemize}

\textsuperscript{42} Ibid, at p.11.
that the defendant owe the deceased a duty of care;

that the defendant have breached that duty of care;

that the breach caused the death; and

that the breach of the duty was so bad that it amounted, when viewed objectively, to gross negligence of an order that warranted a criminal conviction.43.

The existing regime for corporate liability for manslaughter by gross negligence required the identification of an individual sufficiently senior to constitute the 'directing mind and will' of the corporation and who had the requisite mens rea.44 No large corporation had ever been successfully prosecuted for manslaughter by gross negligence, and, of the 34 prosecutions for work-related manslaughter brought since 1992, only seven had been successful.45 In most cases, the companies were of a size and structure in which it was very easy to identify a 'directing mind and will'.46.


The Corporate Manslaughter Act abolishes the common law offence of manslaughter by gross negligence as it applies to 'organisations' (defined to include, inter alia, corporations, government departments and police forces), and institutes a statutory regime for corporate criminal liability in relation to manslaughter by gross negligence.

Relevantly, the effect of the Corporate Manslaughter Act is as follows: An organisation is guilty of the offence of 'corporate manslaughter' ('corporate homicide' in Scotland) where

- the way in which its activities are managed or organized
- causes the death of a person; and amounts to a gross breach of a relevant duty of care owed to the deceased; and
- the way in which the organisation's activities are managed or organised by its 'senior management' is a 'substantial element' of the gross breach of the relevant duty of care.

A 'relevant duty of care' is defined in section 2(1) as any one of a circumscribed list of duties owed under the law of negligence (regardless of any statutory schemes displacing liability in negligence, or any common law rules that prevent a duty of care to persons engaged in joint unlawful conduct, or who have accepted a risk of harm). These duties include:

(a) a duty owed to ... employees or to other persons working for the organisation or performing services for it;
(b) a duty owed as occupier of premises;

(c) a duty owed in connection with-

(i) the supply by the organisation of goods or services (whether for consideration or not),

(ii) the carrying on by the organisation of any construction or maintenance operations,

(iii) the carrying on by the organisation of any other activity on a commercial basis, or

(iv) the use or keeping by the organisation of any plant, vehicle or other thing;

A 'gross breach' of a duty of care arises if the conduct alleged 'falls far below what can reasonably be expected of the organisation in the circumstances'.

Section 8 provides that, where it is established that an organisation owed a relevant duty of care to a person, and it falls to a jury to decide whether there was a gross breach of that duty, the jury must consider whether the evidence establishes that there was a failure to comply with any OHS legislation that related to the alleged breach and, if so, how serious the failure to comply was, and how much of a risk of death it posed. The jury may also consider, among any other matters it considers relevant, any health and safety guidance that relates to the alleged breach and 'corporate culture' factors: the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices
within the organisation that were likely to have encouraged any ... failure [to comply with OHS legislation related to the alleged breach], or to have produced tolerance of it[.]

'Senior management' is defined as: the persons who play significant roles in:

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or

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

There are exceptions to the regime under the Corporate Manslaughter Act that apply to certain acts or decisions of public authorities, or in the exercise of 'exclusively public functions'\(^\text{47}\); military activities\(^\text{48}\); policing and law enforcement\(^\text{49}\); emergencies\(^\text{50}\); and child protection and probation functions\(^\text{51}\).

Where an organisation is convicted of corporate manslaughter a court may, on an application by the prosecution specifying the terms of the proposed order, make a 'remedial order' requiring the organisation to take specified steps to remedy the breach of a relevant duty of care, and other related matters or

\(^{47}\) Section 3 of Corporate Manslaughter Act, 2007

\(^{48}\) Section 4 of Corporate Manslaughter Act. 2007

\(^{49}\) Section 5 of Corporate Manslaughter Act. 2007

\(^{50}\) Section 6 of Corporate Manslaughter Act. 2007

\(^{51}\) Section 7 of Corporate Manslaughter Act. 2007
deficiencies. The prosecution is required to consult with enforcement authorities in relation to the formulation of the proposed order.

A court may also make a 'publicity order' requiring the fact of conviction and certain other matters to be publicised in a specified manner\textsuperscript{52}. Failure to comply with a remedial order or a publicity order is itself an offence\textsuperscript{53}.

Interestingly, under Section 18, an individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter.

7.5. Canada

7.5.1. Overview of Corporate Criminal Liability in Canada

Like Australia, Canada is a federal system, but unlike Australia and the US, the criminal law is exclusively a federal responsibility (though provincial legislatures do have power to enact penal provisions in order to enforce provincial legislation).

Corporations are included within the definition of 'persons' who may commit offences under the Canadian \textit{Criminal Code}\textsuperscript{54}, but the actual attribution

\textsuperscript{52} Section 10 of Corporate Manslaughter Act. 2007

\textsuperscript{53} Sections '9(5), 10(4) of Corporate Manslaughter Act. 2007

\textsuperscript{54} See Revised Statutes of Canada, C-46, Section 2.
of liability to corporations occurs on the basis of the identification doctrine found in the UK\textsuperscript{55}.

Canadian criminal law distinguishes between 'mens rea' offences (requiring a culpable state of mind), 'strict liability' offences (for which a defendant will be liable unless it can be established that the defendant used due diligence to avoid the commission of the offence) and 'absolute liability' offences (for which a defendant will be liable regardless of their state of mind).

In the case of absolute and strict liability offences, no question arises as to the corporation's state of mind. Despite judicial statements that corporate criminal liability under the identification approach is direct, rather than vicarious, it seems that the physical element of these offences is imputed on the basis of standard vicarious liability, such that commission of the physical element of the offences by a corporation's employee or agent will engage corporate criminal liability\textsuperscript{56}.

In the case of mens rea offences, the identification doctrine applies as it would in the UK. However, the Canadian decisions may admit a wider class of individuals as the 'directing mind and will' of the corporation\textsuperscript{57}. The emphasis in Canada is less on the office held by the individual in question than the question of

\textsuperscript{55} Canadian Dredge and Dock Co \textit{v} The Queen [1985] 1 SCR 662.


\textsuperscript{57} See \textit{The Rhone \textit{v} The Peter A B Widener} [1993] 1 SCR 497.
whether the individual is the directing mind and will in their particular area of responsibility\textsuperscript{58}. The Supreme Court has held that

\begin{quote}
[The] key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy\textsuperscript{59}.
\end{quote}

There has been consideration in Canada of an approach based on organisational liability, but the most recent reform of the criminal law applying to corporations, in 2003, retained the basic identification approach, while providing that liability could arise if the 'directing mind and will' of the corporation had failed to take proper steps to avoid the commission of an offence.

\section*{7.5.2 Consideration of a New Basis for Corporate Criminal Liability}

Prior to the 2003 reforms, the issue of corporate criminal liability had been examined in several previous reviews of legislation and law reform projects, but none of these reviews had given rise to draft legislation.

The Westray Mine incident of May 1992, in which 26 miners lost their lives as a result of an explosion, provoked renewed interest in corporate criminal liability. The report of a public inquiry into the accident, released in 1997,

\textsuperscript{58} Canadian Dredge and Dock Co v The Queen [1985] 1 SCR 662 at p.676.

\textsuperscript{59} The Rhone v The Peter A B Widener [1993] 1 SCR 497 at p.526. However, this test gives rise to difficulties of application: the Ontario Court of Appeal appears to have applied it more strictly in \textit{R v Safety-Kleen Canada Inc} (1997) 114 CCC (3d) 214 than in \textit{R v Church of Scientology of Toronto} (1997) 116 CCC (3d) at p.1.
concluded that mismanagement had 'created unsafe working conditions in the mine that directly contributed to the tragedy', and recommended that the Canadian Government examine the accountability of corporate executives for wrongful and negligent acts of corporations, and introduce any legislative amendments necessary to ensure that executives are held accountable for workplace safety.

Interestingly, the report drew attention to a number of 'corporate culture' factors in assessing the causes of the incident: complex mosaic of actions, omissions, mistakes, incompetence, apathy, cynicism, stupidity, and neglect ... Many of the incidents that now appear to fit into the mosaic might at the time, and of themselves, have seemed trivial. Viewed in context, these seemingly isolated incidents constitute a mind-set or operating philosophy that appears to favour expediency over intelligent planning and that trivializes safety concerns ... a story of incompetence, of mismanagement, of bureaucratic bungling, of deceit, of ruthlessness, of cover-up, of apathy, of expediency, and of cynical indifference.60

... management did not instill a safety mentality in its workforce. Although it stressed safety in its employee handbook, the policy it laid out there was never promoted or enforced.

Indeed, management ignored or encouraged a series of hazardous or illegal practices, including having the miners work 12-hour shifts, improperly


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storing fuel and refueling vehicles underground, and using non-flameproof equipment underground in ways that violated conditions set by the Department of Labour - to mention only a few.\textsuperscript{61}

... many instances of hazardous and illegal practices encouraged or condoned by Westray management demonstrate its failure to fulfill its legislated responsibility to provide a safe work environment for its workforce. Management avoided any safety ethic and apparently did so out of concern for production imperatives ... The unsafe use of torches underground was a common practice at Westray. Management was aware of the practice, condoned the practice, and reprimanded those who condemned it. In so doing, management sent a clear message to the underground workers. Management's unsafe mentality was, in effect, filtering down to the Westray workforce.\textsuperscript{62}

Recommendation 73 provided:

\textit{The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.}\textsuperscript{63}

\begin{flushleft}
\textsuperscript{61} Ibid, Summary.
\textsuperscript{62} Ibid, Consolidated Findings.
\textsuperscript{63} Ibid, Consolidated Recommendations.
\end{flushleft}
In response to Recommendation 73, the federal Minister of Justice agreed to examine the issue of corporate criminal liability.

A Private Member's Bill (Bill C-284) was drafted proposing a new provision on corporate criminal liability, which would have read in part:

Where it is shown that an act or omission has been committed on behalf of a corporation, directly or indirectly by the act or pursuant to the order of one or more of its officers, employees or independent contractors, and

... (b) the act or omission was tolerated, condoned or encouraged by the policies or practices established by or permitted to subsist by the management of the corporation, or the management of the corporation could and should have been aware of but was wilfully blind to the act or omission,

(c) the management of the corporation had allowed the development of a culture or common attitude among its officers and employees that encouraged them to believe that the act or omission would be tolerated, condoned or ignored by the corporation ...

The question of corporate criminal liability was referred to the Standing Committee on Justice and Human Rights. A Discussion Paper prepared by the Department of Justice was used as the basis for deliberations, and public hearings were held. On 10 June 2002, the Standing Committee on Justice and
Human Rights presented its Fifteenth Report to the House of Commons, recommending that the Government table in the House legislation to deal with the criminal liability of corporations, directors, and officers64.

The Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights noted that the Westray incident had made obvious that 'regulations, no matter how effective on paper, are worthless when they are ignored or trivialized by management'65. The Government Response also observed the 'stark contrast' between the detailed recommendations made by the Commissioner as regards regulation, corporate policies and practices, and the limited recommendation that the Government should study 'the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation'66.

The Government Response observed that criminal law 'must be an instrument of last resort', and should in most cases be secondary to regulatory legislation67. The Government Response noted that public consultation by the Standing Committee on Justice and Human Rights had indicated little support for the vicarious liability system that characterised US law. The Government


66. Quoted ibid, Background.

67. Ibid, Background.
stated that it shared concerns that 'it would be wrong in principle to impose the stigma of a criminal offence on a corporation when its actions are not morally blameworthy'\textsuperscript{68}. The creation of specific offences for corporations, such as corporate manslaughter (similar to proposals in the UK and Victoria) attracted mixed responses.

The Australian 'corporate culture' approach was canvassed in some detail. However, there was concern about its consistency with the \textit{Canadian Charter of Rights and Freedoms}\textsuperscript{69}.

Further, the Government noted that: "corporate culture" will not necessarily simplify the investigation of alleged corporate crime.

It is still necessary to determine the facts. Determining whether the directors and officers of a corporation tolerated lax procedures would probably require the same investigation as determining whether they directed certain acts or omissions\textsuperscript{70}.

Ultimately, the Government concluded that:

\begin{itemize}
  \item 68. Ibid, The Vicarious Liability Model.
  \item 69. Corporations may enjoy the rights set out in the \textit{Charter}, although the scope of the rights as they apply to corporations will depend, inter alia, on the nature of the right in question: \textit{Irwin Toy v Quebec (Attorney-General)} [1989] 1 SCR 927; \textit{Canada(Attorney-General) v JTI McDonald Corp} [2007] SCC 30.
  \item 70. Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights (November 2002), Corporate Culture Approach and C-284.
\end{itemize}
Corporate culture is at this moment an untested basis for criminal liability. The Government is conscious of the need for clarity in the law and considers that 'corporate culture' is too vague to constitute the necessary corporate mens rea.

The Government opted to retain the basic 'identification' model for corporate criminal liability. However, in recognition of the fact that the modern structure of corporations necessarily leaves managers below board level a great deal of responsibility in implementing policies, the Government sought to expand the class of persons who could constitute the 'directing mind and will' of the corporation for the purposes of imputing fault.

7.5.3 Operation of Current Provisions on Corporate Criminal Liability

Bill C-45 amended the Canadian Criminal Code with effect from 31 March 2004. The new provisions codified the liability of corporations for offences with a fault element (thus, not strict or absolute liability offences).

Section 21 of the Criminal Code defines 'party to an offence' to include persons actually committing the offence, persons abetting the offence, and persons doing or omitting to do anything for the purpose of aiding any person to commit the offence.

Under Section 22.1, a corporation will be a party to an offence with a fault element of negligence if either a 'representative' (an employee, agent or

71. Ibid.
contractor), or two or more representatives whose conduct is aggregated, acting within the scope of their duty, are parties to the offence, and the 'senior officer' responsible for the relevant aspect of the corporation's activities 'departs markedly' from the standard of care that could reasonably have been expected to prevent a representative of the corporation from being a party to the offence.

Under Section 22.2, a corporation will be a party to an offence with a fault element other than negligence when one of its 'senior officers', having an intention at least in part to benefit the organisation:

- acts within the scope of their authority and is themselves a party to the offence; acts within the scope of their authority, has themselves the mental state required to be a party to the offence, but directs other representatives of the corporation to actually commit the offence; or

- knows that a representative of the corporation is or will be a party to the offence, but fails to take all reasonable measures to prevent this.

In their structure, the provisions on offences with a fault element other than negligence remain close to the identification doctrine. However, the provisions extend beyond the orthodox identification approach in that the 'senior officer' ('a representative who plays an important role in the establishment of an organisation's policies or is responsible for managing an important aspect of the organisation's activities') is more expansive than the class of persons who could constitute the 'directing mind and will' of a corporation in the UK.

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The 2004 amendments to the *Criminal Code* also moulded probation orders to the circumstances of corporate offenders, providing that orders for probation against corporate defendants could include, inter alia, requirements that the corporation establish policies and procedures to reduce the likelihood of the corporation committing a subsequent offence, communicate those policies and procedures within the corporation, and report to the Court on their implementation.

7.6. United States

7.6.1 Overview of Corporate Criminal Liability

Like Australia, the US has criminal law at both the state and federal level. The majority of prosecutions are brought under State criminal laws. The liability of corporations under federal criminal law is based on the doctrine of *respondeat superior*, or vicarious liability. The position in relation to State criminal laws is more complex. Some states have adopted more sophisticated statutory provisions concerning corporate liability, based, in some cases, on the *Model Penal Code*.

Despite the relatively simple approach to corporate criminal liability at the federal level, the US has advanced much further than Australia, the UK or Canada in developing sentencing regimes that are adapted to corporate defendants. Under the *Federal Sentencing Guidelines Manual*, 'corporate culture' considerations are taken into account in assessment of the appropriate fine and other orders to be imposed on corporate defendants.

However, the Department of Justice is increasingly relying on 'deferred and non-prosecution agreements', which allow corporate defendants to avoid indictment at all by taking a range of steps, which usually include payment of a monetary penalty, and, more importantly for present purposes, making changes to their corporate governance73.

7.6.2 Liability under Federal Law — Respondeat Superior

Corporations may be criminally liable for the illegal acts of officers, employees or agents, provide that it can be established that:

- the individual's actions were within the scope of their duties; and
- the individual's actions were intended, at least in part, to benefit the corporation.

As regards the first requirement, obviously it is not the individual's illegal actions which need to be within the scope of their duties in order for corporate liability to be attracted. Instead, it is sufficient that the individual commits an offence in the course of pursuing objectives or undertaking tasks which are authorised or required by virtue of their position. Even the fact that a superior officer has given express instructions that the individual should not engage in the conduct constituting an offence does not prevent that conduct from being within the scope of the individual's duties.

The test was discussed recently in US v Potter74, a case in which a general manager had paid a bribe to the Speaker of the Rhodes Island House of Representatives, despite the President of the company having considered the proposed course of action and ordered him not to proceed. The Court of Appeals observed:

For obvious practical reasons, the scope of employment test does not require specific directives from the board or president for every corporate action; it is enough that the type of conduct (making contracts, driving the delivery truck) is authorized ... The principal is held liable for acts done on his account by a general agent which are incidental to or customarily a part of a transaction which the agent has been authorized to perform. And this is the case, even though it is established fact that the act was forbidden by the principal. ... despite the instructions [the individual in question] remained the high-ranking official centrally responsible for lobbying efforts and his misdeeds in that effort made the corporation liable even if he overstepped those instructions75.

As regards the requirement that the individual's actions be intended to benefit the corporation, all that this requires is that benefit to the company be one motivation of the individual's conduct. The test appears to be relatively undemanding. In U.S. v Sun-Diamond Growers of California76, the vice-

74. 463 F 3d 9 (1st Cir, 2006)
75. Ibid, Sit pp.42-43.
76. 138 F 3d 961 (DC Cir, 1998).
president for corporate affairs, responsible for lobbying for the company's interests, also happened to be friends with the Secretary of Agriculture. The Secretary of Agriculture requested the individual to assist in retiring the Secretary's brother's debts accrued in running for the Senate. The vice-president for corporate affairs arranged to transfer $5000 of the company's money towards this debt, disguising it as a payment to a third party communications agency. The Court of Appeals held that, although the acts could be interpreted as acts of friendship for the Secretary, they could also have been intended to benefit the company by consolidating its relationship with the Secretary of Agriculture, despite the fact that the illegal acts effectively defrauded the company.

7.6.3 Liability under State Laws

State criminal laws vary in their approach to corporate criminal liability. Some States have provisions based on the *Model Penal Code*, which, while preserving a mechanism for imputing liability that is very similar to the vicarious liability model existing in federal criminal law, also allows a corporation to be convicted of an offence if the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or a high managerial
agent acting on behalf of the corporation within the scope of his office or employment.  

7.6.4 'Corporate Culture' Factors in Sentencing

Chapter 8 of the Federal Sentencing Guidelines Manual sets out extremely detailed guidelines for the sentencing of 'organizations' convicted of federal felonies and Class A misdemeanours and, insofar as it provides for implementation of 'compliance and ethics programs', is clearly intended to foster reform of the 'corporate culture' of defendants.

Chapter 8 was first introduced in 1991 after several years of research and debate about the best approach to sentencing corporate defendants. 'Corporate culture' considerations are particularly prominent in two aspects of Chapter 8, namely the assessment of appropriate fines, and as an aspect of corporate 'probation'. For the purposes of calculating a fine range, Chapter 8 provides that Courts should determine a 'culpability score' on the basis of certain aggravating and mitigating factors.


78. 'Organization' in this context means a person other than an individual, and includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

One aggravating factor is 'involvement or tolerance of criminal activity', said to arise where:

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 5,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit\textsuperscript{80}.

In 2006, involvement in or tolerance of wrongdoing was taken into account as an aggravating factor in the determination of a 'culpability score' in just over 60% of sentences under Chapter \textsuperscript{81}.

\textsuperscript{80} United States Sentencing Commission, \textit{Federal Sentencing Guidelines Manual} (2006) §8C2.5(b)(1) (\textit{Sentencing Guidelines}) available at <http://www.uscc.gov> (accessed on 14\textsuperscript{th} October 2012). Parallel provisions exist for organizations having more than 1000, 200, 50 and 10 employees. These provisions have clearly been designed with careful attention to corporate structures and empirical evidence as to how corporations behave.
Another aggravating factor is the absence of an 'effective compliance and ethics program'. In 2006, such absence of a compliance program was an aggravating factor in the determination of a 'culpability score' in 100% of sentences under Chapter 882.

Mitigating factors include the existence of an 'effective compliance and ethics program' (defined in some detail below), although this does not apply if

- the organisation unreasonably delayed reporting the offence to the authorities83; or

- an individual within high-level personnel of the organisation, a person within high-level personnel of the unit of the organisation within which the offence was committed where the unit had 200 or more employees, or an individual with either overall responsibility for day-to-day operational responsibility for the compliance and ethics program itself, participated in, condoned, or was wilfully ignorant of the offence84.

There is a rebuttable presumption that the organisation did not have an effective compliance and ethics program if an individual


82. Ibid.


84. Ibid, §8C2.5(b)(3)(A).
• within high-level personnel of an organisation having fewer than 200 employees; or

• within substantial authority personnel, but not within high-level personnel, of any organisation; participated in, condoned, or was wilfully ignorant of, the offence.

Under the Federal Sentencing Guidelines Manual, the Court is required to order a term of 'probation' for corporations (for a period not exceeding five years85) where this is necessary, inter alia, to 'ensure that changes are made within the organization to reduce the likelihood of future criminal conduct'86. Probation terms may include requirements to develop and submit to the Court an effective compliance and ethics program, make periodic reports as to compliance with the program, and submit to audits and interviews of employees, conducted at the corporation's expense by the probation officer or court-appointed experts87. The US Sentencing Commission records that in 2006, a period of probation was ordered in 197 cases of the 217 cases (90.8%) decided pursuant to the 'organizational sentencing' chapter of the Federal Sentencing Guidelines

85. Ibid, §8D1.2.

86. Ibid, §8D1.1(a)(6).

87. Ibid, §8D1.4(c).
In 41 of 217 cases (19.8%), the defendant was ordered by the Court to develop a compliance and ethics program.

The *Federal Sentencing Guidelines Manual* sets out in some detail the parameters of a the 'effective compliance and ethics program' that may be relevant to a corporate defendant's 'culpability score' and / or its probation terms. The relevant provisions are set out in Appendix 4 and have clearly been drafted with close attention to the structures of modern corporations.

7.6.5 'Corporate Culture' Factors and Prosecutorial Discretion

Corporations have typically constituted only a tiny percentage of defendants sentenced for federal offences. Moreover, as noted above, there is increasing reliance by federal prosecutors on 'deferred or non-prosecution agreements' under which corporations avoid indictment in exchange for undertaking certain obligations, often including payment of a monetary penalty and / or reforms of their corporate governance regime.

The 'Principles of Federal Prosecution of Business Organizations' issued by the US Deputy Attorney-General provide guidance on the basis on which

89. Ibid.
prosecutors should decide whether to bring charges against corporate
defendants, and decide which matters should be addressed in plea agreements90.

The McNulty Memorandum provides that, in deciding whether to bring
charges against corporations, prosecutors generally apply the same factors as
they would for an individual defendant, but that, as a result of the special position
of corporate defendants, some additional considerations may be relevant. The
nine specified additional considerations include:

The pervasiveness of wrongdoing within a corporation, including the
complicity in, or condonation of, the wrongdoing by corporate management. The
existence and adequacy of the corporation's pre-existing compliance program91.

The McNulty Memorandum goes on to stipulate that, of the issues going to
'pervasiveness of wrongdoing', 'the most important is the role of management ...
management is responsible for a corporate culture in which criminal conduct is
either discouraged or tacitly encouraged'92. As regards compliance programs, the
McNulty Memorandum emphasises the importance of assessing whether the

90. The current version of the Principles is that issued by Deputy Attorney-General Paul
McNulty in December 2006 (McNulty Memorandum). The McNulty Memorandum
supersedes the previous version of the Principles issued by Deputy Attorney-General Larry

2012).

92. Ibid, at p.6.
compliance program is merely a 'paper program' or is actually being implemented and enforced. 

In circumstances where a plea agreement is reached, the McNulty Memorandum specifies that it will be appropriate to require corporate wrongdoers to comply with an adequate compliance program.

7.7. Switzerland

7.7.1 The Genesis of the Swiss Corporate Criminal Liability Provisions

It has been possible for several years to punish corporations for tax evasion and related offences under Swiss tax law, and to impose administrative penalties directly on corporations whose activities have resulted in the commission of an infraction, where an investigation to identify the physical person responsible would require excessive resources. However, prior to the 1980s, it had been assumed that the Swiss system, heavily influenced by the principle *societas delinquere non potest*, could not accommodate generalised criminal liability for corporations.


94. Ibid, at p.19.

In the 1980s, the Swiss Conseil fédéral\textsuperscript{96} considered introducing provision for corporate criminal liability alongside provisions dealing with organised crime, and reinforcing powers of confiscation in cases of money-laundering. The introduction of criminal liability for corporations proved controversial and was abandoned.

The advent of the \textit{Convention against Transnational Organized Crime}, the European Union's \textit{Convention on the Protection of the Environment through Criminal Law} and the OECD Bribery Convention, all of which require States to introduce measures for the effective punishment of corporations committing certain offences, forced Switzerland to reconsider corporate criminal liability.

The Conseil fédéral submitted to Parliament a proposal for the introduction of provisions on corporate criminal liability, in the context of a general revision of the Penal Code. The focus at this stage was on the importance of providing for corporate criminal liability in cases in which the physical persons responsible for the offence could not be identified.

This provision would become article 102(1) of the Swiss Penal Code. The \textit{Conseil des Etats}\textsuperscript{97}, influenced in part by the requirements of the OECD \textit{Convention on Combating Bribery of Foreign Public Officials} added a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{96} The Conseil fédéral, or Federal Council, is a seven-person body that acts as the head of the Executive. It is approximately equivalent to the US President or the English or Australian Prime Ministers.
\item \textsuperscript{97} The Conseil des Etats, or Council of States, is the upper house of the Swiss legislature. 'States' refers to the country's 26 cantons, 20 of which send two members to the Conseil and six of which send one member for a total of 46 members.
\end{itemize}
\end{footnotesize}

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provision that is now art 102(2), allowing a corporation to be directly liable, regardless of whether particular physical persons could be held liable, in relation to certain limited offences.

7.7.2 An Overview of the Corporate Liability Provisions of the Swiss Penal Code

As a result of its somewhat convoluted historical and legislative origins, Art.102 of the Swiss Penal Code provides two alternative bases of corporate criminal liability which will be examined in more detail below.

Article 103 provides for the calculation of fines against corporations found guilty under art 102 on the basis of several factors, including the 'organisation' of the company, a factor that would seem to invoke notions of corporate culture and is discussed further below in relation to art 102.

According to the Swiss authorities, as far as organisational measures are concerned, consideration must be given to a general due diligence obligation which extends to the overall activity of the enterprise. According to them, this obligation is well-known in relation to offences committed through negligence by individuals. Here, case law has established what is understood by the term "duties of diligence" in certain professions (doctors, skiing instructors, mountain guides), even though the law is silent on that point. In other words, the situation is comparable and case law needs to develop what is to be understood by "reasonable and necessary organisational measures". The Swiss authorities consider that the courts will have to consider what another, comparable
enterprise would reasonably have done, what instructions were given, what controls were in place, what internal information was provided and what the overall organisation was.

As such, it would appear that art 102(2) might raise questions akin to a corporate culture provision, as it focuses attention on the corporation’s internal attempts to comply with the requirements of the relevant law.

Critics of the legislation have pointed out that art 102(2) thus allows corporations to be held criminally liable on the basis of something akin to negligence, in relation to certain limited offences, whereas there could be no criminal liability for commission of the same offences by a human without the mens rea of intention. On the other hand, some commentators have drawn the distinction between liability for the negligent commission of offences, to which objection is taken, and the negligent fostering of conditions in which an offence can occur, which is slightly different.

7.7.3 Articles 102(1) and (2): Overlap and Differentiation

It is not entirely clear whether the organisational deficiencies upon which arts 102(1) and (2) turn are of a different nature. To the extent that the relevant wording differs, this is probably referable to the fact that the two provisions were conceived by different bodies, at different stages of the legislative process.

Commentators have suggested that the lack of organisation to which art 102(1) refers unclear management structures, a lack of supervision, the absence of records, or falsification of records99, whereas the enquiry under art 102(2) is likely to encompass such matters as training, instructions to staff, the control of activities of collaborating organisations, the choice of staff and recruitment practices.

As art 102(1) applies to all offences, it has been pointed out that, even where a corporation has in place adequate organisational measures to prevent an offence mentioned in art 102(2), where an individual nevertheless commits that offence, the corporation may be prosecuted under art 102(1) if it is not organised in such a way that the individual offender can be identified. Where both arts 102(1) and (2) potentially apply, i.e. in situations where the individual offender cannot be identified, and the corporation has not taken reasonable steps to prevent the commission of a relevant offence, art 102(2) applies to the exclusion of art 102(1), presumably as a result of the lex specialis principle.

7.8. Finland

7.8.1 Brief History of Corporate Liability in Finland

Finland’s Penal Code was created in 1889 and, like many civil law countries, operated on the basis that only natural persons could be guilty of offences. The first proposal for corporate criminal liability was made by the Environmental Offences Committee in 1973, suggesting a chapter be added to

99. Ibid.

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Code dealing with environmental offences including provisions for corporate criminal liability. Under the proposal, corporations would be liable on a strict liability basis.

In 1976, the Criminal Law Committee produced a report on the reform of the entire Finnish Penal Code which recommended the introduction of a chapter dealing exclusively with corporate criminal liability. This report set the tone of the work done by the Penal Code Task Force, which made a similar proposal in 1987. This proposal was commented on by the Commission for the Examination of Legislation in 1990 and formed the basis of Bill 95 of 1993. That bill did not pass, but an Act in seemingly identical terms was passed as 743 of 1995. Aspects of Chapter 9 were amended by Act 61 of 2003.

7.8.2 Corporate Criminal Liability in Finland: Provisions of the Penal Code

Before discussing the mechanics of attribution under Chapter 9 of the Penal Code, it is worth examining the structure of the relevant provisions which, for our purposes, are sections 1, 2, 3 and 4. Section 1 is the operative provision. It declares that a corporation may be subject to a fine for an offence committed 'in its operations'. Sections 2 and 3 are interrelated, if not overlapping. Section 2 appears to examine the relationship between the offence and the corporation. It essentially requires the corporation to have played a facultative role in the

100. See M Riijihäri, 'Corporate Criminal Liability — Finland' in de Doelder and Tiedemann (eds), La Criminalisation duComportement Collectif (1996) at p.203-211.
commission of the offence, either through the conduct of management or through a negligent failure to prevent the offence. Section 2 also provides for 'anonymous guilt' where no specific offender can be identified. Section 3 seems to look at the connection between the offender and the corporation. It raises questions of authority, intention and status on the part of the offender.

One possible way of looking at the distinction between section 2 and 3 is to see section 2 as forming a sort of corporate actus reus, as it requires some act or omission on the part of the corporation at risk. Section 3, on the other hand, could be viewed as kind of a question of corporate mens rea by asking whether the offender is the kind of person whose behaviour may be attributed to the corporation. It should be stressed that this explanation is a common law gloss to assist comprehension and that ultimately, Chapter 9 must be approached on its own terms.

Section 4, which we will not examine at length, provides a residual discretion to the court to decline to punish the corporation. It sets out a list of factors which the court may take into account in deciding whether to punish.

7.8.3 Corporate Criminal Liability in Finland: Application in Practice

As with many of the corporate criminal liability provisions, it is difficult to say how effective the provisions are in practice. A 2001 report by the European Institute for Crime Prevention and Control observes that there were 'only a few
cases' brought under the law. The OECD Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions on Finland, produced in 2002, states:

Since the liability of legal persons was created under the Penal Code in 1995, legal persons have been subject to criminal liability five times.

It is not clear whether 'subject to' means prosecuted or convicted, but the number is not particularly high on any account. As such, it is difficult to say how the provisions have been applied in practice.

7.9. Japan

7.9.1 Corporate Criminal Liability in Japan: Ryobatsu-Kitei

General criminal liability of corporations does not exist under Japanese law. This situation arose from the historical origins of the modern Japanese legal system, which was originally based on the French and German Civil law systems and the notion that only natural persons can commit crimes. As a result, the


In 1932, however, the Act Preventing Escape of Capital to Foreign Countries was passed. The Act introduced the 'Ryobatsu-Kitei' into Japanese law. Ryobatsu-Kitei have subsequently appear in various Japanese laws. Ryobatsu-Kitei is frequently translated as 'double punishment', although Kyoto indicates that '[t]wo-sided or bilateral punishment' is a better translation. Essentially, Ryobatsu-Kitei are clauses declaring that in the event of a natural person committing an offence, an associated legal person may also be punished.

An example of a Ryobatsu-Kitei can be found in the Securities and Exchange Act (1 April 2002), article 207:

In case where any representative of a juridical person (including a non-incorporated association which has internal rules providing for a representative or administrator; the same shall apply hereinafter in this paragraph and the next paragraph), or agent, employee, or other worker of a juridical or natural person, conducted an act, in regard to business or property of such juridical or natural person in violation of the provisions set forth in each item below, the person who conducted such an act shall be imposed a penalty; in addition, the juridical person shall be imposed the penalty of fine set forth in each such item; and the

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natural person shall also be imposed such fine as prescribed in each applicable article. These article sets out the amount of fine\textsuperscript{104}.

A second example is in article 164(1) of the \textit{Corporation Tax Act}, which provides: In a case where a representative of a legal person, or an agent, an employee, or a worker of other types, of a legal or a natural person, violated regulations as provided in Art. 159, Para.1 (crime of tax evasion), Art. 160 (crime of non submitting final declaration), or Art. 162 (crime of submitting deceptive intermediate declaration) in the process of carrying out business pertaining to the said legal or natural person, the primary actor shall be punished.

In addition, the said legal or natural person shall be fined pursuant to the aforesaid articles\textsuperscript{105}.

A final example is article 22(1) of the \textit{Unfair Competition Prevention Act} (as at 1 November 2005) When a representative of a juridical person, or an agent, employee or any other [sic] of a juridical person or an individual has committed a violation prescribed in any of the provisions of the following items with regard to the business of said juridical person or said individual, not only the offender but also said juridical person shall be punished by the fine specified by

\begin{itemize}
  \item \textsuperscript{104} Article 207, \textit{Securities and Exchange Law}, available at \texttt{<http://www1.oecd.org>} (accessed on 14\textsuperscript{th} October 2012).
\end{itemize}
the respective items, or said individual shall be punished by the fine prescribed in the relevant article and it prescribe the amount of fines]^{106}.

Although the precise wording differs, a common underlying form is discernible^{107}. On proof that a relevant natural person committed the physical elements of the offence, the legal person may be liable to a fine. In the case of agents, it appears that no further attribution is required. In the case of employees, it must be shown that there was negligence on the part of the legal person in appointing or supervising the employee. Such negligence is, however, presumed, unless rebutted^{108}. Commentators have suggested that corporate criminal liability in Japan thus amounts to a form of strict liability^{109}.

7.9.2 Corporate Criminal Liability in Japan: Theoretical Underpinnings

Japan appears to lack a widely accepted theoretical foundation for the enforcement of Ryobatsu-Kitei. This is in spite of the fact that Japan is the only


107. In addition to the Ryobatsu-Kitei, there are also Sanbatsu-Kitei that personally punish senior management of the legal person in question in addition to the legal person and the offender. These are, however, rare. By way of example, see 953(1) of the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade, available at <http://www.cas.go.jp> (accessed on 14th October 2012).


109. Ibid.
non-common law OECD country in which the prosecution of corporations is well-entrenched. Paraphrasing Kyoto, it is not clear why legal persons are liable under *Ryobatsu-Kitei*. The clauses themselves do not adopt any specific theory.

As noted above, courts have adopted a presumption of negligence in the hiring or supervision of employees to justify fines imposed under *Ryobatsu-Kitei*. In relation to representatives, an agency principle is used as justification for the imposition. As such, it appears that, as a practical matter, Japan applies a mixed agency or negligence approach to the attribution of liability. On the other hand, it seems open to suggest that this may be an *ex post facto* legal positivist justification for the punishment required by the relevant statute.

Kyoto does, however, refer to a number of theories that have been advanced. Hiroshi Itakura has argued for the corporate organisation theory (*Kigyo-Soshikitai-Sekininron*) which would permit findings of guilt on the part of a corporation without identifying any natural offender and which appears to closely resemble corporate cultural approaches.

Kyoto remarks that this is a minority opinion. It would also appear difficult to square with the language of the Ryobatsu-Kitei given above, which

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appear to predicate corporate liability on the underlying liability of the natural person.

Kyoto himself appears to favour a pure negligence approach where the failure of the corporation to prevent the crime is itself a crime of omission. This view is apparently the prevalent view, although with internal divisions, and one form is that used by the Supreme Court¹¹³.

The two last theories mentioned by Kyoto are one advocating a penal administrative approach, where the imposition of fines is justified on the grounds of the administrative benefits it produces¹¹⁴, and another which argues that criminal law is merely a form of social control and does not involve any normative or ethical judgments and, on that basis, there is no reason why a legal person cannot be punished¹¹⁵.

Additional Country Information

The Purpose of this Part

The purpose of this part is to provide a broad overview of what systems are in place in different countries. Countries are included in this section if we have been

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¹¹². Ibid, at p.277.
¹¹³. Ibid, at p.278.
¹¹⁴. Ibid.
¹¹⁵. Ibid, at p.280.
unable to gather enough material, in English or French, to allow us to engage in meaningful analysis of the countries' corporate criminal liability system.

7.10. Austria

7.10.1 Corporate Criminal Liability in Austria

Like many continental European nations, Austria has only recently introduced corporate criminal liability. The *Law on the Responsibility of Associations (Verbandsverantwortlichkeitsgesetz, VbVG)* was passed in 2005 and entered into force on 1 January 2006.

The VbVG establishes corporate liability on the basis of a mixed agency or negligence model similar to that of Finland. Unlike the Finnish model, however, different standards are applicable to different classes of personnel.

(a) Actors Whose Conduct May Be Attributed

By section 2 of the VbVG, an association may be held responsible for the acts of both 'decision makers' and 'employees'. 'Decision makers' as defined in section 2(1) are

- individuals authorized to represent the association under its by-laws (such as managing directors, executive board members or registered agents);

- other individuals authorized to represent the association under its by-laws or a contractual relationship;
> supervisory board members, members of the administrative board or individuals in positions of authority\textsuperscript{116}.

The OECD Examiners note that this definition appears to exclude outside agents and independent contractors\textsuperscript{117}. ‘Employees’ are defined in section 2(2) as those carrying out work for the association, including trainees and apprentices.

(b) Criteria for Attribution

The VbVG posits a two stage test for making a association liable for an offence. Section 3(1) requires that the criminal act itself be of a kind that may be attributed to the corporation. Section 3(2) and (3) then set out the basis on which the association may be held liable for the act of a Decision Maker or Employee respectively.

Section 3(4) provides that both a natural person and the legal person may be held responsible for the same offence.

(i) Primary Criteria for Attribution


Section 3(1) states that a association is liable when the act in question is committed either (a) for the benefit of the association or (b) when the act is committed in breach of the association's duties.

(ii) Secondary Criteria for Attribution

Section 3(2) sets out the test for whether an association may be held responsible for the act of a Decision Maker when the Decision Maker, 'illegally and culpably' commits an offence in their course of their role as Decision Maker.

It is unclear what the phrase 'illegally and culpably' ('illegally and negligently') means in this context. It could be taken as referring to the requirements of *actus reus* and *mens rea*.

Alternatively, it could be taken as speaking to the nature of the intent required and saying that intention is required where the offence requires intention or negligence where the offence requires negligence.

Section 3(3) is more interesting from a comparative legal point of view. It provides that, if an employee commits an offence as defined in the Austrian Criminal Code, an association will be liable when the commission of the deed was made possible or substantially easier because Decision Makers disregarded the due and reasonable care appropriate in the circumstances, especially by way of refraining from essential technical, organizational or personnel measures that would have prevented such deeds.
Section 3(3) would appear to be a negligence provision, but it seems to place a particular emphasis on 'cultural' factors in determining whether such negligence has occurred.

7.11. Belgium

7.11.1 Corporate Criminal Liability in Belgium

The Act of 4 May 1999 reintroduced corporate criminal liability into Belgian law\(^{118}\). The provisions have recently been the subject of legislative review, following the preparation of a bill in February 2007 intended to overcome some of the difficulties arising in the application of the current law.

Article 5 of the Belgian Penal Code provides:

Any legal person is criminally liable for offences which are intrinsically linked to the achievement of its purpose or to the defence of its interests or for offences on whose behalf the facts show they were committed.

When a legal person is liable solely because of the intervention of an identified natural person, only the person who committed the more serious fault may be convicted. If the identified natural person committed the fault knowingly and voluntarily, he/she can be convicted at the same time as the legal person that is liable.

Demeyere states that the first paragraph contains two limbs. First, a corporation may be liable for an offence 'intrinsically linked to achievement of its purpose or to the defence or its interests' or, alternatively, for offence committed on its behalf. The Belgian Cour de Cassation has stated to be 'intrinsically linked to the achievement' of a corporation's purpose, it is sufficient to be directed to the achievement of those goals119.

It is not immediately apparent whether the liability of corporations under art 5 is derivative or organisational. Belgian authorities have stated that it is organisational120 (though a recent legislative review has noted that art 5 fails to provide a free-standing liability for corporations). On this basis, it was said that is unnecessary to specify whether a natural offender must be identified or, if so,

119. Ibid p.12. It is unclear whether this refers to a 'goal' in the legal sense, i.e. contained in the objects clause of a corporation's articles of association, or in a general sense, i.e. the securing of a contract may be a goal of a corporation.

what position they must hold in relation to the corporation\textsuperscript{121}. It was considered to be a matter best left to the judge\textsuperscript{122}.

Nonetheless, liability under art 5 is not objective. There must be some imputation of intention or negligence. The Belgium Phase 1 Report states:

It must be established that the offence was the result of an intentional decision taken within the legal person, or, through a specific relationship of cause and effect, of negligence by the legal person\textsuperscript{123}.

Interestingly, the source given for this assertion, a Belgian Parliamentary statement, gives the following example of what might constitute such a link: defective internal organisation of the legal person, inadequate safety measures or unreasonable budget restrictions created conditions that made it possible to commit the offence\textsuperscript{124}.

As with many provisions that allow for the possibility of negligence, these factors would seem to raise questions going to corporate culture. Of particular interest is the reference to 'unreasonable budget restrictions' which might raise

\textsuperscript{121} Ibid.
\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid.

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interesting questions of causation, as well as whether it was a case of negligence or intent.

Demeyere states that standard of proof required to convict a corporation will depend on the underlying offence. Belgian law generally requires intent to commit an offence.

Negligence may only be used as the basis for a conviction where the relevant provision implicitly or explicitly permits.

The second paragraph of art 5 raises some of interesting questions. First, it refers to circumstances in which the company is liable 'solely' because of the intervention of an identified natural person. It is unclear what this means. Many cases of corporate offending would seem to result from the act of single people and could, on that basis, be said to be 'solely' because of their behaviour. Equally, though, the person whose acts are directly responsible may themselves have been placed in that position by corporate policies. In the absence of guidance, the interpretation of the term 'solely' would seem likely to have significant impact on the availability of corporate criminal liability.

The second point raised by the second paragraph is the question of 'greater fault'. The paragraph appears to prohibit punishing both the natural person and the legal person unless the natural person acted wilfully. Otherwise, the question

is who committed the greater fault. It is not obvious how this is determined. Is the question legal (i.e. intent is worse than negligence) or normative? Faure comments that this restriction\textsuperscript{126} would seriously limit the reach of the criminal law where crimes have been committed in the corporation. Presumably, this was the price to be paid for the endorsement of the Belgian business world. It support for the proposal to obtain the criminal liability of entities was conditioned on creating a guarantee of immunity for managers, with the exception of illegal acts personally and wilfully committed.

A bill of February 2007 proposed to amend the Penal Code by omitting the second paragraph of art 5 altogether (as well as by altering provisions for nomination of a representative of a corporation to stand in for the corporation during proceedings, and by systematising some penalties applicable to corporations).

The explanatory statement noted a number of deficiencies in the present law, and admitted that it had not adequately reflected the underlying principle that had motivated the introduction of the Act of 4 May 1999, namely that a corporation could bear criminal responsibility in its own right, rather than on a derivative basis\textsuperscript{127}.

\textsuperscript{126} Michael Faure, 'Criminal Responsibilities of Legal and Collective Entities: Developments in Belgium' in Eser, Heine and Huber (eds), \textit{Criminal Liability of Legal and Collective Entities}(1999) at p.105, 110.

\textsuperscript{127} Chambre des représentants de Belgique, 'Projet de loi modifiant la loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales' (19 February 2012) 7.
A number of observations were also made concerning difficulties in the application of the law:

- It requires a judge first to be satisfied that the liability of a corporation has been engaged 'exclusively' by the intervention of a natural person, and then, paradoxically, to assess whether the fault of the corporation or the natural person was greater.

- It provides no guidelines for assessing the magnitude of fault committed by the corporation on the one hand, and the natural person on the other.

- It creates the possibility of unequal treatment of natural persons who offend: where one commits an offence on their own account, they are automatically exposed to criminal punishment, whereas another natural person committing the same offence may escape punishment if the offence was intrinsically linked to the achievement of their employer's purpose, and the employer itself engaged in wrongdoing judged to have involved the greater fault.

- Practice has shown that, as it was unclear how the determination of which party had committed the greater fault would be reached, both the physical person and the moral person were investigated and charged, generating an increased workload for the courts128.

The legislative review stated that it should be possible to pursue both a physical person and a moral person for commission of an offence, each within their own sphere of responsibility, and approved the deletion of the second paragraph of art 5. It is unclear whether or when this amendment will take effect.

7.12. China

7.12.1 Corporate Criminal Liability in China

Corporate criminal liability exists in China as a subset of what are called 'Unit Crimes'.

Units include corporations, but also various entities. In 1997, revisions to the General Part of the Chinese Criminal Code allowed for unit crimes. As translated by Jianfu Chen, article 30 of the Criminal Code provides:

Companies, enterprises, institutions, state organs and social organisations when committing acts endangering the society shall assume criminal liability when prescribed by law129.

Chen observes that approximately 81 offences in the Criminal Code allow for corporate criminal liability130. Liu Jiachen, writing later, states that there are 129131.


130. Ibid.
Liu states: A unit crime is committed as a result of a decision made by the unit collectively or by a person in a position of responsibility, and reflects the will of a unit.

"The decision made by a unit collectively" refers to the decision made by an agency which has the authority to act on behalf of a unit in accordance with the law or the constitution of that unit, e.g., decision [sic] made by staff and workers' representative assembly, shareholder's assembly, board of directors, and special leader's agency. "The decision made by a person in a position of responsibility" refers to the decision made by an individual who has the authority to act on behalf of a unit in accordance with the law or the constitution of the unit, e.g., decision made by a factory director, chairman of the board of a corporation, general manager, or the persons who are responsible in organs and institutions.

He goes on to say that an ordinary employee's crimes will not amount to a unit crime. The majority of unit crimes can only be committed intentionally, although some can be committed by negligence. The second part of this test, the 'person in a position of responsibility' limb, is essentially the 'identification' approach seen in many jurisdictions.

132. Ibid, at p.74-75.
133. Ibid, at p.76.
The collective decision of the unit limb is different. It seems to represent either a form of genuine collective responsibility unrecognised by common law systems or alternatively perhaps an aggregatory form of identification in which bodies composed of individuals can be found to have a collective *mens rea* imputable to the corporation.

Chinese law also appears to impose a benefit test: Liu observes that a unit crime requires the unit to obtain an illicit benefit for the unit. The requirement of benefit for the unit exclude private crimes committed by personnel for their own private benefit. More confusing is the requirement of 'illicit benefit'. Liu explains: Here "illicit benefit" refers to the benefit prohibited by national laws, administrative laws and regulations, local laws and regulations, as well as other related stipulations. If a unit obtains a legitimate benefit by an act which violates the law, it will not have committed a unit crime\(^\text{134}\).

It is unclear what exactly this means, but it appears to suggest that a unit will be only be liable when the end sought by the crime is itself illegal, not merely where the means is illegal. It also unclear, whether the unit must have actually benefited from the offending, although Liu seems to indicate that it must\(^\text{135}\).

Article 31 of the Chinese Criminal Code provides:

\(^{134}\) Ibid, at p.74.

\(^{135}\) Ibid.
When a unit commits a crime, it shall be fined. At the same time, the person in charge of the unit and other directly responsible persons shall be able to be punished by the criminal law unless otherwise provided...\textsuperscript{136}

Liu describes this as a 'dual punishment' system and it is clearly similar to the Japanese \textit{Ryobatsu-Kitei}. Liu makes the following observation:

If a unit, as an independent subject of a crime and of its own will, commits a crime which seriously endangers society, the unit ought to receive criminal punishment. At the same time, the intention of committing the crime and the act of endangering society shall be deemed to be conscious actions by the person who is responsible within the unit. \textit{If no person is responsible, there is no crime committed by a unit}. (emphasis added)\textsuperscript{137}

It is unclear how far this principle goes. As China uses an identification system, it will, in practice at least, be necessary to identify an offender before the unit can be held liable. It is not clear, however, whether the offender needs to be convicted as a prerequisite to a finding against the unit.

7.13. Denmark

7.13.1 Corporate Criminal Liability in Denmark

Corporate criminal liability in Denmark is governed by Chapter 5 of the Danish Criminal Code, introduced by Act 474 of 12 June 1996. The sanctions

\textsuperscript{136} Ibid, at p.76.

\textsuperscript{137} Ibid, at p.77.
under Chapter 5 are only available where the relevant offence provides that a corporation may be punished\textsuperscript{138}.

Section 27 (1) provides

Criminal liability of a legal person is conditional upon a transgression having been committed within the establishment of this person by one or more persons connected to this legal person or by the legal person himself.

Liability under 27(1) is not restricted to management, senior personnel or even those formally employed by the company and encompasses agents. In terms of intent, it must be shown that the person in issue had the relevant mental state, whether negligence or intent.

The phrase 'within the establishment' appears to mean in the course of business, so as to exclude purely private acts of persons associated with company. Acts contrary to corporate policy may still be attributed to the company, but not where such acts are 'totally abnormal'. Nielsen gives an example of such a case: an employee of a company used the fork on a fork lift truck to lift himself, even though there was a basket specifically for the purpose. The High Court acquitted, but the Supreme Court convicted, noting the act was not aberrant enough to

\textsuperscript{138} Gorm Nielsen, 'Criminal Liability of Collective Entities — the Danish Model' in Eser, Heine and Huber (eds), \textit{Criminal Responsibility of Legal and Collective Entities} (1999) at p.189.
warrant dismissal\textsuperscript{39}. It is not necessary to identify the natural person responsible for the offence.

Nielsen observes the question of guilt is typically satisfied by an employee having negligently broken the rules. This is enough. Whether or not any blame attaches to management is irrelevant under Danish law. The company will also be found guilty in cases where management has been very active in ensuring observance of the law. The fact that it is irrelevant whether management has been active or passive is probably the question attracting most debate\textsuperscript{140}.

But, if in order to obtain judgment against the company, the prosecutor has to prove the manager is personally liable, he may as well bring the charges against him personally. If managerial negligence must be proved, company liability will lose much of its meaning\textsuperscript{141}.


7.14.1 Corporate Criminal Liability in Iceland

Article 19 of the General Penal Code of Iceland provides for corporate criminal liability.

\begin{enumerate}
\item[139.] Gorm Nielsen, 'Criminal Liability of Collective Entities – the Danish Model' in Eser, Heine and Huber (eds), \textit{Criminal Responsibility of Legal and Collective Entities} (1999) at p.189.
\item[140.] Ibid, at p.192.
\item[141.] Ibid, at p.193.
\end{enumerate}
Under 19(b), liability can attach to any person who is (a) a non-natural person and (b) capable of bearing rights and duties.

Section 19(c) provides:

Subject to other provisions in law, a legal person can only be made criminally liable if its officer, employee or other natural person acting on its behalf committed a criminal and unlawful act in the course of its business. Penalties may be imposed even if the identity of that person has not been established. Administrative authorities can only be made criminally liable if an unlawful and criminal act has been committed in the course of an operation deemed comparable to the operations of private entities.

7.15. Ireland

7.15.1 Corporate Criminal Liability in Ireland

Ireland follows the Anglo-Australia approach and relies on the identification doctrine. Interestingly, however, the case-by-case nature of the identification process itself has been criticised in Ireland and it has been suggested that it may be so unpredictable as to be contrary to principle of legality and, as such, unconstitutional under the Irish Constitution\(^ {142} \).

7.16. Indonesia

7.16.1 Corporate Criminal Liability in Indonesia

It is unclear whether Indonesia has a system for the attribution of criminal liability to corporate entities. The Indonesian Penal Code, stipulated by the Dutch in the early years of the 20th century, does not treat corporations as the subject of criminal law. A number of other laws have subsequently introduced corporate criminal liability for specific offences. It is now suggested that the future revision of the Penal Code should include provision for corporate criminal liability143.

The Fafo report on Indonesia suggests that there is no uniform approach to attribution of liability and that it depends on the views of the individual judge. Nor is there agreement in professional or academic circles as to the criteria to be used in attributing liability144.

7.17. South Africa

7.17.1 Corporate Criminal Liability in South Africa

South Africa has adopted a statutory model of corporate criminal liability based on vicarious liability. Section 332 of the Criminal Procedure Act 1977


144. Ibid, at p.5.
provides: For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law:

(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by the corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

It should be noted that the meaning of 'for any offence' is contested. On the one hand, it has been read as meaning exactly what it says. On the other, it has been treated as meaning only those offences for which a corporation can *prima facie* be liable.


146. E.g. not bigamy or rape, although *quaere* whether either offence could ever meet the requirements of attribution under s332 other than theoretically. See Ferdinand van
The principles applicable to Sec.332 seem to be similar to those used in relation to vicarious liability in the US. For example, in both jurisdictions, there is no apparent restriction on the level of the employee whose conduct can be attributed to the corporation. Equally, in both jurisdiction, an intention to benefit the corporation will be sufficient to bring an ultra vires act within the scope of the doctrine. It appears, however, that s332 may be wider than the US test for vicarious liability as the US test appears to require a party to be acting in the course of their duties and for the benefit of the corporation, whereas s332 phrases these considerations in the alternative.

It has been suggested that Sec.332 violates South Africa’s Constitution. Van Oosten states: Legal commentators, on the other hand, unanimously repudiate the doctrine of vicarious responsibility as representing a departure from the fault requisite for criminal liability, and it will in all likelihood be declared unconstitutional by the constitutional court for the same reason, if and when the matter comes up for decision147.

In addition, South Africa recently signed the OECD Bribery Convention and it will be interesting to see whether a pure vicarious liability system is sufficient to meet the requirements of the Convention.

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147. Ibid, at p.199.

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7.18. South Korea

7.18.1 Corporate Criminal Liability in South Korea

Corporate criminal liability in South Korea appears to be very similar to the position in Japan, although we have only been able to find information on the foreign bribery offence Korea was obligated to create under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Article 4 of The Act Preventing Bribery of Foreign Public Officials in International Business Transactions provides:

In the event that a representative, agent, employee or other individual working for legal person has committed the offence as set out in Article 3(1) in relation to its business, the legal person shall also be subject to a fine up to 1,000,000,000 won in addition to the imposition of sanctions on the actual performer. In case that the profit obtained through the offence exceeds a total of 500,000,000 won, it shall be subject to a fine up to twice the amount of the profit. If the legal person has paid due attention or exercised proper supervision to prevent the offence against this Act, it shall not be subject to the above sanctions.

It may be observed that the structure is much like the Japanese Ryobatsu-Kitei. According to Korean authorities, liability under art 4 is strict and may be triggered by an employee of the corporation provided it is committed ‘in relation to [the] business’. In determining whether the offence was committed in relation

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to the business, the Supreme Court of Korea has said that a number of factors needed to be considered:

➢ Objectively, the offence must appear to have been done in relation to the business.

➢ Subjectively, the employee must have intended to act for the legal person.

Relevant considerations mentioned by the Court were:

- the legal scope of the business of the corporation;
- the rank and position of the employee;
- the relation between the crime and the scope of the business;
- knowledge of the corporation of the offence and its involvement in the offence;
- origin of funds used in the offending; and
- who receives the benefits of the offending.

It will be noted that art 4 include a defence of due diligence. The scope of this defence is somewhat unclear. In the OECD Phase 1 Report on South Korea, authorities suggested it was also a strict liability test (akin to Japan) where the


149. Ibid.
corporation must show that it has taken 'concrete and specific' steps to avoid the offending\textsuperscript{150}. On the other hand, in the Phase 2 Report, the Examiners comment adversely on an Explanatory Manual published by the Ministry of Justice which suggests that a statement on a website or a general policy may be sufficient to establish a defence of due diligence\textsuperscript{151}.

7.19. The Netherlands

7.19.1 Corporate Criminal Liability in the Netherlands

A provision concerning general corporate criminal liability was introduced into the Dutch Criminal Code 1976. Previously, it had existed under the Act on Economic Crimes, but was of narrower application. Article 51.2 of the Dutch Criminal Code provides Where a criminal offence is committed by a juristic person, criminal proceedings may be instituted and such penalties and measures as are prescribed by law, where applicable may be imposed:

(1) against the juristic person; or

(2) against those who have ordered the commission of the criminal offence, and against those in control of such unlawful behaviour; or

(3) against the persons mentioned under (1) and (2) jointly.

\textsuperscript{150} Ibid.

There appear to be different tests for attribution to the corporation based on its size\textsuperscript{152}.

Attribution in relation to smaller corporations appears to be on the basis of the 'power and acceptance' test, which asks whether the corporation had the power to control the act in question and, if so, whether the act was in line with the business of the corporation (that is, was of the kind ‘accepted’ by the company). This second limb is somewhat vague, but was used to convict a hospital of manslaughter for: failing to ensure that old or redundant anaesthetic equipment was removed or made un-useable. The equipment in question was not listed as being in service, and routine maintenance of it had ceased. No safety system for checking the work of maintenance technicians was in place. As a result, the wrong tubes were connected to obsolete equipment which was then used in an operation with fatal consequences. The management of the hospital trust claimed they could not prevent the unsafe practices because they did not know of them, but the District Court responded that their lack of knowledge actually made the case against them, since they ought to have been aware of routine practices within the hospital\textsuperscript{153}.

Severely aberrant or purely self-serving behaviour would presumably be excluded on the basis of the acceptance principle. In the case of larger


corporations, the test seems to be different. Jägers states that in such cases the question focuses more on 'normal company policy'. Unfortunately, there is no elaboration on what this means other than a reference to a 1993 judgment of the Supreme Court.

The terminology of 'power and acceptance' seems largely to refer to the necessary connection between the offender and the corporation in that the corporation must have power over the offender (an employment relationship would seem the most likely candidate) and the action must be one that it accepts, the test for which looks at the business activities of the corporation. As such, in practical terms, it may well be that the 'power and acceptance' test is essentially one of negligence. In the hospital case referred to above, it is clear that it was the failure of the hospital to properly supervise its operations that led to the finding against it.

7.20. New Zealand

7.20.1 Corporate Criminal Liability in New Zealand

Corporate criminal liability in New Zealand is broadly based on the identification doctrine. There appear, however, to be two interesting differences.

In the OECD Phase 1 Report, the Examiners note....


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The accepted test currently applied in New Zealand is whether the individual responsible for the alleged conduct has actual authority within the company in relation to the area of the alleged conduct. Therefore it is no longer necessary to determine whether he/she can be regarded as the "brains or mind" (and possessed the necessary state of corporate mind for the offence) or is simply the "hands" of the company.\(^{155}\)

Thus it would appear that Tesco has been used more broadly in New Zealand. The second point of interest is that the Human Rights Act 1993 (NZ) does appear to contain a form of corporate culture provision. Section 68 of the Human Rights Act provides:

(1) Subject to subsection (3) of this section, anything done or omitted by a person as the employee of another person shall, for the purposes of this Part of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.

(2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Part of this Act, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is

done or omitted without that other person's express or implied authority, precedent or subsequent.

(3) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.

As the OECD Examiners observe ...........

This appears to be a form of vicarious liability with a possible defence based on "corporate culture" and would have the salutary effect of providing corporations with an incentive to engage in meaningful preventive efforts\textsuperscript{156}.

At present, however, it only applies to breaches of the Human Rights Act.

7.21. Norway

7.21.1 Corporate Criminal Liability in Norway

The Norwegian corporate criminal liability regime is similar to other Scandinavian regimes. Introduced in 1991, Chapter 3 a. of the Criminal Code sets the conditions under which an enterprise will be liable. Section 48a provides

When a penalty provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty. This applies even if no individual person is prosecuted for the contravention.

By enterprise is here meant a company, society or other association, one-man enterprise, foundation, estate or public activity. The penalty shall be a fine. The enterprise may also be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms, cf. section 29157.

Hillblom158 states that an offence will be committed ‘on behalf of’ an enterprise when three conditions are satisfied:

- A crime has been committed;
- A connection between the offender and the corporation is shown; and
- The offence formed part of the offender’s work for the corporation.

The first condition appears to be straight forward. As to the second, the offender will usually be a statutory organ of the corporation, an agent or an employee but may come from outside these groups. It is a question of the interpretation of the legislation. The liability of agents is subject to further tests.

157. Section 29 of the Code allows for a comparable prohibition on a person pursuing certain activities if they have shown themselves unfit, e.g. a lawyer might be prohibited from practicing if they defrauded clients.

Where the cumulative effect of a number of legal acts is an illegal act, the corporation may be liable (provided that the actors had the relevant connection to the corporation).

The third condition requires the offence to have been committed in the scope of employment. Acts of extreme disloyalty by an employee will not be attributed to the company. A mere failure to obey instructions will not, however, amount to such disloyalty.

If the above conditions are satisfied, the corporation may be punished. In punishing the corporation, a court must consider ‘whether the enterprise could by guidelines, instruction, training, control or other measures have prevented the offence’ (Art 48b (c)). As such, it appears that corporate culture concepts may have some application in Norway at the sentencing stage.

7.22. Conclusion

Basing on the above discussion - Civil, common and hybrid legal systems recognise various levels of intent, ranging from direct intent to negligence. Generally, the more serious the crime, the more direct the intention required to be found guilty of the offence.

In general, common law countries, such as the UK, Canada and New Zealand, have adopted a general approach by defining the subjects of criminal law as ‘persons’ and then defining person to including both natural and corporations.
By contrast, civil law countries have historically tended to prefer specific liability. In Finland, Section 1(1) of Chapter 9 restricts corporate liability to offences which specifically state they may be punished by corporate fine. In Denmark, Section 25 of the Criminal Code states that a corporation may be punished if that punishment is authorised by a law.

Similarly, in the civil law-influenced jurisdictions of Japan and China, liability of corporations is specific. As with the common law nations, this position is not universal, however: Belgium and the Netherlands have general liability systems. The more interesting point about general and specific liability, however, is its application in terms of federal systems. Both the US and Australia apply different tests of corporate criminal liability at the State and Federal levels. The test applied at the Federal level is by definition specific, since it applies only to those offences which the Federal government has power to punish.