INTRODUCTION
The first statute enacting industrial manslaughter legislation in Australia was passed by the Australian Capital Territory (ACT) Legislative Assembly on 27 November 2003. The Crimes (Industrial Manslaughter) Amendment Act 2002 (ACT) took effect from 1 March 2004.

Victoria had earlier proposed a similar change to the law with the introduction in December 2001 of the Crimes (Workplace Deaths and Serious Injury) Bill 2001. Following an intensive lobbying campaign by business and other lobby groups, the Bill was rejected in the Upper House of the Victorian Parliament, the Legislative Council, on 29 May 2002.2


These three statutory proposals represent the tip of the policy iceberg. A great deal of community debate about actions to reduce workplace death both in Australia and overseas has lead to the development of a number of proposals for strengthening the law and the introduction of the legislation just mentioned.4

The primary purpose of this paper is to analyse the new ACT legislation, essentially because it is enacted law that lawyers and other members of the community must understand, and to discuss whether or not it meets the purposes attributed to its introduction. During the course of that analysis, the question is posed as to whether or not the crime of industrial manslaughter fits appropriately within the criminal law or whether there are better approaches to reform.

THE ACT LEGISLATION—NEW CRIMINAL OFFENCES
The first point to be made about the ACT legislation is that it amends the Crimes Act 1900 (ACT). It does not introduce a new offence into occupational health and safety (OH&S) legislation, which has, subsequent to the change introduced by the industrial manslaughter offence provisions, separately been comprehensively overhauled.5

The significance of this step (that is to strengthen the criminal law per se rather than to introduce an offence at the top of the pyramid of OH&S offences) is that it represents an explicit choice not to distinguish workplace conduct from other conduct. Haines and Hall6 have characterised the distinction as follows:

Manslaughter is seen within the contemporary context as signaling ‘traditional’ as opposed to ‘regulatory’ criminality, where traditional criminal law refers to outcome or result-based offences such as murder or manslaughter and regulatory criminal offences are contained, for example, in OH&S statutes, and are often more duty based.7

No injury or fatality needs to have occurred for an occupational health and safety prosecution to be mounted. The Maxwell Report8 encapsulates why prosecuting for breach of a duty under the statutes creating OH&S offences is of a different character to general criminal prosecution:

First, the offence is committed whether or not harm was caused. Though prosecution typically follows workplace accidents, the dutyholder is not charged with ‘conduct causing death...
or serious injury'. Nor is the seriousness of the breach of duty measured by the seriousness of the consequences (if any) of the breach. Secondly, proof of a breach of an OHSA duty does not depend upon proof of a relevant state of knowledge or intent ('mens rea'). And there are no statutory defences under OHSA.\(^9\)

The conscious choice to place industrial manslaughter within the general criminal law, with the complete retention of the traditional criminal offence of manslaughter, appears to have been part of a 'message' that the ACT Government wished to send to the community. The Minister responsible for introducing the Bill in the ACT is reported as saying that the industrial manslaughter legislation was passed in the ACT on the following basis:

Industrial Manslaughter law is good law, it’s about protecting workers and it’s about sending a strong message to our community that, here in the ACT, avoidable workplace deaths are dealt with in the strongest possible way.\(^10\)

The assumption brought to bear is that the application of the 'strongest possible' response will move to reduce 'avoidable workplace deaths'. Accordingly, an examination of the elements of the offence and consequences stemming from a conviction should next be examined. The effectiveness of the offence as a means of reducing avoidable workplace deaths may then be assessed, posing the question, will this law reduce or eliminate 'avoidable workplace deaths' or have other consequences?

In addition, the other two more formally expressed purposes attaching to the new law should also be tested against the provisions of the legislation. The Minister, in a different context, enunciated that the legislation had two main purposes:

The first is to ensure that corporate employers can be properly prosecuted if their reckless or negligent behaviour results in the death of a worker. The second is to raise awareness of the duty of employers to provide a safe workplace.\(^11\)

THE NEW OFFENCE

Under section 49C of the Crimes Act as inserted by the Crimes (Industrial Manslaughter) Amendment Act the employer commits an offence where the employee dies in the course of employment, the employer’s conduct caused the death and the employer is reckless or negligent about causing the death of the worker by the conduct. Under section 49B an omission can be conduct. Section 49B says that an employer’s omission to act can be conduct if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from inter alia ‘anything in the employer’s possession or control’.

Section 49D provides that a senior officer of an employer commits the offence if the worker dies or is injured in the course of employment, the senior officer’s conduct caused the offence and the senior officer was either reckless or negligent about causing the death of the worker.

The ss.49C and 49D offences operate independently of the offence of manslaughter dealt with in section 15 Crimes Act.

The maximum penalty for an offence under s.49C and s.49D is 2,000 penalty units or 20 years’ imprisonment or both. Pursuant to s.133 Legislation Act 2001 (ACT), the monetary value of a penalty unit applies differently for an individual or a corporation. 2,000 penalty units
The Code Act expresses the idea that there is a discernible corporate culture that affects liability. As Sarre notes a company with a poor corporate culture may be considered to be as culpable under this legislation as individual directors or senior managers.

of the burden that compliance with the order will impose. This provision provides a court with the discretion to recognise the financial circumstances of smaller enterprises that may face insolvency if hit with a substantial cost burden arising from the making of a section 49E order.

ADDRESSING CORPORATE CONDUCT
This penalty provision specifically addresses the idea that sentencing in respect of a company should be outside of, or in addition to, the traditional penalties available to courts. It represents a means of attacking the presence of a corporate culture that is adverse to the interests of OH&S.

Section 49E builds upon the provisions in the Code Act. The provisions of the Code Act have been labeled as:

Australia’s first attempt at a new legislative paradigm for corporate criminal liability.  

In the ACT, the Government is progressively adopting the Code Act. It is the only jurisdiction to date to assimilate the provisions of the Code Act into the criminal law. All new offences after 1 January 2003 are to comply with the Code Act.  Section 7A Crimes Act specifically applies the Criminal Code, Chapter 2 to the section 49C and 49D offences. The new statutory offence, therefore, deliberately does not emulate the traditional form of manslaughter offence because the new offence follows the Code Act. The Code Act expresses the idea that there is a discernible corporate culture that affects liability. As Sarre notes a company with a poor corporate culture may be considered to be as culpable under this legislation as individual directors or senior managers.
The notion of vicarious liability (which underpinned the Victorian Bill relating to industrial manslaughter) has been replaced with an attribution of fault to the body corporate where it expressly, tacitly or impliedly authorises or permits the commission of an offence where the prosecution is required to show an element of fault, mens rea. That authorisation or permission can be established by the means set out in s.12.3 of the Code Act, emulated in section 51 Criminal Code 2002 (ACT), the formal means by which the Code Act has been legislated in the ACT. Apart from conduct that was exhibited by the board of directors or a ‘high managerial agent’ (importing traditional notions of vicarious liability), section 51(2)(c) and (d) are relevant.

These paragraphs provide that the ways in which authorisation or permission may be established include proving that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the contravened law or proving that the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law. It is this latter aspect of the manner in which the law looks through the corporate veil that is interesting in an OH&S context. This is because this concept is very close to Gaudron’s view of the nature of the statutory OH&S duty that distinguishes it from the common law civil duty, especially as all Australian statutes proceed from the same basis.16 The High Court was considering the South Australian legislation but, as stated, the analysis applies to all State and Territory OH&S legislation:

The statutory duty imposed by s.24(2a)(a) of the Act differs from the common law duty of care in at least two important but related respects. The first significant difference between the statutory duty and the common law duty of care is that s.24(2a)(a) imposes a duty to ensure the safety of construction workers, not simply to prevent a foreseeable risk of injury to them. The statutory duty is a duty to protect against all risks to construction workers, if that is reasonably practicable. In the words of Lord Upjohn in Nimmo v Alexander Cowan & Sons Ltd, the duty is to make the structure ‘100 per cent safe (judged of course by a reasonable standard of care) if that is reasonably practicable and, if it is not, to make it as safe so far as is reasonably practicable to a lower percentage’.17

In my view, the very nature of the duty at law expressed in an OH&S context is to require a corporate culture (and, obviously, related behaviours) that leads to, in the context of the building and construction industry, protecting against all risks to construction workers to the extent that is practicable. Bearing this proposition in mind, the manner in which mens rea may be said to need to be proven may be accommodated by the very nature of the new offence as drafted. In each instance where a death has occurred, it will be difficult to prove that an OH&S duty has not been breached and in turn difficult to prove that a corporate culture that required compliance with the contravened law was present. It will be very difficult for an employer to show that no breach of an OH&S duty has occurred where a death or serious injury results from a workplace activity given the strictures of the duty, that is one of strict liability ameliorated only by the notion of practicality.

CORRECTING THE PRIOR MANSLAUGHTER DEFECT
Part of the rationale that was offered for the passage of the legislation was that it ensured that corporate employers were able to be ‘properly prosecuted’ if their reckless or negligent behaviour results in the death of a worker. This purpose relates to a cure for the problem with the application of the traditional manslaughter offence to corporations and the perceived use of the corporate structure to shelter corporate officers from the consequences of unacceptable behaviour.

The problem of attributing blame in respect of corporations has been based upon the notion of identification of the conduct of directors or senior managers as conduct of the corporation. This principle was established in Tesco Supermarkets Ltd v Nattrass and adopted by the High Court in Australia in Hamilton v Whitehead. 19

The basis of the doctrine of identification has been explained as follows:

The theory is narrower than vicarious liability. It requires that the corporation take responsibility for those with decision-making authority over matters of corporate policy (rather than only implementing policy). It is not sufficient merely to establish that any employee or agent acted criminally.20
The doctrine of identification has been located as the difficulty that has lead to very few prosecutions of corporations for the traditional crime of manslaughter,\textsuperscript{21} with one successful prosecution following a guilty plea in the case R v Denbo P/L.\textsuperscript{22}

Clearly the new offence applies to corporations and other employers but it is not an offence that applies solely to corporations. Employer is defined in section 49A. It says that a person is an ‘employer of a worker if the person engages the worker as a worker of the person; or an agent of the person engages the worker as a worker of the agent: This definition relies upon the defined terms ‘worker’ and ‘agent’, also set out in section 49A, for its cogency. In the result, the breadth of these definitions is extraordinary. An employer who engages a contractor has engaged a ‘worker’ for the purposes of ss.49B, 49C and 49D. The Act defines a worker to be:

(a) an employee; or
(b) an independent contractor; or
(c) an outworker; or
(d) an apprentice or trainee; or
(e) a volunteer.

This makes the employer potentially liable for the death of the contractor and of the contractor’s employees or agents, including employees of subcontractors of those contractors.

Another provision that extends liability to new, difficult to discern situations is sub-section 49B(3) which deems void any agreement the effect of which is to pass control of a ‘thing’ to a third party. ‘Thing’ is not defined. However, it would be reasonable to assume that this provision covers tools, equipment, substances and so forth. When this is read together with the extended definition of ‘agent’ and ‘worker’ it becomes difficult to see the limits of liability as the principal contractor on a building site retain liability for all equipment or tools that are used by those down the contracting chain and therefore this provision seems designed to elevate the standard of care in relation to the operation or use of equipment. This is a sensitive issue for the building and construction industry with cases such as Transfield Pty Ltd v Maccarron\textsuperscript{23} indicating the need for principal contractors to extend supervision to subcontractors using dangerous machinery, even where they have a demonstrated history of the correct use of that piece of machinery but where it is involved in a new application.

LIMITATIONS IN THE IDEA OF DUTY AND CAUSATION

Clearly, the provisions just discussed, go well beyond a ‘cure’ to the problems raised by the doctrine of identification. What limiting effects exist appear to be in notions of duty, the boundaries of which are uncertain, and the test of causation adopted. Each of these areas will now be discussed.

How the Courts will interpret the nature and extent of an employer’s duty when construing the Act is a deep unknown, particularly as the civil and criminal tests are not compatible.

The starting point is the prior standard under the criminal law regarding manslaughter. To support an indictment for manslaughter, the prosecution is first required to prove beyond reasonable doubt the matters necessary to establish civil liability (except pecuniary loss).\textsuperscript{24} In addition, the prosecution must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.\textsuperscript{25}

The standard of criminal negligence is generally higher than the tortious standard\textsuperscript{26} but the extent to which the Act can be construed in order to make a greater nexus between the two standards is a further unknown. As already emphasised, in the ACT the Code Act shapes the offence. The new statutory offence therefore deliberately does not emulate the traditional form of manslaughter offence because the new offence follows the Code Act.

This schism creates an anomaly because there is a clear difference between the new statutory offence of industrial manslaughter and the traditional offence with its common law elements. The extent to which the common law tests will be followed given that the inherently circular test of conduct that merits criminal punishment remains as a central part of whether or not the offence has been committed is an issue open to argument.

Sections 20 and 21 of the ACT’s Criminal Code 2002 define the terms ‘reckless’ and ‘negligent’ for the purposes of all criminal offences that are subject to the Code, including the new industrial manslaughter offences. Section 21 says:

A person is negligent in relation to a physical element of an offence if the person’s conduct merits criminal punishment for the offence because it involves—

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
(b) such a high risk that the physical element exists or will exist.

It is for a more detailed study of these provisions to determine

\textsuperscript{21} R v Denbo P/L.

\textsuperscript{22} R v Denbo P/L.

\textsuperscript{23} Transfield Pty Ltd v Maccarron.

\textsuperscript{24} P/L.

\textsuperscript{25} P/L.

\textsuperscript{26} P/L.
whether or not there is a major substantive change brought about by the inclusion of this new test of negligence, an issue worthy of a criminal law analysis of great depth. For the present, other commentators have noted that the Code Act will change the interpretation of the law fundamentally. These considerations add further complexity to the administration of the new offence and will encourage employers to litigate to avoid the consequences of the new legislation.

In addition, as previously discussed, the Code Act has new concepts of liability that are determined by reference to a ‘corporate culture’ rather than being determined solely from the conduct of specific individuals. How will the collective notion of negligence be seen? What is conduct which merits criminal punishment in the context of a workplace death?

Obviously there is a duty that has been broken. This is the statutory OH&S duty and a duty that arises from the traditional connection between employer and employee and the now more broadly cast duty canvassed earlier. Mere inadvertence at common law, using the test in Nyadam was insufficient to ground a conviction. However, an omission is, as expressed earlier, pursuant to section 49B, able to be construed as conduct. The missing piece in the jigsaw is what for the purposes of the offence is a gross or shocking departure from acceptable standards of behaviour by an employer? Here the idea that an omission is capable of falling into such a category is new. Will an omission constitute such a shocking departure from acceptable standards? One answer could be that if the omission lead to the death of a worker then ipso facto the standard of behaviour was unacceptable and indicated a corporate culture that did not promote the adherence to strict liability associated with worker protection.

On the other side of the spectrum from an omission being capable of constituting conduct that may be negligent is the notion of recklessness. The concept of recklessness has been described as, fundamentally, a singular criminal law construct. Section 20 requires an awareness by the employer that there was a ‘substantial risk’ that the result would happen for the employer to have been reckless. In practice this construct may prove meaningless and the ideas of recklessness and negligence under the Code Act are likely to merge, especially in the context of a failure to meet a statutory OH&S duty:

Though the Commonwealth Code … takes the distinction to be fundamental, the differences, in terms of fault, between a person who was actually aware of a risk and another who ought to have been aware, because the risk was obvious, are both contentious and subtle. To maintain that distinction, across the broad range of criminal offences, is likely to prove a demanding challenge. All the more challenging, one might think, in view of the invitation in the Code for courts to test a profession of ignorance or mistake by asking the question whether mistake or ignorance was reasonable in the circumstances.

One commentator has observed that the risk must be of such nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person (employer) would observe in the situation. In the context of a breach of an OH&S duty that leads to a death I believe that
question will be subsumed into the same considerations as apply when judging whether the conduct was criminally negligent.

CAUSATION

Section 49A makes it clear that the employer causes the death of the worker if the conduct substantially contributes to the death. The use of the word ‘substantial’ indicates that the actions or omissions of the employer or its senior officers need not be the only cause. The issue of criminal causation in this context deserves a paper in itself. Suffice to say that commentators appear to agree that the courts will use a broad test. How the causal chain between the actions or omissions of the employer and the death of the worker may be seen by the courts to have been broken or when an intervening act is sufficient to remove responsibility are issues that will need judicial interpretation.

The Maxwell report was clear in its view that the nature of statutory OH&S offences is such that ‘no question of manslaughter can arise’. In essence, this view is maintained because there can be a punishable breach of an OH&S duty whether or not that breach has any consequences in the form of injury or death. The focus of OH&S law is not necessarily upon consequences or upon aetiology. A breach of an OH&S statute may be found despite the fact that an injury that occurs is not causally related to the breach. Accordingly, the area in which there is a very palpable need for clarification of the law is in the causative link required by the statute to satisfy the offence. The use of a unique test makes this an area open to a range of arguments.

TOKENISM?

The recent report by McCallum et al about reform of the law relating to workplace death, supports the offence at the tip of the enforcement pyramid being retained within OH&S law as a specialist jurisdiction, separate from mainstream criminal law. It does so on a different basis to Maxwell. Part of the rationale for this position is the view that requirements for a conviction under the ACT legislation, compared with the offences under the New South Wales OH&S Act 2000, are ‘excessively onerous’.

The authors of the report believe that there will be few convictions and therefore there is not likely to be a ‘real’ deterrent effect. They label the provisions as ‘tokenistic’ in nature. Part of their negative assessment is based upon a departure from the strict liability approach and the attribution of the fault element in sections 12.3 and 12.4 of the Code Act. With respect, the manner in which the failure of a corporation to maintain a corporate culture requiring compliance with the contravened law can be indicative of fault for the purposes of the ACT Criminal Code is highly consonant with the idea of the general strict liability OH&S duty and its application will not lead to potential confusion amongst employers of the standards expected of them, as proposed by McCallum et al.

Under both regimes the standard is very high and it is difficult to conceive that the ACT legislation will operate only tokenistically. Rather, the small number of workplace deaths in the ACT may mean that there are infrequent prosecutions. That is likely to lessen the deterrent effect of the law.

CONCLUSION

In essence the idea of sending a ‘message’ to the business community has worked. This paper is one reaction to the message. However, the uncertainty in the application of the law does not create a useful communication. In addition, part of the message is mixed when it comes to dealing with OH&S compliance and the reinforcement of the statutory OH&S duties.

An information leaflet issued by ACT Workcover on the subject of industrial manslaughter has this to say:

The new law does not impose any new OHS requirements on employers or their employees. An employer who is concerned about the new laws simply needs to ensure that they are taking all reasonable steps to provide a safe workplace consistent with current OHS legislation.

This statement appears to indicate that the Government is not seeking to elevate OH&S standards. The intent and the manifestation of that intent is to increase the sanctions available for OH&S breaches that lead to death at work. The Government has taken this step in the context of the traditional criminal law, with the added uncertainty of the experiment with the new legislative paradigm offered by the Code Act.

It is therefore open to argue that in the ACT the essence of the new criminal offence is expressive not instrumental. The new law may be viewed as one that is more important as an emotional response to workplace deaths, and hence a political device, rather than as a direct means of reducing industrial deaths through greater OH&S compliance. This view is substantiated by two able commentators in this area of law:
The principal motivations for industrial manslaughter prosecutions are moral, symbolic and retributive, and show society’s intolerance for organisational behaviour causing workplace deaths.\(^4^4\)

It cannot be argued that the purpose of overcoming the problem with prosecuting corporate employers for manslaughter has been other than met. However the manner in which this has occurred has arguably extended the notion of employer criminal responsibility to a large number of entities that fall outside of the traditional idea of the employer/employee relationship. The employers who will bear the brunt of the new offence are not merely large corporate employers, where the idea of directors constructing devices using the corporate veil to protect themselves including from OH&S prosecutions has been very much in the public eye recently.\(^4^5\)

It is likely that smaller employers who are less able to command the resources to effectively meet the OH&S strict liability regime will be caught by the new offence rather than larger corporate employers.

The idea that the legislation increases the awareness of employers in relation to the need to create a safe workplace is a matter that is also open to argument. In one sense a diversion of resources into defending criminal proceedings or expending resources on essentially defensive means to protect themselves from the criminal law is an opportunity lost to expend those moneys on OH&S improvements.

Both the McCallum report and the Maxwell report recommended change to OH&S laws to increase punitive sanctions at the top of the OH&S enforcement pyramid, within the construct of current OH&S laws. Leaving aside the efficacy of their recommendations, an offence which sits within the construct of current OH&S laws makes more sense than a separate criminal offence. This is because the notion of industrial manslaughter sits oddly with the nature of OH&S offences, as isolated by Maxwell and discussed earlier.

Despite that legal argument, the question that employers are asking relates to the existence of evidence that increased prosecutions under whatever regime is imposed lead to reduced incidence of workplace deaths and injuries. Surely the answer to that question should have been plain before the new legislation was introduced?

Richard Calver thanks Maria Mitchell, Solicitor, Meyer Clapham, for her comments on an earlier draft of this paper.

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5. See the Occupational Health and Safety Amendment Act 2004 passed by the Legislative Assembly on 28 June 2004. The Act commenced operation on 5 August 2004, except for right of entry provisions (see in particular s.77) which commence on 1 January 2005.
7. Id. at 264.
9. Id. at para 1700 and 1701.
11. Ms K Gallagher in evidence to the Legislative Assembly Standing Committee on Legal Affairs reference into the Crimes (Industrial Manslaughter) Amendment Bill 2002 Transcript p1, 4 April 2003.
13. Personal communication with a member of the Chief Minister’s office.
16. A point made by Hall, Johnston and Ridgeway supra n4 at p6.
17. Supra n.15 at para 51.
20. Dept of Justice Canada, Corporate Criminal Liability Discussion paper March 2002:

22. Unreported Supreme Court of Victoria (Teague J) 14 June 1994.

23. Unreported Supreme Court of Western Australia, Hasluck J [2004] WASCA 78 (28 April 2004).

24. Eugeniou v The Queen (1963–64) 37 ALJR 508 at 512.


26. In Nydam at 445 the Full Court of the Supreme Court of Victoria held that manslaughter by criminal negligence required the prosecution to prove that:
   (a) the act [or omission] which caused death was done by the defendant,
   (b) it was a conscious and voluntary act,
   (c) that it was done in circumstances involving such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or GBH would follow that the doing of the act merited criminal punishment.


28. Supra note 25.


30. Supra note 27 at p12.

31. Cook supra n29.


33. See J Clough and C Mulhern, Criminal Law, Butterworths 1999 para 4.2.18 et seq for a good summary of causation in manslaughter cases especially at 4.2.23 re operating and substantial cause.

34. Supra note 8.

35. Id. at para 1709.


38. Id. at para 48.

39. Ibid.

40. Id. at para 49.


42. Ibid.

43. Terms used by Haines and Hall supra note 6 at p268.
