

CORPORATE MANSLAUGHTER, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT: AN APPRAISAL OF AUSTRALIAN INDUSTRIAL KILLING LAWS

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Abstract

The right to life is a universally recognized human right, which is the utmost critical right of any human being residing anywhere in the world with any identity. Despite this, many workers are getting killed while working for a living. The International Labor Organization (ILO) estimates that a total of 2.3 million workers currently die from work-related injuries and diseases worldwide every year, numbering over 6,000 deaths every single day, and another 160 million breadwinners suffer from nonfatal diseases. They are being killed largely with impunity, although they are the mainspring of development, which cannot be sustainable without protecting workers from peril. Australia is no exception, where corporate homicides used to be tried under common law with little or no success, primarily because of the legal complexity invoked by the pro-corporation organic theory. To ease the conviction of corporate offenders and promote justice by circumventing this theory, several Australian jurisdictions have recently introduced statutory industrial manslaughter laws that demonstrate both convergence and divergence in definitions of the offense and offenders. This Article aims to appraise the efficacy of these laws of three Australian jurisdictions in terms of facilitation of conviction with a view to promoting sustainable development by protecting workers.

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I. INTRODUCTION

The concept of capitalism rests on competition amongst the market players that necessitates competitive production cost to win the race and maximize profits. For this, sometimes disproportionate pressures are meted out to workers making them the ultimate victims and the sole

object of inhuman exploitation. The ILO estimates that currently a total of 2.3 million workers die from work-related injuries and diseases worldwide every year, numbering over 6,000 deaths every single day, and another 160 million breadwinners suffer from nonfatal diseases.¹ They are being killed largely with impunity, although they are the mainspring of development, which cannot be sustainable without protecting workers from peril. Maximizing profits for one stakeholder at the cost of another amounts to a zero-sum game, threatening corporate sustainability with eventual instability. The two constituent components of the concept of sustainable development (SD) are development and sustainability. They originally emerged independently but are now integrated into a single concept of SD in which one is integral to the other in order to produce enduring benefits for all stakeholders of business ventures. Neoclassical economists accentuate that there is no incongruity between development and sustainability,² whilst Sachs, emphasizing their interplay, argues that one cannot persist without the other.³ Both are thus regarded as a critical consideration in the contemporary workplace.

The responsibility of businesses to respect all human rights is stated to be a minimum standard, rather than a legal obligation.⁴ The right to development is “an inalienable human right by virtue of which all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.”⁵ Accordingly, all people are capable of realizing all human rights and fundamental freedoms, as proclaimed by the U.N. Declaration on the Right to Development 1986 (RTD Declaration).⁶ However, both the contents and obligations set out in the RTD Declaration are still disputed, despite the Vienna World Conference on Human Rights⁷ and the U.N. Agenda for Sustainable Development Goals 2030 (SDGs)⁸ reinforcing them as a pivotal part of the international

1. *The enormous burden of poor working conditions*, INTERNATIONAL LABOR ORGANIZATION, https://www.ilo.org/moscow/areas-of-work/occupational-safety-and-health/WCMS_249278/lang--en/index.htm [<https://perma.cc/K5QJ-RGP7>].

2. Sharachchandra M. Lélé, *Sustainable Development: A Critical Review*, 19 WORLD DEV. 607, 609 (1991).

3. Wolfgang Sachs, *Environment*, THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER 24, 28 (Wolfgang Sachs ed., 2d ed. 2010).

4. Audrey Guaghan, *Business and Human Rights and the Right to Water*, 106 AM. SOC'Y INT'L L. PROC. 52, 52 (2012).

5. G.A. Res. 41/128, Declaration on the Right to Development art. 1 (Dec. 4, 1986).

6. *Id.*

7. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF. 157/23 (June 25, 1993).

8. G.A. Res. 70/1, Transforming Our World, the 2030 Agenda for Sustainable Development, 10, 35 (Sept. 25, 2015), <https://sdgs.un.org/2030agenda> [<https://perma.cc/EY5D-GNXX>].

human rights framework.⁹ The SDGs appear to be a tenacious initiative to put state and non-state actors together to shoulder the responsibility for development with a sharing spirit.¹⁰ In parallel, the U.N. Global Compact is engaged in promoting their ten principles and driving progress towards achieving SDGs, with a missionary vision that business is a force for good.¹¹

SDG 17 especially aims to strengthen the means of implementation and revitalize the global partnership for SD. The SDGs have been instrumental in understanding the notion of international SD.¹² Businesses operate with a social license, implicitly earned through “consistent and trustworthy behavior and interactions with stakeholders”¹³ comprised of the members of the society where they bring their activities to bear by using corporate influence to provide service. This is termed a “social contract” between businesses and respective societies,¹⁴ which, by implication, ethically requires the former not to harm the latter whose acquiescence enables commercial enterprises to operate and make profit. This view has visibly blossomed in the corporate sector in many countries, particularly in Australia, during the 1990s.¹⁵ Despite such international initiatives to protect stakeholders residing in relevant places and the recognition of social contracts to avoid harm, a study conducted by the Special Representative of the Secretary-General of the United Nations (SRSG) discovered corporate violations of all categories of human rights across several industries.¹⁶

9. Tamo Atabongawung, *A Legally-Binding Instrument on Business and Human Rights: Implications for the Right to Development in Africa*, 21 AFR. HUM. RTS. L. J. 262, 263 (2021).

10. *Id.* at 271.

11. U.N. Global Compact, *Business as a Force for Good*, <https://www.unglobalcompact.org/what-is-gc/mission> [<https://perma.cc/8A7K-HKPB>] (last visited Jan. 13, 2023).

12. Jennifer Wills, *Sustainable Development Is Good for Business*, 48 TRENDS 12, 13 (2017).

13. LEEORA BLACK, *THE SOCIAL LICENSE TO OPERATE: YOUR MANAGEMENT FRAMEWORK FOR COMPLEX TIMES* 18 (2013).

14. JOHN MORRISON, *THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE* 23–26 (2014).

15. *Id.* at 14.

16. See Special Representative of the Secretary-General of the United Nations (SRSG), *CORPORATIONS AND HUMAN RIGHTS: A SURVEY OF THE SCOPE AND PATTERNS OF ALLEGED CORPORATE-RELATED HUMAN RIGHTS ABUSE* (U.N. Doc. A/HRC/8/5/Add.2, May 23, 2008), <https://undocs.org/A/HRC/8/5/Add.2> [<https://perma.cc/RG77-JT4H>], summarized in JOHN GERALD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* 19–27 (2013); PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 560–61 (3d ed. 2021).

Industrial killings continue to grow, even in developed economies, such as the United States of America¹⁷ and European Union.¹⁸ Conversely, the statutory industrial manslaughter regimes in Australia have started to decrease such fatalities,¹⁹ which stimulates the undertaking of the present study. To stay within an acceptable length, this Article examines, the Australian Capital Territory (ACT), Queensland, and the Northern Territory (NT) statutory laws of industrial manslaughter focusing on the similarities and dissimilarities between the laws by employing a comparative method, aimed at assessing their efficacy by drawing on archival primary and secondary materials. These three jurisdictions have been chosen as they introduced statutory manslaughter laws before others in Australia. The pioneering industrial manslaughter law of Australia recently lost its original “home and content” following its relocation from the crime legislation to the work health and safety (WHS) law of the ACT. This endeavor, nonetheless, incorporates an examination of the relevant parts of that previous law of the ACT as the foundation of the statutory laws concerning workplace deaths in Australia.

The current pieces of state and territory WHS legislation have been drafted based on the Australian federal statute titled the *Work Health and Safety Act 2011* (Cth). The federal parliament initially enacted this framework legislation in consultation with states and territories in Australia in order “to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces” and “to facilitate a consistent national approach to work health and safety” in the country.²⁰ States and territories then individually embraced the federal legislation as their own, and they have subsequently modified as they like, which has created some disparity. The original version of the federal legislation did not have any industrial manslaughter provisions, which have been incorporated recently by some of the jurisdictions at different times, whilst others still rely on the common law for this offense.

17. AFL-CIO, *Death on the Job: The Toll of Neglect, 2022* (Order the Death on the Job Report) (Apr. 26, 2022), <https://aflcio.org/reports/death-job-toll-neglect-2022> [<https://perma.cc/QVD5-ZS7X>]; Walter Jones, *Number of Worker Deaths in Construction Continues to Rise* (Feb. 2018), <https://www.lhsfna.org/number-of-worker-deaths-in-construction-continues-to-rise/> [<https://perma.cc/GT2F-B75B>].

18. The European Trade Union Confederation (E.T.U.C.), *Workplace Deaths Rising in 12 EU Countries* (Oct. 28, 2022), <https://www.etuc.org/en/pressrelease/workplace-deaths-rising-12-eu-countries> [<https://perma.cc/75HN-4DWZ>].

19. Worksafe-Queensland, *New Statistics Reveal Continued Fall in Workplace Fatalities*, <https://www.worksafe.qld.gov.au/news-and-events/newsletters/esafe-newsletters/esafe-editions/esafe/december-2021/new-statistics-reveal-continued-fall-in-workplace-fatalities> [<https://perma.cc/S86R-C2QL>].

20. *Work Health and Safety Act 2011* (Cth), s 3 (Austl.).

This Article is split into seven parts. Part I, as above, introduces the topic referring to the distressing fatalities of industrial manslaughter, which violate human rights and hinder sustainable development. Part II seeks to demonstrate the interplay amongst business, human rights, and sustainable development. Part III segregates corporate killings from other types of culpable homicides, whilst Part IV explains the inception of the statutory industrial manslaughter laws in Australia. Part V carries out a comparative appraisal of various aspects of the physical elements of corporate manslaughter laws in three selected jurisdictions in Australia. Part VI critically analyses the mental elements of the offense by way of comparison amongst the laws of the chosen jurisdictions. Part VII concludes this Article with eleven specific recommendations to improve the relevant laws of Australia that may also be useful for other nations in addressing their workplace deaths.

For clarity, deaths at work are expressed in different terms. These include corporate manslaughter, industrial manslaughter, corporate homicide, workplace manslaughter, workplace death, and so on. All these terms are used synonymously in the present research. Companies and corporations are also used interchangeably.

II. BUSINESS, HUMAN RIGHTS, AND SUSTAINABLE DEVELOPMENT— CONCEPTUAL UNDERPINNINGS AND INTERPLAY

A. *Business*

The overwhelming majority of large business organizations are corporations which are regarded as “organs of society,” however, they are specialized economic organs, rather than democratic public interest establishments.²¹ Professor John Ruggie who had previously worked on the establishment of the U.N. Global Compact said as the SRSG that “business and human rights is a microcosm of a larger crisis in contemporary governance: the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”²² Scottish economist Adam Smith is widely believed to be the father of the modern economic theory of capitalism for his ground-breaking publication in 1776, briefly known as *The Wealth of Nations*.²³ Smith strongly opposed government intervention in the market in describing the industrialized capitalist

21. SRSG, PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS ¶ 53 (U.N. Doc. A/HRC/8/5, Apr. 7, 2008), <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> [<https://perma.cc/TY7C-CCYW>].

22. RUGGIE, *supra* note 16, at xxiii.

23. See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Univ. of Chicago 1997) (1776) (commonly known as “The Wealth of Nations”).

system. He argued that the force of the invisible hand would regulate the market. This old concept has lost its usefulness these days.²⁴ Smith's proponent, Nobel laureate Milton Friedman seriously postulated in 1970 that the only social responsibility of business enterprises had been to maximize profits.²⁵ This view is also preponderantly redundant in the present corporate climate. The rise of corporate power has resulted in sixty-nine of the richest one-hundred economies worldwide being corporations, not states.²⁶

Following massive corporate misdeeds inflicting harm on humans, biodiversity, and global warming, the concept of absolute freedom of corporations is now effectively excluded from the legal discourse. Such freedom has been displaced by the widely acceptable view of corporate social responsibility (CSR), which at present, is an ingrained part of modern corporate strategy. Consequently, the profit maximization theory, favoring exclusively stockholders, has been overridden by the stakeholder theory, requiring businesses to pursue hybrid goals of achieving social good and economic gains.²⁷ This essentially entails useful workplace safety laws that compel businesses to stay within the rules of the game. This safety is instinctively connected with human rights.

B. Human Rights

Corporate compliance with human rights is an integral part of the social contract referred to earlier.²⁸ The perception of human rights vis-a-vis business now extends to even global warming, as exemplified by the Hague District Court's holdin in *Milieudefensie et al. v. Royal Dutch Shell* that the company was legally obligated to reduce carbon emissions.²⁹ Consistently, the Supreme Court of Canada in *Nevsun Resources v. Araya* held that workers, who had been forcibly conscripted to work and had suffered abuse of their fundamental human rights at

24. See John Lauritz Larson, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 35 J. EARLY REPUB. 1, 12 (2015).

25. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES (Sept. 13, 1970).

26. *69 of the Richest 100 Entities on the Planet are Corporations, Not Governments, Figures Show*, GLOB. JUST. NOW (Oct. 17, 2018), <https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/> [<https://perma.cc/CNN5-AGDV>].

27. Andreas Nilsson & David T. Robinson, *What Is the Business of Business*, 18 INNOVATION POL'Y & ECON. 79, 79–80 (2018).

28. MUCHLINSKI, *supra* note 16, at 563.

29. PETER T. MUCHLINSKI, *ADVANCED INTRODUCTION TO BUSINESS AND HUMAN RIGHTS* 96 (2022) (citing *Milieudefensie v. Royal Dutch Shell PLC*, District Court of the Hague, May 26, 2021, ECLI:NL:RBDHA:2021:5339 (English translation available at <https://uitspraken.rechtpraak.nl/#/details?id=ECLI:NL:RBDHA:2021:5339>) [<https://perma.cc/7U4N-AB8A>].

work, could bring an international human rights-based claim before the courts in Canada against the company's Canadian parent.³⁰ Likewise, pursuant to Principle 1 of the U.N. Global Compact, business organizations should support and respect the protection of internationally recognized human rights.³¹ It further requires businesses to take voluntary actions to positively contribute to the protection and fulfillment of human rights.³² The Principle further clarifies that the positive actions of businesses supporting human rights should be a complement to, and not a substitute for, actions to respect human rights.³³ Similarly, the SDGs also impose positive obligations on businesses by implication to promote human rights and avoid negative impacts by embracing the standards contained in the 2011 U.N. Guiding Principles on Business and Human Rights (UNGPs).³⁴ Going beyond the sanctions of law, Nobel laureate Amartya Sen posits that the concept of human rights is not rooted purely in law, rather it is chiefly a concern of moral and ethical virtue, hence, their observance does not necessarily entail recognizing legal force behind them.³⁵ It means, businesses are obligated to respect human rights beyond the prescription of positive laws.

The 2003 U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (U.N. Norms) and the UNGPs both contribute to normative roots of businesses' responsibility for human rights, and the latter covers their obligation to respect all internationally recognized human rights enshrined in major international instruments within the United Nations system.³⁶ The UNGPs do not create a new law establishing legally enforceable obligations, rather they reflect existing insights into human rights in conformity with other soft law instruments and the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines).³⁷ The UNGPs remain a non-binding human rights instrument.³⁸ Whilst UNGP 17 relates to the

30. *Id.* at 99 (citing *Nevsun Resources v. Araya*, [2020] 1 S.C.R. 166 (Can.)).

31. *The 10 Principles of the UN Global Compact, Principle One: Human Rights*, U.N. GLOB. COMPACT, <https://unglobalcompact.org/what-is-gc/mission/principles/principle-1> [<https://perma.cc/HVS6-FRSM>].

32. *Id.*

33. *Id.*

34. MUCHLINSKI, *supra* note 16, at 64 (citing Shift Project, Oxfam and Global Compact Network Netherlands, *Doing Business with Respect for Human Rights: A Guidance Tool for Companies*, SHIFT PROJECT 114–16 (Nov. 22, 2016)).

35. See Amartya Sen, *Elements of a Theory of Human Rights*, 32(4) PHILOS. PUB. AFF. 315, 315 (2004); Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913 (2006).

36. MUCHLINSKI, *supra* note 29, at 61–62.

37. *Id.* at 100.

38. *Id.*

present topic,³⁹ Principle 13 relates to both direct and indirect involvement of businesses in violating human rights as it requires them to “avoid causing or contributing to adverse human rights impacts through their own activities” and to productively deal with negative consequences when they occur. It also requires business enterprises to take positive action “to prevent or mitigate adverse impacts on human rights that are directly linked to their operations, products or services by their business relationships, even if they have not affected to those impacts.”⁴⁰ The OECD Guidelines adopt this approach of the UNGPs.⁴¹

Distressingly, a 2020 study of the European Union found that corporate motivation for respecting human rights comes predominantly from contemplation of avoiding reputational harms, whilst compliance with the law and regulation is one of the least important motives.⁴² This is again a self-centric consideration, devoid of public good. That selfish forethought should be discarded. Business organizations are development actors, and the concept of human rights is linked to development. As human lives are directly affected by the level of development of the land they live on, the right to development is sometimes termed an “umbrella right” encompassing all other rights of humankind.⁴³

Business enterprises are profit-hungry by nature. The economic globalization, resting on trade liberalization, has promoted competition which implicitly induces large business enterprises to undermine workers’ rights in favor of profit maximization. This situation calls for re-contextualization of our traditional human rights perceptions where only states can be human rights violators by tying non-state actors to the human rights regime.⁴⁴ The state participants at the 1996 World Summit on Social Development unanimously enunciated the due role of business

39. *Id.* at 102.

40. U.N. Office of the High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights (U.N.G.Ps)*, Principle 13, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [<https://perma.cc/8XTB-TQCX>].

41. Org. for Econ. Coop. and Dev. [OECD], *The Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises*, at 31 (2023) (“Enterprises should . . . : 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved; 2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur; 3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship . . .”).

42. *Study on Due Diligence Requirements Through the Supply Chain: Final Report*, at 16 (2020), <https://op.europa.eu/s/yZ79> [<https://perma.cc/JWB7-2F9S>].

43. Atabongawung, *supra* note 9, at 263.

44. Bard A. Andreassen, *Development and the Human Rights Responsibilities of Non-State Actors*, DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS 149, 150 (Bard A. Andreassen & Stephen P. Marks eds., 2d ed. 2010).

actors as “vehicles for social development,”⁴⁵ the concept of which is inherently linked to human rights. It is thus argued that corporations must be held fully accountable for the deleterious impacts of their operations on human rights.⁴⁶ It is also suggested that the members of the society where the corporation operates must be entitled to “have all of their human rights fully respected, protected, promoted, and fulfilled.”⁴⁷ In recognition of the legitimacy of the widespread demand for corporate accountability, an international effort is currently underway to formulate a legally binding instrument imposing human rights obligations on business enterprises following the adoption of the Human Rights Council Resolution 26/9.⁴⁸ It is further recommended that the legally binding instrument should be applied to all types of businesses operating at both the domestic and transnational levels, and should require businesses to adhere to all major international instruments on human rights and fundamental freedoms, including those of the ILO to which the state is a party.⁴⁹ Additionally, they should respect customary international law as well.⁵⁰ The international community is waiting to see whether the current effort will eventually result in global consensus on accepting legally enforceable obligations of businesses to respect human rights.⁵¹

To conclude, currently there are some guidelines and principles urging or encouraging businesses to respect human rights, but no legally enforceable binding obligations are in place at the international level. The global community, however, is highly expecting that international human rights obligations will be firmly imposed on all types of business organizations through binding instruments under the auspices of the United Nations.⁵²

45. States represented at the World Summit for Social Development held in Copenhagen in March 1995 resolutely agreed on the need to place people at the center of development. See UNITED NATIONS, PEACE, DIGNITY AND EQUALITY ON A HEALTHY PLANET, <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html> (last accessed Jan. 26, 2022).

46. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) YALE L.J. 443, 448 (2001); U.N. Office of the High Commissioner on Human Rights, *Corporations Must Be Held Accountable for Human Rights Violations* (Feb. 20, 2012), <https://www.ohchr.org/en/stories/2012/02/corporations-must-be-held-accountable-human-rights-violations> [<https://perma.cc/DZ4B-WJFJ>].

47. Clarence J. Dias, *Corporate Human Rights Accountability and the Human Right to Development: the Relevance and Role of Corporate Social Responsibility*, 4 NUJS L. REV. 495, 513 (2011).

48. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (June 26, 2014). See Atabongawung, *supra* note 9, at 276.

49. Atabongawung, *supra* note 9, at 287.

50. *Id.*

51. *Id.* at 289; MUCHLINSKI, *supra* note 29, at 118.

52. MUCHLINSKI, *supra* note 29, at 118.

C. Sustainable Development

The word “development,” as viewed by several neoliberal and modern development theories established over the past sixty years⁵³ merges with the contemporary understanding of the term to refer to a process, the outcomes of which are dedicated to improving quality of life and strengthening self-sufficiency in the capability of national economies.⁵⁴ The phrase “sustainable development” was first used with respect to preservation of forestry and afforestation viewed from an ecological perspective.⁵⁵ SD with its broad meaning is defined as “development which meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁵⁶ SD is now widely regarded as a cohesive concept comprised of three pillars: environmental protection, economic improvement and social wellbeing.⁵⁷ Alongside legal prescriptions, SD is obviously a strong ethical or moral consideration of relevant authorities in making decisions,⁵⁸ focusing particularly on generational public good. Quite consistently, the concept of SD from a moral perspective is further argued to have three ethical imperatives: satisfying human needs, ensuring social equity, and respecting environmental limits.⁵⁹ All three of them are critical concerns of global communities, and they obviously relate to human rights. Hence, they have now been critical considerations in assessing social and economic aspects of development across the globe. Business enterprises are thus incorporating the principles of SD into their decisions and operations in order to reduce risk, foster innovation, and protect their stakeholders.⁶⁰

The forgoing discourse demonstrates the interplay between business, human rights and SD. Workers’ protection at work is a fundamental human right attached to the right to life. The ensuing discussion concentrates on protecting human lives at the workplace under work health and safety laws in three selected Australian jurisdictions that

53. KATIE WILLIS, *THEORIES AND PRACTICES OF DEVELOPMENT* 27 (1st ed. 2005).

54. Joseph Remenyi, *What is Development?*, *KEY ISSUES IN DEVELOPMENT* 22, 22 (Damien Kingsbury et al., eds. 2004).

55. Tomislav Klarin, *The Concept of Sustainable Development: From Its Beginning to the Contemporary Issues*, 21 *ZAGREB INT. REV. ECON. BUS.* 67, 70 (2018).

56. MONASH SUSTAINABLE DEV. INST., *What Is Sustainable Development?*, <https://www.monash.edu/msdi/about/sustainable-development/what-is-it> [https://perma.cc/74V6-J6WK].

57. Eleni Sinakou, Jelle B. Pauw, Maarten Goossens & Peter V. Petegem, *Academics in the Field of Education for Sustainable Development: Their Conceptions of Sustainable Development*, 184 *J. CLEAN. PROD.* 321, 321 (2018).

58. Erling Holden et al., *The Imperatives of Sustainable Development*, 25 *SUSTAIN. DEV.* 213, 215 (2017).

59. *Id.*

60. Wills, *supra* note 12, at 12.

introduced their industrial manslaughter laws before others. Its beginning seeks to define industrial manslaughter.

III. INDUSTRIAL MANSLAUGHTER—ITS LEGAL CHARACTERIZATION

Corporate manslaughter tacitly denies the right to life. Manslaughter is incontrovertibly a serious offense in every legal system across the globe. However, industrial manslaughter is not incontestably accepted universally with equal prominence despite its palpable fatal consequence.⁶¹ As an artificial person, the civil and administrative liabilities of corporations are well accepted worldwide. However, its criminal liability still remains a complex and contentious issue in law.⁶² Homicide, as a generic name of unlawful killings, is a serious crime across the globe. This crime is broadly split into two—murder and manslaughter. The differentiation between the two is made based on the fault or mental state of an offender, whilst the conduct element may remain the same or differ, with an identical consequence of death of a human being in both cases. To distinguish in simple terms, murder requires unlawful intentional killing of another person without justification or a valid excuse, whilst manslaughter refers to death of a person caused by another person unintentionally, or intentionally with justification or a valid excuse.⁶³ Australian laws further break up manslaughter into two, manslaughter by an unlawful and dangerous act, and manslaughter by criminally negligent conduct that includes both acts and omissions.⁶⁴ However, the term may vary between jurisdictions, such as culpable homicide, negligent manslaughter, manslaughter by criminal negligence, negligent killing, or unintentional killing—all these terms are used equivalently.

Industrial manslaughter is generally characterised as being manslaughter by criminal negligence (MCN). It takes place while at

61. Muirgen O'Seighin & Andrew Wydmanski, *Industrial Manslaughter Laws Around Australia*, ALLENS (Jan. 31, 2022), <https://www.allens.com.au/insights-news/insights/2022/01/Industrial-manslaughter-laws-around-Australia/> [<https://perma.cc/XNY2-LL94>] (explaining that three out of eight Australian jurisdictions, Tasmania, New South Wales, and South Australia, have not enacted laws about industrial manslaughter; although the latter two have previously unsuccessfully attempted to pass such laws).

62. See, e.g., D. R. Fischel & A. O. Sykes, *Corporate Crime*, 25 J. LEG. STUD. 319, 319 (1996); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J. L. PUB. POL'Y 833 (2000); V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); John C. Coffee, *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Joseph F. C. DiMento, Gilbert Geis & Julia M. Gelfand, *Corporate Criminal Liability: A Bibliography*, 28 WEST. STATE UNIV. LAW REV. 1 (2000).

63. See, e.g., *The Queen v Lavender* (2005) 222 CLR 67 (Austl.); *Lane v R* [2013] NSWLR 317 (Austl.); *Grant v R* [2014] NSWLR 67 (Austl.).

64. DAVID BROWN ET AL., *CRIMINAL LAWS: MATERIALS AND COMMENTARY ON CRIMINAL LAW AND PROCESS IN NEW SOUTH WALES* 775–866 (7th ed. 2020).

work, not necessarily at the usual workplace of an employee. The victim may die instantly at the workplace, or receive serious injuries resulting in subsequent death. Victims typically include workers, however, they can also be visitors or clients of the business, depending on the coverage by a particular law.

IV. INCEPTION OF STATUTORY INDUSTRIAL MANSLAUGHTER LAWS IN AUSTRALIA

The Australian Capital Territory (ACT), the capital of the nation, has been the pioneer in legislating corporate manslaughter law in the common law world since 2003.⁶⁵ The ACT enacted the industrial manslaughter provisions and incorporated them initially into its Crimes Act 1900 (ACT-CA1900) in 2003 with effect from March 2004. However, it shifted them to the Work Health and Safety Act 2011 (ACT-Act) in August 2021 with effect from November 12, 2021. The United Kingdom followed this lead by legislating its Corporate Manslaughter and Corporate Homicide Act 2007 (UK-CMA2007) that came into force in April 2008, which is described as a “landmark in law.”⁶⁶ However, unlike the industrial manslaughter provisions in the ACT-CA1900 which was applicable to both business entities and their executives, the UK-CMA2007 can be applied to only business organizations, leaving executives’ liability under the common law negligent manslaughter.⁶⁷ Business organizations can be found guilty of this offense based on serious management failures constituting a gross violation of a duty of care occasioning death at work, as prescribed in the UK-CMA2007 for the first time in the United Kingdom.⁶⁸ Following the enactment of industrial manslaughter laws in the ACT and the United Kingdom, four other Australian jurisdictions have gradually inserted industrial manslaughter provisions into their respective occupational health and safety legislation. These jurisdictions include Queensland, the Northern Territory, Victoria, and Western Australia. The remaining three jurisdictions (New South Wales, South Australia and Tasmania) still remain reliant on the common law of negligent manslaughter, the enforcement of which is complicated by the application of the “directing mind and will theory” or the “identification theory” or “organic theory”

65. See Marsh McLennan, *Industrial Manslaughter Laws Australia: What You Need to Know*, <https://www.marsh.com/au/services/workers-compensation/insights/industrial-manslaughter-in-australia.html> [https://perma.cc/UY4P-V3MW].

66. Health and Safety Executive, *About Corporate Manslaughter*, <https://www.hse.gov.uk/corpmanslaughter/about.htm> [https://perma.cc/E9KC-AZXR].

67. Corporate Manslaughter and Corporate Homicide Act 2007, c. 19 (UK).

68. G. Keith Still, *Crowd Safety and Crowd Risk Analysis*, GK STILL BLOG, <https://www.gkstill.com/Support/Links/CorporateManslaughter.html> [https://perma.cc/HG8C-SF9S].

of corporations (all three used interchangeably) for *mens rea* elements of manslaughter. However, the process of enacting such a law is underway in both New South Wales and South Australia.⁶⁹

The ACT's industrial manslaughter law which was enacted in 2003 was a product of the common law's failure and criminal legislation's shortcoming in convicting businesses of this offense.⁷⁰ The law imposed liability only on the business entities and their executives, excluding other employees whose offenses were to be tried separately under the general manslaughter law. A new Part 2A comprised of sections 49A–49E contained the industrial manslaughter provisions, which kept section 15 of the ACT-CA1900 dedicated to dealing with other manslaughter cases committed beyond the scope of industrial manslaughter.⁷¹ Sections 49A–49E created new offenses which were not covered under the general criminal law and occupational safety law of the time. These provisions of the first enactment by the ACT are helpful to adequately understanding the progression of Australian statutory manslaughter laws, even though they are no longer in force as part of the crime legislation as of November 2021. This is so because those were the foundation of the statutory industrial manslaughter laws in Australia, and subsequent developments can be assessed in the light of their kernel.

The ACT-CA1900 separately defined the offense of the employer and its senior officers in identical words. Section 49C created the manslaughter liability of employers in the following terms:

An employer commits an offense if—(a) a worker of the employer—(i) dies in the course of employment by, or providing services to, or in relation to, the employer; or (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and (b) the employer's conduct causes the death of the worker; and (c) the employer is—(i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or—(ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

Senior officers of the employer could be held criminally liable for manslaughter under section 49D of the ACT-CA1900. These two sections are worded in identical terms with a single modification in

69. See Work Health and Safety Amendment (Industrial Manslaughter) Bill 2021 (NSW) (Austl.); see also Government of South Australia, *Draft Industrial Manslaughter Laws Enter Next Phase* (Oct. 5, 2023), <https://www.safework.sa.gov.au/news-and-alerts/news/news/2022/have-a-say-on-industrial-manslaughter-laws> [<https://perma.cc/8J8N-MM6A>] (last visited Jan. 19, 2023).

70. See S. M. Solaiman, *Liability for Industrial Manslaughter Caused by Robots under Statutory Laws in Australia*, 38 CO. LAW. 225, 226 (2017) (discussing industrial manslaughter laws passed for Australian Capital Territory (Dec. 20, 2003)).

71. See *Crimes Act 1900* (ACT), ss 49A–49E (Austl.).

section 49D replacing “employer” with “senior officers.” Although the penalties are also identical in terms of the length of incarceration and penalty units, the latter’s value significantly vary between business entities and individual offenders, which make the pecuniary penalties markedly different as will be discussed later.⁷²

The above stated laws no longer exist in the ACT-CA1900, as they have been relocated to the ACT-Act with notable modifications by the *Work Health and Safety Amendment Act 2021*.⁷³ Section 10 of the amending legislation declares that the industrial manslaughter offense means an offense against section 34A of the ACT-Act.

V. A COMPARATIVE APPRAISAL OF ASPECTS OF THE PHYSICAL ELEMENTS OF INDUSTRIAL MANSLAUGHTER LAWS IN AUSTRALIA

Admitting the general principle of criminal law, both *actus reus* and *mens rea* elements are required to commit industrial manslaughter as a truly criminal or an indicatable offense. Hence, discussions that ensue carry out a comparative analysis of these constituent elements along with the identification of defendants and victims and the determination of causation as prescribed in the selected jurisdictions. The terms *actus reus* or physical or conduct element are used synonymously to mean the external element of the offense while for the internal element, *mens rea* or fault or mental element are regarded as interchangeable.

A. Statutory Physical Element of Industrial Manslaughter

As can be seen in the above-stated lately defunct sections 49C and 49D of the ACT-CA1900, two separate definitions were provided for the liability of employers and officers.⁷⁴ Unlike its predecessor, section 34A(1) of the ACT-Act defines “industrial manslaughter” itself by replacing “employer” with the word “person” and changing a “senior officer” to an “officer.” It reads:

A person commits an offense if—(a) the person conducts a business or undertaking, or is an officer of a person who conducts a business or undertaking; and (b) the person has a health and safety duty; and (c) the person engages in conduct; and (d) the conduct results in a breach of the health and safety duty; and (e) the conduct causes— (i) the death of a worker; or (ii) an injury to a worker and the injury later causes the death of the worker; or (iii) the death of another

72. See *Legislation Act 2001* (ACT) s 133(2) (Austl.) (providing that a penalty unit is \$160 AUD for an offense committed by an individual, and \$810 AUD when the offender is a corporation).

73. *Work Health and Safety Amendment Act 2021* (ACT) (Austl.).

74. Respectively section 49C and section 49D of the ACT-CA1900 which existed before the 2021 amendment.

person; and (f) the person is reckless or negligent about causing the death of the worker or other person by the conduct.

This section outlines all relevant factors, such as persons to be held liable, conduct triggering liability, fault incriminating a defendant, and conditions to be satisfied for conviction.

B. *Persons to be Held Liable*

The identity of the defendant is critical to the enforcement of the law. The first distinctive point to make is thus the usage of a single word, “person,” to mean both “an employer” and “a senior officer,” which were previously separate potential defendants. Potential defendants are now “persons” and “officers.” The meaning of “employer” used in the previous law was provided in section 49A of the ACT-CA1900,⁷⁵ stating 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.” So workers were those who were recruited by the employer or the employer’s agent who engaged workers as the agent’s workers for the purposes of the employer’s services. It means that both the employer and its agent (deemed an employer) could be held liable for industrial manslaughter. The conduct of an individual worker could be automatically attributed to an employer directly or via an agent.

Conduct includes both actions and omissions. Since an action requires doing something by a human actor, it needs to be attributed to corporations to hold them liable, simply because a corporation cannot do anything without its human agent. However, unlike an action, an omission represents inaction; therefore, no involvement of a human actor is required to commit an omission by a company. Thus the omission of a worker as a conduct element need not be attributed to corporations as a common law principle,⁷⁶ which is reinforced by section 50 of the ACT’s *Criminal Code 2002* (ACT-CC2002). The ACT-CC2002 applies to all pieces of legislation of the ACT where relevant. Section 50 of the ACT-CC2002 concerns conduct elements and reads, “[a] physical element of an offense consisting of conduct is taken to be committed by a corporation if it is committed by an employee, agent or officer of the corporation acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority.”

75. Section 49A of the ACT-CA1900 was the “dictionary section” for all the terms used in the industrial manslaughter provisions.

76. *Linework Ltd. v. Department of Labor* [2001] 2 NZLR 639 at [25] per Blanchard J (N.Z.).

The definition of employer is broad, encompassing all types of business organizations, and needing no formal attribution of human conduct to corporations as a separate person.

A flaw in section 34A(1) mentioned above is evident in that while “person” and “officer” are separately mentioned in subsection (a), the rest of the section does not include “officer” with respect to the relevant duty, or breach thereof, or causing the victim’s death. It results, by implication, that only a person conducting a business or undertaking (the PCBU) can be held liable for the offense at hand. It needs to be clarified that both the PCBU and its officers engaged in the prohibited conduct will be liable for industrial manslaughter, subject to satisfaction of certain conditions, as will be discussed shortly below.

Section 27 of the ACT-Act offers the meaning of “person” which includes a corporation, an unincorporated association and a partnership. Section 5 of the ACT-Act provides an extensive definition of a PCBU, which effectively encompass all types of businesses, regardless of whether or not they are for profit or are conducted alone by a single individual or with others, but it excludes volunteer associations where volunteers themselves work together for one or more community purposes without having to appoint any worker. If the business or undertaking is run by a general partnership, the word “person” will refer to each of the partners, whilst incorporated partnerships will be treated alike with corporations as having separate legal personality. Further, section 160 of the *Legislation Act 2001* (ACT), which applies to all statutes of the jurisdiction, clarifies that a person generally includes a corporation and individual. Taken together, it is clear that the word “person” covers both business entities and individuals. However, additional clarification in section 34A(1) about the liability of both would be helpful because they are mentioned separately in the section. Officers remain effectively detached from the requirements of the offense.

There is a terminological difference about human actors between the provisions of the previous ACT-CA1900 and the current ACT-Act, as the former used “senior officers” whilst the latter designates them “officers.” The previous section 49A adopted the definition of officers from s9 of the *Corporations Act 2001* (Cth) as it was at the time of commencement of the industrial manslaughter law, which was sufficiently broad. Section 49A defined “senior officers” as encompassing both employees of government as well as those of corporations who occupied executive positions and who had the power to make, or take part in making, decisions affecting all or a substantial part of the functions of the government or corporation. The offense definition in the ACT-Act has combined both government and corporate officers in a wider manner under the general designation of “officers” in place of “senior officers.” However, the imbedded dictionary of the ACT-Act describes the meaning

of an “officer” evidencing no substantial difference between the previous law and the current law when it comes to defendants—other than the separate mentions of business entities and their officers in the old law. Whilst the current law provides wider coverage of businesses, a clear assertion of officers’ liability linking to other requirements of the offense would arguably be helpful with respect to both the creation of deterrence and facilitation of conviction. Otherwise, individual officers will look for legal loopholes to escape liability.

Queensland was the second jurisdiction to follow suit in enacting industrial manslaughter law. However, unlike the ACT, Queensland incorporated the provisions into the *Work Health and Safety Act 2011* (Qld-Act) from the beginning. The *Work Health and Safety and Other Legislation Amendment Act 2017* inserted Part 2A containing sections 34A–D into the Qld-Act. Section 34A of the Qld-Act offers definitions of the terms and concepts critical to industrial manslaughter, whilst section 34B notes the exceptions by excluding liability of certain persons in specific circumstances. Section 34C defines the offense of business entities, and section 34D imposes liability on ‘senior officers’ of the business. Similar to section 34A of the ACT-Act, section 34C(1) of the Qld-Act defines “industrial manslaughter” in terms of a PCBU as:

A person conducting a business or undertaking commits an offense if— (a) a worker— (i) dies in the course of carrying out work for the business or undertaking; or (ii) is injured in the course of carrying out work for the business or undertaking and later dies; and (b) the person’s conduct causes the death of the worker; and (c) the person is negligent about causing the death of the worker by the conduct.

This is followed by section 34C(2), which simply mentions that an offense against subsection (1) is a crime, implying that it is an indictable offense.

Unlike the ACT-Act, the Qld-Act defines an officer’s crime separately but in identical terms, as was the case in the previous provisions of the ACT-CA1900. The meaning of a PCBU is defined in the same way in section 5 of the Qld-Act as in section 5 of the ACT-Act, with only one additional exclusion in the Qld-Act, that an elected member of a local government does not in that capacity conduct a business or undertaking. Therefore, unlike the laws of the ACT, there is no ambiguity with respect to potential individual offenders in Queensland in which both business entities and individuals can be held liable simultaneously for a single offense, by imputing human actions to the artificial person.

However, the Qld-Act defines “senior officer” differently from the definition of “officer” in the ACT. According to section 34A(1) of the Qld-Act, a senior officer of a PCBU “means—(a) if the person is a

corporation—an executive officer of the corporation; or (b) otherwise—the holder of an executive position (however described) in relation to the person who makes, or takes part in making, decisions affecting all, or a substantial part, of the person’s functions.” The same section also defines an “executive officer” of a corporation as being “a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer.” If the two definitions are read together, an “officer” in the ACT and a “senior officer” in Queensland carry the same meaning particularly with respect to their roles.

The NT is the third jurisdiction to introduce a statutory industrial manslaughter law in its *Work Health and Safety Act 2011* (NT-Act), which came into force on February 1, 2020. It defines industrial manslaughter in much the same way as the ACT does in terms of defendants and *actus reus* ingredients, with a noticeable variation that the person’s engagement in the prohibited conduct needs to be intentional.⁷⁷ The purpose of the mention of “intention” with respect to engagement is not clear because subsection (2) does not make this engagement a strict liability provision. Limb (e) of section 34B(1) adds *mens rea* elements applicable to the commission of this offense except for limbs (a) and (b) which are strict liability provisions under section 34B(2). The usefulness of the additional requirement of intentional engagement in conduct is questionable because, as a matter of general principle, no one can be punished for involuntary or unintentional conduct constituting an indictable offense (i.e., except regulatory offenses, such as breaching traffic regulations). Although the NT-Act does not declare it an indictable offense, its equivalents in the ACT and Queensland do. As per the decision of the High Court of Australia (HCA) in *He Kaw Teh v. The Queen*,⁷⁸ one of the considerations in adding *mens rea*, where the legislation is silent, is to take into account whether the offense is truly criminal. Given the maximum punishment of a life sentence under section 34B(1), the offense is overtly truly criminal which warrants voluntary or intentional acts. This additional requirement can create a scope for the offenders to circumvent liability if the prosecution fails to prove that the act was intentional, which follows purely a subjective test. This additional explicit requirement giving extra incentive to defendants should be removed to avoid unnecessary complexity.

Section 5 of the NT-Act replicates the definition of PCBU from the Qld-Act in identical terms including the exclusion of elected person of local government council is not a PCBU. The term “officer” is defined in section 4 of the NT-Act by adopting the definition from the *Corporations*

77. *Work Health and Safety Act 2011* (NT) s 34B (Austl.).

78. *He Kaw Teh v The Queen* [1985] HCA 43 (Austl.).

Act 2001 (Cth),⁷⁹ and additionally adding officers of the Crown and those of public authority. However, it follows the ACT-Act in articulating the imposition of liability on a PCBU. Consequently the same ambiguity in relation to officers, as noted in discussing the law of ACT exists, which requires clarification for the efficacy of the law of NT as well. Other than this opacity, the definition of potential defendants sounds fine and consistent with others.

C. *Conduct Required to be Satisfied for Conviction*

Both the previous and current laws of the ACT require the prohibited conduct to cause the victim's immediate or subsequent death as a consequence of the workplace injury. The term "conduct" was not defined in the previous law, instead it referred to the ACT-CC2002 for its meaning.⁸⁰ Section 13 of the ACT-CC2002 defines "conduct" as "an act, an omission to do an act or a state of affairs." Although "conduct" was not defined, for the purposes of the offense at hand, sections 49B(1)–(2) of the ACT-CA1900 described an omission as a conduct element being established if it was an "omission" to perform the duty to prevent or avoid danger to the human life or safety or health of a worker of the employer when the danger arises from: (a) an act of the employer or the senior officer; or (b) anything in the employer's or the senior officer's possession or control; or (c) any undertaking of the employer or the senior officer. It evidently means that employers or senior officers had a duty to avoid or prevent harm to the life, safety or health of workers. Failure to do so would be breach of that duty, satisfying the *actus reus* element of omission. This was a good description of omission, but it does not exist any longer since the repeal of the whole part 2A of the ACT-CA1900 in 2021.

No definition of the word "act" is found in either the ACT-CA1900 or in the ACT-CCA2002. Therefore, the legislation implicitly accepts its dictionary meaning. As defined in Black's Law Dictionary for legal purposes, an act is "something done voluntarily by a person; the exercise of an individual's power" In a more technical sense, it means something done voluntarily by a person, and of such a nature that certain legal consequences attach to it.⁸¹ The UK High Court of Justice (Chancery Division) in *Piggott v. Middlesex County Council* interprets

79. *Corporations Act 2001* (Cth) s 9 (Austl.).

80. Section 49A of the ACT-CA1900 referred to section 13 of the ACT-CC2002 for the definitions of others terms including "conduct," which had not been defined in that dictionary section for industrial manslaughter. Section 13 of the ACT-CA1900 defines "conduct" for all offenses created by the legislation.

81. Black's Law Dictionary (6th ed. 1990).

an act in law as being any act which a person is legally bound to do, or is done under statutory compulsion.⁸²

The ACT-Act does not define the word “conduct” either. It however proffers the meaning of “engage in conduct” which denotes doing an act or omitting to do an act.⁸³ The ACT-Act thus succinctly includes both actions and omissions, similar to the previous law stated above. In brief, the conduct which is prohibited under the industrial manslaughter law embraces both actions and inactions, any breach thereof may trigger prosecution and end up in conviction, if other requirements are met. However, an omission in the context of manslaughter is a crucial part of prohibited conduct, and the repealed sections 49B(1)–(2) of the ACT-CA1900 provided a good definition of “omissions” as stated above. It is recommended that the ACT-Act incorporate this definition, which is well crafted especially for industrial manslaughter purposes. This recommendation can be premised on its clarity against the ambiguity of its current alternative general description of the term contained in section 13 of the ACT-CC2002.

Unlike the ACT law, the Qld-Act provides a concise definition of “conduct” for the purposes of industrial manslaughter, as it stipulates, conduct means an act or omission to perform an act. Unlike its counterparts in the ACT and Queensland, the NT-Act does not have any dictionary as a separate schedule. Instead, its section 4 provides definitions of important terms used in this legislation. However, section 4 does not provide any separate definition of conduct, although it describes the meaning of “engage in conduct” as being doing an act or omitting to do an act.

Therefore, the relevant conduct for industrial manslaughter in all of these three jurisdictions covers both actions and omissions causing death of a victim. It represents a standard brief meaning of conduct. However, given the significance of an omission in the context of manslaughter, the definition of omissions provided in section 49B(1) of the ACT-CA1900 was drafted with a greater clarity for the present purposes, which could be more helpful for the efficacy of the law.

D. Duty to be Breached by the Defendant’s Conduct

Any valid complaint should involve a breach of a legally defined duty resulting in infringement on another’s right, sometimes regardless of the actual outcome. Similarly, an occurrence of industrial manslaughter warrants a breach of duty by the defendant’s conduct directly or indirectly by imputation. However, the old provision in the ACT did not provide any definition of the duty. Instead, it mentioned that defendant’s “conduct

82. *Piggott v. Middlesex Cnty. Council*, [1909] 1 Ch 134, 142 (U.K.).

83. *Work Health and Safety Act 2011* (ACT) (Austl.).

causes” the consequence of worker’s death. Filling in that gap, section 34A(1)(b) of the ACT-Act specifies that the defendant has a “health and safety duty” (typically owed to the victim), and the defendant’s conduct results in a breach of that duty. More appreciably, section 34A(4) expounds in great detail the meaning of the “health and safety duty,” referring to a duty imposed under section 19 (Div. 2.2), sections 20–26 (Div. 2.3) or section 27, as below.

As pronounced in section 19 of the ACT-Act, a PCBU, as its primary duty of care, must ensure, so far as is reasonably practicable, the health and safety of workers and other persons while at work, and provide a safe work environment, and impart adequate training to workers on health and safety. The preceding section 18 explains the phrase “reasonably practicable” in relation to this duty as that “which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters,” such as hazards, risks, concerns actually or reasonably known to the persons, the availability and suitability of ways to eliminate or minimize the risk, and whether the cost to eliminate or minimize the risk is grossly disproportionate to the risk.

To be brief, a close reading of all these defining sections (sections 18–27) suggest that they all concern WHS and obligate the defendants to exercise reasonable care and diligence to avoid any harm to workers or others that may attract this liability. Accordingly, both business entities and their officers must exercise due care and diligence in discharging their WHS responsibilities and strictly comply with them. Such a detailed explanation of the relevant duty is good for both successful enforcement and deterrence.

Unlike the ACT-Act, its Queensland equivalent defines “industrial manslaughter” much the same way as the ACT-CA1900 did. Thus, the offense defining sections are silent about the relevant duty and instead require the defendant’s conduct to cause the death of the worker.⁸⁴ There seems to be a “hide and seek” game about the definition of “health and safety duty.” This is so because the dictionary in Schedule 5 of the Qld-Act refers to section 30 for the definition of “health and safety duty,” which in turn suggests to see its sections 2–4 for the meaning of the duty. Frustratingly, none of the sections 2, 3 and 4 contains any definition of the duty in question. Instated, section 2 is about the commencement of the Act, section 3 is dedicated to narrating the objects of the legislation, whilst section 4 suggests to look up the dictionary for definitions in Schedule 5. In the end, the meaning of “health and safety duty” remains hidden from the readers. This is a considerable loophole in the legislation. Certainly in any law, clarity is always desirable for the sake of its efficacy

84. *Work Health and Safety Act 2011* (Qld) pt 3 ss 34C, 34D (Austl.).

because any legal uncertainty inhibits proper enforcement and eventually accords the defendant the benefit of the doubt culminating in acquittal. This shortcoming should be addressed in line with the duty provisions in the ACT-Act as alluded to earlier, as well as corresponding provisions of the NT-Act, as follows.

The NT-Act highlights the duty with a greater emphasis compared to its ACT counterparts. To commit the offense, the defendant is required to have a health and safety duty under section 34B(1)(a) of the NT-Act. Section 4, containing its dictionary, states that health and safety duty means a duty imposed under Part 2, Division 2, 3 or 4 consisting of sections 13–26. Notably, Part 2 of the legislation is dedicated to health and safety duties, and detailed meanings of the duty in sections 19–27 capture every aspect of workplace safety and protection of individuals irrespective of the person's official identity. The description of the duty can be followed by others. The commission of manslaughter requires breach of the relevant duty by engaging in conduct, discussed below.

E. Breaching the Duty by Engaging in Conduct

Notably, the repealed provisions of the ACT-CA1900 did not include any specific requirement of breach, nor did it define “health and safety duty,” although the defendants had “the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises.”⁸⁵ So the deemed duty was a “health and safety” duty by implication. However, the ACT-Act and NT-Act clearly define the duty while Queensland's law remains silent like the ACT-CA1900.

The defined and deemed duty in all three jurisdictions is a “health and safety duty” which is required to be breached in order to commit the offense in question. As needed under the ACT⁸⁶ and NT⁸⁷ laws, the conduct must breach the duty. The designated duty can only be breached by engaging in conduct which means doing a prohibited act or omitting to do a legally obligated act. However, the NT law adds a further requirement that the defendant *intentionally* engages in the conduct breaching the duty.⁸⁸ The purpose of this additional word has not been clarified anywhere in the legislation. It may create unnecessary complexities, placing a huge burden on the prosecution, which is likely to struggle with proving the defendant's intentionality or disproving the complainant's or prosecutor's claim of lack of intention. Voluntariness as an *actus reus* element is a generic and implied requirement,⁸⁹ which will suffice to serve the purpose.

85. *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) s 49B (Austl.).

86. *Work Health and Safety Act 2011* (ACT) s 34A(1)(d) (Austl.).

87. *Work Health and Safety Act 2011* (NT) s 34B(1)(d) (Austl.).

88. *Id.* at s 34B(1)(c).

89. *See Criminal Code 2002* (ACT) s 15 (Austl.).

Unlike the ACT and NT, the Qld-Act does not directly necessitate a breach of the relevant duty, instead, it rests on causing death by the conduct. Although causation is a separate element, it can be argued that the word “breach” is embedded in the expression that the defendant’s conduct must cause the victim’s death. Nevertheless, precision with adequate eloquence is always helpful in law. Hence, the Queensland law is recommended to be clarified in line with the other two by adding the requirement of breach of the duty in question.

F. Persons Whose Death May Constitute Industrial Manslaughter

The protection of workers remain a central concern of the laws of industrial manslaughter. The previous section 49A of the ACT-CA1900 defined the term “worker” very broadly by encompassing an employee, an independent contractor, an outworker, an apprentice, a trainee and a volunteer. Adding further clarity, all of these were precisely defined separately in section 49A adopting their ordinary meanings. Of them, “outworker” seems to be distinctive, which was defined to be “an individual engaged by a person (the principal) under a contract for services to treat or manufacture articles or materials, or to perform other services in the outworker’s own home, or on other premises not under the control or management of the principal.”⁹⁰ The contract with the outworkers must be to “provide services” to, or in relation to, a person which includes performing work for, or in relation to, the person.

When the above-stated provisions were shifted to the WHS legislation, the definition became even broader. Workers covered by the ACT-Act are identified in its section 7 which spells out that a person is a worker if he/she carries out work in any capacity for a PCBU. The list of these persons includes an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labor hire company who has been assigned to work in PCBU, an outworker, an apprentice or trainee, a student gaining work experience, a volunteer, and a person of a prescribed class (not defined this class). Notably, even a police officer while on duty and the PCBU, if the person is an individual and carries out work in that business or undertaking, can be a worker within this definition for the purposes of ACT-Act. The new definition of worker is obviously broader than its previous counterpart. The protection of such remote workers and other persons on duty, including police officers, is appreciable from the perspective of WHS.

The Qld-Act imposes liability for the death of only workers, who are identified in section 34A(3) for the present purposes. According to section 34A(3), workers include “a worker who is at a workplace to carry out work for the business or undertaking, including during a work break.”

90. *Crimes Act 1900* (ACT) s 49A (Austl.).

This definition is much narrower compared to its ACT counterpart in that the Qld-Act considers the safety of only a worker who is physically at the workplace, excluding the safety of the same person when working for the PCBU outside the physical boundary of the workplace, let alone protecting others and outworkers as defined in the ACT law. This narrow-down is not appreciable. Such a narrow scope of coverage evidently undermines the protection of workers while staying away though working directly or indirectly for a given PCBU.

The definition of the protected persons under the NT-Act looks wider than its Queensland equivalent, though may be narrower than its counterpart in the ACT-Act. The NT-Act extends its protection to “an individual” to whom the relevant duty is owed.⁹¹ In one sense, this provision is appreciable as it aims to protect any persons irrespective of their employment relation with the PCBU, which is distinctive from the other two. The true extent of its protection will be directly affected by the explicit condition of owing the duty to the victim, unlike other laws. This condition requires the adoption of the common law “neighbor doctrine,”⁹² which would be very useful for widening the coverage. This is because anyone whose harm was reasonably foreseeable would be protected under the neighbor doctrine. Otherwise, a statutory clarification is needed to determine whether it applies to only workers, or outworkers and visitors as well. The neighbor doctrine embraces all of them. The lack of clarity is likely to inhibit its enforcement in a desired manner to achieve the core objectives of the legislation.

G. Causation of Victim's Demise

The causation requirement is the nucleus of the offense at hand, and can be a game changer in that conviction will greatly rely on the level of impact the defendant's conduct had on the victim's death as an essential consideration. It is thus unquestionably agreeable that the death of the victim must be caused by the defendant's conduct. The question, however, is whether the conduct has to be the sole cause, or a major or substantial and operating cause, or just a cause. The ACT-CA1900 required the death to be caused by the employer's or its senior officer's conduct.⁹³ This causal link is also an essential condition in common law manslaughter as held, for example, in *R v. Taktak*.⁹⁴ However, the erstwhile industrial manslaughter provisions of the ACT-CA1900 did not provide any elucidation of causation, and its complementary law, the ACT-CC2002, remained equally silent. Further, neither of the two

91. *Work Health and Safety Act 2011* (NT) s 34B(1)(b) (Austl.).

92. *Donoghue v. Stevenson* [1932] AC 562 (HL) 564 (appeal taken from Scot.).

93. *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) amended the *Crimes Act 1900* (ACT) and inserted ss 49C(b), 49D(b).

94. *R v Taktak* [1988] 14 NSWLR 226, 237 (Austl.).

previous sections, 49C and 49D, explained the meaning of the expression “conduct causes the death.” The complete taciturnity about such a critical issue was a weakness of those statutory provisions, impliedly suggesting to look for the judicial interpretation of the term.

The determination of causation would be less complex, if the victim having no pre-existing condition, had died immediately. The intricacy, however, may arise when the death of a worker with a pre-existing health condition occurred instantly, or at a later point of time from a relevant injury where there had been some intervening cause(s). These situations were also mentioned in the previous ACT law, though without offering any guidance on the applicable type or extent of causation.⁹⁵ Consequently, under the old regime, its meaning had to be drawn from the principles of judge-made law. In this respect, Lord Justice Joff, bringing out the complexity, observed in *R v. Pagett* that “[p]roblems of causation have troubled philosophers and lawyers throughout the ages; and it would be rash in the extreme for us to trespass beyond the boundaries of our immediate problem.”⁹⁶

As a welcome revision, the current provisions in section 34A(4) of the ACT-Act appreciably simplify this issue by stipulating that “a person’s conduct causes death if the conduct substantially contributes to the death.” Hence there is no need for the defendant’s conduct to be the sole or a major cause, rather it will suffice if the conduct was a substantial cause, which appears to have been borrowed from the common law (discussed below). However, there is no further explanation of “substantial contribution” in the legislation. Therefore, reliance on common law is again required for its judicial interpretation, which proffers further guidance.

Pursuant to the common law doctrine of causation, the disputed conduct in the present context has to be one of the causes, rather than being the only cause, as declared in *R v. Pagett*.⁹⁷ However, it needs to be an “operating and substantial cause” of the death in question, and it must be something more than *de minimis*.⁹⁸ The court further clarifies that such a cause need not be a major cause,⁹⁹ and to determine whether or not it was a substantial cause, the trier of facts will apply an objective test.¹⁰⁰ To be fair to both parties or deliver justice to the community, the trier of facts should also pay due regard to a *novus actus* (a supervening or

95. *Crimes Act 1900* (ACT) ss 49C(a)(ii), 49D(a)(ii) (Austl.).

96. *R v. Pagett* (1983) 76 Cr. App. R. 279 (UK).

97. *Id.* at 288.

98. *R v. Hennigan* (1971) 55 Cr. App. R. 262, 265 (UK).

99. *Pagett*, 76 Cr. App. R. at 288.

100. *Royall v R.* (1991) 172 CLR 378, 412 (Austl.); see also Gavin Ruddy, *R v Southampton and Fatal Medical Negligence: An Anomaly or a Sign of Things to Come?*, 3 PLYMOUTH L. REV. 81 (2010).

intervening act or event) that might have potentially broken the chain of causation—if there was any. Affirming the need for this consideration, the Supreme Court of Western Australia in *Krakouer v. Western Australia* pronounced that in deciding whether or not the defendant's conduct was an operating and substantial cause of the victim's demise, any supervening act, which could be an act of anyone, including that of the victim, should be taken into account to determine whether a *novus actus* broke the chain of causation.¹⁰¹ In this respect, the HCA in *Burns v. The Queen*, in determining whether the act of the victim taking a prescribed medicine together with methadone supplied by the defendant was sufficient to break the chain of causation, held that:

The deceased was a sane adult. It is not suggested that his decision to take the methadone was vitiated by mistake or duress. His ability to reason as to the wisdom of taking methadone is likely to have been affected by the drugs that he had already taken but this is not to deny that his act was voluntary and informed. It was informed because he knew that he was taking methadone. He chose to take methadone not knowing what effect that drug would have in combination with the drugs he had already taken. A foolish decision to take a prohibited drug not knowing its likely effects is nonetheless the drug taker's voluntary and informed decision.¹⁰²

The court reinforced that the determination on the supervening act should follow the standard requirement of proof beyond reasonable doubt.¹⁰³ The importance of a *novus actus* factor cannot be gainsaid for the sake of justice in that such an intervention does not necessarily repudiate the potential of defendant's conduct being an operating and substantial cause. To this effect, Lord Parker CJ ruled in *R v. Smith* that “[i]t seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound.”¹⁰⁴ A defendant can, however, be absolved from liability banking on an intervening event only, when it is proved beyond reasonable doubt by applying an objective test that the intervention was “so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused.”¹⁰⁵ The U.K. Divisional Court in the negligent manslaughter case of *DPP Ex p. Jones (Timothy)*, involving a worker's death following

101. *Krakouer v. WA* (2006) 161 A Crim R 347 (Austl.).

102. *Burns v. The Queen* (2012) 246 CLR 334 (Austl.).

103. *See Krakouer*, 161 A Crim R at 347.

104. *R v. Smith* (1959) 2 QB 35, 42–43 (UK).

105. *R v. Pagett* (1983) 76 Cr. App. R 279, 288 (UK); *see also R v. Hallett*, [1969] SASR 141, 149 (Austl.).

an inadvertent act of another employee, pronounced about the employer's liability that the conduct of any employee within the defendant corporation may not be sufficiently independent to constitute a *novus actus interveniens*.¹⁰⁶ The Court in this case further held that:

His [another employee, the crane operator's] inadvertent act was not sufficient to break the chain of causation. An act of gross negligence, independent of any negligence in the system of work, perhaps would have done; but, as far as the evidence went, he was an innocent, or semi-innocent, agent The real cause of the death was the failure to establish a safe system of work in breach of the personal duty imposed by the common law upon an employer . . . and its . . . [senior executives].¹⁰⁷

Now an inference can be plausibly drawn relying on the analysis above that the ACT-Act presents more useful guidance on the determination of causation compared to its recently defunct equivalent. It is certain that the current law requires for the defendant's conduct to be a substantial and operating cause, and with respect to intervening events that break the chain of causation, such an event needs to be completely independent of the defendant's conduct. It is also now established that the victim can be blamed for breaking the chain only for his/her voluntary act with the knowledge of the wrongdoing that it may contribute to his/her own unnatural demise. The law of Queensland, the Qld-Act, also requires the defendant's conduct to be a substantial cause,¹⁰⁸ however, the NT-Act is silent, which may mean the sole cause, given its succinct assertion of the breach "causes the death." Therefore, the NT-Act should be revised by adding that the causation element will be satisfied if the defendant's conduct is proved to be a substantial and operating cause, as analyzed above.

The forgoing appraisal and analysis covers various relevant aspects of *actus reus*, defendants, and workers or victim. It demonstrates loopholes in some laws which can be addressed by their better crafted equivalents in other laws, as identified and recommended. Since it is not a strict or absolute liability offense, its commission entails the mental state of the defendant which must meet the physical element at the time of the offense being committed, as the discussion ensues.

VI. MENTAL ELEMENTS OF INDUSTRIAL MANSLAUGHTER

Mens rea literally refers to criminal intent or "guilty mind" of an accused. As held by the Supreme Court of the United States in *Staples v.*

106. R v. DPP Ex p Jones, [2000] IRLR 373, CRIM. L.R. 858, 859–60 (UK).

107. *Id.*

108. *Work Health and Safety Act 2011* (Qld) s 34A(2) (Austl.).

United States, a *mens rea* element denotes the state of mind legally required to be proved by the prosecution in order to convict a given defendant of a certain crime.¹⁰⁹ The presumption of innocence is a golden thread of criminal law.¹¹⁰ The guilt or fault of an offender comes from *mens rea*. Thus, as a general principle of criminal law, *mens rea* is an essential element, and perhaps the most guilty-centric constituent of a crime that distinguishes a civil wrong from a criminal offense, except for strict and absolute liability offenses. An offense generally occurs when the conduct element meets the corresponding fault element, unless the statute creating the offense provides otherwise.¹¹¹

The mental elements of the defendant's conduct were "recklessness" and "negligence" for both artificial and natural persons under the ACT-CA1900.¹¹² The common law recognizes only grossly or wickedly negligent conduct.¹¹³ The statute deliberately deviates from the common law requirements with a view to facilitating conviction in the backdrop of the latter's inefficacy to hook up the crook. Both of these fault elements are discussed below in turn with reference to the statutes at hand and case law.

A. *Recklessness as the Mens Rea of Industrial Manslaughter—Individual Defendants*

Proving recklessness in the workplace context is a difficult task, because of its requirement of subjective "foresight of, or advertence to, the consequences of an act as either probable or possible and a willingness to take the risk of the occurrence of those consequences."¹¹⁴ The ACT-CA1900 itself did not provide any interpretation of "recklessness" for the present purpose. Instead, as referred to earlier in discussing the conduct element, the ACT-CC2002 provides meanings for mental elements as well. The ACT-CC2002 contains separately two sets of rules to explain the elements of relevant offenses, one for individuals and another for corporations. Sections 17–22 of the ACT-CC2002 contain the provisions for fault elements of individuals, whilst sections 49–55 are dedicated to corporate faults. About an individual's recklessness respecting the consequence and circumstance of an offense, section 20 of the ACT-CA2002 lays down that:

(1) A person is reckless in relation to a result if—(a) the person is aware of a substantial risk that the result will

109. See *Staples v. U.S.*, 511 U.S. 600 (1994).

110. *Woolmington v. DPP*, [1935] AC 462 (HL) 469–70, 480–82 (appeal taken from Eng.).

111. See *Criminal Code 2002* (ACT) ss 11–12 (Austl.).

112. *Crimes Act 1900* (ACT) ss 49C(c)(i), 49D(c)(i) (Austl.).

113. See *Cittadini v. R.*, [2009] NSWCCA 302 (Austl.); *R v. Bateman* (1925) 19 Cr. App. R 8 (HL) (UK); *R v. Adomako*, [1995] 1 AC 171 (HL) (UK).

114. NSW Law Reform Commission, *Report 122: Workplace Deaths* (July 2009), 4 [4.11].

happen; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk. (2) A person is reckless in relation to a circumstance if—(a) the person is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk [emphasis original].

The articulation of the above meanings perceptibly shows that recklessness is a subjective fault element, and the prosecution is required to prove that the defendant was personally aware of a substantial risk of the death of a worker or another person happening, called industrial manslaughter in the present context.¹¹⁵ To clarify, the doctrine of transfer of *mens rea* (malice)¹¹⁶ applies when the defendant was reckless about one worker's serious harm, but eventually and albeit lamentably ended up killing another worker. The subjectivity in the test is fortified by the further onus to prove that the defendant actually knew that it was unjustified to take the risk of causing death (result), given the circumstances surrounding the event. Any subjective *men rea* element is difficult to be made out, unless the defendant pleads guilty voluntarily. This is so because no defendants have any obligation to incriminate themselves, rather remaining silent,¹¹⁷ or outright denial of any wrongdoing or the claim of innocence is a legal right, regardless of the facts.¹¹⁸ In Australia, the right to remain silent is recognized by all courts at state and federal levels as a fundamental common law right.¹¹⁹ A general principle of criminal law is that a person is innocent until proven guilty,¹²⁰ and the burden is on the state to prove the accused's guilt.¹²¹ Hence the recklessness fault element effectively favors defendants. This favor is arguably intensified by the additional requirement that the defendant truly knew that taking of the risk was unjustified given the relevant circumstance. The defendant thus has a choice to claim without any legal burden that he/she was unable to properly judge the

115. Read section 20 of the ACT-CC2002 in combination with previous sections 49C and 49D of the ACT-CA1900.

116. See Shachar Eldar, *The Limits of Transferred Malice*, 32(4) OXF. J. LEG. STUD. 633, 633–58 (2012).

117. See JEREMY GANS, CRIMINAL PROCESS AND HUMAN RIGHTS 204 (2011); Janet Ainsworth, *The Meaning of Silence in the Right to Remain Silent*, THE OXFORD HANDBOOK OF LANGUAGE AND LAW 287–98 (Lawrence M. Solan & Peter M. Tiersma eds., 2012).

118. See *RPS v. The Queen* (2000) 199 CLR 620, 630 (Austl.); *Jones v. R.* [2005] NSWCCA 443 (Austl.); *Sanchez v. R.* (2009) 196 A Crim. R. 472 ¶¶ 47–52 (Austl.).

119. Adam Guest, *Do You Have the Right to Remain Silent in Australia?* (Feb. 14, 2022), <https://guestlawyers.com.au/do-you-have-the-right-to-remain-silent-in-australia/> [<https://perma.cc/S8G4-56CD>] (last visited Jan. 3, 2023).

120. *Momcilovic v. The Queen* (2011) 245 CLR 1 (Austl.).

121. *CB v. Director of Public Prosecutions (NSW)*, [2014] NSWCA 134 at [45] (Austl.).

circumstance leading to an inadvertent misjudgement, which may result in acquittal of a true offender.

The remainder of the statutory interpretation of recklessness, being subsections (3) and (4) of section 20 of the ACT-CC2002 ascertains that the determination of whether risk-taking is unjustifiable is a question of fact, meaning that the jury as the trier of facts will determine the justifiability of defendant's judgment to take the risk. This is an appreciable clarification in that the jury is comprised of ordinary members of the community where the offense has been committed. Further guidance is included in section 20(4) which provides for evidentiary purposes that the defendant's recklessness can be established by proving his/her intention, knowledge or recklessness. However, this may not be very useful, given that all are subjective fault elements, and therefore are harder to prove by the prosecution.

*B. Recklessness as the Mens Rea of Industrial Manslaughter—
Corporate Defendants*

Corporations cannot do anything without their human agents. Like the physical element, their mental elements are also to be derived from humans. As regards corporate "recklessness," section 51 of the ACT-CC2002 provides details of how to prove corporate *mens rea* other than negligence. It relies effectively on a deeming provision. It provides that to prove the existence of corporate intention, knowledge or recklessness as *mens rea* of an offense, the element is taken to exist if the corporation expressly, tacitly or impliedly authorizes or permits the commission of the offense. It also directs the ways in which this authorization or permission may be established referring to proof of certain facts. As listed in section 51(2), these facts include, if proved that: (a) the board of directors of the defendant corporation intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offense; or (b) a high managerial agent of the corporate defendant intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offense; or (c) a corporate culture existed within the corporations that directed, encouraged, tolerated or led to noncompliance with the law which has been flouted; or finally, (d) the artificial person failed to create and maintain a corporate culture requiring compliance with the law that has been violated.¹²² These factual scenarios include both actions and inactions of the corporation for which the entity can be held liable, whereas recklessness of individuals can be proved by actions alone while inactions will come under

122. *Criminal Code 2002* (ACT) s 51(2) (Austl.).

negligence. These deeming provisions will certainly help avoid the common law requirement of the organic theory.

Section 51(3) of the ACT-CC2002 exempts a corporation from liability if it is grounded on the above subsection (2)(b) (high managerial agent of the corporation) where it is proved that it exercised due or appropriate diligence to prevent the conduct, or the authorization or permission to breach the law. This exemption is acceptable given the proven attempt of the entity to avoid the contravention of law.

Section 51(4) adds explanations as to the factors linked to the grounds (c)¹²³ and (d)¹²⁴ of section 51(2): that consideration be given whether a high managerial agent gave authority to commit an offense of the same or a similar character; and the individuals (employee, agent or officer) of the corporation who committed the offense reasonably believed, or had a reasonable expectation, that a high managerial agent of the corporation would have authorised or permitted the commission of the offense. Both of these two factors highlight the role of the high managerial agents who are considered to be the mind and will of the company.¹²⁵ It means that corporations can be held liable where high managerial agents played a contributory role in committing the offense. The beauty of the phrase “high managerial agent” lies in its focus on the responsibility of an employee rather than the corporate executive position held, as opposed to the common law organic theory which highlights the high executive position. This is so because, the meaning of the expression “high managerial agent” seems to be helpful for the proof of corporate guilt, as for the purposes of section 51 this denotes “an employee, agent or officer of the corporation whose conduct may fairly be assumed to represent the corporation’s policy because of the level of responsibility of his or her duties.” The justification of these explanations can be premised on paying due regard to the fact that the efficacy of this law is likely to be lost to a great extent if a corporation is held liable for manslaughter for the fault of any employee irrespective of managerial authority. If any individual employee’s fault is attributed to the corporation, it may open the floodgates for litigation and convictions of manslaughter affecting the productive performance of the corporate sector, discouraging its growth and eventually diminishing the value of separate personality.

Corporate culture can be even more reasonably applied to convict corporations. Section 51(5) clarifies that subsection (2) applies to exclusively corporate recklessness, not to any other fault elements. Finally section 51(6) seeks to define “corporate culture” and the “high managerial agent.” As defined in subsection (6), “corporate culture”

123. Proving the existence of a corporate culture to prove *mens rea*.

124. Proving corporate failure to create and maintain a corporate culture in favor of workplace safety.

125. Tesco Supermarkets Ltd. v. Nattrass (1971) 2 All ER 127 (UK).

connotes “an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in the part of the corporation where the relevant conduct happens.” The meaning is quite broad and the culture can be conveniently proved with reference to the policies and practices of a defendant corporation, even the practice is confined to a certain part of business where the crime took place. The adoption of this principle clearly deviates from the organic theory, paving the way for corporate conviction. Overall, the provisions contained in section 51 are arguably helpful for corporate conviction, as opposed to the reliance on the identification theory as alluded to earlier. It is pertinent to note that the ACT-CC2002 derived its corporate liability provisions from the *Criminal Code Act 1995* (Cth), which is a national guide for Australia (CCA1995).¹²⁶

Corporate culture as evidence of corporate *mens rea* element is a comparatively new consideration. The communitarian theory of corporations sturdily supports the view of criminal liability of corporations as a social institution with a pronounced legal personality.¹²⁷ Hence, corporate culture can be viewed as a social or communitarian aspect of corporations. It is widely accepted that corporate culture is presently the most compelling approach to hold corporations criminally liable.¹²⁸ This view is further promoted by Cavanagh who asserts that corporate culture is “the most suitable model for imposing liability upon a corporation” as applied in Australia.¹²⁹ Likewise, Pieth went even further in labelling the Australian law about corporate culture as the best model in the common law world.¹³⁰ Appreciably, the federal law of Australia regarding organizational fault has drawn attention of many countries.¹³¹

Finally, in view of the preceding discussion, recklessness may be difficult to prove against individuals because of subjective test, but it

126. Section 12.3(6) of the *Criminal Code Act 1995* (Cth) defines corporate culture: “Corporate culture, for a corporation, means an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in the part of the corporation where the relevant conduct happens.”

127. See, e.g., Julian Velasco, *The Fundamental Rights of the Shareholder*, 40(2) U.C. DAVIS L. REV. 407, 455 (2006); Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1374–76 (2009); Miriam H. Baer, *Organizational Liability and the Tension between Corporate and Criminal Law*, 19(1) J.L. & POL’Y 1, 4 (2010).

128. Olivia Dixon, *Corporate Criminal Liability: The Influence of Corporate Culture*, INTEGRITY, RISK AND ACCOUNTABILITY IN CAPITAL MARKETS: REGULATING CULTURE 251–68 (Justin O’Brien & George Gilligan eds., 2013).

129. Neil Cavanagh, *Corporate Criminal Liability: An Assessment of the Models of Fault*, 75(5) J. CRIM. LAW 414, 416 (2011).

130. THE OECD CONVENTION ON BRIBERY: A COMMENTARY (Mark Pieth, Lucinda A. Low & Peter J. Cullen eds., 2007), <https://www.oecd.org/daf/anti-bribery/39200754.pdf> [https://perma.cc/3DD9-KCFP] (last visited Jan. 23, 2023).

131. *Id.*

would be convenient for the prosecution to establish recklessness against corporations. When recklessness cannot be proved against individuals, gross negligence can be argued as a statutory alternative fault element. Hence the provisions of recklessness rests in the positive territory.

Section 34A(f) of the ACT-Act retains recklessness as a fault element alongside negligence, without having to provide any specific meaning. Therefore, its meaning discussed above applies to the section 34A manslaughter offense in the ACT. The other two jurisdictions exclusively rely on negligence as *mens rea*.

C. Negligence as the *Mens Rea* of Industrial Manslaughter—Individual Defendants

The ACT-CC2002 had adopted the meaning of negligence of a natural person from the CCA1995.¹³² Section 21 of the ACT-CC2002 elucidates the meaning of “negligence” as *mens rea* of a natural person by stating that a person is negligent concerning a conduct element of an offense “if the person’s conduct merits criminal punishment for the offense 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.”¹³³ The first limb¹³⁴ about the standard of conduct is originally borrowed from common law as discussed shortly below, and thereby it has assumed a recognized formulation of the objective duty of care. However, the second limb,¹³⁵ combining a high risk and the existence of a conduct element, is unclear. Instead of referring to the risk of the existence of an unspecified high risk in terms of conduct, it should have included the high risk of certain consequences being causing death, or grievous bodily harm (GBH), as interpreted by the judiciary for common law manslaughter.¹³⁶ Moreover, it does not mention anything about the sole ultimate consequence of death. Perceptively, section 21 of the ACT-CC2002 carries a generic interpretation, but it should be noted that negligence usually breeds civil liability, whilst it is considered *mens rea* only when the consequence is death caused by gross negligence¹³⁷ as a substantial and operating cause of the death. Hence, the result of the physical element where negligence

132. *Criminal Code Act 1995* (Cth) pt 2.2, s 5.5 (Austl.) (“The elements of an offense.”).

133. *Criminal Code 2002* (ACT) s 21 (Austl.).

134. *Id.* s 21(a).

135. *Id.* s 21(b).

136. *Nydam v. R* (1977) 50 VR 430, 445 (Austl.); *The Queen v. Lavender* (2005) 222 CLR ¶¶ 67, 17, 60, 72, 136 (Austl.); *Burns v. The Queen* (2012) 246 CLR 334 ¶ 19 (Austl.). In contrast, the U.K. common law requires high risk death only as in *R v. Rose* [2018] EWCA (Crim) 1168 (appeal taken from Eng.); *R v. Zaman* [2017] EWCA (Crim) 1783, 24 (appeal taken from Eng.).

137. J. R. Spencer & Marie-Aimée Brajeux, *Criminal Liability for Negligence—A Lesson from Across the Channel?*, 59 INT. COMP. LAW Q. 1, 3 (2010).

is *mens rea* warrants being categorically mentioned. This is arguably a flaw in section 21. This needs to be addressed by the legislature.

For the proper application of negligence as *mens rea*, the courts are expected to follow the common law principles. Although negligence originally gained prominence in a civil tort case as an alternative remedy in the absence of privity of contract between contending parties, invented by the U.K. House of Lords,¹³⁸ it has been getting increasingly popular as a fault element in both common law and statutory law manslaughter regimes. Although this Article is focused on the industrial manslaughter under legislation, judicial interpretations of criminal negligence still need to be explored in order to clarify the statutory meanings of criminal negligence.

The inception of common law of negligence dates back to the late nineteenth century when Brett M.R. in *Heaven v. Pender* pronounced in *obiter dicta* that

whenever one person is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.¹³⁹

However, it has to be acknowledged that the modern law of negligence is ingrained in the common law “neighbor principle” articulated by Lord Atkin in *Donoghue v. Stevenson* in 1932.¹⁴⁰ His oft-quoted principle spells out:

The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer’s question, Who is my neighbor? . . . You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? . . . [P]ersons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹⁴¹

The neighbor principle applies to manslaughter offenses alongside its pertinence to civil suits. The endorsement of the application of the neighbor principle to manslaughter or criminal negligence came from its

138. *Donoghue v. Stevenson* [1932] AC (HL) 562 (appeal taken from Scot.).

139. *Heaven v. Pender* (1883) 11 QB 503 (UK).

140. *Stevenson*, AC (HL) at [562].

141. *Id.* at 580.

creating authority itself. The House of Lords in *R v. Adomako* affirmed that the ordinary principles of the law of negligence governing civil disputes apply to MCN in the determination of the existence of duty and the breach thereof.¹⁴² Accordingly, the principle has been utilized in the U.K. in many criminal cases.¹⁴³ Consistently, for example, the HCA in *Burns v. R*, involving a negligent killing, applied the neighbor principle.¹⁴⁴ The principle has thus become part of the common law of Australia, and is applied by its state and territory jurisdictions.¹⁴⁵ Highlighting the nature or level of negligence needed for criminal charges, Simpson JA of the NSW Court of Criminal Appeal in *R v. Moore* asserts that “[t]he offense of manslaughter by gross criminal negligence is derived from the tort of negligence, with an additional important element, which is grossness or wicked in negligence.”¹⁴⁶ The NSW Court of Criminal Appeal has applied and analyzed the elements of corporate common law negligent manslaughter case of *Cittadini v. R* in conformity with the directions of the HCA.¹⁴⁷ Based on this case, the four elements of common law MCN are as follows:

1. *Existence of duty of care*: That the accused owed a duty of care to the deceased.

2. *Breach of duty of care by negligent conduct*: That the accused was negligent in that, he/she breached the duty of care by his/her act(s) or omission(s), meaning he/she did something that a reasonable person in his/her position would not have done or he/she failed to do something that a reasonable person in his/her position would have done.

3. *Grossly or wickedly negligent conduct*: That the breach of duty fell so far short of the standard of care that a reasonable person in his/her position would have exercised, and it involved such a risk of death or serious bodily harm as to constitute, “gross” or “wicked” negligence and be treated as criminal conduct.

4. *Causation*: The act or omission of the accused caused the death of the deceased.¹⁴⁸

It means the negligence should be gross, the risk of death or serious physical harm should be in the elements, and an objective test applies in

142. *R v. Adomako* (1995) 1 HL 171–72 (appeal taken from EWCA (Civ)) (UK).

143. *E.g.*, *Mitchell v. Glasgow City Council* [2009] 3 All ER 205, 893 (Scot.); *R v. Miller* (1983) 2 HL 161, 179 (UK); *R v. Evans* [2009] EWCA (Crim) 650 (UK).

144. *Burns v. The Queen* (2012) 246 CLR 334 (Austl.); *see also* *The Queen v. Lavender* (2005) 222 CLR 67 (Austl.).

145. *E.g.*, *R v. Moore* [2015] NSWCCA 316 (Austl.); *Nydam v. R* (1977) 50 VR 430 (Austl.).

146. *R v. Moore* [2015] NSWCCA 316, 142 (Austl.).

147. *Cittadini v. R* [2009] NSWCCA 302 ¶ 29 (Austl.).

148. *Id.*

determining corporate criminal negligence for industrial manslaughter. There is no judicial interpretation suggesting to measure the standard of negligence set by the common law by applying a subjective test.¹⁴⁹

The above-stated elements of MCN apply to both natural and artificial persons for industrial manslaughter in common law jurisdictions unless legislation provides otherwise. Consistently, section 12.4 (corporate negligence) of the CCA1995 referring to section 5.5 (natural person's negligence) overtly confirms that the same test applies to statutory criminal negligence. Likewise, an additional note attached to section 52 directs that the test of negligence for a corporation is the same as set out in section 21. This maintains the need for consideration of judicial interpretations of this *mens rea* in further detail in order to have adequate clarity.

Regarding the above stated four elements of MCN, it should be noted that the English Court of Criminal Appeal in *R v. Bateman* involving MCN¹⁵⁰ set out a similar set of four requirements as above, which have been reinforced by the House of Lords in *R v. Adomako*.¹⁵¹ However, recently the U.K. Court of Appeal (Criminal Division) in *R v. Rose*,¹⁵² *R v. Zaman*¹⁵³ and *R v. Kuddus*¹⁵⁴ ascertained five elements. These are: (i) the existence of a duty of care owed by the defendant to the victim; (ii) a breach of that duty by the defendant; (iii) reasonable foreseeability that the breach caused an obvious and serious risk of death; (iv) gross negligence on the part of the defendant; and (v) a causal link between the defendant's breach of the duty and victim's death.¹⁵⁵

There is no fundamental difference between the two sets of elements, because points (ii) and (iii) in the U.K. are subsumed in (ii) in the aforesaid NSW articulation. More recently, the U.K. Court of Appeal in *R v. Broughton* split those five into six elements by segregating the above U.K. element (iii) into two—first, a serious and obvious risk of death at the time of the breach of duty making it as element (iii), and second, reasonable foreseeability that the breach created an obvious and serious risk of death element separating as element (iv). This has been argued to be nothing more than a cosmetic rearrangement of the prevailing five elements.¹⁵⁶

149. *Nydam v. R* (1977) 50 VR 430, 445 (Austl.). The HCA further approved the application of the objective test in *Wilson v. R* (1992) 174 CLR 313, 341 (Austl.).

150. *R v. Bateman* [1925] 19 (HL) Crim. App. ¶ 8 (UK).

151. (1995) 1 AC (HL) 171, [9] (UK).

152. [2018] QB 328 at [41] (Sir Brian Leveson P) (UK).

153. [2017] EWCA Crim 1783 at [24] (Hickinbottom LJ) (UK).

154. [2019] EWCA Crim 837 (UK).

155. See Tony Storey, *Causing Death by Failing to Seek Medical Help*, 85(1) J. CRIM. L. 62, 63–64 (2021); G. R. Sullivan & A. P. Simester, *Omissions, Duties, Causation and Time*, 137 LAW Q. REV. 358, 359–60 (2021).

156. Storey, *supra* note 155, at 64.

The discussion of the common law elements presented above digs out the weaknesses in section 21 of the ACT-CC2002 which needs to be enriched following the common law interpretation of criminal negligence, particularly the risk factor. This is because the consequence is the pivot of criminalizing negligence. However, a sharp distinction is evident between the requirements in Australia and their U.K. counterparts in that the former make the scope of the industrial manslaughter law wider by adding the reasonable foreseeability of death or serious bodily harm. As explained in the dictionary appended to the ACT-CC2002, “serious harm” refers to “any harm (including the cumulative effect of more than one harm) that—(a) endangers, or is likely to endanger, human life; or (b) is, or is likely to be, significant and longstanding.” The U.K. common law is restricted to only the foreseeability of death of the victim. The statutory meanings of negligence of individual offenders in Queensland and the NT is shown after the common law corporate negligence, as below.

D. *Negligence as the Mens Rea of Industrial Manslaughter—Corporate Defendants*

The statutory law obtains the concept from common law concerning corporate negligence, however, the latter’s efficacy is frustrating because of the directing mind and will theory of corporations,¹⁵⁷ which is extensively argued to be an obstacle to corporate conviction.¹⁵⁸ Statutory laws, therefore, intend to bypass the common law organic theory to facilitate corporate conviction. Moreover, the application of the concepts of imputation of conduct and fault elements of a crime from humans to corporations is generally held to be enigmatic.¹⁵⁹ This Article puts the attribution complexities aside because legislation offers guidance independently of common law on such imputation, which is to be followed in the present pursuit as it is concerned with statutory manslaughter. However, the judicial interpretations of corporate criminal negligence still needs to be pondered for the application of statutory guidance and differentiation between the two sources.

As is the case with individual negligence, the ACT-CC2002 replicates the corporate negligence provisions from the CCA1995.¹⁶⁰ The ACT-CC2002, as regards the criminal negligence of corporations, in section

157. See S. M. Solaiman, *Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy*, 25(2) ARTIF. INTELL. L. 155 (2017); S. M. Solaiman, *Laws Governing Manslaughter by Food Safety Crimes in the United Kingdom, Australia, Bangladesh and India: A Critical Review*, 47(1) N.C. J. INT’L L. 75 (2022).

158. See Rebecca Rose, *Corporate Criminal Liability: A Paradox of Hope*, 14 WAI. L. REV. 52, 62–65 (2006).

159. Cavanagh, *supra* note 129, at 414.

160. *Criminal Code Act 1995* (Cth) pt. 2.5, s 12.4 (Austl.).

52(2) provides that the “fault element of negligence may exist for the corporation in relation to the physical element if the corporation’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers).” Subsection (1) of section 52 clarifies that this section applies where a corporation has a conduct element of an offense in the absence of negligence on the part of any individual employee, agent or officer of a corporation. It distinctly embraces the “aggregate theory” from the CCA1995 to be applied to determine corporate negligence in sharp contrast to the common law principles.

These statutory corporate criminal negligence provisions aim to circumvent the common law organic theory, which requires proof of negligence of a senior executive who acts as, rather than for, the corporation. In other words, executives are known as the embodiment of the company.¹⁶¹ The identification theory is founded on Lord Denning’s comment by analogy in *HL Bolton (Engineering) Co. Ltd. v. TJ Graham & Sons Ltd.* in 1957 that:

A company may in many ways be likened to a human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.¹⁶²

Hence, the determination of the mind and will of a large company becomes exceedingly difficult when the organic theory is applied.¹⁶³ Consequently, this theory made conviction of large corporations for manslaughter “almost impossible.”¹⁶⁴ The refusal of the judiciary to apply the aggregate theory,¹⁶⁵ meaning considering the actions of a

161. *Tesco Supermarkets Ltd. v. Natrass* (1971) 2 All ER 127 (UK).

162. (1957) 1 QB 159 at 172.

163. *See Natrass*, 2 All ER at [127] (UK).

164. The House of Commons Home Affairs and Work and Pensions Committees, UK, DRAFT CORPORATE MANSLAUGHTER BILL, *First Joint Report of Session 2005-2006*, Volume 1: Report, HC 540-I (2005) at 3.

165. The aggregate, or associational, theory of the corporation posits that corporations are nothing more than products of both contractual agreements between the government and natural persons and agreements between individual natural persons to conduct a joint business’s, Ryne T. Duffy, *Corporate Rights and Moral Theory: The Need for a Coherent Theoretical Justification of Corporate Rights*, 12(2) WASH. U. JUR. REV. 267, 283 (2020). For details of corporate theories,

number of individuals within a corporate structure, striving to establish corporation's liability, deepened the problem.¹⁶⁶ That situation discouraged prosecution of manslaughter and led to seeking remedies under the WHS legislation for less serious wrongs by ignoring the manslaughter charges in the U.K. prior to enacting the corporate manslaughter legislation.¹⁶⁷ Therefore, pieces of legislation discussed above have adopted the aggregate theory of corporations by divorcing from the common law restrictive organic theory. This legislative overhaul is expected to be helpful for corporate conviction. The following section considers statutory recklessness and negligence under the WHS legislation in light of the afore-discussed criminal law and common law principles.

E. Viewing Recklessness and Negligence Contained in the WHS Legislation Through the Prism of Criminal Codes and Common Law

The foregoing discussion of recklessness and negligence *mens rea* elements provides an overview of the original industrial manslaughter law of Australia and the current common law, which will be instrumental in examining those elements presently contained in the WHS legislation of the ACT, Queensland and the NT.

The ACT-Act retains both recklessness and negligence,¹⁶⁸ and the NT-Act follows that lead,¹⁶⁹ however, the Qld-Act adopts only negligence. This disparity goes against the avowed consistency across the jurisdictions in Australia. Apart from this difference, they additionally differ from one another with regard to the statutory meanings of the fault elements. Also, the adoption of the old law in the current WHS legislation is one thing, and its interpretation is another. So the meanings of the *mens rea* elements incorporated into the WHS laws need to be analyzed in order to determine their usefulness and efficacy.

The ACT-Act states that "the person is reckless or negligent about causing the death of the worker or other person by the conduct."¹⁷⁰ As suggested in section 12B of the ACT-Act, the ACT-CC2002 applies to all offenses against the ACT-Act, and it particularly mentions the

see Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15(1) *FORDHAM J. CORP. & FIN. L.* 97, 106–12 (2009); Jess M. Krannich, *The Corporate 'Person': A New Analytical Approach to A Flawed Method of Constitutional Interpretation*, 37(1) *LOY. U. CHI. L.J.* 37, 61, 63 (2005).

166. A-G's Reference (No 2 of 1999) [2000] QB 796 (UK); Victoria Roper, *The Corporate Manslaughter and Corporate Homicide Act 2007 - A 10-Year Review*, 82(1) *J. CRIM. L.* 48, 52 (2018).

167. C. M. V. Clarkson, *Corporate Manslaughter: Yet More Government Proposals*, 9 *CRIM. L. REV.* 677, 678 (2005).

168. *Work Health and Safety Act 2011* (ACT) s 34A(1)(f) (Austl.).

169. *Work Health and Safety Act 2011* (NT) 34B(1)(e) (Austl.).

170. *Work Health and Safety Act 2011* (ACT) s 34A(1)(f) (Austl.).

applicability to the meaning of “recklessness.” As alluded to earlier, section 20 of the ACT-CC2002 contains the meaning of “recklessness” for individuals, and its limitation has been discussed earlier in the context of the old ACT law of corporate manslaughter, which remains equally valid for the present ACT-Act.

The NT-Act explains recklessness as *mens rea* of “persons” in sections 31, 245(3) and 251, without having to mention anything about PCBU or corporations. Section 31, which is identical to section 31 of the ACT-Act, provides that a person having a health and safety duty commits an offense¹⁷¹—if the person engages in conduct without reasonable excuse that exposes an individual, to whom that duty is owed, to a risk of death or serious injury or illness; and the person is reckless as to the risk to an individual of death or serious injury or illness. This does not seem to apply to industrial manslaughter which requires “causing” death,¹⁷² whereas section 31 applies to the allegation of “exposing” an individual to the risk of death or injury or illness. Also section 245(3) and section 251(2) reference recklessness, but they do not provide any guidance to prove recklessness as they state “[i]f an offense under this Act requires proof of knowledge, intention or recklessness, it is sufficient . . . for that offense to prove that the person referred to . . . had the relevant knowledge, intention or recklessness.”¹⁷³ Section 12A of the NT-Act declares that Part IIAA of the *Criminal Code Act 1983* (NT-CCA1983) applies to an offense against the NT-Act. This Part IIAA contains provisions for corporate criminal responsibility (sections 43BK–43BN). As regards recklessness, section 43BK of the NT-CCA1983 is equivalent to section 51 of the ACT-CC2002 with a single difference—section 51 prescribes a deeming provision that corporate subjective fault elements (intention, knowledge, recklessness) “is taken to exist” if it is proved that the corporation expressly, tacitly or impliedly authorised or permitted the commission of the offense. Section 43BM of the NT-CCA1983 enunciates that these mental elements “must be attributed to” a corporate body. The NT directly follows the words of the federal legislation, CCA-1995, by using the emphatic expression being “must be attributed.”¹⁷⁴ Though both are positive, the NT law is even stronger in its wording, and thus better for the prosecution to prove the critical element of corporate *mens rea*. The recklessness can be proved by corporate culture as is the case with the ACT.¹⁷⁵ The definitions of “corporate culture” and “high

171. The offense refers to “Reckless Conduct- Category 1 offense.” Sections 31–33 of the NT-Act describe offenses of three categories, only section 31 requires recklessness.

172. *Work Health and Safety Act 2011* (NT) s 34B(1) (Austl.).

173. The ACT-Act has identical provisions in sections 245(3) and 251(2). They are equally unhelpful to prove recklessness.

174. *Criminal Code Act 1995* (Cth) div. 12, pt. 2.5, s 12.3(1) (Austl.).

175. *Criminal Code Act 1983* (NT) s 43BM(2) (Austl.).

managerial agents” in the NT are also identical to that of the ACT and the CCA1995. In accordance with these statutory interpretations, the recklessness of a corporation can be proven by both actions and inactions resulting in failure to create and maintain corporate culture requiring compliance with law. As a whole, the discussion of corporate recklessness presented earlier with respect to the ACT, equally applies to the NT with a positive note that these are facilitative to corporate conviction.

Unlike the other two, the Qld-Act does not recognize “recklessness” as *mens rea*. Given the benefits of using corporate culture in proving this mental element, it is recommended that Queensland adopts this in the same way their counterparts have done in line with the federal guidance provided by the CCA1995.

As regards to “negligence,” all three of the jurisdictions have commonly incorporated this objective mental element.¹⁷⁶ Without repeating the previous discussions, it can be noted that that criminal negligence as *mens rea* against natural persons can be established by applying an objective test as explained in this Article’s preceding Section 5(C), subtitled “negligence as the *mens rea* of industrial manslaughter—individual defendants.” Complexity arises in proving corporate negligence.

Section 52 of the ACT-CC2002 paves the way for proving corporate negligence by employing the aggregate theory, and it applies when negligence of no individual employee, agent or officer of a corporation can be proved. Section 52(2) provides that “negligence may exist for the corporation in relation to the physical element if the corporation’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers).” So the aggregate theory and an objective test apply to corporations as devised in section 21 of the ACT-Act.¹⁷⁷

Section 43BN of the NT-CCA1983 sets out the rules regarding corporate negligence, which is worded differently from its ACT counterpart, though the meaning remains similar in that the aggregate theory has been accepted to be applied in the absence of proven negligence of any employee, agent or officer of the corporate body.¹⁷⁸ Both the ACT and NT have adopted the aggregation provisions from the CCA1995.¹⁷⁹ However, going beyond the CCA1995, section 43BN of the NT-CCA1983 adds subsection (4), which declares that corporate

176. *Work Health and Safety Act 2011* (ACT) s 34A(1)(f) (Austl.); *Work Health and Safety Act 2011* (Qld) ss 34C(1)(ii), 34D(1)(c) (Austl.); *Work Health and Safety Act 2011* (NT), s 34B(1)(e) (Austl.).

177. As noted in section 52 of the ACT-Act.

178. *Criminal Code Act 1983* (NT) s 43BN(2)–(3) (Austl.).

179. *Criminal Code Act 1995* (Cth) div. 12, pt. 2.5, s 12.4 (Austl.).

negligence can be evidenced by the fact that the proscribed conduct was substantially attributable to: “(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.”¹⁸⁰ This supplementary clause may work in either way. It may be helpful if administrative or managerial weaknesses can be easily established; and conversely, it may inhibit proving corporate negligence if such weaknesses are not easily detectable. This clause is absent from both the ACT-CC2002 and CCA1995. The enforcement of the law would arguably be more convenient for the prosecution without this additional provision of proof of corporate negligence. Being different from the other two, Queensland does not have any specific guidance regarding proof of negligence of the PCBU or individuals. It does not even specify the degree of negligence required. This implies that Queensland is reliant on the common law for the interpretation of negligence, its sole *mens rea*.¹⁸¹ Whilst it should be fine to follow the common law principles of gross negligence and the pertinent objective test as analyzed earlier, the proof of corporate negligence requires a statutory rule overriding the common law identification doctrine. It is therefore recommended that Queensland incorporate statutory provisions from the other two jurisdictions which have adopted the interpretation from the CCA1995¹⁸² to simplify proving corporate guilt and enhancing its efficacy.

VII. CONCLUSIONS

The foregoing analysis of *actus reus* and *mens rea* of industrial manslaughter along with the critical terms attached thereto in the statutory laws of the ACT, Queensland and NT reveals both similarities and dissimilarities amongst them in relation to statutory language, and sometimes in consideration of core factors, such as the consequence of the offense and mental elements. These become more evident when the elements are analyzed in light of the relevant case law and their statutory meanings provided. The propulsion enacting the statutes at hand was to avoid the application of the common law organic theory in the determination of corporate guilt. This has been attempted in discernible ways by introducing separate liability provisions for officers and incorporating the corporate culture and aggregate theories for companies. However, certain flaws exist in all of the three pieces of legislation that are sometimes common in all of them and other times specific to one or two. Below are the recommendations to address them in order to enhance

180. *Criminal Code Act 1983* (NT) s 43BN(4) (Austl.).

181. *Work Health and Safety Act 2011* (Qld) ss 34C(1), 34D(1) (Austl.).

182. *Criminal Code Act 1995* (Cth) div. 12, pt. 2.5, ss 12.3, 12.4 (Austl.).

the efficacy of these laws towards achieving their predominant objective of facilitating corporate conviction and workers' protection.

A. *Potential Defendants*

All of the three jurisdictions impose liability on both business entities and their certain officers as potential defendants of corporate manslaughter. The original provisions of the ACT-CA1900 had two separate sections for businesses and officers, whereas the current ACT-Act has combined them in a single section. Incorporated organizations with separate legal personality will face separate charges, whilst managerial executives of unincorporated businesses themselves will be held responsible for the commission of industrial manslaughter. Corporations and their defined executives are to be liable separately. These provisions sound mostly fine. However, two issues need to be clarified. First, the *actus reus* and associated other requirements need to be satisfied for officers are not clear in the ACT-Act. The Qld-Act can be followed in adding this clarification. Second, the NT-Act explicitly adds an extra requirement that their acts must be "intentional." This Article argues that this requirement will impose a huge burden on the prosecution and offer a safeguard to offenders. Voluntariness is a standard implied requirement which should be good enough to defend the innocent. Hence this requirement should be removed bringing the NT provision in parity with the other two laws.

B. *Physical Element of the Offense*

The erstwhile criminal law provisions of the ACT did not fully define conduct, rather it referred to the ACT-CC2002 for the definition. However, the ACT-CA1900 defined "omissions" in an appreciable manner. The ACT-Act does not directly define "conduct" as such although it adds a description of "engage in conduct" encompassing both actions and omissions. The meaning of "acts" can be taken from the ACT-CC2002, however, the ACT-Act should incorporate the definition of "omissions" from the repealed section 49B of the ACT-CA1900. This is because although section 16 of the ACT-2002 provides a general definition of "omissions," the old section 49B definition was carefully crafted specifically for industrial manslaughter, which justifies this recommendation for adoption. The Qld-Act simply mentions that "conduct means an act or omission to perform an act." Its NT counterpart describes conduct in the same way as the Queensland law does. The meaning of "omissions" is better captured in the old ACT law. As opposed to omissions, the "act component" of conduct is not well defined in the legislation. Therefore, a useful definition of "acts" can be articulated drawing on the earlier discussion presented referring to case

law and dictionary meanings. To add greater clarity to all three laws, the old ACT-CA1900 definition of “omissions” should be adopted by all.

C. Defendant’s Relevant Duty To Be Breached

The predecessor, the ACT-CA1900, did not define the duty that needs to be breached to commit the crime, it just mentioned that “conduct causes death.” However, the successor ACT-Act offers a fairly detailed definition of the relevant duty called “health and safety duty.” Its Queensland equivalent is identical to the ACT’s previous law. The NT-Act proffers the clearest definition of the duty amongst the three. Hence it is recommended that others follow the NT definition.

D. Breaching the Duty

A breach of the relevant duty is essentially required in both the ACT-Act and its NT counterpart. However, Queensland remains silent probably following the repealed ACT-CA1900 provisions. Breach is a pressing need, so a clear mention of this requirement is reasonably expected to facilitate conviction by precluding the unscrupulous defendant from arguing otherwise. Hence, Queensland should follow the other two.

E. Persons Who Can Be Victims

The ACT-CA1900 defined “workers” fairly broadly by including outworkers who will be working for the defendant outside of the main workplace on a contractual basis. Its successor, the ACT-Act provides a definition which is even more encompassing that includes volunteers and police officers. The Queensland law offers a very narrow definition protecting only workers who are physically present at the PCBU’s workplace. The NT definition is certainly wider than its Queensland equivalent but narrower than the ACT coverage. However, the NT protects any persons irrespective of their employment relations, who are not covered by the other two. The ACT and NT can mutually learn from each other, whilst Queensland should follow both of the other two.

F. Causation of Victim’s Death

It is crucial whether the defendant’s conduct was the sole cause, or just a cause, of the victim’s death. None of the three laws adequately explain this issue, however, some are better than others. The ACT-CA1900 provided no elucidation on this requirement, so its silence was a weakness. Its successor, the ACT-Act, simplifies the requirement by stating that the defendant’s conduct causes death if the conduct substantially contributes to the demise. Similarly, the Qld-Act requires the conduct to be a substantial cause, whilst the NT-Act is completely

silent on this. The NT law just mentions that “the conduct causes death” of the victim, which may mean the conduct shall be the sole cause. The defense may arguably claim so, in order to avoid liability in certain cases. For example, for a victim who might have some previous health condition contributing to his/her death, the defense may argue that the defendant’s conduct was not the sole cause, hence they are not liable. All three laws should be revisited with reference to the common law interpretations in respect of manslaughter that the defendant’s conduct should be an “operating and substantial cause,” which need not be a major cause, of the death but must be more than *de minimis*.¹⁸³ Such a flexible meaning will be helpful for conviction.

G. Test to Determine Causation

None of the selected laws provide any guidance on the appropriate test to be applied in determining whether the causation requirement is met. As discussed previously, an objective test is recommended to be adopted by all pursuant to the common law principle.¹⁸⁴ Statutory certainty of the applicability of this test will bring about predictability of outcome in prosecution by informing both parties of the judicial consideration of resolving their dispute beforehand. Such a stipulation will also help create deterrence, because an objective test is always instrumental in succeeding in trial compared to the application of a subjective view.

H. Recklessness of Individual as *Mens Rea*

The ACT-CA1900 adopted “recklessness” as *mens rea*. The ACT-Act retains this fault element and the NT follows suit. However, Queensland does not accept recklessness as *mens rea*. The WHS laws do not provide any guidance as to how this element can be made out. Pursuant to section 20 of the ACT-CC2002, however, a purely subjective test applies to prove that the defendant was personally aware of a substantial risk and nonetheless he/she took the risk unjustifiably. Similar guidance is contained in section 43AK of the NT-CCA1983. This subjectivity is also maintained by case law discussed previously. The test is, therefore, “subjective,” which makes the prosecution’s job harder. This is not all negative though. If the prosecution fails to prove recklessness, proof of negligence will suffice to convict. However, if recklessness can be proved, the prosecution can demand an enhanced minimum penalty because of the higher degree of culpability. Queensland may incorporate recklessness for the sake of consistency, which is a proclaimed objective of enacting the framework legislation by the federal parliament as a guide

183. R v. Hennigan (1971) 55 Cr. App. R 262, 265 (Lord Parker CJ) (UK).

184. Royall v. R (1991) 172 CLR 378, 412 (Deane and Dawson JJ) (Austl.); *see also* Ruddy, *supra* note 100, at 81–92.

for all Australian jurisdictions.¹⁸⁵ This objective is echoed in section 3 of the Qld-Act too.

I. Recklessness of Corporations

Both the ACT and NT laws adopt “recklessness” as a fault element for corporations as well, but Queensland stays away from it. Corporate recklessness can be proved in different ways, as prescribed in the CCA1995 and adopted by both the ACT-CC2002 and the NT-CCA1983. Of the various ways, the most convenient means seems to be reliance on the “corporate culture theory,” as alluded to earlier. The culture theory implicitly displaces the common law identification theory, easing the proof of corporate recklessness. Like the case against an individual, if recklessness can be proved, the prosecution can seek a greater penalty to reflect the higher level of corporate criminality. Queensland can follow suit, again to maintain uniformity.

J. Negligence of Individual Defendants

The original industrial manslaughter law of the ACT relied on the ACT-CC2002 for the meaning of “negligence” of an individual and accordingly, its current WHS legislation also accepts the same meaning. The statutory meaning is focused on the high risk of “the existence of a physical element,” whereas the common law principle considers “the high risk of consequences” that include death or serious bodily harm of another person. The statutory meaning is thus generally inconceivable at its best and inconsistent with the common law principle at its worst. There is no mention of consequence in the legislation, although only the end result of death makes certain negligence criminal in law. This inconsistency needs to be addressed so as to make the law more useful. A similarly flawed expression is provided by the NT-CCA1983, whilst the Qld-Act highlights the consequence of death, and relies on case law for the interpretation of negligence. The judicial interpretation of negligence in the present context of industrial manslaughter would provide more appropriate guidance than that provided by the criminal codes couched for all offenses with no particular reference to manslaughter. So the common law principles of negligence crafted for negligent manslaughter should be adopted by all selected WHS legislation specifically for this offense.

K. Proving Corporate Negligence

All three pieces of legislation have embraced the aggregate theory for proving corporate negligence from the CCA1995. The common law identification theory denies the aggregation of the negligent conduct of a

185. *Work Health and Safety Act 2011* (Cth) s 3 (Austl.).

number of employees, agents or officers of a defendant corporation. This demonstrates the legislators' commitment to holding corporations to account for criminal negligence, which is due to exalt the efficacy of law.

A person's right to life must be respected by all others equally, always and ubiquitously. Accordingly, workers are entitled to have this inalienable right respected by their employers while at work.

The common law created a stumbling block by the organic theory with respect to corporate conviction of industrial manslaughter. The pieces of legislation at issue have attempted to circumvent the common law theory in order to promote corporate conviction alongside their officers. However, perfection in drafting law can rarely be achieved given the changing nature of societal expectations and human limitations in anticipation. Besides, a legislature is typically composed of members with diverse views which are needed to be accommodated in making a law. Hence, flaws in laws generally persist and the WHS statutes in question are no exception.

Despite the presence of some imperfections, the legislative initiative to address the serious concern of industrial manslaughter is appreciable, and the current laws can be improved further by addressing the issues discussed above taking into consideration the suggestions furnished in this Article. These enactments are consistent with the protection of human rights and achievement of sustainable development in Australia. However, in addition to the selected jurisdictions in Australia, both the laws discussed and recommendations proffered can be regarded as guidance for other jurisdictions nationally and internationally having similar problems with workplace deaths.