

Chapter One: Introduction

Corporations are no longer simply a type of business structure; they are dominant social institutions¹. In this thesis I examine the effects of corporate activity on individuals and communities as emblematic of the complexities of modern social organisation that have concerned social theorists of late. I argue that the increasing popularity of the corporate form over the past hundred years has seen corporations flourish economically. This is indicated by the form's presence in industry, employment, and asset ownership. Economic strength can be seen as the basis for the increase in corporate activity in realms such as politics and social welfare where it is more difficult, though not impossible, to discern corporate power.

Through a case study of asbestos disease in Australia, I claim that corporate dominance is most strikingly evident when it results in harm. Cases of industrial disease and injury clearly indicate the layers which constitute 'corporate activity' and the way these traverse time, individuals and communities to have often dramatic effects.

In this thesis, I argue that an understanding of the corporation in law is central to accounting for this dominance and its effects on the communities in which corporations operate. Therefore, the state as law-maker is prominent in analyses of corporate activity. The business corporation is created by legal doctrine, which is also the primary mediator of its social interactions. By examining the substantive law as it relates to corporations and complementing this with a theoretical exploration of these laws through legal theory, I claim that law has a key role in establishing and ordering the complexity of contemporary corporations.

¹ I use the term 'institutions' as meaning those structures and mechanisms of social order that emerge beyond individual intentions to make and enforce rules and conditions governing human behaviour.

Legal individualism is central to the establishment of corporate dominance. The legal description of the corporation works to enhance and legitimate its social power, primarily by assigning it the capacities of a human individual through corporate legal personhood. This means that a corporation is a legal personality in its own right, with the same legal rights and responsibilities as a human legal individual. This description of the corporation is at odds with its collective realities; the largest corporations are collectives of human and monetary resources that function through co-operative processes. They are the antithesis of the liberal individual which legal individualism attempts to universalise. To determine the extent of this difference I examine accounts of corporate structure, decision-making and work processes alongside theoretical accounts of the corporation.

The effects of legal individualism are examined in their practical context by reference to the regulation of workplace deaths in Australia. Workplace deaths are a significant worldwide issue; examining their regulation in Australia builds upon knowledge of regulatory regimes in other common law countries and highlights the disconnection between legal individualism and the corporate form. The tests of liability which corporate legal personhood necessitates do not recognise this collective basis to corporate activity. Due to this, they cannot be effectively applied to instances of alleged corporate wrongdoing.

The effective regulation of corporations is important given their contemporary role, as the potential for harm to result from corporate activities has grown alongside the increase in their organisational complexity. However, I question the extent to which effective corporate regulation can be achieved within existing legal frameworks. In doing so, I also question the efficacy of attempts to reform existing laws which do not challenge the foundations of corporate law. By highlighting the fundamental problems with the legal individualised conception of corporations, I hope to enhance the possibilities for meaningful corporate law reform to take place.

Sociology and the social sciences generally need to grapple with the issue of corporate activity, particularly given its potential to lead to adverse outcomes such as injustice and inequality. In examining corporate activity by reference to corporate law, legal theory and their application in the contemporary context, this thesis posits the corporation as a phenomenon worthy of study in its own right. In doing so, it adds to a body of comparatively sparse sociological literature on corporations.

Existing Research into Corporations

Research into corporations has not increased in proportion with corporate power. There are some practical reasons for this; statistics on corporate activity are difficult to locate, the intricacies of corporate law and economics are difficult to comprehend, and, in the social sciences, there has been little interest in the 'macro' issues that a study of corporations involves. There has been research into corporate power over the past seventy years, some of which is especially significant in understanding the origins and effects of corporate power, corporate crime, politics and corporations and the legal regulation of corporations (Berle & Means 1932; Bowman 1996; Clinard & Yeager 1980; Clough & Mulhern 2002; Conklin 1977; Fisse & Braithwaite 1983, 1993; Glasbeek 2002; Marris 1974; Pearce & Snider 1995; Pearce & Tombs 1998; Stone 1975; Tombs & Whyte eds. 2003; Tombs & Whyte 2007; Wells 2001).

The corporation has also been studied in the social sciences in terms of its internal, bureaucratic functions (Drucker 1970; Barley and Kunda 2001). Studies of work practices have also touched on the corporate form (Drucker ed. 1969; Morgan 1986; Ritzer 2000; Salaman 1979; Witte 1980). This research is not strictly concerned with the corporation; rather, the corporation is the location for the phenomena being studied. In this thesis, the corporation, in its legal context, is the phenomenon being studied.

For this project, the absence of exhaustive literature on corporations required an emphasis on the collection and analysis of literature from diverse fields. Due to this, the existing literature on corporations has proven to be a central part of this project's methodology. This partly accounts for the interdisciplinary nature of this project but also complements my attempt to establish the possibility for analysis of the corporate business form. The inclusion of these literatures in this research is a methodological point, based in the fact that corporations are under-theorised in sociology and in the social sciences generally.

Boltanski and Chiapello (2005: 162), in analysing French academic publications, claim that critical research into capitalism and corporations was largely absent until the mid 1990s. This, they argue, is because scholars became preoccupied with describing changes in the structure of organisations that accompanied changes to capitalism, and that this replaced critical analysis (Boltanski & Chiapello 2005: 178). Despite this, recent works have contributed significantly to the critique of contemporary corporations and are important to the research framework of this thesis (Castells 1998, 2000; Pearce & Tombs 1998; Tombs & Whyte 2007). Castells (1998, 2000: 56, 59), in his work on *network society*, describes a new global capitalism based on automated financial transactions that operate beyond the limitations imposed by states, laws, investors, consumers and communities. From this networked electronic economy, which Castells (2000: 57) labels 'collectivist capitalist', changes in organisational structure emerged.

In response to the uncertainty created by the new global economy, Castells (1998: 153, 163-165) claims that organisations became focused on increasing flexibility through the use of sub-contractors, teamwork, flattened management hierarchies and information sharing between corporations. He describes the corporation that emerges from the *network economy* as the *network enterprise* (Castells 1998: 171). The dominant feature of the network enterprise is the diversity of interests that it houses; Castells (1998: 171) defines the network enterprise as 'that specific form of enterprise whose system of means is constituted by the intersection of

segments of autonomous systems of goals'. It is only through the technology of the network economy that these complex organisations can be managed (Castells 1998: 169). Calhoun and Hiller (1988: 161-182) also describe corporations as complex organisations where large-scale activities coincide with new technologies. This complexity, they argue, is associated with the increase in harms perpetrated by corporations, particularly the incidence of industrial disease.

Pearce and Tombs (1998) and Tombs and Whyte (2007) similarly assert the link between capitalism and corporations, but focus on how this manifests in law and legal outcomes. Pearce and Tombs (1998) explore the economic structures of capitalism that challenge corporate regulation, with a focus on workplace health and safety. For Pearce and Tombs, the absence of meaningful corporate law reform in the wake of chemical disasters such as that in Bhopal, indicates how states attempt to protect capital through law. This leads the authors to advocate studies of corporate crime that go beyond definitions provided by the state and toward sociological and political-economic considerations of wrongdoing (Pearce & Tombs 1998: 96-124). Pearce and Tombs reassert the importance of the state to corporate regulation and thus to studies of the corporation. This element of the corporate context is lost in Castells' analysis, which does not argue for the irrelevance of the state but which, by virtue of its ambitions, obscures what I claim is the centrality of states to creating and regulating corporations.

Tombs and Whyte (2007) attempt to directly link the intentions of the state to what they describe as the failure of occupational health and safety systems to ensure safety in workplaces around the world. Their description of corporate regulation for safety crimes indicates the inadequacy of individualist, state based, laws in preventing and accounting for safety crimes when faced with the type of networked enterprise which Castells describes (Tombs & Whyte 2007: 129-142). In tracing the history of safety regulation, Tombs and Whyte understand corporations, as contemporary employers, to be the privileged in a class-based

legal system. They see class interests as an impediment to effective corporate regulation. For Pearce and Tombs (1998) and Tombs and Whyte (2007: 208-210) this leads them to call for analyses of safety crimes to go beyond the realms of criminology and law and toward disciplines that can question the state and its definitions and categories.

Castells indicates the collective nature of corporate operations through his description of network enterprises. Pearce and Tombs (1998) and Tombs and Whyte (2007) extend this to consider the impact of corporations on worker safety. In their analyses, law, and therefore the state, are central to understanding contemporary corporate power.

In this thesis, I attempt to build upon this new critical literature by further exploring the network qualities of corporate operation and the extent to which these networks are formed by law and influence its administration. Central to this is an emphasis on the state as the creator and regulator of corporations, including networked enterprises. Through an examination of the substance, history and theory of corporate laws the state is posited as being of central relevance to the quality of corporate regulation. A focus on workplace health and safety, as in the work of Pearce and Tombs (1998) and Tombs and Whyte (2007), is considered in the Australian context to highlight the importance of considered and reformed corporate regulation.

Methodological Limitations

Aside from the contextual limitations identified by Boltanski and Chiapello (2005), there are practical methodological problems encountered by researchers of corporations that may have affected the quantity and quality of this research to date.

One of the most significant limitations is restricted access to corporate information (Snider 2003: 64; Tombs & Whyte 2003: 32; Tweeddale 2003: 82).

When information is sought on a particular corporation, there is little claim that can be made to information that the corporation attempts to conceal. Tombs and Whyte (2003: 32-35) argue that private corporations possess almost complete ownership of the business' information and that even when a public disclosure is made, the veracity of the information cannot be ensured. Employees are likely to treat corporate information as sensitive and may be bound to contracts that prohibit them from commenting on business operations.

Aside from the problems with obtaining 'inside information' on corporations, there may be difficulties being awarded funding for such studies. Tombs and Whyte (2003) acknowledge the difficulties associated with being awarded state funding to study corporate crimes, as such studies normally require a strong critique of the state itself. They are concerned that this leads to hegemonic studies of corporate crime. This occurs due to the link between universities and the state which, they maintain, does not entail that universities are 'unambiguously ideological apparatuses' as government departments and agencies are, but which is felt through the economic imperatives of the university (Tombs & Whyte 2003: 28).

They account for the granting of funding to some studies of corporate crime as evidence of *passive revolution*, where ideals of the counter-hegemonic groups are satiated by the hegemonic order, in this case the state:

liberal claims of state neutrality dictate that some funding be granted to critical voices, even where these are voices of resistance, since the liberal state must at least be seen to be supporting and acting on behalf of those who claim to take seriously its ideas of greater social equality, social justice and democratic accountability (Tombs & Whyte 2003: 41).

They claim that as a result of this, academic work can maintain, as well as challenge, hegemonic orders (Tombs & Whyte 2003: 14). A similar analysis, in the context of criminology, is forwarded by Schwendinger and Schwendinger

(1975) who argue that traditional academic studies of crime work to maintain corporate liberal ideology by operating within this ideology's concepts and definitions to determine legitimate and illegitimate areas of criminological critique. They believe that this immediately excludes very important fields of human social experience from criminological study.

While research into corporations and corporate crime presents methodological and ideological challenges, corporations are too significant to ignore. Increasing amounts of people's social lives are influenced by corporate activity, from employment, consumption and property ownership, to political decisions which have the potential to affect our lives in many and varied ways. The methodological problems are themselves revealing of the power of corporations; the way corporations are able to avoid public scrutiny can be seen as a direct influence over, and product of, poor corporate accountability structures (Tombs & Whyte 2003: 4).

These methodological constraints have presented challenges to the formulation of this research project. Secondary statistics presented here are intended to illustrate, rather than encapsulate, aspects of corporate activity. Their specific limitations are acknowledged in footnotes. Similarly, sources of corporate information have, on occasion, been difficult to locate. However, the integrity of the research has been assured through comprehensive analysis of publicly available documents from corporations, journals, newspapers and consultation with industry professionals at all stages of the research.

References to law in this research relate to common law countries, particularly Australia, the United Kingdom (UK) and the United States (US). This allows for conceptual clarity that would not be feasible if all jurisdictional variations were accounted for in a project of this nature. The proliferation of corporations in the UK and the US also mandates this focus; it is in these common law countries that many contemporary corporations find their home. Sections of Australian

legislation referred to in the thesis are reproduced in alphabetical order in the Appendix.

Patterns of Corporate Activity as Patterns of Dominance

There have been few attempts to fully interrogate and formulate a set of indicators of corporate power as dominance, primarily due to the lack of research into corporations. Some studies identify corporate dominance in economic data (Holloway and Wheeler 1991), through the analysis of trends in global economic governance (Roper 2002), in the organisation of labour within organisations (Clegg 1981) and through studies of the economic geography of corporations (Klimasewski 1978). These examples highlight the contestability of the term corporate dominance and hence the contestability of all research using the term, including this thesis. However, they also provide a background from which it is possible to identify and discuss corporate dominance through patterns of corporate activity, particularly as it relates to corporate personhood, which is a primary concern of this thesis.

Holloway and Wheeler (1991), using data from *Fortunes* magazine on the 300 largest corporations in the US between 1980 and 1987, identify corporate dominance in the potential of large corporations to significantly impact employment and economies. Through their statistical analysis, which uses the amount of assets owned by the largest 300 corporations as a marker of dominance, they consider the impact of shifts in the location of corporate headquarters, brought about by mergers and acquisitions, on urban systems. Their conclusion is that these movements altered what they called 'geograph[ies] of corporate dominance' in these urban systems, as the economic fortunes of the largest corporations and the communities in which they were housed fluctuated alongside these geographical shifts (Holloway and Wheeler 1991: 55). A similar perspective has been taken by Klimasewski (1978) who argues that geography is an important consideration in first identifying corporate dominance and then in defining it. Using case studies of small counties in the US, Klimasewski (1978:

94) found that wealth from corporate activity did not necessarily lead to increased long-term economic growth in an area. He found that while corporations in these areas were responsible for most employment in the counties, the corporations rarely stayed long enough for discernible economic gains to be made by individuals and the community (Klimasewski 1978: 94, 100). He uses these case studies to initiate a discussion of corporate dominance by claiming that these patterns indicate the 'input-output' linkages of corporations (Klimasewski 1978: 94). He explains that corporations have strong relationships with other corporations, particularly parent companies, which compromise their relationships with employees and local communities. This happens, Klimasewski (1978: 94) argues, because corporations have an 'external character' which looks beyond geography. This important conclusion indicates both the potential impact of corporate dominance and a reason for this dominance.

The idea that corporations are dominant through processes of globalisation, as suggested by Klimasewski, has been explored in more contemporary research and is an important perspective for this thesis. Roper (2002: 115) claims that the emphasis of neo-liberal policies on capital accumulation and the globalisation of industry has made corporations dominant. She identifies corporate dominance in global economic governance systems which she argues have shifted from the state to corporations. She cites as examples the emphasis given in state decision-making to placating business and the increasing involvement of corporations in negotiations around issues such as the environment (Roper 2002: 115, 116). She also uses the perspective of Castells, discussed earlier in this chapter, on the role of technology in increasing the frequency and speed of financial transactions as another basis for corporate dominance (Roper 2002: 115).

Clegg (1981) takes an alternative position when discussing organisational dominance. For him, organisations including corporations achieve control through the organisation of labour. Clegg's (1981: 559) perspective is class-based with his main contention being that specialised modes of control are evident at

different levels of class structures evident in organisations.

The different perspectives taken in the literatures reviewed above illustrate the complexity of demonstrating and theorising corporate dominance, particularly when one area of human experience, for example labour or geography, is emphasised. Other literatures take a more comprehensive and interdisciplinary approach, opting to examine patterns of corporate economic activity, corporate structures, global corporate activity and work processes as indicators of corporate dominance. Hartmann (2004) begins from an economic perspective, claiming that corporate control over wealth amounts to corporate dominance. He then extends this to consider what he argues are political-economic inequalities between corporations and humans, arguing that corporations are advantaged by taxation systems, tests of criminal accountability, influence on government and access to natural resources. This, he argues, is the cause and effect of corporate personhood laws which construe corporations as legal individuals.

This argument has been evident in writings on corporate dominance, though is generally neglected (see Hoffman 1986; Scruton 1989). Such research is economic in its determination of corporate interests, predominately human and environmental in its identification of the effects of corporate activity and historico-legal in its determination of corporate personhood laws as fundamental to understanding the coincidence of these interests and their effects. Hoffman (1986: 96) describes the granting of corporate personhood to corporations as a significant historico-legal moment for its upholding of capital above other elements of personhood such as civic participation. It is an example of what he describes as an over-inclusive attempt to grant personhood, one where the rights of existing persons to a fair share of scarce resources is violated (Hoffman 1986: 75). Scruton (1989: 262-263) argues that the movement of personhood rights from individuals to institutions, such as corporations, means that the exercise of power becomes unanswerable. He sees corporations as autonomous institutions which, because of this fact, pose a threat to the power of the state. While not

strictly legal, his argument is highly relevant to discussions of corporate activity and corporate laws such as corporate personhood and highlights how these issues transcend the legal to permeate everyday human experiences.

It is on this basis that this thesis explores patterns of corporate activity as patterns of dominance through a legal lense. This begins with a discussion of patterns of corporate activity in economics which is then rooted in a discussion of the links between these patterns and corporate law.

Contemporary corporate activity is characterised by numerous high-value financial transactions carried out across national borders by a sometimes equally dispersed, often hierarchical workforce. The scale and frequency of these transactions make patterns of corporate activity visible. The statistics presented in the next section highlight this; the increasing number of corporations and the increasing value of the activities in which they are engaged have established corporations as economic powerhouses. The construing of these patterns of corporate activity as patterns of dominance is by no means universally accepted (Franko 2003), but is supported by data on industry concentration, also presented in the next section.

The modern history of corporations, explored in Chapter Four, has seen the creation of corporate legal structures which act as the basis of the economic patterns of corporate activity presented in the next section. Without their construction as legal individuals, corporations would not have the capacity to amass such wealth, to concentrate industry and to have widespread networks of activity. The difference this would entail in the social experience of corporations is difficult to imagine let alone estimate. However, an examination of the effects of corporate activity, undertaken in this thesis through the case study of the James Hardie asbestos company in Australia, indicates the vast areas of social life which are currently vulnerable to corporate activity. Understanding the vastness of this influence and its links to law and therefore neoliberal politics and economics enables a description of corporate dominance to be developed. Positing law as

the basis of corporate dominance is just one possible interpretation of the discernable patterns of corporate activity evident in statistics, economics and human experience. As discussed above, other interpretations may focus on neoliberal politics (Tombs and Whyte 2008), technology (Franko 1989) or class (Pearce and Tombs 1998) amongst others. The legal perspective taken here has been selected due to its scope; it includes analyses of politics, technology, class relations and more while being steeped in a very real, discernible history which is central to understanding the corporation's present form and how the patterns of its activity indicate its dominance.

Economic Patterns

Analysing the economic patterns of corporations is an important step in determining their institutional nature. Corporations are an important source of wealth which individuals, other institutions and other organisations are reliant through direct involvement in the economy through employment and production, and also through shareholding.

Tomasic, Jackson and Woellner (1996: 96) found that the corporate structure is the most common form of legal organisation for medium to large business in Australia and is an increasingly predominant form of organisation for small businesses. Most Australian corporations are private and cannot have their shares traded publicly on the stock exchange.

In 2007, there were 1,601,851 corporations registered in Australia² (Australian Securities and Investments Commission [ASIC] 2007a). In the same year, there were 158,261 new corporation registrations (ASIC 2007a). This data reflects the general upward trend in the registration of corporations in Australia over the past decades. Most of these corporations are registered and operate from New South

² Statistics from the ABS (2007b) on the amount of businesses in Australia by type of legal organisation indicate there are 641,538 corporations in Australia. The difference is explained by the methodology of the ABS, which counts only those corporations with revenue of more than \$50,000. ASIC statistics include all registered corporations regardless of revenue.

Wales (NSW). In the 2006-2007 financial year, \$519 million was collected in revenue for the Federal Government from *Corporations Act 2001* fees and charges administered by the Australian Securities and Investments Commission (ASIC). Of these companies, 2222 were listed on the Australian Stock Exchange (ASX) as of March 2008 (ASX 2008: Monthly Statistics).

When calculating corporate economic patterns, it is difficult to use categories and measurements that are widely accepted as satisfactory. This, and the scale of such research, makes drawing strong conclusions as to the economic clout of corporations a problematic task. The secondary data presented here represents a cross-section of the most common means of calculating corporate economic power. These statistics are drawn from the Forbes (2007) magazine annual compilation of the largest companies in the world³.

The world's 2000 largest corporations, as calculated by Forbes magazine, possess a significant amount of economic resources. In 2007, the 2000 companies had the following values when combined:

Profits: US\$30,000,000,000,000 (trillion)

Assets: US\$119,000,000,000,000

Market value: US\$39,000,000,000,000

These corporations employ 72 million people worldwide and are located in 60 countries. Corporations in the banking industry dominate the list in terms of number of corporations, with 315, assets of US\$58.3 trillion and profits of US\$398 billion. The 123 corporations in oil and gas operations have the most aggregate revenue of US\$3.760 billion and the second highest profits US\$386 billion.

³ To measure size, Forbes uses a composite ranking of sales, profits, assets and market value on the basis that it gives a better-rounded picture of corporate size than lists based on a single measurement. This methodology and the resulting statistics are by no means exhaustive or incontestable. The statistics are intended to illustrate, rather than prescribe, the extent to which corporations hold significant economic power.

There are 50 Australian corporations in the Forbes 2000 list⁴. Most of these corporations are in the banking and diversified financials industries. In 2007, these fifty corporations had the following values when combined:

Profits: US\$62,920,000,000

Assets: US\$2,421,720,000,000

Market value: US\$855,370,000,000

Sales: US\$386,420,000,000

Corporate profits are liable to fluctuate with economic cycles. The last ten years have seen consistent growth in corporate profits in Australia and worldwide. In the September 2007 to December 2007 quarter, there was a 3.9% increase in the gross profit of all corporations in Australia, from AU\$32.562 billion to AU\$32.981 billion (Australian Bureau of Statistics [ABS] 2007a⁵: 1). There was an 11.7% increase in gross corporate profits from the December 2006 to the December 2007 quarters, from AU\$31.6 billion to AU\$32.981 billion (ABS 2007a: 19). This reflects the general trend, since 2004, of quarterly increases in corporate profits of between 0.5% and 3% (ABS 2007a: 1, 19).

Statistics from the US indicate that corporate profits almost doubled in the financial years between 1998 and 2007, and have recently slowed (Bureau of Economic Analysis [BEA] 2008a). Corporations operating in the US generated US\$698.7 billion in 1998 compared to US\$1,257.7 billion in 2007 (BEA 2008b). Most of this profit was made in non-financial markets, particularly in manufacturing and retail trade. Non-financial markets accounted for 74% of domestic corporate profits (BEA 2008b). Taxes on corporate profits in 2007 increased on previous years but are increasing at a slower rate. Dividends continue to increase, and in 2007 rose 13.8%.

⁴ This figure includes the Australian/UK corporation BHP Billiton.

⁵ These figures from the ABS include unincorporated entities which employ more than 250 people. There are no national statistics exclusively on the profits of Australian corporations.

These statistics indicate a pattern of corporate involvement in increasingly high-value transactions and large-scale operations. Of particular note are the assets owned by the Top 2000. Corporations are becoming increasingly complex organisations that own stakes in, and are owned by, other corporations. This particularly occurs in large public corporations and is examined in Chapter Three. Many of the institutions owning corporations are superannuation and investment funds. This means that most people holding retirement or savings funds have an economic interest in corporations and a stake in their success. The complexity of contemporary fund management and the significance of corporations to economic activity, including employment and production, integrate corporate and human networks. While this interest is initially economic, it also gives corporations a broader social relevance.

The active encouragement and occasional subsidy of superannuation funds by governments goes some way in indicating the link between neoliberal politics and the rise of corporate activity. This is discussed further in Chapter Three where the role of neoliberalism in industry concentration is considered with reference to the media industry. The media industry is the most concentrated industry in Australia (ABS 2001) with global media industries also displaying high levels of concentration by corporations (Motta and Polo 1997). Motta and Polo (1997: 310) link this to neoliberal policies of de-regulation which, in attempting to increase competition, also increased the price of fixed costs in the industry, thereby increasing barriers to entry for smaller providers and entrenching and expanding the power of large corporations with high economies of scale.

Legal Patterns

Legal personhood, limited liability, perpetual succession and transferability of shares are fundamental laws common to all corporations. They are also particular to corporations and make the corporate form a distinct business structure that appeals to investors thereby encouraging the business form to proliferate. This

thesis argues that these characteristics are a significant source of corporate dominance due to their individualism. For an economy governed by legal rules, recognition as a legal individual is vital for entrance to, and participation in, the economy.

Legal personhood gives the corporation a separate legal identity from the people who make it up. This is one of the founding principles of corporate law, evident in common law since Roman times (Williston 1968: 196, 216). Under this doctrine, corporations have the same legal rights and responsibilities as human legal individuals; corporations can own and sell property and be party to a contract. It also means that the corporation is perpetual; changes in its ownership do not effect the operation of the firm. These features of corporate legal personhood make it easier to create a stable and profitable business environment. This suggests there is a strong relationship between legal individualism, corporate personhood and capitalism.

Distinguishing so sharply between the legal identity of the corporation and its owners describes the corporation as a bureaucratic convenience without personality. This perception of the corporation has significantly shaped theories of the corporation and has been significant to the development of corporate laws. Most significantly, it has made the application of the law to corporations a difficult task. The creation of a separate legal identity for the corporation also means that breaches of the law can be assigned to the corporation rather than individuals within the corporation. In this way, the corporation acts as a shield for the people who constitute it.

Limited liability is another historical, individualistic, legal construct. This law, designed to afford financial protection to shareholders in corporations, means that shareholders are responsible for the debts of the corporation only to the value of the shares they own. Thus, upon purchasing shares, shareholders understand exactly what they stand to lose should the corporation fail. This distances the

owners of the corporation from the corporation itself, and affirms the individuality of each.

Analysis of the history of corporate laws gives significant insights into the origins of these legal features and how they have contributed to contemporary corporate dominance. The legal aspects of the corporate form developed in response to particular social conditions. It proliferated in the early American republic in response to the need for public services that arose after the War of Independence; this period saw the development of the foundations for contemporary corporate law. Significant legal developments also took place in Britain until the early eighteenth century, and then again in the mid twentieth century. In both countries the corporate form arose to meet public purposes. Law makers sought to make the corporate form available and appealing to entrepreneurs engaged in the provision of essential services. The large amounts of capital, which were needed to provide infrastructure such as bridges, banks and roads, exceeded that of any one or few individuals. The corporation housed a collection of labour and capital that made the provision of this infrastructure a reality. However, the conditions of contemporary society are vastly different. There is no longer the same level of material need as in the nineteenth and early twentieth century. The shift in material conditions should be sufficient to warrant the review and revision of fundamental corporate laws.

The problems with applying individualist laws to corporations are becoming more apparent as corporations increase in number. Despite the legally designated capacity of corporations to be responsible in the same ways as human individuals, it is difficult to apply law to corporations. Corporations are fundamentally different from human individuals in terms of decision-making processes, structure and social obligations. This is a significant advantage for corporations as it entails an implicit exclusion of corporations from important fields of regulation. This limits the ability of law to effectively deter or punish corporations.

The individualist conception of the corporation captured in fundamental corporate laws is inaccurate. In describing the corporation as an individual, law gives corporations features and capacities, which I argue they do not possess. However, to fit within the individualist design of liberal law, the corporation *must* emulate the human individual; the corporate collective is the antithesis of the liberal individual, but the material advantages gleaned from the former far outweigh those to be found in the latter. This has led to an ongoing process of legitimising the reified corporation in law and scholarship that I examine with reference to five dominant theories of the corporation.

Theories of the Corporation

Most theoretical debates within jurisprudence, economics and sociology as to the corporation's personality appear to be trapped within a liberal, individualist paradigm. These theories are examined on the basis that they have informed the legal description of the corporation. The five most influential theories, fictionalism, fellowship, natural entity theory, managerialism and contractarianism, are studied as representing different stages of legal and academic analysis of the corporation.

The description of corporate personhood in legal doctrine supports the view of the corporation as a creature of the state. This is reflected in *fictionalist* accounts of the corporation that see the corporation as a fiction, a 'mask' for the people who make it up (Bratton 1989; Tomasic et al. 1996: 88). In this theory, the state is central to the corporation's existence.

Otto von Gierke's ([1868] 1990) *fellowship theory*, which sees the corporation as having a personality of its own by virtue of it being an association of real people, has provided the most extreme counter-point for fictionalist theories but has been unsuccessful in influencing common law legal systems. Von Gierke's theory is a significant departure from the liberal individualism of alternative theories such as fictionalism and has had limited jurisprudential endorsement.

Natural entity theory played an important part in the development of corporate personhood. Rather than seeing the corporation as a collective endeavour, this theory sees the corporation as a contractual body comprised of individual relationships (Bratton 1989; Millon 1990). Under this theory, the role of the state is reduced; accordingly, the corporate person becomes regulated as a human individual rather than through special laws. The primary contractual relationship in this context is between managers and shareholders.

The importance of the internal relationship between managers and shareholders, and the nature of its evolution, became a primary concern in the early twentieth century as the ownership of corporations became increasingly dispersed. It was most famously addressed by Berle and Means (1932), who conceived of the corporation as one of the most powerful collectives due to the *separation of ownership and control*. As corporations proliferated in the post World War One economy, Bratton (1989: 1492) argues that managers took on an expanded role and corporations developed hierarchical management structures that were soon normalised.

The work of Berle and Means on the dispersion of shareholding and the ensuing separation of ownership and control is of central importance to understanding the growth of corporations. Berle and Means (1932: 1) saw this separation as being responsible for what they called the *corporate system* where corporations moved from being a method of property tenure to institutions responsible for organisation of the economy. They identified two main problems stemming from this; fiduciary issues regarding the relationship between managers and shareholders and a concern over how changes in the theoretical value of property impact upon its use.

Berle and Means' approach to analysing the managerial corporation is framed by legal pluralism; they conceived of the democratic state as being constituted by collectives, such as corporations, whose power is often equivalent to that of the

state. Tsuk (2005) explains that their concern with corporations lay in the potential for this power to be abused and the state's role in regulating this power. In this sense, the separation of ownership and control was a case study of institutional power for Berle and Means. Their approach was a departure from fictionalism and natural entity theory, in its examination of the corporation as a collective that drew its significant social power from its collectiveness. A highly influential perspective in its day, the *managerial thesis* has since been reinterpreted in a way that undermines the legal pluralism of their argument (Tsuk 2005: 211). Tsuk (2005: 199-200) claims that this was partially the result of a concern with the collectivism evident in their argument; the theory could not persist in a social environment of individualism. That this was a reason for the theory's decline speaks to the strength of individualism in contemporary western countries.

An extreme individualism is posited by *contractarianism*, a theory of the corporation drawing upon elements of natural entity theory to see all interactions involving corporations as being based on contracts (Easterbrook & Fischel 1989; Gordon 1989; Winkler 2004). The theory came to its peak in the 1980s when it received strong legal and academic support. Aside from individualising the corporation, contractarianism effectively removed the state, claiming that a system based on voluntary contracts could rely on the market for regulation. By reintroducing law and economics, contractarianism discredited the concerns of the legal pluralists as to the power of corporations and the proposed measures to control the exercise of power. Instead, contractarians proposed a system whereby individuals could guard their interests contractually and through the market.

Contractarian theory individualises the corporation to such an extent that it becomes a simplistic theory unable to account for the undesirable consequences of corporate activity. While contractarianism has had many of its basic premises challenged, it remains an influential theory of corporate personality. This should be of considerable concern as it is, arguably, the least accurate theory presented

to date in its individualising of the corporation and the relationships which constitute it.

These theories reveal the extent to which legal and scholarly adherence to individualism is theoretically problematic. There is a sharp divide between the legally reified corporation and the structure and functioning of corporations. This presents a serious challenge to theories of the corporation but, I argue, is most worryingly problematic in practice as it means that legal structures are sometimes unable to control corporations.

Corporate Liability Laws

Despite problems with the legal conception of corporations, law is increasingly used to control corporations whose legal relationships continue to grow in number and complexity as the form itself proliferates. Corporate liability laws highlight the difficulties associated with regulating corporations in the existing legal framework. The potential social harms that come from these difficulties, and from the intersection of faulty legal principles and an increasing reliance on law, are most conspicuous in the regulation of workplace health and safety where jurisprudential failings have translated into risks to the health and safety of workers. I examine the regulation of workplace deaths in Australia as an example of the practical manifestation of problematic legal theory.

The granting of legal personhood to corporations means that in most legal doctrine, corporations are legislated for alongside human legal individuals. Law makers have not developed specific laws and legal tests for corporations within criminal law that take account of the non-human, collective features of corporations identified in Section One. Norrie (2001: 82-83) argues that corporations have been either *assimilated* or *differentiated* at law. Represented by the *identification doctrine*, assimilative laws determine the liability of a corporation by establishing the liability of its representatives such as managers, CEOs and directors (Norrie 2001: 95, 105). Conversely, laws that differentiate the

corporate legal individual from other legal individuals have developed special tests of liability for the corporation. In common law, this is encapsulated in the doctrine of *strict liability*, which does not require evidence of *mens rea*, a guilty mind for liability to be established.

Strict liability offences are found in regulatory laws, such as occupational health and safety (OHS) legislation. Regulatory laws have different aims, procedures and punishment schemes from criminal laws, where imputed corporate liability in the form of the identification doctrine remains the standard. While corporate legal personhood claims to equalise the legal status of corporations and humans, I argue that the development of two different bodies of law and two different liability modes indicates the legal struggle to reconcile the corporate and human forms. Differentiation now goes beyond liability structures and permeates the nature of the regimes that regulate them. However, far from this distinct body of law effectively regulating corporations, Tombs and Whyte (2007: 115) claim that this leads to a construction of differentiated liability and the crimes associated with it as 'second class offences'.

To illustrate the differences between assimilative and differentiating laws, an analysis of the regulation of workplace deaths in NSW is undertaken. Workplace deaths in NSW can be regulated by both the criminal law under *Crimes Act 1900* (NSW) and regulatory law under the *Occupation Health and Safety Act 2000* (NSW). Johnstone (1996: 2) argues that regulatory and criminal law are so different in language, aims, perception and process that OHS law is ineffective in preventing and accounting for workplace deaths. While there is evidence to prove this, I argue that the criminal law is no more effective at preventing workplace deaths without significant reform due to its individual focus. I examine the two regimes using data drawn from legislation, punishment schemes, conviction rates and penalties. A discussion of corporate structures and hierarchies highlights the difficulties that individualised approaches to corporate criminal liability face. On this basis, I question the assumptions made by trade

unions in Australia that have campaigned to create a specific crime of workplace deaths in the general criminal law. An analysis of this campaign in NSW and the Australian Capital Territory (ACT) highlights the need for a shift in the jurisprudential perception of corporations as individuals if law reform is to be successful.

The maintenance of theoretically and practically problematic liability structures draws attention to the received nature of law. Tombs and Whyte (2007: 141-142) argue that law has no reality in itself; it is created by the state and is designed to reflect the intentions of the state in maintaining order. The same theory applies to contemporary business corporations; equally 'unnatural', there is nothing inevitable about their legal shape. The characteristics of corporations can be disputed and modified and there exists an equal possibility to reshape the legal system.

Unlike most human individuals, the corporation is accountable to no other social control than the law. Braithwaite (1981: 481) explains that there is little that can be done to control or sanction corporations when legal controls are unsuccessful. This attests to the continued importance of law to the effective regulation of corporations and in doing so affirms the need for law reform. I argue that a revision of legal individualism and the corporation is central to achieving this.

Section and Chapter Outlines

The thesis is separated into two sections. Section One, comprised of Chapters Two and Three, explores patterns of corporate activity as patterns of dominance through an examination of the legal, organisational and economic features of contemporary corporations. The way these patterns indicate the embeddedness of corporations in contemporary social systems is explored through a case study of James Hardie's activity in the Australian asbestos industry.

Chapter Two gives a legal description of the corporate form, focusing on

corporate personhood, limited liability, perpetual succession and the transferability of shares. The way these concepts reflect the legal individualism of common law legal systems is introduced. The organisational features of corporations are also explored in this chapter. I emphasise the relationship between corporate management and shareholders with reference to the work of Berle and Means (1932) in an effort to understand the importance of shareholding patterns to patterns of corporate dominance. The ownership structures of the top twenty Australian corporations in the Forbes 2000 list is examined in an attempt to understand, apply and update the work of Berle and Means on the separation of ownership and control. Contemporary ownership structures, where ownership is concentrated and held by institutional investors rather than humans, have the effect of further institutionalising the corporate system which Berle and Means identified. This further enhances the role of the manager and reduces the role of the shareholder, while asserting the collective basis of the corporate form.

A discussion of industry concentration in the Australian economy, using case studies of the Australian insurance industry and the cardboard box cartel between Visy and Amcor, is used to illustrate the scope of contemporary corporations and the degree to which the corporate form is at odds with classical conceptions of competitive capitalism. However, this analysis indicates that industry concentration by corporations paradoxically springs from governments' attempts to create and encourage neoliberal economies (Motta and Polo 1997).

Chapter Three, the second chapter in this section, explores the manifestation of these patterns by reference to a case study of the operations and restructure of the Australian asbestos company James Hardie. This case study illustrates the complexity of contemporary corporate activity that Calhoun and Hiller (1988) and Castells (1998, 2000) discuss and which is central to the rationale for this thesis, namely an exploration and description of contemporary corporate dominance. Despite being aware of the health effects of its products, the company James Hardie manufactured asbestos products profitably for decades. A series of legal

manoeuvres between 2001 and 2003 saw the company restructure in a way that enabled it to avoid paying compensation to victims of its products. An inquiry into the restructure found that it was lawful and that there was no legal imperative for James Hardie to provide compensation.

The decisions and actions of James Hardie have influenced the lives of thousands around the world. Asbestos disease has become a global health issue, which has now spread from developed to developing nations. Examining these messiness of the links between James Hardie's previous activities and current trends in asbestos-related illness and death highlights the very real and far-reaching consequences of complex corporate activity.

This case study is as much a study of the state as it is of James Hardie. The history of asbestos use in Australia and the dangers it has presented to community welfare highlight the state determined legal context of corporate actions. Asbestos exposure in Australia was not properly controlled until the late 1960s. The absence of state intervention cannot be thoroughly explained by the limited information available to states on the dangers of the substance. Instead, it demonstrates complicity between the state and asbestos companies and a disinterest, identified by Norrie (2001) and Tombs and Whyte (1998, 2007), in regulating the powerful.

The centrality of the state in producing the conditions for the patterns of corporate dominance identified in Section One is examined in Section Two of the thesis, comprised of Chapters Four, Five, Six and Seven. This section interrogates the legal basis of corporate dominance by reference to corporate law's theoretical and practical history. The story presented indicates how corporate individualism is the cornerstone of the patterns of corporate activity and dominance identified and examined in Section One of the thesis.

The historical development of corporate laws is examined in Chapter Four. The history of legal doctrine highlights the dynamic relationship between the state and the corporate form. It is only through the state monopoly over law-making powers that corporations are able to take a legal, and therefore economic and social, shape. The contemporary role of corporations has developed with the assistance of the state through various legal concepts. The legal concepts of corporate legal personhood, limited liability and general incorporation have enabled contemporary corporations to become economically and socially dominant. This chapter posits contemporary corporate dominance in its historical context and in doing so questions the applicability of historic corporate laws to contemporary corporations.

Chapter Five explores the seemingly contradictory inclusion of corporations as legal individuals into liberal, individual, legal systems. The inclusion of corporations into economic systems through corporate personhood has stressed the individualist aim of liberalism to the detriment of others such as equality before the law and universality. By stressing the corporation as an individual, despite the ramifications of this for other liberal ideals, corporations were able to legitimately enter into economic transactions. This draws out the connections between legal individualism, corporate personhood and capitalism in theory.

Chapter Six demonstrates how the tension between liberal theory and the desirability of corporations for capital accumulation is also found in legal, economic and sociological accounts of the corporate form. Most theoretical debates about the nature of the corporation's personality are in the transmitted individualist paradigm. Five of the most influential theories, fictionalism, fellowship, natural entity theory, managerialism and contractarianism are examined in this chapter. Each of these theories of the corporation have informed legal, academic and social perspectives on corporations; an examination of the content of these theories and their historical context is important to understanding the ideological basis to descriptions of the corporate form. Despite their

differences, all the theories are based on historical, social and political conditions as opposed to any objective observations of the corporate form. They serve to highlight the political nature of the corporation that is perhaps its only objective reality.

The practical effects of the disconnect between the corporate collective and the legal individual are identified in Chapter Seven which explores the difficulties associated with applying legal tests of liability to corporations. This begins with an explanation of corporate liability laws in the Australian legal system. By examining the structure of contemporary corporations and the nature of decision making within them, it is argued that there are substantial failures in the common law approach to regulating corporations. These failures are based on the continued use of nineteenth century legal concepts such as corporate personhood and limited liability, with the individualism of these measures being in direct opposition to the collective dimensions of the corporate form. Both the application of law and its ability to deter corporate wrongdoing are impacted by this.

This chapter also discusses attempts to differentially regulate corporations through regulatory agencies. A comparison between the regulation of workplace deaths in NSW under regulatory and criminal regimes is undertaken to describe the inadequacies of regulatory agencies as an alternative control of corporate activity. This section of the chapter stresses the need for comprehensive law reform in order to effectively regulate corporations.

The thesis concludes in Chapter Eight with a restatement of the dominance of corporations and the attendant significance of studying them within the social sciences. While much of this thesis is framed in critical terms, this chapter explains that this does not imply that effective corporate regulation is impossible. An emphasis on the role of the state as creator and regulator of corporate dominance is central to achieving effective regulation. A study of corporations

that includes an analysis of the state is posited as enhancing the potential for critique and reform to be realised as an objective possibility.

Section One

Patterns of Corporate Activity as Patterns of Corporate Dominance

This section explores patterns of corporate activity through an examination of the legal, organisational and economic features of contemporary corporations. It aims to highlight the way in which these patterns can also be seen as indicating patterns of corporate dominance. This is done by first presenting a series of statistics on corporate ownership and industry concentration. In conjunction with the statistics presented in Chapter One, consistencies in corporate activity are established. Overall, these indicate the complexity of contemporary corporations and the embeddedness of their operations in contemporary social systems.

This is explored further by reference to a case study of the Australian asbestos company James Hardie, to which these categories of corporate dominance can be applied. The conclusion of this case study indicates the centrality of the state as law-maker to corporate dominance, an issue which is fully explored in Section Two.

Chapter Two: Legal, Organisational, and Economic Features of Corporations

The corporation is an increasingly prevalent form of business organisation. While the specific features of single corporations are unique, there are legal features that are common to them all. This makes it possible to discuss corporations generally and helps establish them as legitimate objects of critique. These features also relate directly to the central premise of this thesis, namely that corporate dominance is derived from legal constructs. Aside from common legal constructs, there are also structural and organisational features, such as the existence of management distinct from owners, which are common to many corporations, particularly those corporations with significant economic resources.

Legal personhood, limited liability and perpetual succession are mutually dependent features of the corporate form. They serve to make the corporate form a very distinct type of business structure. This distinctiveness makes the corporate structure an appealing one for investors. Central to these laws is their construction of the corporation in individual terms. This allowed for the corporate form to proliferate and have been central to its contemporary dominance.

Elements of corporate organisation, such as work processes, ownership and management hierarchies, while relevant in themselves, are typically derived from the legal description of the corporation. The second part of this chapter focuses on the structural and organisational elements of corporations and their relationship to law. The relationship between managers and shareholders is of central importance to the operation of most corporations, particularly the largest corporations. The work of Berle and Means (1932) on the nature of this relationship continues to be useful for understanding the implications of the separation of ownership and control in contemporary corporations. An analysis of the widely dispersed, yet concentrated, ownership structures of the twenty

largest Australian corporations highlights the continued relevance of Berle and Means' thesis, albeit in a form which can account for spread of institutional ownership. The largest corporations have the ownership of most of their shares monopolised by a minority of shareholders. From this example, the complexity of corporate organisation, the manifestation of which will be seen in the next chapter, becomes apparent.

The concentration of industry by corporations is an important theoretical and economic issue in most western countries. The most successful corporations are those that can dominate their industries; the dispersion of shareholding assists in this by providing the capital required for such expansion. Corporate activity in industries in Australia such as banking, media, insurance and telecommunications is highly concentrated (ABS 2001). The wealth and scope of the second largest insurance corporation in Australia, Insurance Australia Group (IAG) will be examined to show the economic effects of such concentration. The cartel between Visy and Amcor, which saw the companies engage in price-fixing and market sharing, involved breaches of Australian corporate and criminal law and resulted in significant economic losses. It is a prime case study of the potential harm associated with corporate monopoly and oligopoly.

The legal imperative for corporate managers to maximise the return on investment for shareholders is a reason for the active concentration of industry by corporations. This is linked to the legal imperative for corporate managers to maximise the shareholder's return on investment. The collective elements of the corporate form, the pooling of human and monetary resources, make it particularly well equipped to make profit. However, these collective elements are at odds with the legal construction of the corporation as a liberal individual through corporate personhood, limited liability, transferrable shares and perpetuity. Despite the contradiction, it is the legal emphasis on the corporation as an individual, to the detriment of acknowledging its collective realities, which advantage the corporation. While this results in significant profits, technological

advancements and employment, the legal definition of the corporation as an individual gives rise to problems in effectively regulating these collectives and preventing the harm that may emerge from their activities. These collective features and their adversity to individualistic laws are explored in depth in Chapter Seven. The profit imperative further illustrates the confusion over who benefits and who suffers from complex and multi-layered contemporary corporate activity; the identities of consumers, employees and investors are no longer delineated. Accordingly, judging the source and allocation of profits is a difficult task.

Legal Definition of a Corporation

Many organisational forms evident in society have economic functions; these range from the family to business structures. Business structures include corporations, sole proprietorships, partnerships, co-operatives and trusts. In legal discourse, and for the purposes of this thesis, a corporation is a form of legal organisation.

A corporation is distinct from other types of business organisations on account of four distinct features: legal personality, limited liability, transferable shares and perpetual succession.

First, a corporation is recognised as a distinct *legal person*. This means that the corporation and the people who constitute it are considered to be distinct persons at law; the corporation is an individual in its own right with both rights and duties (Ford, Austin & Ramsay 2001: 112). While laws vary across jurisdictions, there are five general rights that exist for a corporation (Fisher, Wiseman & Anderson 2001: 29-36; Ford et al. 2001: 101, 112-116). A corporation has the ability to sue and to be sued, thereby gaining access to the courts; the right to own property in its own right and name, allowing it to hold its assets separately from the assets of its members; the right to hire agents; the right to a common seal, enabling it to have a 'signature' for contract making; and the right have a constitution to govern

its internal operations. From these rights flow a variety of other rights and responsibilities, many of which are the same as those exercised by humans such as owning property, committing crimes and being a party to an action in tort.

Limited liability, the second feature, means that shareholders are liable for debts of the corporation only up to the value of their shares (Ford et al. 2001: 5)⁶. Since the corporation has its own legal personality it is responsible for its own debts and cannot call upon shareholders to meet these debts (Jackson 2004c: 415). This minimises the amount of property investors risk losing should the venture fail; shareholders invest knowing the full extent of what they may lose. Limited liability also allows for shares to be traded anonymously and independently of the interests of third parties, for example creditors. Jackson (2004c: 416) acknowledges that the primary advantage of limited liability is the amount of capital that it can help raise for a corporation. Alternative business forms such as sole proprietorships and general partnerships do not have such rights (Fisher et al. 2001: 6-9; Ford et al. 2001: 5). The individuals who own these businesses have unlimited liability or liability to the extent specified in contracts, thereby risking more of their personal property.

The anonymous trading of shares is the third hallmark of the corporate structure. The legal personality of a corporation does not change alongside changes in its membership (Ford et al. 2001: 105). The operation of partnerships is often disrupted by changes in membership and the associated legal requirements for changes to trading name registration (Fisher et al. 2001: 7-8). This is a particular problem in relation to the death of members.

Finally; since a corporation exists independently of its owners it continues to exist when its owners change, leave, or die. Known as perpetual succession, the effect

⁶ However, directors found guilty of breaching s. 588G(2) of the Corporations Act, 2001, allowing a company to trade whilst insolvent, that is, unable to pay its debts as and when incurred, can be liable for the Company's debts incurred whilst it was insolvent: s. 588J(1). Similarly, liquidators may recover losses as damages suffered by a company from insolvent trading from such directors.

is that until moves are made to deregister or wind up the corporation, it will continue to exist (Ford et al. 2001: 105-107). Without this, there is the risk of assets being dissolved and distributed with the deaths of members and continual uncertainty as to when this may happen. The absence of this risk and uncertainty allows for capital to be accumulated in a stable way and enhances the possibility for future investment by, and growth of, the corporation.

The way a corporation distributes and sells its stock, the capital a corporation raises through its shares, determine whether a corporation is private or public. A private corporation cannot issue its shares or securities to the general public. A public corporation, through the issuing of a prospectus, can issue its shares or securities to the general public through the stock market. The majority of corporations are private, also known as proprietary, and there are some advantages to this form (Ford et al. 2001: 158-160). Generally private corporations have less shareholders, this enables them to make decisions more quickly than a public company. They are also less likely to suffer from losses due to general market activity, the effect of losses incurred due to company activity can be minimised. For example, if the company incurs operating losses, it can recover from this provided it has the support of its shareholders, bankers and customers without being overly concerned about the reaction of the general public. In a public company, extensive financial losses can encourage shareholders to sell their shares and drive down the market share price. Additionally, a stock exchange listing requires compliance to a variety of additional laws, such as continuous disclosure laws; accordingly, private corporations are slightly less regulated (Ford et al. 2001: 159-160). However, a public company, on account of the risk involved in its operation as such, is able to raise significant amounts of capital and it is these corporations that are the most economically successful (Ford et al. 2001: 764). The dispersion of ownership allows public corporations to spread their debts more effectively than a private corporation. The effect of this is considerable and clear; despite the risks involved, the largest financially successful corporations are public corporations.

A corporation is governed by a board of directors that acts on behalf of the corporation (Ford et al. 2001: 208-209). The board of directors is also expected to act in the best interests of shareholders. Shareholders are entitled to vote in relation to various aspects of the corporation's operation, including the election of company directors. The board selects the chief executive officer and managing director (Ford et al. 2001: 209). This aspect of corporate organisation reduces, though does not eliminate, the potential for conflict between members to have a significant impact on the corporation's operation as it may in partnerships and co-operatives. Additionally, decision-making is centralised, theoretically reducing the amount of time it takes to make a decision in comparison to a structure such as a co-operative that requires the participation of members to be successful. However, there are also many problems associated with the governance structure of corporation discussed later in this chapter.

A corporation is formed by registering with the government of the state in which it is present. In Australia corporations are registered, monitored and deregistered by the ASIC which regulates them through the *Corporations Act, 2001*. Prior to the creation of national corporations law in 1991, corporations were regulated by the states and territories in which they were formed. Until 1961, each Australian jurisdiction had different corporate laws based on legislation passed in England (Ford et al. 2001: 42). As the corporate structure proliferated, there were calls for the legislation to become uniform and centralised (Ford et al. 2001: 43). Between 1961 and 1962 the states and territories developed uniform corporate acts that went some way in nationalising corporate law. In 1991, a national corporate law scheme was adopted and has since developed into the *Corporations Act 2001*. While the states and territories of Australia no longer control the formation and regulation of corporations under corporate law, corporations operating in Australia are also subject to other legislation such as the Crimes Acts of each State, the *Trade Practices Act 1974* and State and Commonwealth labour laws.

When a company is registered with ASIC it must provide details as to its ownership structure, details of officeholders and governance structure, the type and number of shares issued and members' details⁷. ASIC must be informed of ongoing changes in these areas of the corporation's operation, on a contemporaneous basis. Failure to comply with ASIC's regulations and the *Corporations Act 2001* can result in a range of penalties, from pecuniary fines allocated to the corporation itself in the form of late lodgement fees, through to criminal proceedings against company directors.

These are the fundamental laws of the corporate form. While this account has been largely descriptive, Section Two will examine this content with reference to social and jurisprudential theory.

Organisational Structure of Corporations

As a collective of members, corporations are a form of organisation. There are a variety of corporate organisations including businesses, bodies corporate, private and public. The size of corporations also varies significantly; the variety found within this species of organisation makes it difficult to generalise about 'the corporation'. However, unlike other organisations, there are homogenous features of the corporate organisational form that allow for them to be described generally. These are the four legal features outlined in the previous section: legal personality, limited liability, transferable shares and perpetual succession. When these features are combined with the manager's imperative to maximise the return on investment for shareholders, the possibility to discuss corporations in general terms emerges. These legal features shape the structure and organisation of corporations, particularly the ownership structures and relationships between managers and shareholders.

⁷ This includes details on the type of share issues (employee, founder, management, ordinary, redeemable, and preference shares) and the number of shares issued.

Corporate Management: The Board, Managers, Shareholders

A corporation is governed by a board of directors who, together with other directors and officers, are taken to represent the corporation. The board of directors is elected by shareholders. The board then selects the corporation's officers, such as the CEO and managing director.

Directors and officers of corporations are considered to have particular legal duties toward the corporation itself, including its shareholders and creditors (Fisher et al. 2001: 135). The legal definition of 'director' and 'officer' is broadly defined in section 9 of the *Corporations Act 2001* to include all those individuals who could be said to participate in decision-making which could affect the whole, or a substantial part, of the corporation. The legal duties these individuals possess are fiduciary, meaning that the individual is expected to act with regard to the interest of another, in this case the shareholder (Fisher et al. 2001: 136). Amongst these fiduciary duties are included a duty to act in the bona fide interests of the company, a duty to act within the scope of their powers for the purpose intended by the corporation and a duty to avoid conflicts of interest⁸ (Fisher et al. 2001: 137-146).

Shareholders are an essential part of corporations. It is through the capital contributed by shareholders that corporations exist and are able to access the legal advantages of incorporation. In return for their capital investment, shareholders receive specific rights (Fisher et al. 2001: 178). The exact nature of these rights is explicated in the corporation's constitution and, in the case of public companies issuing shares or securities to the public, within prospectuses lodged with ASIC⁹.

There are general legal rights for shareholders including repayment of capital, entitlement to dividends, access to information and voting rights. Unless there are

⁸ See sections 180-183 *Corporations Act 2001* (Cth).

⁹ *Corporations Act 2001* (Cth) s 254B.

contrary provisions in the corporation's constitution, a shareholder has a right to be repaid in capital equal to the proportion of their investment (Fisher et al. 2001: 179). Similarly, there are no prescribed amounts for the dividends payable to shareholders. Boards determine the dividend policies of corporations and the proportion of after-tax net profits that will be declared as dividends. The entitlement of a shareholder to dividends is set out in the corporation's constitution; the board can exercise a considerable amount of discretion in determining the quantum of dividends to be declared and paid to shareholders (Fisher et al. 2001: 180-181).

While the *Corporations Act 2001* advocates shareholder democracy (one vote per share) in terms of voting rights, this is a 'replaceable rule' meaning that, as with repayment of capital and dividends, the corporation's constitution can determine the voting rights attached to shares (Ford et al. 2001: 275). In the event that the shareholder cannot vote in person, they are entitled to appoint a proxy. Disclosure laws protect the rights of shareholders to timely and accurate corporate information. Non-members of corporations do not have a legal right to access all corporate information. The exception to this is ASIC which has been given powers to access corporate information and corporations engaged in litigation (Fisher et al. 183). Non-members can access, for the cost of a search fee, the financial reports of large proprietary and public companies on the ASIC public database. Similarly, non-members of listed public companies can access all material information required to be disclosed to the ASX under the continuous disclosure laws (both under the *Corporations Act, 2001* and ASX Listing Rule 3.1), including financial reports, by accessing the corporation's website or the ASX website.

The relationship between managers and shareholders has changed considerably in the past hundred years. Berle and Means (1932) argue that while corporations were once closely held, often by those who managed it, the modern corporation is owned widely. Corporations are no longer likely to be owned by those who

control them. This pattern emerged in the early twentieth century when it became clear that more capital than that owned by a few people was required to establish corporations. The wide issuing of shares allowed corporations to raise significant amounts of capital, but also meant that the amount of shareholders also increased (Williston 1968: 203). It is the relationship between those who constitute the corporation; directors, managers and shareholders which is most influenced by the dispersion of shares. Berle and Means (1932) identify the distance between owners of the corporation and its managers as the principal reason for the rise of a 'corporate system' where corporations come to dominate economic and social life.

Berle and Means argue that corporations began as a method of property tenure but with the dispersion of ownership have become a central economic organising principle. They claim that corporations organise economic activity as a result of their size and their role as major employers (Berle & Means 1932: 3). The centrality of corporations to economic life has meant, they argue, that the corporation has become a 'major social institution' (Berle & Means 1932: 1). They identify two causes of this development. First, the development of the factory system brought a large number of workers under the control of a few managers. Second, the rise of the manager, which resulted from the dispersion of shareholding. They argue that the changes in property ownership that accompanied the dispersion of shareholding are responsible for the emergence of the modern corporate system.

To prove the connection between shareholding and the development of a corporate system Berle and Means contrast shares with traditional forms of property. Where previous property owners both controlled and benefited from their property, the availability of direct and indirect sources of capital in the form of shares and investment precipitated the development of an open market for securities (Berle & Means 1932: 6). According to Berle and Means, the use of this market for securities transformed the corporation from a form of legal organisation

to an institution at the service of its investors. This gave rise to new relationships between owners, workers, consumers, managers and the state (Berle & Means 1932: 6). It is the managers, the only parties capable of centralising corporate activity, who are responsible for the coordination and satisfaction of these relationships. For Berle and Means this is the revolutionary element of shareholding as property ownership; it made a new distinction between property and its control. Berle and Means' argument is premised on the capitalist theory that self-interest is a determinant of economic efficiency. Of central concern to Berle and Means is the likelihood that managers would not operate the corporation in the interest of the shareholders:

Physical control over the instruments of production has been surrendered in ever growing degree to centralised groups who manage property in bulk, supposedly, but by no means necessarily, for the benefit of security holders...There has resulted the dissolution of the old atom of ownership into its component parts, control and beneficial ownership (Berle & Means 1932: 7-8).

For Berle and Means, this re-allocation of power is directly related to the growth and dominance of the corporation: '[as] ownership continually becomes more dispersed; the power formerly joined to it becomes increasingly concentrated; and the corporate system is thereby more securely established' (Berle & Means 1932: 9). Berle and Means had made the link between organisational complexity and dominance in the early twentieth century.

Through statistical analysis, Berle and Means (1932: 65-66) conclude that individual wealth in the early twentieth century had begun to take the form of securities. This was held either through direct shareholding, or indirect shareholding through banks or investment companies. For Berle and Means, this signalled a significant shift in the idea of wealth that necessitated a review of basic social and academic concepts of property. They argue that the nature of the relationship between shareholder and management means that ownership has

moved from being active to passive (Berle & Means 1932: 66). The owner has rights and responsibilities but little control over the business or its physical property; the owner has no responsibility for the business or its property (Berle & Means 1932: 66-68). The value of this property is constantly fluctuating and being reappraised; these are values that the property owner has little control in determining (Berle & Means 1932: 67). This wealth is highly liquid and can be converted easily but its owner cannot directly use it. It can only be used by being sold. This, Berle and Means claim, forcibly integrates the individual into the market (Berle & Means 1932: 67). They also argue that property has lost its spiritual value, the ability it once had to satisfy the owner outside of income has disappeared: 'this quality has been lost to the property owner much as it has been lost to the worker through the industrial revolution' (Berle & Means 1932: 67).

Berle and Means (1932: 46) argue that the accumulation of power by managers changed social life and increased the dominance of corporations:

The economic power in the hands of a few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organisations which they control have passed far beyond the realm of private enterprise – they have become more nearly social institutions...Such is the character of the corporate system – dynamic, constantly building itself into greater aggregates, and thereby changing the basic conditions which the thinking of the past has assumed.

While Berle and Means focus on the impact of this on concepts of property ownership, it is these wider implications which Berle and Means hint at which are of concern to this thesis. An examination of patterns in the ownership and management of contemporary corporations asserts the continued relevance of Berle and Means' thesis, but also the greater complexity of contemporary corporations. The concentration of share ownership in corporations by other

corporations¹⁰ indicates further distance between management and owners in contemporary corporations than Berle and Means had described. This gives their concerns over the fiduciary issues at stake when ownership and control are separated a new significance.

Ownership and Management of Contemporary Corporations

Berle and Means were unable to forecast the extent to which corporations would come to own significant stakes in one another. While laws exist which limit the interests that competing corporations can hold in one another, there is no law against a corporation owning stakes in another. This phenomenon takes the implications of Berle and Means' analysis a step further. The problems they identified with the distance between owners and their property, with managers as custodians of the traditional power associated with property ownership, are doubled when the ownership relation is further distanced by the existence of a mediating corporation and another set of managers.

An examination of the top 20 Australian corporations, using the Forbes (2007) list, highlights the extent to which institutional shareholders dominate the largest corporations of Australia.

The 20 largest shareholders of these companies own between 30 and 82 per cent of these corporations. With the exception of one, Westfield Group, all these shareholders are corporations. The following table¹¹ indicates the corporation, the amount of shares owned by the largest twenty shareholders, and the proportion of the corporation's value in stocks that this ownership represents.

¹⁰ This is particularly the case with large corporations, but there are exceptions to this. Visy, the corporation being studied for its cartel behaviour later in this chapter, is a privately owned company mainly held by the Pratt family. Similarly, Frank Lowy, the founder of Westfield Group, one of the top 20 corporations studied in this list, holds the majority of its stock.

¹¹ These statistics were collected from the 2007 Annual Reports of each of the corporations. They are drawn from the statistical information on ordinary, as opposed to preferential, shareholders.

Table 1 *Ownership concentration of the twenty largest Australian corporations*

Company	Number of shares held by top 20 shareholders	Percentage of total ordinary shares
National Australia Bank	824,330,232	50.84
Commonwealth Bank	559,920,906	43.04
ANZ Banking	1,050,323,057	56.32
Westpac Banking Group	1,096,539,554	58.82
Telstra	9,508,027,741	76.41
QBE Insurance Group	730,251,861	82.40
Westfield Group	1,474,870,655	75.92
Woolworths	601,264,765	49.65
Macquarie Group	160,964,151	63.39
AMP	939,547,020	50.08
St George Bank	164,348,836	30.86
Suncorp-Metway	450,310,415	48.68
Wesfarmers	120,277,720	31.18
Qantas Airways	1,617,972,375	81.51
Woodside Petroleum	488,486,800	70.97
Insurance Australia Group	802,173,787	44.70
Stockland	1,117,171,097	76.23
Brambles	1,069,001,314	75.47
Toll Holdings	399,241,210	62.12
Foster's Group	1,431,344,603	72.63

Source: Company Annual Reports 2007

There are regulations concerning corporate ownership of corporations. Section ten of the *Financial Sector (Shareholdings) Act 1998* (Cth) prohibits an individual, including corporations, from having a holding of more than 15 per cent in a financial sector company without approval from the Australian Treasurer. Section 23 of the Act specifies that even without a 15 per cent stake in the corporation the Treasurer can find that an individual has ‘practical control’ of a corporation and can order that individual to reduce their stake or renounce their control.

The *Corporations Act 2001* prohibits an individual from having more than 20 per cent of voting rights in a corporation without lodging a takeover bid. However, the 20 per cent shareholding threshold can be exceeded by three per cent every six months. An individual is considered to have a substantial holding if they total votes equal or exceed five per cent. Section 671B of the Act specifies that substantial shareholders must advise the corporation and the ASX of their interests when they begin or cease to be a substantial shareholder.

Section nine of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) states that any proposed foreign acquisition of Australian shares is subject to approval by the Australian Treasurer when this interest is expected to exceed 15 per cent.

Despite the regulations, the statistics with respect to shareholding in the largest Australian corporations indicate that institutions dominate ownership of the largest Australian corporations. The role of the human individual is found most directly in its corporate capacity, as a manager, director, or officer. Human individual shareholders, whilst often being represented by institutional shareholders, have all but disappeared. In relinquishing control over their property to managers, the human individual's ability to access their property is significantly reduced. In the case of superannuation and investment funds this is such that the exact location of capital at any given point in time could be unknown. Control over shares as property is no greater for most human individual investors who have directly invested their capital. Given the size of institutional shareholders' interests, human individual investors are likely to be overwhelmed where voting is concerned.

Patterns of Industry Concentration in Australia

The dispersion of shareholding and the significant amounts of wealth available from large institutional shareholders helps corporations to achieve industry and market domination. This can lead to situations of oligopolistic and monopolistic market behaviour. In Australia, industries such as media, insurance and telecommunications are highly concentrated. The corporations operating in these industries are amongst the most profitable in Australia. The following discussion of concentration in the Australian insurance industry and the corrugated fibreboard container industry will examine practical instances of market concentration by corporations. The profits and market control that can emerge from monopolistic or oligopolistic corporate activity are too significant for regulation to be left to the market. It is an example of specifically corporate

activity¹² that can have detrimental effects on many individuals and communities. This is highlighted by those instances of harmful monopolistic activity where regulatory or criminal laws are breached. In Australia, matters relating to market concentration and competition are regulated under the *Trade Practices Act 1974* which is administered by the Australian Competition and Consumer Commission (ACCC), a statutory body formed in 1995.

Statistics collected by the ABS for the years 2000-2001 (the latest data available) attempted to calculate industry concentration in Australia by considering the proportion of sales, persons employed and industry value added (IVA)¹³ of the 20 largest¹⁴ enterprise groups operating in each industry category. Sampler (1998: 350) agrees with such a methodology, claiming that it is not so much the number of competitors relevant to determining concentration, but rather the concentration of sales.

On this basis, the most concentrated industry in Australia is communication services which includes broadcasting and newspaper services. In this category, four businesses control 77.6% of sales, 83.9% employment and 97.2% of IVA of the total industry. Competition in the Australian media industry is controlled under the *Broadcasting Services Act 1992* (Cth) which is administered by the Australian Communications and Media Authority. Despite this, the statistics indicate considerable levels of concentration. The industry is dominated by News Corporation and John Fairfax Holdings.

Motta and Polo (1997) undertook an analysis of global concentration in broadcasting, with a focus on European markets. They found similar patterns of

¹² As opposed to monopoly in other realms, involving other institutions, for example state monopoly over provision of services such as telecommunications and rail transport. While these are monopolies, the link to capital is less clear than in corporate monopolies and capital is arguably less a motive.

¹³ The ABS uses the IVA as a summary measure of industry production which they say is approximately 'the value of output at basic prices minus the value of intermediate consumption at purchasers' prices' (ABS 2001).

¹⁴ The ABS defines the 'largest' corporations according to their profit and loss statements and the number of employees (more than 200).

concentration by corporations in these countries despite state regulations covering ownership, broadcasting licence rights, advertising time and programme content aimed at limiting market power and concentration (Motta and Polo 1997: 306-307). Importantly, they found that this concentration had continued, and increased, following active state deregulation of broadcasting (295-296).

Motta and Polo (1997: 296-301) claim that the broadcasting industry became more diversified than in the 1970s and 1980s due to changes in technology and neoliberal policies of privatisation. However, they argue that while this reduced barriers to entry, it also increased the fixed costs associated with broadcasting thereby leading to concentration: 'competition among firms tends to push up the quality of the goods or services, but it increases fixed costs as well, preventing fragmentation' (Motta and Polo 1997: 310). In the broadcasting industry the most significant fixed costs relate to technical and network equipment. These, they argue, are invariant to market size.

Patterns of media concentration are also evident in the US where the corporations Disney, TimeWarner, News Corporation, Bertelsmann AG and General Electric together control more than 90% of US media holdings. The Italian media industry is dominated by the corporation Mediaset, which is owned by the Italian Prime Minister Silvio Berlusconi. Mediaset owns three of seven television channels. When combined with Berlusconi's power as Prime Minister over a further three national channels, Berlusconi controls 90% of the Italian television networks.

Motta and Polo (1997: 321) note the impact of such concentration on pluralism and the tendency toward cultural hegemony. They argue that while public policy's objective of protecting pluralism of opinions can be difficult to reconcile with competition policy objectives, the regulation of broadcasting tends to ensure both.

The analysis of Motta and Polo indicates the role of neoliberalism in patterns of industry concentration by corporations. In attempting to open the market, neoliberal policies of deregulation sometimes have the opposite effect. Franko (2003: 172) claims that deregulation and increased international trade in the 1960s and 1980s had the effect of reducing concentration in the US.

While Franko (2003: 166, 179) argues against the claim that industries are monopolised, he acknowledges that large firms exist. He claims that industry leaders, by virtue of their economies of scale, size and experience, have greater industry influence than smaller firms. Due to this, he acknowledges that managers will sometimes have financial discretion based on profits from states of oligopoly and that both good and bad can emerge from this (Franko 2003: 179). Franko (2003: 172) emphasises the responsibility of international operations, another neoliberal precept, for the high sales of large corporations and what he sees as their occasional monopolistic or oligopolistic behaviour (Franko 2003: 172). Sampler (1998: 350) also identifies the importance of information and its effective transmission to the economic success of corporations. He argues that the priority in ensuring contemporary business profitability is the possession of *critical information*, that is, customer information that enables a corporation to create a specialised product or service. This, he argues, allows for sales to increase, and for industries to be concentrated. Similarly, Franko (1989) identifies the importance of research and development to the economic success of corporations. This argument is a specific example of what Castells describes in analysing the network economy and networked enterprise, both of which are typical of neoliberal economies.

This again suggests that neoliberal policies are pivotal to deciphering patterns of corporate activity and in accounting for the effects of these patterns.

Deregulation, expansion of international trade and information technologies that enable the management and transmission of information work to both advance neoliberal politics while supporting concentrated corporate activity.

The ABS statistics further indicate that industries apart from communication services are concentrated. After communication services, the most concentrated industries are mining, retail, electricity, gas and water supply, and transport and storage:

Table 2 *Concentration in Australian Industries by 4 Largest Corporations per Industry 2000-2001*

Industry	Sales %	Employment %	IVA %
Communications	77.6	83.9	97.2
Mining	26	36.9	37.7
Retail trade	26.6	25	21.5
Electricity, gas & water supply	21	20.4	16.1
Transport & storage	16.9	25.3	24.1

Source: ABS 2001

These statistics indicate patterns of concentration in significant Australian industries. When compared with the previous statistics collected by the ABS in 1998, the rate of concentration in these industries has remained steady, though there are some notable increases in sales percentages in the communication services, transport and storage, and mining industries (ABS 1998).

A more detailed inspection of the statistics reveals that subdivisions within these industries show significant amount of concentration. The food retailing subdivision within retail trade is highly monopolised, with the four largest corporations in the subdivision controlling 58.8% of sales, 47.7% of employment and 51.6% of IVA. The National Association of Retail Grocers of Australia (NARGA 2008: 1) estimate that two corporations, Woolworths and Coles, control a market share of the food retailing industry of 44% and 34% respectively. Independent grocers now constitute less than 20% of the Australian grocery market.

Higher rates of monopolisation are found in the mining subdivisions. The four largest companies involved in coal mining, dominated in Australia by Rio Tinto and BHP Billiton¹⁵, account for 47.6% of sales, 49.5% of employment and 47.4% of IVA. The five largest corporations involved in oil and gas operations, including

¹⁵ BHP Billiton is listed on both the Australian and London Stock Exchanges.

BHP Billiton, account for 63.8% of sales, 83.3% of employment and 64.9% of IVA. The discussion found in Motta and Polo (1997) concerning the high entry costs of the media industry as an impediment to competition could equally apply to the mining sector. This echoes Polanyi's argument, detailed below after the discussion of concentration in the Australian insurance industry, concerning the high costs of industrial production and the subsequent disappearance of the individual entrepreneur. This indicates the close link between patterns of corporate concentration and industrial production processes and suggests this pattern is likely to continue, leading to further consolidation of economic wealth and human resources by corporations.

In both ABS (1998, 2001) data sets on industry concentration, statistics were unavailable for the financial industries, however it is known that the insurance industry in particular is characterised by few providers and little competition. An analysis of the insurance industry in Australia highlights the paradoxes in the application of neoliberalism, for where competition is encouraged, so too is corporate growth. As seen above in regards to broadcasting, this has also led to concentration of the Australian insurance industry.

The Insurance Industry in Australia

The Australian insurance industry has become highly concentrated due to a gradual and steady decline in the number of general insurers since 1988. In 2005 there were 133 individual underwriters, however many of these belong to consolidated groups of more than one insurance brand (Australian Prudential Regulatory Authority [APRA] 2005: 2-7). The Australian Prudential Regulation Authority (APRA) anticipates that corporate restructures will further reduce these numbers, thereby making the industry even more concentrated (APRA 2005: 4). The activities and assets of the largest insurance groups in Australia indicate the extent of this concentration. The five largest insurance groups underwrite 70% of net premium revenue and hold 63% of total industry assets (APRA 2005, 2006: 6). APRA (2005: 4), in its quarterly comment on the Australian insurance industry,

claims that this concentration has positive effects for shareholders: 'The consolidation in the Australian market means that major insurers now have a size and diversity of business to enable them to handle major loss events with little overall impact on the balance sheet'. This is a particularly telling comment. Concentrated ownership, the antithesis of Adam Smith's vision of capitalism, is actively searched for by insurance corporations as a way of reducing risk and increasing shareholder's return on investment. The most financially successful insurance companies are actively monopolising the industry.

IAG is the largest general insurance company in Australasia. Its Australian operations make it the second largest insurance company in Australia, after QBE. An examination of its business structure and its assets gives an insight into the relationship between corporate ownership and industry concentration.

Insurance Australia Group

IAG was formed in 2002 from insurance companies that had originally constituted the National Roads and Motorist Association (NRMA) group, some of which had provided insurance in Australia since 1925. In addition to significant product and brand holdings in Australia and New Zealand, IAG has an expanding presence in New Zealand, the UK and Asia, particularly China, Malaysia, Singapore and Thailand. More than \$900 billion of property is insured by the group, including more than five million cars, 2 million homes, 25,000 businesses and 75,000 farms (IAG 2006: 20-21). The company employs approximately 16,000 people in these operations (IAG 2006: 20-21).

In Australia, IAG owns five insurance companies that provide commercial insurance, consumer credit, home and contents insurance, workers' compensation and many other products (IAG 2006: 20-21). It is the largest general insurance company in Australia with \$21,610 million in total assets including \$10,884 million in investments (IAG 2007: 60). In 2007, the company recorded a net profit of \$552 million.

In August 2007, the company had more than 920,000 shareholders who held over 1.7 billion shares (IAG 2007: 140). No individual or institution owns a controlling stake in the company. Most shareholders own between one and one thousand shares; 609,908 shareholders own 17.86 per cent of shares. At the other end of the scale there are 199 shareholders who each own over 100,001 shares, this interest represents 51.25 per cent of the company; the most significant shareholders are the least in number. Information supplied by the company in its 2007 Annual Report lists its twenty largest shareholders. All are corporations involved with superannuation and investment funds that together hold 44.7% of the company. Through its ownership structure and its place as principal insurance provider in Australasia, IAG is a prototype of the socially embedded corporation.

In April 2008, the largest Australian general insurance company, QBE, sought to merge with IAG. This would have created a \$27 billion insurance group, made QBE Australia's fifth largest financial services company and would have placed QBE among the world's top 15 insurers (Sainsbury 2008: 33). QBE offered \$7.4 billion for IAG, a bid described as 'opportunistic' by insurance analysts given the decline of IAG's share price in the 18 months prior (Sainsbury 2008: 34). IAG eventually rejected the offer claiming it was not in the best interests of shareholders (Jiminez 2008: 21). The further consolidation of corporate capital that would have occurred had the merger proceeded would have gone beyond the Australian insurance market to impact upon competition in global insurance markets. Ultimately, this was not a factor in the decision to merge or otherwise; the final decision was based around the interests of shareholders, many of who believed the merger should have proceeded because of the monetary gain associated with the proposed insurance conglomerate (Verrender 2008: 21).

Schumpeter and the Potential Positivity of Monopoly and Oligopoly

Contemporary accounts claim that corporations do not seek competition; rather they want stable and predictable operating environments (Fligstein 1996;

Swedberg 2003: 300). Concentration of industries is one way to achieve this. Not all theorists of capitalism consider monopoly or oligopoly as being antithetical to the capitalist ideal. One advocate of monopoly and oligopoly was Schumpeter (1976: 87-106) who, through empirical analysis, claims that increases in production and standards of living, arguably two of the hallmarks of capitalism, had occurred when industry was dominated by a few big companies. He argues that perfect capitalistic competition as conceived by theorists has never existed (Schumpeter 1976: 81). His concept of *creative destruction* explains this historical tendency. Creative destruction is the result of constant innovation in the production system. As creative destruction continued, production processes became more complex. Polanyi's analysis of industrialisation is helpful in this context. Polanyi (1965: 73-75) saw production processes in the market economy as increasingly expensive and complicated. He identified an equivalent shift from small scale production processes to large scale production. The development of the factory system of production saw industry become more important to the economy than commerce (Polanyi 1965: 75). The new factors in production were what lead to the disappearance of the individual entrepreneur and the institutionalisation of the means of production by larger firms (Polanyi 1965: 88; Triglia 2002: 111). The new forms of industrial production were expensive and required long-term investment (Polanyi 1965: 75). There were risks attendant with such investments which individuals could not bear either financially and organisationally (Triglia 2002: 111). From these circumstances, the corporation arose. The historical analysis of corporate laws presented in Chapter Four supports this analysis of corporate dominance as arising from the necessity for large amounts of capital.

These historical observations work with Schumpeter's to explain the presence of monopolised and oligopolised industries within capitalism. For Schumpeter, monopoly and innovation go hand in hand. Innovation would work toward improving social conditions, therefore monopoly was a key ingredient to social well being as he conceived of it. Schumpeter (1976: 85) acknowledges that

monopoly could lead to increases in prices and decreases in production, but he argued that the long term benefits in relation to product quality and production costs would outweigh this, leading to more substantial increases in innovation than could occur under situations of perfect competition. The new products, technology, production processes and organisational forms which emerge from monopolised industries are more effective measures of success than highly competitive markets which emphasise their advantages in regards to profits and production rates, advantages which Schumpeter (1976: 84) argues are peripheral:

[monopolistic] competition is as much more effective than the other [perfect competition] as a bombardment is in comparison with forcing a door, and so much more important that it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly; the powerful lever that in the long run expands output and brings down prices is in any case made of other stuff (Schumpeter 1976: 84-85).

Despite Schumpeter's assertions, monopolies also lead to adverse outcomes including inefficiency in production and distribution, high prices for goods and services, limited choice for consumers and limited technological development. There also exists the potential for corporations in a monopoly or oligopoly to engage in this conduct deliberately in order to enhance profits. Such collusion has the potential to significantly disrupt communities; the cartel between Visy Corporation¹⁶ and Amcor, the primary corporations in the Australian corrugated fibreboard container industry, led to significant financial losses for farmers around the country. Together, the two companies controlled 90% of Australia's billion-dollar cardboard industry (Johnston 2007: 1). With the guarantee of immunity, Amcor alerted the ACCC to the cartel behaviour that had been taking place from

¹⁶ Visy Corporation is the world's largest private packaging and recycling company. It is owned by the Pratt family. The company has more than 8,000 employees in Australia, New Zealand, and the USA. The company's manufacturing revenues are more than AU\$2.8 billion, its total manufacturing assets are valued at more than AU\$3 billion (Visy Corporation 2008).

2000-2004. During this time, the supposed market rivals were fixing the prices of cardboard boxes being sold to farmers. The economic loss from the cartel activity is unquantifiable but is estimated to be between \$300 and \$700 million (Binnie & Collier 2007: 1, 17).

Visy was found guilty of contravening section 45 of the *Trade Practices Act 1974* that outlaws anti-competitive market behaviour. The company was given a record \$36 million fine, with two former executives being given \$1.5 million and \$500,000 fines (Washington 2007: 43). While this is a record fine in Australia, it is much lower than fines given in the European Union for cartel activity. In 2007, four major elevator companies were fined €992 million (A\$1560 million) for a multi-country elevator supply cartel engaged in price-fixing (Maiden 2007: 43).

In June 2008, four criminal charges were laid against the company's chairman and CEO Richard Pratt for giving false and misleading evidence during an ACCC examination into the cartel in 2005 (Durkin 2008: 3). Each charge carries a penalty of either \$2200 or up to 12 months imprisonment. Pratt's lawyers have claimed that the criminal charges were premeditated by the ACCC and constitute an abuse of process (Durkin 2008: 3). The case is currently being heard before the Federal Court of Australia.

The ACCC also called for the Commonwealth to introduce criminal sanctions, including imprisonment, for individuals involved in cartels, a penalty available in other countries such as Canada, the US, Germany, France and eight other OECD countries but not in Australia (Washington 2007: 43). Proposals for similar penalties are planned to reach parliament this year, but will not be applied to the individuals involved in this particular cartel. The companies now face a class action and other legal action from the users of their products who suffered significant economic loss as a result of the cartel.

In May 2008 an Australian Qantas executive, Bruce McCaffrey, was sentenced in the US to eight months prison and given a US\$21,000 fine for his involvement in

an air cargo price fixing cartel that ran in North America from 2000-2006. Qantas received a US\$61 million fine for its involvement in the cartel. It was estimated that approximately 30 other companies were involved in the cartel including British Airways, Korean Air, Japan Airlines, Air France-KLM and Cathay Pacific with these companies receiving fines of between US\$42 million and US\$300 million (Creedy 2008: 33; Rochfort 2008a: 41; Rochfort 2008b: 43). In a statement on the case, the Associate Attorney General, Kevin O'Connor (2006), claimed that some of these companies raised their fuel surcharges by up to 1000 per cent between 2001 and 2006, an amount well in excess of the percentage increases in fuel costs. Losses to the US economy from this and from freight price fixing have been estimated by the US Department of Justice to amount to hundreds of millions of dollars (O'Connor 2008). Lufthansa revealed the criminal activity and was given immunity from prosecution despite being a party in the cartel. Four other Qantas staff in Australia have been implicated in the cartel. However, they will not be extradited to the US, as price fixing is not a criminal activity in Australia (Rochfort 2008a: 41). The convicted corporations have only pled guilty in the US; European, Australian and New Zealand authorities are undertaking investigations into the cartel's operations outside of the US (Rochfort 2008b: 43). Australian businesses affected by the cartel have brought a AU\$200 million class action suit against the companies involved (Rochfort 2008a: 41).

These examples highlight two things. First, the potential for monopolistic corporate activity to cause harm; many of those affected by the Visy and Amcor cartel were growers who sold fruit and vegetables in the boxes supplied by the companies. While the losses from this and the airfreight cartel are difficult to quantify, the estimated losses are significant to the individuals and communities involved. The difficulties with calculating economic loss from cartel activity attests to the vastness of network economies and enterprises. Second, it highlights the need for monopolistic or oligopolistic corporate operation to be tightly regulated. The potential profits that arise from monopolistic activity at the expense of others are too great for regulation to be left to the market. This is

particularly the case when the monopoly power is a large corporation with significant economic resources. Oddly enough, this may involve the reversal of neoliberal policies of deregulation which characterised western economies in the 1980s because they are, as previously discussed, partly responsible for the concentration evident in industry today (Motta and Polo 1997).

The imposition of criminal sanctions on individuals and corporations in these examples is significant, as are proposals to increase the severity of the sanctions. Each of the cartels discussed here were discovered by the cooperation of corporations and state authorities. This hints at the extent to which criminal activity generally escapes the attention of the state. Where this criminal activity involves corporations, the effects are both unquantifiable and far-reaching. This activity invariably results from a corporation's desire to control its operating environment to maximise profit and reduce risk. Profit is central to a corporation's existence and operation. The dominance of corporations that Berle and Means (1932) identified is a product of profit. Contemporary institutions and individuals rely on the profitability of corporations for employment, the provision of goods and services and returns on investment. The institutional and individual reliance on corporate profits, while contributing to corporate dominance, also produce complex organisations and indefinable interests. This complexity makes a critique of corporate activity pertinent, but also requires an awareness of the breadth of interests represented by corporations and an acknowledgment of the form's achievements as well as its failures and problems.

Corporations and Profit: Indications of Organisational Complexity

To this point, 'profit' as an aim of corporate activity has been discussed in general terms: as an impetus to, and entitlement of, investment and as the product to be sought and controlled by managers. Profit, legally defined as the amount of gain made between two dates (Ford et al. 2001: 818), is central to the existence and operation of the corporate form. The corporate form is the business model best suited to making profit; the collective of resources, both human and monetary, is

unmatched in quantity by other business forms. This is partly due to the legal features granted to them by the state that construe these collective virtues in individual terms.

Levine (1997: 43) defines capitalism as 'an economic system organised around production for profit...things are produced only if it is profitable to do so'. Profits that are made from capitalist enterprise are re-invested; capital is used to acquire more capital. Swedberg (2003: 59) argues that this makes capitalism a dynamic economic system constantly able to change both the economy and the society in which it operates.

The corporation is well suited for profit making by virtue of the four legal characteristics previously described: corporate personhood, limited liability, transferable shares and perpetual succession. These four features of the corporation are attractive to investors. The intersection of corporate personhood and limited liability makes the corporation particularly attractive; investors know the full extent of their financial liability for the corporation's debts will not exceed the value of their shares.

It is a duty of the corporation's management that all decisions be made in the interests of shareholders. This interest has been legally defined as the maximisation of return on investment (Ford et al. 2001: 207). Therefore, the corporation is legally compelled to seek profit, not just well equipped to do so.

There are many sources of profit for corporations. Human labour, one of the central features of production, is one such source most famously emphasised by Marx ([1954] 1977: 152-153) as a source of profit and subject to exploitation. While human labour is central to the production process in corporations and business profits generally, there are other sources of profit. Profit is now made, alongside actual products, in things that are intangible. The development of the stock market and sophisticated financial markets has made new sources of profit

available. Wolff (2003: 70) argues that the finance industry has further simplified the circuit of capitalism to M-M', where profit is made without any direct production or sales. Alongside this, a valuable market in 'images' and 'brands' has developed to which marketing and advertising are central.

These developments complicate attempts to apply Marx's critique of capitalism and profit to contemporary production. The value of a product's image is difficult to either include or differentiate from the product itself and the labour involved in its production. The nature of production, and hence labour, in corporate capitalism is also more complex than at the time of Marx's writing. Both labour and production are highly specialised and it can be difficult to define the contribution of a single worker to a final product (Stone 1975: 44, Tombs & Whyte 2007:19-21). As a result, the point at which labour becomes surplus labour is also difficult to define. The worker's role as a consumer has similarly shifted; the concept of what is 'necessary', in Western countries at least, now includes these intangible features of products brought about from marketing and advertising (Hamilton & Denniss 2005). Overall, the nature of labour and consumption has become more abstract and therefore more complex than Marx had accounted for. However, his critique of profit remains relevant insofar as labour remains relevant to the profit-making process. Its application to the contemporary context must recognise the complexity that intangible profit sources have brought.

As identified by Berle and Means (1932: 65-66) consumers are often also shareholders with an interest in corporations maintaining and increasing profit levels. The complexity of this is highlighted by situations where an individual's interest as a consumer and their interest as a shareholder are in conflict; banking fees illustrate this point well. Fees for account keeping, withdrawal of funds, credit card membership fees and charges on overdrawn accounts constitute a significant portion of the revenue of banks, and therefore of their profits. While income received from other sources, particularly interest, exceeds that of bank

fees, fees remain an important source of revenue. The Reserve Bank of Australia (RBA) reported that the fee income of domestic banks¹⁷ grew by 12 per cent between 2002 and 2003 to reach AU\$8.7 billion (RBA 2007: 57). The RBA (2007: 58) attributed a significant portion of this increase to fees from credit cards; bank fee revenue increased by 38 per cent on account of the household use of credit cards.

The fairness and equity of these fees is persistently debated by politicians, banks and consumers (Dearne 2008: 23; Irvine 2008a, 2008b; Saulwick 2008: 3). However, the fact that bank fees constitute a part of bank profits means that these fees are also in the interest of shareholders. The principal shareholders in Australian banks are institutions dealing with superannuation and other investments¹⁸. It is likely that the holders of these investments are bank customers. Therefore individuals are both paying and benefiting from the payment of bank fees. This example highlights the complexity of the contemporary economy and the relationships within it. The rise of the corporation is central to this complexity; it brings the consumers, workers and shareholders together under the promise of profit while remaining the dominant figure of interactions involving these participants. The extent of this is indicated by the case study of James Hardie presented in the next chapter.

Conclusion

The corporation is a unique organisational structure on account of four legal features: it possesses a separate legal personality from its owners, owners have limited liability for the corporation's debts, shares in the corporation are fully and anonymously transferable and when these shares are transferred the corporation's structure need not change. These four features make for a more stable operating

¹⁷These statistics are taken from a survey of nineteen commercial banking institutions which together account for more than ninety per cent of the total assets of the Australian banking sector (RBA 2007: 57)

¹⁸This information is drawn from the 2007 Annual Reports of ANZ, Commonwealth Bank, National Australia Bank, St. George, and Westpac.

environment than alternative business structures such as partnerships and sole proprietorships. While there are risks associated with incorporating a business, primarily vulnerability to stock market activity for public corporations, there is significant profit to be made by investors due to these risks. The steady increase in the number of corporations in Australia and the increases in their profit are evidence of this.

As a result of the economic and legal advantages to incorporation, the corporate form is an increasingly predominant business structure. Economically, corporations dominate industry and employment. This domination is also evident through the monopolisation and oligopolisation of industries that can result in significant social and economic losses as evident from the Visy and Amcor cartel in Australia and the airfreight cartel in the US. Monopoly and oligopoly are counter to liberal-capitalist visions of the economy, yet they are readily found and are sometimes attributable to neoliberal economic policies. This is partly due to the large scale of corporate organisation and the possibilities that corporations have to raise much greater levels of capital than any other competitor or potential competitor (Franko 2003; Motta and Polo 1997).

The Australian legislative and economic system is supportive of the corporate business structure. As a proportion of business, corporations are becoming widespread. They constitute the most profitable business forms, own significant assets and have significant roles as employers. This integration is economically advantageous but it also enables corporations to dominate consumers, employees and states.

It is the systemic nature of this dominance which highlights that the 'corporate system' identified by Berle and Means in the early twentieth century has intensified. Human individuals now hold stakes in corporations as consumers and employers, but now also through indirect shareholding associated with superannuation and banking. Institutional investment has meant that

shareholding is becoming a more distant form of property ownership. As a result, managers are being endowed with greater powers over the direction of corporations. When there are such powerful institutions and individuals evident in society, their regulation needs to be considered and stringent so as to mitigate any ill effects that may come from it.

The legal illustration of the corporation as an individual is at odds with its collective realities. As the statistics presented in this chapter have begun to show, the corporation is a collective of people; including managers, shareholders and employees. The practicalities of the corporation as a collective, particularly the managerial hierarchy and the fragmentation of organisational knowledge, are explored in Chapter Seven. The denial of the corporation's collective elements through its legally granted features, particularly corporate personhood and limited liability, have allowed for profit to be legitimately harnessed in capitalist economic systems (Bowman 1996: 8). The legally rationalised departures from traditional capitalism that accompany corporate activity are also evident in scholarship that continues to perpetuate the individualist vision of the corporate form. Neither regulating nor conceptualising the corporation in individual terms is adequate; the impacts of this on community health and welfare are considerable and sufficient to warrant a reform of corporate laws. This is explored in the next chapter through a case study of James Hardie's asbestos operations in Australia. This case study is evidence of the patterns of corporate activity which were described in this chapter but also goes some way in exploring the effects of this activity on society, thereby further indicating corporate dominance.

Chapter Three: Representations of Corporate Dominance in Insidious Injuries

Calhoun and Hiller (1988: 162-181) describe asbestos related diseases as *insidious injuries*, where the link between causes and symptoms are obscure. They associate the increasing prevalence of these diseases with the development of extensive social networks, new technologies and corporate dominance:

Insidious injuries are associated with increased scales of social organisation and with the introduction of complex and dangerous new technologies, but they are not simply reducible to such impersonal forces. They are injuries caused by people and often by corporate 'persons' (Calhoun & Hiller 1988: 162).

They claim that attempts to reduce the incidence of insidious injuries and compensate victims need to address the issue of corporate, as opposed to individual, responsibility (Calhoun & Hiller 1988: 162).

In undertaking an analysis of the US asbestos company Johns-Manville and their attempt to mitigate the financial impact of asbestos liabilities Calhoun and Hiller (1988: 171) conclude that it is not the corporation or its representatives who are malevolent. Instead it is modern economic and legal structures, such as those described in the previous chapter, which increase the impact of their potentially harmful decisions:

The most important point is not that Manville or its executives were distinctively bad, but that the scale of the company's operations and the danger of its products made the bad actions of its executives distinctively efficacious. The...history [of Johns-Manville] indicates that the increasing size, complexity and impacts of corporate actors, and the resulting rise of new and widespread injuries, pose fundamental challenges to the legal system (Calhoun & Hiller 1988: 171).

As Calhoun and Hiller (1988) explain, and as the previous chapter set out, economic and legal structures give rise to complex organisations that make both preventing and accounting for corporate harms a difficult task. A consideration of the 'corporate person' is central to understanding corporate dominance and its effects.

In this chapter I examine the effects of corporate activity, as described by Calhoun and Hiller (1988) and detailed in the previous chapter, through a case study of the Australian asbestos corporation, James Hardie. The history of the corporation, its involvement with asbestos mining and manufacturing and its subsequent dealings with victims of its operations, attest to the complexity of social organisations in modernity which Calhoun and Hiller (1988) and Castells (1998) identify. The case study is a prime example of the patterns of corporate structure, managerial hierarchy and shareholding discussed in the previous chapter, but goes further in examining the effects of these patterns. Asbestos disease is now a significant public health issue in Australia and the activities of James Hardie can be linked directly, albeit messily, to this problem. Examining the prevalence of asbestos disease as an example of an 'insidious injury' perpetuated by asbestos corporations raises questions about the structures upon which networked capitalism operates. Principally, it draws attention to the way in which the patterns of corporate activity have their basis in law and therefore in the state. This chapter introduces this idea, which is explored at depth in Section Two of the thesis.

Asbestos Use in Australia

Asbestos was widely mined, manufactured, and used in Australia for most of the twentieth century. The Australian Council of Trade Unions ([ACTU] 2007: 1) reports that Australia had the highest per capita use of asbestos in the world from the 1950s until the 1970s. This period saw significant growth in the provision and use of asbestos; a material believed to be well suited to the economic and natural climate of Australia:

...in the early 1950s, the market [for asbestos] seemed unappeasable. From the mid-1950s to the mid-1960s, fibre imports grew almost three-fold, and as many as six in 10 houses were being clad in fibro. In a hot land, it did not retain heat. In a big land, it was light and easy to transport. (Haigh 2006: 70)

Asbestos was most commonly found in fibre sheeting; its use for this purpose was so widespread that the ACTU estimate one out of every three houses built before 1982 in Australia contains asbestos. Asbestos was also used for insulation and as a sprayed coating in products such as brake linings, piping, building products and structural steelwork.

Asbestos has been mined and manufactured all over the world notably in the UK, South Africa, Italy and Canada. Asbestos products are found worldwide, including in developing countries where awareness of its dangers is low.

The Continuing Significance of Asbestos to Australia

Due to its extensive use of the substance, Australia now has one of the highest rates of asbestos-related disease in the world. The UK and Belgium also experience high rates of asbestos disease though the diseases are found in most developed countries and many developing countries (Bianchi and Bianchi 2004). The diseases linked to asbestos exposure include asbestosis, mesothelioma, pleural disease and lung cancer (Handen Zeren, Gurmurdulu & Roggli 2000: 1047; LaDou 2004: 285). Mesothelioma is a malignant cancer, usually fatal, which typically occurs 20 to 40 years after asbestos exposure. The disease starts when malignant cells develop in the protective lining of the body's organs, usually around the lungs, abdominal cavity and the heart (Osinubi, Gochfeld & Kipen 2000: 668). The most common symptom is breathlessness occurring as a result of the collection of fluid between the lungs and the chest wall (Kannerstein & Churg 1980: 31). Known as *pleural effusion*, this causes significant pain to sufferers of the disease as the build up of fluid puts pressure on nerves and organs.

There is a median survival time of nine to 12 months following diagnosis and there are no effective treatment options (ACTU 2007: 2; Osinubi et al. 2000: 668).

Data from the National Occupational Health and Safety Commission ([NOHSC] 2008) and the Australian Institute of Health and Welfare ([AIHW] 2005) show that cases of mesothelioma in Australia are steadily increasing. Australia has the highest reported rates of malignant mesothelioma, per capita, in the world (Leigh, Davidson, Hendrie & Berry 2002: 188). It is now mandatory for diagnoses of mesothelioma to be reported to the Australian Mesothelioma Register.

In 1982 there were 156 new cases of mesothelioma diagnosed, in 2004 there were 596 new cases (NOHSC 2008). Men account for between 80 and 90 per cent of new cases, with most occurring in the 75 to 79 year age group. This reflects the differential exposure to asbestos between men and women and the latency period of the disease. Deaths from the disease have similarly increased. The earliest statistics on mesothelioma deaths are from 1997 when 416 people died; in 2005 this had increased to 522 (NOHSC 2008). Eighty three per cent of these deaths were amongst men, again in the 75 to 79 age group. The AIHW (2005: 9-10) predicts that new cases of mesothelioma will increase by 98 per cent among women, from 107 in 2001 to 212 in 2011, and 69 per cent among men, from 460 in 2001 to 778 in 2011. Given the latency of the disease, rates are expected to peak after 2010. It is estimated that by 2020, by which rates of the disease will have peaked, 18,000 people will have been diagnosed with mesothelioma with 11,000 of these cases appearing after 2000 (Leigh et al. 2002: 188).

Exposure to asbestos can also result in asbestosis, a respiratory disease where inhalation of asbestos fibres scars the lungs (AIHW 2005: 22; Jackson 2004b: 113). The disease usually manifests itself as breathlessness on exertion; it leads to disability and shortens life expectancy (AIHW 2005: 22). There is no national data available on the incidence of, and morbidity from, asbestosis in Australia.

However, statistics from the Australian Safety and Compensation Council ([ASCC] 2007: 25-26) on workers' compensation show that asbestosis is increasing as a cause of workplace injury and death. These statistics only include compensated incidents of the disease related to occupational exposure to asbestos. This is a significant limitation as there are cases of asbestosis which are not compensated through workers' compensation and where the exposure occurred outside of employment.

In the financial year 2004-05 there were 214 compensated, work-related, fatalities in Australia. Twenty-eight of these were related to asbestos, including 16 deaths from mesothelioma and eight deaths from asbestosis (ASCC 2007: 26). Mesothelioma is the second most common category for compensated fatalities after deaths by multiple injuries, asbestosis is the fourth most common (ASCC 2007: 25). Mesothelioma and asbestos account for 34% and 27%, respectively, of disease related deaths in the construction industry (ASCC 2007: 50). They are also the second most common type of injury in this industry (ASCC 2007: 50). The diseases are increasingly prevalent in general statistics on compensation for illness and disease. Compensation for diseases of the respiratory system, including asbestosis, has increased by 40% from 375 claims in 1996-97 to 525 claims in 2003-04 (ASCC 2007: 35). Claims for neoplasmas, including mesothelioma, have increased by 69% from 145 claims in 1996-97 to 245 claims in 2003-04 (ASCC 2007: 35). The NOHSC attributes this increase to asbestos exposure:

The increase in claims related to...[respiratory disease and neoplasm]...was largely driven by the increase in claims for two diseases related to past asbestos exposure: claims for *Asbestosis*...increased by 162% (from 65 to 170 claims) and claims for *Mesothelioma*...increased by 320% (from 25 to 105 claims) (ASCC 2007: 35).

Asbestos is expected to continue killing people for at least another forty years and is one of the most pressing public health issues in Australia. Many of the victims

will not have had any experience working with asbestos; they will be home renovators and the children of home renovators (Brown 2004: 34). It is estimated that between 30,000 to 40,000 people will have contracted an asbestos-related cancer (including mesothelioma and lung cancer) by 2020 (ACTU 2007: 2; Leigh et al. 2002: 199).

Ruers (2004) explains that for these victims compensation will be more difficult to access because of problems associated with locating the original source of asbestos exposure and establishing sufficient causation. This is a problem for the next generation of asbestos disease sufferers across the globe. In jurisdictions such as Japan, most compensation for asbestos disease is awarded only through workers compensation schemes (Furuya 2004), this will automatically exclude many future sufferers who will not have had occupation exposure to asbestos. Given the prevalence of asbestos disease in Australia and its established effects on those exposed outside of the workplace, sufferers are more likely to be able to succeed in compensation claims, though this is by no means guaranteed (O'Meally 2004).

In NSW, claims for compensation for asbestos disease are heard by a specialist court, the Dust Disease Tribunal. The tribunal was established in 1989 because of an identified trend of asbestos-disease sufferers dying before their cases were resolved (O'Meally 2004). It hears all cases related to claims in tort for negligence relating to death or personal injury resulting from specified dust diseases (Dust Disease Tribunal 2007). Sufferers of asbestos disease who experienced occupational exposure to asbestos can also be compensated through the workers compensation legislation of the states (O'Meally 2004). There are few options available for sufferers through criminal law, primarily because the latency of asbestos diseases usually goes beyond the statute of limitations (Davidson 2007). This means that the Dust Disease Tribunal hears the majority of cases relating to asbestos exposure and will hear an increasing proportion of cases

over the next forty years, as most sufferers will not have been occupationally exposed to asbestos.

Overall, these legal issues indicate the inability of law generally to both control and account for the connections between corporate activities and human experience. Legal reactions, such as the establishment of the Dust Disease Tribunal, lead to better compensation outcomes for victims but do little more. They are retrospective attempts to manage the effects of corporate activity and as such are limited in their capacity to manage the activity itself.

Corporations and Asbestos in Australia

From the 1920s until 1987 in Australia, companies in the James Hardie Group were involved in the manufacture, distribution and mining of asbestos and asbestos products such as building products, insulation, pipes and brake linings. There were asbestos plants in NSW, South Australia, Victoria, Queensland and Western Australia. James Hardie was the largest manufacturer of asbestos products in Australia and was in a dominant market position¹⁹ particularly in South Australia and Western Australia where it was the only commercial supplier of fibre board (ACTU 2007: 1).

James Hardie's operations and products are not responsible for all cases of asbestos-related disease; other companies involved in the mining and manufacturing of asbestos, most notably Colonial Sugar Refining Company (CSR) and BHP Billiton, also settle claims related to exposure to asbestos (Prince, Davidson, Dudley 2004: 1). State and federal governments in Australia also face significant liabilities (Prince et al. 2004: 1). Quinlaven (2004: 28-29, see also Prince et al. 2004: 1) estimates that Australia's asbestos liabilities will total AU\$6 billion.

¹⁹ Other notable competitors included BHP Billiton, Wunderlich, Colonial Sugar Refining Company (which later acquired Wunderlich), Woodreef Mining, and Marlew.

Despite the various sources of liability, more than 50% of claims made to the NSW Dust Disease Tribunal in 2002 were brought against companies in the James Hardie group (Prince et al. 2004: 1). Prince et al. (2004: 1) assert that this is related to the range of mining and manufacturing interests that James Hardie has had throughout its operating history. In 2006, Hardie's liabilities were estimated to be 4,600 claims for mesothelioma from 2006 onwards, with an expected peak in claims in 2010 or 2011 with 250 claims per year (ACTU 2007: 2). The total for all past and future claims from James Hardie is estimated to be 12,513; of these, 8,103 will be claimed from 2006 onwards (ACTU 2007: 2). The estimated nominal value of compensation costs is \$3,168.9 million.

Claims for compensation from James Hardie were few until the 1980s. The proliferation of cases since this decade saw James Hardie acknowledge that asbestos was known to be dangerous, however they argued that the company had taken all reasonable steps to protect workers (Haigh 2006: 137-138). Haigh (2006: 141), in researching James Hardie's history, found that the difficulty in these cases was establishing the knowledge which parties to a claim had about the dangers of asbestos. The history of this knowledge indicates the potential effect of a corporation's activities on employees and communities.

James Hardie's History of Knowledge

It is believed that James Hardie was aware of the health effects of inhaling asbestos dust by the 1930s, not long into the establishment of its asbestos interests (ACTU 2007: 1; Haigh 2006: 21-31; Jackson 2004b: 126; Sexton and Stephens 2004: 27). Despite indications that the material was dangerous, little was done to protect workers, consumers and society at large. This may be partly due to the fact that asbestos related diseases are long latency. In some cases, the symptoms can take decades to surface and only months to kill following diagnosis. However, the company had been unequivocally aware of the dangers that asbestos presented to workers at least from the conclusion of World War Two and had admitted as much in compensation claims (Jackson 2004b: 125).

In 1957, James Hardie received a medical journal article²⁰ which comprehensively evaluated and publicised the effects of asbestos amongst Australians. The research presented in this article indicated that asbestos also threatened the health of those who worked with the material outside of its raw state (Haigh 2006: 78; Thomas 1957: 76). It asserted the link between asbestos and lung cancer, asbestosis, mesothelioma and pleural diseases following either occupational or environmental exposure to the fibres. It also found that a third of the 300 asbestos workers which had been examined had asbestos bodies in their sputum and that fifteen per cent had damage to their lungs visible on x-rays (Thomas 1957: 76). This report contributed to a body of knowledge on the medical effects of asbestos exposure which had been growing in the UK and US since the early twentieth century (Calhoun & Hiller 1988: 165).

Despite receiving this information, the company did not significantly alter working conditions, did not issue warnings to consumers and fought all compensation claims brought against it by ill employees (Haigh 2006: 79-83). It was not until another twenty years later, in 1978, that labels were put on James Hardie's asbestos products warning that inhalation of asbestos dust may result in cancer (Sexton & Stephens 2004: 27). This is a stark example of the potential impact of a corporate managerial hierarchy.

The company has defended its knowledge of the dangers of asbestos by claiming that the research on which they had based their knowledge was later disproved (Jackson 2004b: 124-125). Quality scientific research into the dangers of asbestos was persistently hampered by the asbestos industry. Haigh (2006: 45) claims that medical research into the effects of asbestos was conducted under the auspice of companies in the industry such as John-Manville and Turner and Newell. When industry funded research indicated a correlation between asbestos and lung disease, the results would be subject to editing or suppression, what Wikeley

²⁰Thomas (1957).

(1992: 365) refers to as 'corporate concealment' (see also Calhoun & Hiller 1988: 165-167; Haigh 2006: 47). In situations where the results were to be published independently, asbestos companies would withdraw their permission for it to be published, start legal action and attempt to dissuade editors from accepting the article in question (Calhoun & Hiller 1988: 165-167; Haigh 2006: 48).

Wikeley (1992: 373-374) argues that from 1930 scientific research into asbestos was controlled by the asbestos industry. Calhoun and Hiller (1988: 165-167), in describing the activities of Johns-Manville, claim that this and other asbestos companies attempted to control the spread of information about the dangers of asbestos by limiting its dissemination and challenging it with industry-funded research. Wikeley directly links the control of information to the scope of legislation; until the mid-1960s there was an absence of effective legislation regarding asbestos exposure. There was little state regulation of the asbestos industry in Australia, and no asbestos legislation in NSW until 1964 (McCulloch 2007: pars 25, 47). Legislation existed in the UK since 1931, but the science behind it was flawed (Wikeley 1992: 372-373). The *Asbestos Industry Regulations 1931* were introduced in the UK in response to the Merewether Price Report released in 1930. The report, described by Wikeley (1992: 366) as '[t]he turning point in the development of medical and scientific knowledge about asbestosis', found high rates of asbestosis amongst those who worked directly with the substance. This led to the legislation regarding ventilation, breathing apparatus and cleaning methods in factories (Wikeley 1992: 368). However, the Merewether Price Report and the subsequent legislation were based on the premise that there was a safe level of exposure (Wikeley 1992: 373). Further, it only applied to asbestos factories and not to other points of exposure; because of this, no attempt was made to protect the general public from exposure to asbestos (Wikeley 1992: 373). Aside from its inherent problems, the legislation was poorly enforced; prosecutions for breaches of the legislation were rare with the factory inspectorates preferring to seek compliance through advice and guidance to

employees (Wikeley 1992: 373). Regulatory agencies were limited in their control of James Hardie.

Legislation introduced in NSW in 1964 set limits on dust levels in factories and mines (McCulloch 2007: para 25). Acceptable levels were gradually reduced as filtration methods improved. However, McCulloch (2007: para 39) shows that the results of measurements taken by the Health Department and those taken by James Hardie itself were vastly different. Aside from methodological problems, the company was often alerted of imminent inspections of its principal mine by the Mines Inspectorate itself, and would prepare for their visits by slowing down and cleaning up operations (McCulloch 2007: para 30). McCulloch (2007: para 29) argues that the Mines Inspectorate lacked the political will to effectively enforce the existing regulations. Central to this reluctance was James Hardie's role in major government contracts. The involvement of Australia's state and federal governments with asbestos has been identified by Wikeley (1992: 374) as a key reason for the absence of effective regulation of asbestos in Australia, particularly in its mining operations in Wittenoom:

In Western Australia...both the state and federal governments actively encouraged the exploitation of blue asbestos mines at Wittenoom. Official concern about the need to locate industry in the under-populated territories, allied with the strategic value of asbestos and the desire for self-sufficiency in minerals, meant that there were no effective health and safety controls in the mines.

This indicates some of the political interests around sovereignty, trade and planning which took priority over health concerns. Governments in Australia were both poorly equipped to regulate the industry given the monopolisation of knowledge and complicit in its ineffectiveness. There were benefits for the state in asbestos operations, and a lack of will to regulate powerful corporations.

The absence or dismissal of information on the dangers of asbestos hastened the general disinterest of most employees of the company into their conditions of

work; Haigh (2006: 82) claims that most employees remained unaware of the dangers of asbestos until the 1970s (see also Calhoun & Hiller 1988: 166). By the mid-1960s research in the US and the UK, some of it commissioned by trade unions concerned by the deaths of their members, clearly indicated that asbestos was dangerous to health even at low levels of exposure (Haigh 2006: 90-92). In light of these reports, asbestos companies began recording lower incomes and some closed. Calhoun and Hiller (1988: 166) argue that by this point, attempts by the asbestos industry to control the spread of information were no longer viable. They explain that from this initial strategy, asbestos companies sought to confront the litigation explosion they were faced with (Calhoun & Hiller 1988: 167).

A calculation of asbestos compensation liabilities commissioned by James Hardie in 1967 estimated that there would be approximately two hundred compensable cases from the company's present and past employees. This was estimated to cost the company \$1.5 million, a figure which represented approximately five per cent of its shareholder funds at the time (Haigh 2006: 98-99). It is the threat of low profits and closure, rather than any particular interest in worker health, which Haigh (2006: 97-98) identifies as responsible for a shift in James Hardie's approach to worker health and safety. He describes James Hardie as focusing on the costs associated with past exposure while neglecting to prevent further exposure (Haigh 2006: 97).

A combination of poor publicity and increasingly stringent government regulations in the 1970s saw James Hardie improve working conditions. New, more accurate, devices for detecting asbestos dust were created and new standards set for acceptable dust levels in factories (Haigh 2006: 112). There were significant advances in the methodology of medical examinations; more workers were being examined at regular intervals, dust samples were collected from mines and plants, existing literature was reviewed and external advice sought by government health officials (Haigh 2006: 96). However, this was not matched by

advancements in working conditions; James Hardie's facilities rarely complied with the new standards and workers continued to work without protective equipment and in poorly designed plants (Haigh 2006: 112-113).

Unions became concerned about the poor conditions in which workers were handling asbestos. The Federated Miscellaneous Workers Union (FMWU) represented asbestos workers in NSW (Haigh 2006: 115). The FMWU distributed multi-lingual information to workers, whom they found to be largely ignorant of the dangers of asbestos (Haigh 2006: 117). Union involvement led to greater scrutiny of James Hardie by the Health Department, increased worker awareness and negotiations with the company over conditions and compensation.

In April 1983 James Hardie ceased the production and sale of asbestos products and focused on new materials to replace the asbestos in fibre-cement (Haigh 2006: 130). Manufacturing of asbestos products by the company ceased entirely in March 1987 (Haigh 2006: 133). During the 1980s the company underwent various restructures aimed at simplifying its structure; this involved the selling of interests in Indonesia, Malaysia and Canada.

James Hardie's Corporate Structure

Since 1937 James Hardie had been structured as a parent company operating through a variety of subsidiaries; all asbestos operations were undertaken by subsidiary companies, the most significant of which were James Hardie and Coy and Hardie-Ferodo (later known as Jsekarb) which were its principle source of income until the mid 1990s (ACTU 2007: 3). Other asbestos companies, most notably CSR, were operating in a similar way. Both companies had used these structures to limit their legal responsibility; it was the subsidiaries of both companies which were responsible for providing compensation (Haigh 2006: 149). However, with its subsidiary close to bankruptcy in 1988, CSR accepted responsibility for claims by virtue of its proximity, as parent company, to its subsidiary (Haigh 2006: 150). This resulted in the company paying considerable

amounts of compensation through the 1980s. There was no legal obligation for the company to do so, it could have continued to delegate responsibility to its subsidiary and fight claims against it on this basis. James Hardie took the opposite approach to CSR by asserting its separateness from subsidiaries; Haigh (2006: 151-153) suggests this was because its group of potential claimants was larger than that of CSR. James Hardie's approach to denying association with the liability of its subsidiaries continued and was to have significant consequences for victims of James Hardie's asbestos and for the company itself.

Separation of Parent and Subsidiaries with Asbestos Liabilities: 2001

Between 1995 and 2000, the parent company James Hardie began to remove the assets in its subsidiaries James Hardie and Coy (since renamed Amaca) and Jsekarb (since renamed Amaba) whilst leaving them with most of the asbestos liabilities of the Hardie group (ACTU 2007: 3). Amaba and Amaca had been paying compensation from their own funds. On 15 February 2001, these two subsidiaries were separated from James Hardie and were acquired by the Medical Research and Compensation Foundation (MRCF) for no monetary consideration. The separation meant that James Hardie would be able to continue its business free from the stigma of asbestos liabilities. It mirrored a failed attempt by Johns-Manville to create a separate fund to deal with its mounting asbestos liabilities in the 1980s (Calhoun & Hiller 1988: 167). James Hardie described the principle benefit of the separation for shareholders as being 'greater certainty' (James Hardie 2003). Two components of this increased certainty for investors included the fact that asbestos liabilities would no longer impact profit and loss and that no future asbestos provisions would be required (James Hardie 2003). At the time of separation, James Hardie's then CEO Peter McDonald made public announcements emphasising that the MRCF would have sufficient funds to meet all future claims and that James Hardie would not be giving the MRCF any more substantial funds. The net assets of the subsidiary groups amounted to approximately \$293 million, most of which lay in real estate and loans (Jackson 2004a: 9). This amount exceeded the 'best estimate' of \$286m in asbestos

liabilities contained in an actuarial report commissioned by James Hardie (Jackson 2004a: 9).

From this point, James Hardie further distanced itself from Amaca and Amaba. In October 2001, a scheme of agreement was approved by the courts whereby the parent company, known as James Hardie Industry Limited, became a subsidiary of James Hardie Industries NV (JHINV), a Dutch company. In 1983, James Hardie had moved into the North American market. Fifteen years later, the profitability of the company's US operations significantly exceeded its Australian operations (Haigh 2006: 184). Moving the company's headquarters to the Netherlands allowed James Hardie to move its operations offshore for what it claimed were significant tax advantages for the company and its shareholders. It also allowed James Hardie to focus on its largest growth markets which were primarily in North America.

In order to do this, James Hardie had to give assurances to the Australian courts that there would be enough compensation available to meet the asbestos liabilities of the MRCF. For the court's purposes, victims were seen as potential creditors. The courts needed to ensure that the business would be protected from such liabilities and remain fruitful for shareholders. The courts were satisfied of this and James Hardie was able to relocate to the Netherlands. In moving, James Hardie²¹ took \$1.9 billion from its former Australian companies, in the form of partly paid shares, to the Netherlands. The courts had been assured that these assets would be available to Australian creditors, including asbestos victims, if needed (ACTU 2007: 3).

By the end of October 2001, a revised actuarial report showed that liabilities for asbestos related disease would actually reach \$574.3 million (Jackson 2004a: 30). The Fund sought extra funding from JHINV and was offered \$18 million if the

²¹ References to 'James Hardie' from this point refer to JHINV, the parent company located in the Netherlands.

MRCF acquired JHIL, which by this time was a shell company with no operations and only \$18 million in assets. The MRCF rejected this offer. Asbestos liabilities were subsequently revised to \$751.8 million in 2002 and then \$1.573 billion in 2003 (Jackson 2004a: 31). As the cost of liabilities continually rose, it became clear that the MRCF was inadequately funded and that eligible victims would miss out on receiving compensation. James Hardie executives, in discussing the shortfall with the MRCF, refused to accept further responsibility for the liabilities of Amaca and Amaba on the grounds that the MRCF and James Hardie were separate entities (Jackson 2004a: 461). Then company executive Peter McDonald²² claimed that the company had designated adequate funds to the MRCF based on estimates of claims and assets contained in an accounting document prepared in 2001. It was this document which James Hardie had taken to the courts and presented to the ASX to support their bid to relocate to the Netherlands.

It was later found that these original estimates, undertaken by accounting firm Towbridge and Deloitte, were inadequate because they did not account for the effect of separating Amaca and Amaba from James Hardie, the figures were subject to unspecified conditions and a financial model was used which made unfounded predictions on the earning rates of investments held by Amaca and Amaba (Jackson 2004a: 9). James Hardie designed this financial model for use by Towbridge and Deloitte and had ignored independent advice that the assumptions made by the model were unfounded (Jackson 2004a: 9)

In March 2003, JHINV cut all links with its former Australian subsidiaries. This had the effect of cancelling its former subsidiaries' access to the \$1.9 billion in partly paid shares it had assured the courts would be available to Australian creditors (ACTU 2007: 3). JHINV did not advise the NSW Supreme Court, the NSW Government, or the ASX that it had done so (ACTU 2007: 3). The cancelling of the partly paid shares and the decision of JHINV's directors not to

²² Chief Executive Officer (CEO) of JHIL and then CEO and Managing Director of JHINV

alert the authorities were later deemed to be legal actions, though ethically dubious: 'in cancelling the partly paid shares...[there was no breach of directors duties]...notwithstanding a lingering lack of enthusiasm for the commercial morality of the transaction' (Jackson 2004a: 571).

On 12 February 2004 the NSW Cabinet Office commissioned a special committee (hereafter referred to as 'the Jackson Inquiry') to investigate the formation of the MRCF. The committee, headed by David Jackson QC, released the report in September 2004. The terms of reference for the inquiry included an examination of the separation of the MRCF from James Hardie, along with an examination of the corporate restructure of James Hardie following this separation, to determine whether these movements had affected the ability of the MRCF to meet asbestos liabilities. The report heard a range of evidence from, amongst others, solicitors, accountants, medical professionals, journalists and judges. James Hardie CEO Peter McDonald and the company itself released statements which welcomed the inquiry but simultaneously re-stated the company's position that it was no longer responsible for the liabilities of Amaca and Amaba (Jackson 2004a: 557).

The report found that JHINV was under no legal obligation to provide for the compensation shortfall of its former subsidiaries despite its history in directly jeopardising the health of workers, their families and the community: 'there is a very significant inadequacy [in the provision of funds for compensation], although the legal obligation to provide for it is not accepted [by the inquiry]' (Jackson 2004a: 37). The thorough investigation of the company's records and the applicable laws found that James Hardie had done nothing illegal. Despite this finding, unions, political parties, victims and victims' support groups called for full compensation to be made (ACTU 2005; Howell 2008: 37).

On 1 October 2004, talks began between James Hardie, the NSW Government, the ACTU and asbestos support groups in a quest to come to an agreement over the allocation of compensation.

Soon after the findings of the Jackson Inquiry were released, James Hardie executives stated that the company was looking to develop a statutory scheme to cover compensation claims. This would see JHINV contribute to a government-run compensation system and was an idea that had been posited to shareholders in July 2004 (Jackson 2004a: 557). The Jackson Inquiry (Jackson 2004a: 558) supported this; however, unions, the NSW Government and victim support groups were highly opposed to such a scheme. They were concerned that claims would be capped and were calling for full, unconditional compensation (Higgins 2004a: 3).

Legal construction meant that the James Hardie corporate structure, as at March 2003, was diverse enough to be outside of the ambit of the law in relation to the asbestos liabilities of its former subsidiaries. From a legal perspective, James Hardie's decision to enter into compensation negotiations was a voluntary one. Despite the legality of the compensation outcomes, by virtue of the legality of the corporate restructure, James Hardie's historical reliance on the legal perspective as a way of avoiding liability became untenable.

Legal and Extra-Legal Pressures on James Hardie to Negotiate a Compensation Deal

James Hardie was threatened with national and international boycotts of its products prior to and during compensation negotiations. In October 2004, then NSW Premier Bob Carr had stated that NSW and other states would boycott James Hardie products should the company not provide compensation (Sexton 2004b: 2). Simultaneously, the Local Government Association of NSW had voted unanimously to support any boycott of James Hardie products (Sexton 2004b: 2). For the duration of the inquiry, and after its findings were released, unions in

Australia had been threatening James Hardie with a global union movement against the company which centred on a black ban on James Hardie products (Skulley 2004: 8). This was given clear international support by unions, governments and building industry representatives at the Global Asbestos Conference where one thousand delegates from forty countries supported a boycott of James Hardie products ('Conference Supports Hardie Ban' 2004: 1). These boycotts were powerful symbolically, as opposed to economically; the boycott was more successful in publicising the grievance than in overtly attacking James Hardie's bottom line. Smith (1990: 258-259) argues that while symbolic boycotts can become effective in economic terms, their real power is in threatening the corporate image.

Given the majority of James Hardie's interests being placed in the US, and the fact that there was no legal liability, the ability of these groups to seriously affect James Hardie's bottom line through overt action is debateable. The value of shares in James Hardie had been declining since the MRCF declared in October 2003 that asbestos compensation claims would reach \$1.5 billion. In addition, the company saw a twenty five per cent decline in operating profits in the September quarter in 2004, most of which was made up of legal costs from the Jackson Inquiry (Higgins 2004c: 4). The effect of the boycotts was not quantified but the company had said they were 'biting' (Higgins 2004c: 4). It is likely that James Hardie was concerned about the highly negative publicity that the inquiry and subsequent negotiations had brought. Negative publicity was flagged as a primary shareholder concern upon release of the Jackson report and was a major reason why shareholders thought it best to come to some sort of compensation agreement (Sexton 2004a: 1).

The Jackson Inquiry (2004a: 8-9) noted that one of the key concerns of the company in initially attempting to over-fund the MRCF was the public perception of the company. However, adverse public opinion was most dangerous in its potential to lead to legislation: 'a wave of adverse public opinion...might well

result in action being taken by the Commonwealth or State governments...to legislate to make other companies in the Group liable in addition to Amaca and Amaba' (Jackson 2004a: 9).

The intense media coverage before, during and after the Jackson Inquiry was not favourable to the company. The legality of the company's actions was understood, but not accepted. There was an immense political, union, media and public backlash against James Hardie in a very short period of time. Social pressure came from individual citizens, unions, victims groups and also governments. Trade unions organised much of the movement against James Hardie, from demonstrations and boycotts, to providing an organisational platform from which victims could speak. A series of demonstrations were held throughout 2004 and 2005. The largest demonstration was held Australia-wide, in Brisbane, Adelaide, Hobart, Melbourne and Sydney, on 15 September 2004, just prior to the release of the Jackson inquiry. The rallies called for full compensation to be given to the victims of James Hardie's asbestos products. Five thousand people, mainly members of the Construction, Forestry, Mining and Energy Union (CFMEU) and asbestos disease sufferers, marched from Town Hall in Sydney to the James Hardie shareholder information meeting at Darling Harbour. Fifteen thousand people attended the Melbourne rally to hear union officials and victims speak. On an international level, smaller rallies were also held in the US and the Netherlands at James Hardie headquarters. These were aimed at showing solidarity with Australian unions but also at bringing the issue to the attention of people and governments overseas. This action spurred a series of radio, television and newspaper stories that focused on the hollow faces and breathless voices of asbestos disease sufferers. This combination, with the vital inclusion of the government, saw, just as James Hardie's executives had feared, social pressure start to equate to legislative pressure. It was once these threats emerged that James Hardie's profits were most threatened and a response from the company was demanded.

The concern James Hardie had over the potential for state intervention was not unfounded and speaks to the integration of the company into realms beyond business. Uncompensated victims would require state support; this, alongside the impact on the health care system and the cost of managing asbestos in buildings and worksites meant that states had a strong economic interest in seeing the company take some responsibility. The NSW Labor Government was openly supportive of asbestos victims and was demanding full compensation be made, while strongly rejecting the proposals made by James Hardie for a statutory compensation scheme. Superficially, this was a surprising response since this government was quite supportive of business despite the party's working-class roots; the party has reportedly received over \$140,000 in donations from James Hardie in the financial years from 2001/02 to 2003/04²³. However, the NSW Government's interest in ensuring that James Hardie took responsibility for the compensation made them a major stakeholder in the compensation negotiations. In addition to this, the then NSW Premier Bob Carr had repeatedly made statements to the media following the release of the Jackson Inquiry that the NSW Government would seek to enact retrospective legislation in order to access \$1.9 billion in cancelled shares to fund the MRCF should James Hardie not reach a satisfactory agreement during negotiations (Higgins 2004b: 11).

Further governmental action was taken across Australia with the Federal Labor party, then in opposition, forwarding \$77,500 in donations received from James Hardie since February 2001 to the compensation fund. Pressure was then placed on the then Federal Government, the Liberal Party, to do the same. After much confusion within the party, the Liberal Party forwarded \$90,000 in donations to the compensation fund following the release of the Jackson Inquiry. The now-defunct Federal Democrats party also forwarded \$15,000 in donations it had received from James Hardie to the MRCF. In addition to this, there were discussions between the governments of Australia and the Netherlands as to the establishment of a bilateral treaty between the two countries which would allow

²³ The Greens Party (2004).

Australian legal judgements to be enforceable against James Hardie in the Netherlands (Banham 2004: 25; Prince et al. 2004: 2).

Following the release of the Jackson Inquiry, the Australian Securities and Investments Commission (ASIC) commenced its own investigation into whether the statement made by JHIL CEO Peter McDonald on 16 February 2001 to the ASX as to the liquidity of the MRCF was fraudulent. A few days after the investigation commenced, both Peter McDonald and Peter Shafron resigned from their positions, with payouts of \$9 million and \$1 million respectively (ACTU 2007: 5; Long 2004). Two months after this, the Federal Government enacted special legislation which revoked elements of legal professional privilege in relation to particular resources to allow ASIC and the Director of Public Prosecutions access to new, previously classified, information in conducting the investigation (Murphy 2004: 2). ASIC and the NSW Premier Bob Carr also alerted the US Securities and Exchange Commission (SEC) of the results of the Jackson Inquiry. Given that James Hardie is listed on the New York Stock Exchange, the SEC would be able to commence its own investigations the legality of the actions of James Hardie in the US (Higgins 2004d: 33).

In October 2005, the then Federal Liberal Government considered the introduction of ten year jail terms for company restructures which are overtly aimed at avoiding personal injury compensation (Sexton 2005a: 19). This proposal was made in response to the James Hardie issue and the deficiencies in Australian corporate law which were identified by the Jackson Inquiry (Sexton 2005a: 19).

James Hardie's Response

Prior to the release of the Jackson report and for a few weeks after, JHINV refused to acknowledge any extra-legal liability for asbestos compensation (Jackson 2004a: 557). This position quickly became untenable in the face of the pressure group activity outlined above. The company then sought to negotiate some sort

of compensation scheme which would satisfy the demands of both shareholders and stakeholders. While the company advocated the establishment of a statutory compensation system, pressure groups refused the offer on the basis that it was too conditional (Prince et al. 2004: 3). They threatened further industrial action if compensation needs were not met. On 21 December 2004, a voluntary agreement was reached which would see James Hardie pay compensation to asbestos disease sufferers over a period of forty years. The non-binding agreement set an annual limit on the payments, capped at thirty five per cent of James Hardie's free cash flow. When compensation payments exceed this limit, funds were to be accessed from a 'buffer' account. More negotiations were expected to take place in early 2005 with a legally binding document based upon the initial agreements to have been completed by the end of June. However, the deadline passed and the expected date of completion was revised to July 2005. Once completed, the document was to be presented to James Hardie shareholders for approval. The then chairperson of the James Hardie board, Meredith Hellicar, indicated that major shareholders were willing to support the payment of compensation on both economic and moral grounds (Sexton 2004a: 1).

Once the initial terms of the compensation fund had been agreed to, a lengthy process began toward making the terms legally binding. As previously mentioned, the dates for the final legal document to be processed and presented to shareholders were revised from June 2005 to July 2005. In August 2005 there was still no result and the company refused to disclose the date that they would finalise the compensation deal (Higgins 2005a: 3). There were small rallies led by unions and victim support groups outside a company meeting where the company was recording an AU\$68.5 million profit for the previous quarter.

In November 2005 it appeared as though little progress had been made toward the finalisation of the compensation deal. There was considerable union and governmental concern over this as December 1 would be the last full sitting day

of parliament until the next year. Any compensation deal would need to be passed before this date to take immediate effect. The NSW Government gave James Hardie one week to settle the compensation deal and threatened the introduction of punitive legislation which would cancel partly paid shares and use them to fund compensation claims should the company fail to settle the deal (Porter & Schmidtke 2005: 7). Alongside legislative pressure, unions began planning a renewed boycott which they threatened to spread to North America, James Hardie's largest market, if the agreement was not signed (Davies 2005: 6).

The week passed with then NSW Premier Morris lemma continuing to threaten legislative moves if an agreement was not reached. Tax appeared to be the final obstacle to completing the deal, with James Hardie demanding that payments to the compensation fund be tax deductible and that the compensation fund be recognised as a charity by the Australian Taxation Office (ATO), making it exempt from income tax. Unions and victims groups, while unimpressed, saw it as the last hurdle and urged the Federal Government to consider the company's demands (Higgins 2005b: 7). The then Federal Treasurer Peter Costello initially refused on the basis that the company was no longer based in Australia (Clark 2005: 5). The then Government also rejected the company's request for civil immunity at the federal level (Higgins 2005a: 3).

On 1 December 2005 the final agreement was signed on the condition that tax deductibility for contributions to the compensation fund be granted to the company alongside civil immunity for the company and its representatives. Two pieces of legislation were introduced to NSW parliament with the signing of the agreement. One extinguished the civil liability of James Hardie subsidiaries, staff, board members, directors; the other supported the structural elements of the funding agreement.

From this point, disagreements over taxation between the company and the state and federal governments stalled the completion of the deal. It was the Federal

Government which had ultimate jurisdiction over the compensation fund's taxation status and the tax deductibility or otherwise of James Hardie's contributions to the fund. In June 2006, the ATO ruled against the tax deductibility of the compensation. They ruled that the separate fund for compensation was not a charity and, as a result, would have to pay tax. Then NSW Premier Iemma and unions called on the Federal Government to intervene while then Prime Minister John Howard and then Treasurer Peter Costello supported the ATO ruling. At this point, James Hardie threatened to withdraw the offer of full compensation and continued to resist signing the deal because of the ATO ruling over the special fund's charitable status. Another ATO decision allowed James Hardie to claim tax deductions on its contributions to the new fund, as a result of 'black hole' expenditure legislation introduced by the Federal Government in March 2006²⁴. This legislation allows for business expenses which are unrecognised by income tax laws, to be made tax deductible over a period of five years (Joseph 2006: 1). Sexton (2006: 5) has claimed that the legislation was 'purpose built' for James Hardie by a government which did not want to be seen as blocking the provision of compensation but also did not want to be seen as helping a company with such a poor public image.

At the end of October 2006, James Hardie failed to meet the already extended completion date for the establishment of the compensation fund set by the NSW Government. Again, the company was concerned about the taxation status of the fund and would not finalise negotiations. In November 2006 the ATO ruled in James Hardie's favour by declaring that the compensation fund would not have to pay tax. In December 2006 the James Hardie board unanimously recommended that shareholders vote in favour of providing compensation. After a year and a half of negotiations, the legal validity of the deal rested on its endorsement from shareholders. In February 2007, 99.6% of shareholders voted in favour of the proposed compensation scheme and the special fund began operating days later.

²⁴ *Tax Laws Amendment (2006 Measures No.1) Act 2006* (Cth)

Subsequent Legislative Action

February 16, 2007 was the sixth anniversary of the company's statement as to the liquidity of the MRCF. This date marked the end of the statute of limitations for the enactment of civil proceedings against the company through ASIC. ASIC had been investigating the possibility of civil and criminal actions to be taken against the company and individuals within it since the end of the Jackson Inquiry. On 15 February 2007, every member of the 2001 board and some senior management²⁵ were charged by ASIC for breaching director's duties by failing to act with care and diligence. There have been a range of allegations made by ASIC for breaches of the *Corporations Act 2001* including the provision of misleading information to the ASX, institutional investors and the courts as to the extent of future asbestos liabilities. In bringing the civil proceedings, ASIC was asking the court to ban individuals from acting as company directors and to impose fines (ASIC 2007b). The case continues to be heard before the courts.

A few days after the bringing of civil proceedings against them, Meredith Hellicar, Michael Brown and Michael Gillfillan resigned from the James Hardie board, thus emptying it of all members and senior management involved in the 2001 restructure (Sexton 2007a: 3).

ASIC also commenced investigations into possible criminal actions against the company's executives based on the false statement issued to the ASX. However, in September 2008 the Commonwealth Director of Public Prosecutions decided there was insufficient evidence. This decision followed an eighteen month long investigation which spanned three continents and searched through more than 122 million computer files (Hall 2008).

²⁵ Those sued include: Peter Shafron (former in-house counsel), Peter McDonald (former CEO), Phillip Morley (former chief financial officer), Michael Brown (former director), Martin Koffel (former board member), Peter Willcox (former director), Greg Terry (former board member), Dan O'Brien (former board member), Michael Gillfillan (former director), Meredith Hellicar (former chairperson). See Sexton 2007b: 2.

In March 2006 it was revealed that tax benefits accorded to James Hardie from moving the company headquarters to the Netherlands would be removed in four years due to changes in the law of that country (Knight 2006: 23). A capital gains tax bill received by the company from the ATO of \$412 million for unpaid tax, penalties and interest meant the company only saved \$95 million in tax over five years (Gettler 2006: 1).

Despite this, James Hardie became more successful than ever, indicating the advantages accorded to them through their organisational structure. Profit levels and share prices did fluctuate for the company due to the Inquiry, uncertainty from the compensation negotiations and the ASIC civil proceedings. The company recorded more than US\$1.4 billion in annual sales in 2005-2006 in the US. In May 2006, profit increased by more than sixty three per cent to US\$208.9 million due to the success of its US operations. In May 2007 the company declared its biggest ever dividend. Throughout the years following the release of the Jackson report, the board and management of the company received pay rises and significant retirement packages. Hellicar received an AU\$972,000 payment upon her retirement following the launch of civil proceedings against her by ASIC (Higgins 2007: 1).

The story of asbestos disease sufferers is somewhat different. An actuarial report in 2005 indicated a spike in compensation claims at the end of 2004 due to increased public awareness of asbestos related diseases following the Jackson Inquiry (Sexton 2005b: 11). Reported cases of asbestos-related disease are also expected to rise. Leigh et al. (2002: 188) anticipate that rates of mesothelioma and asbestosis will peak in 2010 or 2011 and that there will be between 30,000 and 40,000 cases of asbestos-related cancers by 2020.

Asbestos and the State

The state as lawmaker is central to this story. In this case, the regulatory capacity of states was limited by the asbestos industry's monopolisation of scientific

knowledge about the dangers of asbestos (Wikeley 1992: 373-374). Without quality scientific evidence, the state was always limited in its ability to legitimately regulate corporations such as James Hardie. However, the absence of any meaningful state interest in controlling asbestos exposure until the late 1960s indicates both the complicity of the state with asbestos companies and the continued disinterest of states in regulating against the powerful.

McCulloch (2007: para 47) claims that it was only once litigation costs from state owned power stations, railways and shipyards began mounting that states became active in asbestos regulation. Until then, Australian governments had an economic and nationalistic interest in the continued success of asbestos companies like James Hardie (Wikeley 1992: 374). In December 2003, a nationwide ban on importing and using all forms of asbestos was introduced in all the states²⁶ and territories alongside national legislation seeking to control exposure to asbestos by introducing new standards for its management, control and removal²⁷.

The movement from loose to stringent government controls mirrors several developments, of which the growing liability of governments is just one. Equally significant is the decline of the asbestos industry generally as scientific evidence emerged as to its dangers not only for those working with the substance, but also for the general public. This finding made asbestos disease a public health issue, one which the health care and welfare systems of states would have to manage.

Rosenberg (1962: 5 in Wikeley 1992: 374) says of the nature of disease: 'a disease is no absolute physical entity but a complex intellectual construct, an amalgam of biological and social definition'. Wikeley (1992: 374) refers to this in discussing the medicalisation of asbestos disease and the way it has been framed

²⁶ See, for example, the Victorian legislation *Occupational Health and Safety (Asbestos) Regulations 2003*.

²⁷ Administered by the NOHSC and found in the *Code of Practice for the Safe Removal of Asbestos (2005)* and *Code of Practice for the Management and Control of Asbestos in the Workplace (2005)*.

in terms of a 'hazard' rather than an illness which people experience and suffer from. However, Rosenberg's words are also true of the acknowledgement of asbestos disease as a priority of the state. It was not until the disease developed from being an affliction of the working class of relatively low cost to the state and corporations, to becoming a virtually classless illness with huge costs associated with it that the disease really developed at all.

James Hardie: A Case Study in the Effects of Corporate Activity

The legality of James Hardie's restructure did not placate those who missed out on compensation. Nor was it a sufficient defence for the company against potential claimants, unions, the media and politicians. In the months that followed the release of the Jackson Inquiry, James Hardie came under immense pressure from these groups to provide compensation despite there being no legal imperative for them to do so. The reasons for the company's decision to provide compensation appear to stem from social pressure that eventually threatened to, and did, manifest into legal pressure. The process through which this occurred attests to the continued importance of pressure groups and normative consensus in realms where legislation does not exist or is inadequate in its reflection of social ideals.

The historic facts of this case study, namely the widespread use of asbestos and the knowledge that companies involved in its mining and manufacturing had of the material's dangers, indicate the potential effect of patterns in corporate structure, managerial hierarchy and economic imperatives which come when corporations are highly socially embedded. They are also of particular relevance to the progression of events following James Hardie's 2001 restructure. By then, the extent of asbestos-related disease in Australia was understood; there were statistics available as to the type and frequency of disease, the scope of potential victims was acknowledged to go beyond those who had worked with asbestos to effect those who had consumed asbestos products, and asbestos exposure was being treated as a public health issue by governments at the local, state and federal levels. Asbestos related diseases moved from being an affliction of

working class men to being indiscriminate. Arguably, it is the egalitarianism of asbestos-related disease which enabled the formulation of a normative consensus on the extra-legal criminality of James Hardie.

While elements of the 2001 restructure of James Hardie were investigated for illegalities, the outcome for compensation was deemed legal. The Jackson Inquiry's conclusion that the only obligation of the company toward providing compensation was an ethical one indicates the significance of legislation to interactions with corporations. Had James Hardie been a human individual rather than a corporation, aside from having almost certainly died or being close to death himself, there may have been a greater chance he could have been found responsible for making his employees and customers ill and for compensating them for their illnesses either through pecuniary measures or through imprisonment. Instead James Hardie the corporation has continued to operate profitably and will outlive those who have contracted a disease from its asbestos.

The fact that there was no existing legal avenue through which compensation could have been ensured is particularly telling. It indicates the inability of law to account for every situation; the law is an imperfect mechanism of social control. While imperfections are to be expected given the breadth and complexity of social relationships, the effects of these imperfections vary. Law need not act as a contemporary and complete reflection of social ideals. It is one mechanism of social control able to be supplemented by other such as religion, morals and the market (Smith 1990: 91-94, 281).

However, unlike most human individuals, the reified corporation is accountable to no other social control than the law. When legal controls are unsuccessful, there is little that can be done to control or sanction corporations (Braithwaite 1981: 481). In this instance, gaps in legislation would have resulted in legitimate claimants missing out on compensation and in doing so would have, in some sense, legitimated James Hardie's past.

This indicates the need for research into the effects of corporate activity to be extra-legal in their focus. Breaches of the law cannot be the methodological yardstick for determining instances of corporate-wrongdoing worthy of study. Under this perspective, the case study presented in this chapter could not be considered. In coming chapters, the effects of corporate dominance, encapsulated in this case study, are connected to law as the source of corporate dominance.

Conclusion

The history of James Hardie's knowledge of the dangers of asbestos and the continued mining and manufacturing of the substance over decades despite this knowledge, is evidence of the complexity of social organisation described in the previous chapter. The growth of the business, its mass of employees and larger pool of consumers, the suppression of quality research into the dangers of asbestos and weak state regulation coincided to give the activities of James Hardie a scope and dominance which would prove fatal to many. As the previous chapter indicated, these patterns of corporate activity, in relation to size, employment and sales, are seen in many other industries and corporations. This suggests that a situation with similar characteristics to the one presented in this chapter could emerge in the future.

The organisational and legal complexity of James Hardie's corporate structure mandated the shortfall in asbestos disease compensation. In this regard, the case study highlights the role of law in determining complexity and the difficulty of ordering its outcomes. As Calhoun and Hiller (1988: 163) explain, the corporate person, legally defined, is central to these stories. Through the pooling of monetary and human resources, the scope of the corporation is far greater than that of any human individual. Effective regulation of the corporate person is necessary for insidious injuries and other corporate harms resulting from their activity to be prevented and compensated for.

The next section of the thesis explores perspectives on the regulation of corporations from law and theory in an effort to understand current approaches to this. The history and practical application of these laws, examined through the regulation of workplace deaths, indicates the role of current legal structures to the patterns of corporate activity and dominance identified in Section One.

Section Two

The Legal Basis of Corporate Dominance

The previous section sought to discern corporate dominance through patterns of corporate activity in areas such as sales, employment, industry concentration and shareholding patterns. It concluded, though the case study, that law was central to determining these patterns, and therefore to determining dominance. This section explores this claim by reference to historical, theoretical and jurisprudential works on corporate law and the corporate legal individual.

The historical analysis of Chapter Four highlights the origins of legal individualism in corporate laws. In attempting to explain how corporations became the dominant institutions identified in Section One, it affirms the link between individualism and profit, which is subjected to theoretical critique in Chapter Five. Chapter Six extends this by exploring theories of the corporation, some of which support its designation as a legal individual and others which challenge it.

While corporate legal individualism is a significant source of power for corporations in establishing patterns of dominance, it is also something directly problematic. Doctrinal commitment to corporate personhood impacts on the design of all subsequent corporate law. Chapter Seven focuses on this process and its consequences in relation to corporate criminal liability for workplace deaths. This chapter argues that the individualism of corporate criminal liability laws impedes the effective regulation and prevention of workplace deaths.

Together, the two sections of this thesis question the current structures which govern corporate activity by highlighting their potential impacts on individuals and communities. The possibilities for alternative approaches to corporate regulation are considered in the final chapter.

Chapter Four: History of the Corporation

As Berle and Means (1932: 4) argue, corporations have not always been as significant as they are today. Their dominance developed over centuries, most rapidly over the past hundred years when the patterns of activity identified in Section One began to emerge. This Section argues that without law corporations would not exist as they have in the past and presently do; law is central to establishing the complexity and dominance of the contemporary corporation, the effects of which were explored in Chapter Three. Laws such as legal personhood, general incorporation, and limited liability made the corporate structure an appealing and easily accessible one. The combination of accessibility and appeal made them increasingly prevalent as a business form. While the number of corporations is one cause for their dominance, the nature of the legal concessions granted by the state is another. This historical account of the development of the corporation begins to explore this issue by linking important legal developments with their broader social-political context.

Using secondary sources, this chapter documents the most significant developments in the legal history of the corporation examined in Chapter Two, including corporate personhood, limited liability, and the role of shareholders. The account of corporate history is based primarily around key legal developments in common law legal systems as this is the system of most relevance to Australian law and to the rise of multinational corporations as a global phenomenon.

This historical information is set out in a thematic, as opposed to sequential, way. Presenting corporate history thematically gives a more accurate and informative perspective than is possible with a linear portrayal. This is because most corporate history has occurred in a piecemeal fashion and has varied across

jurisdictions. Jurisdictional variations are particularly difficult to represent in a linear fashion as the information flows between jurisdictions are difficult to trace.

While the history of corporations and associations is long and geographically dispersed, this chapter focuses on the development of the corporation as a business form in nineteenth century England and in the early American republic. This epoch saw the development of fundamental laws of the corporation that have a continuing influence in common law countries. These laws constructed the corporation as an individual in its own right. However, these laws were made according to the economic and social conditions of the times. They are particular to the types of corporations that existed in those times which focused on public works such as bridges, railroads, and telecommunications and were created to encourage investment in these works. The historical analysis of the corporation questions the continued application of historical laws to contemporary corporations that are distinct from their predecessors in terms of size and scope. The persistence of these individualistic laws has ramifications for corporate regulation; viewing a contemporary, large corporation as equal in capacity to a human individual is unrealistic and potentially harmful.

The analytical focus here is with reference to the historical conditions particular to the epochs in question. All of the legal developments can be linked to the particular state's approach to regulation. Governments in both Britain and the US, the primary jurisdictions under examination, sought to profit from the corporate business form in very different ways. Where the British parliament sought to profit by controlling and restricting the corporation, governments in the US sought to profit through the corporate form by relaxing chartering laws and allowing corporations to proliferate. Government control is an important theme around which this chapter is framed. It is significant to contextualising the legal developments discussed in Chapter Two and the potential outcomes as explored in Chapter Three thereby emphasising the constructed nature of corporate law. This highlights the degree to which the corporation's assigned individual

characteristics can be contrasted to the collective characteristics that corporations tend to display.

The Early Corporate Form

Williston argues that while the exact origins of the corporate form are disputed, it is evident in Roman law in which organisations of villages, towns, and artists, amongst others, were treated as individuals under the jurisdiction of the court (Williston 1968: 195-196). People worked together to cover a greater geographical area, to get more work done, and to make more money (Braudel 1981: 434). At this point, the law of business corporations was not distinguished from other corporations such as municipalities and ecclesiastical organisations (Williston 1968: 195-196).

In England, corporations developed in the fourteenth century, and were primarily trade groups or residential associations (Williston 1968: 198). From these, the municipalities and craft guilds developed alongside ecclesiastical associations. Municipalities and craft guilds are recognised as the first lay charter corporations in England (Ekelund & Tollison 1980: 716; Risk 1973: 270; Williston 1968: 198). They were based on Roman law and exercised significant power over the people who constituted them and on the population in general in terms of controlling trade, products, and prices (Williston 1968: 198, 228).

Carr (1909: 163) questions the 'corporateness' of the municipalities. He argues that it is difficult to locate the essence of corporateness in early institutions due to the ambiguity of Roman phrases that make references to community and references to corporations difficult to distinguish. He argues that communal ownership in villages, such as the English municipalities, was not equivalent to corporateness even though it appears to be and questions the Roman influence on these municipalities:

The appearance of corporateness which grew up in the English boroughs was a native English product. However Italian may

have been the principles which came to govern the corporation at the end of the Middle Ages, it is doubtful whether there was anything Roman about the earliest English municipalities (Carr 1909: 167).

Conversely, Williston (1968: 203-204) argues that the link to Roman law is pivotal to understanding the contemporary corporate form: '(Corporations) are not a spontaneous product, but are rather the result of a gradual development of earlier institutions running back farther than can be traced'. While this does not address Carr's concern about the corporateness of the municipalities, likening these organisations to corporations is not as implausible as Carr suggests.

Williston (1968: 198-199) claims that from the residential associations grew the first 'municipal corporations' that were different to their modern counterparts because of the overt control exercised upon those who lived within the municipality. Trade associations incorporated to become trade guilds equally controlling of their members through the enactment of by-laws that regulated the trade and its operation within certain areas (Williston 1968: 198-199). The first trades which organised themselves in this way were the manual trades which were seen as necessary to the maintenance of 'civilised life' such as weavers, goldsmiths, haberdashers, fishmongers, and tailors (Williston 1968: 199). This indicates the role of incorporation in medieval England. It shows Anglo corporations as being borne from both necessity and could be seen to indicate the way incorporation was controlled in scope.

Government Control of the Corporation

The sixteenth and seventeenth centuries saw the successful operation of several trading companies²⁸ across national boundaries (Carlos & Nicholas 1988: 398). Williston (1968: 199) accounts for the establishment of transnational corporations on the basis that a 'commercial spirit' had developed with the discovery of

²⁸ For example the East India Company, Hudson's Bay Company, and the Muscovy Company (see Carlos and Nicholas 1988: 398-419).

resource-rich continents and countries. The English transnational corporations were granted their charter by parliament, which reserved the right to revoke or alter it. Their operations were limited to the terms of their charter. Often, a part of their mandate included the regulation of their trade. So the corporation was not only a convenient structure, it was invested with a significant social, economic, and political purpose: it was 'a public agency' (Williston 1968: 201).

At this time, grain futures were the subjects of active speculative trading in Amsterdam (Barbour 1963: 74; Williston 1968: 202). By the late seventeenth century, speculative trading reached a level of previously unforeseen sophistication (Barbour 1963: 78). Rare commodities whose availability to the market was highly unpredictable were traded at high value (Barbour 1963: 74). The development of the speculative markets was important to the development of modern stock markets generally and is pivotal to the development of the corporation. Significantly, it also signalled a move away from trading based on supply and demand, as supply was not guaranteed; risk itself became a source of profit.

Business activity grew as access to world resources increased through colonisation (Williston 1968: 199). Companies formed at this time required significant investment as business expenses exceeded the wealth of any one, or few, entrepreneurs (Williston 1968: 201). The requirement for united capital in the building of water works and canals, amongst other large-scale, essentially public, ventures was another force in the expansion of the corporation (Williston 1968: 203). By the end of the seventeenth century, grants of charter by parliament were becoming more frequent (Williston 1968: 201). The corporate form grew in number, value, and socio-political significance well into the eighteenth century.

Incorporation was not easily available. In England, charters were granted by the crown on a case-by-case basis (Patterson & Reiffen 1990: 164). This allowed for

the aligning of corporate and political interests and explains the 'public purpose' of early corporations. This public purpose included management of the corporation's trade, and sometimes, in the case of transnational corporations, foreign policy (Patterson & Reiffen 1990: 164; Williston 1968: 200-201). Monopolisation of particular industries often resulted from the stringent political control over the granting of charters. Patterson and Reiffen (1990: 164-5) claim that the combination of stringent control over the granting of charters and almost guaranteed profitability through monopoly made charters highly valuable.

While some advantages came from parliamentary control, it also imposed limitations on corporations. The rights of early corporations were fewer than the rights of modern corporations (Patterson & Reiffen 1990: 165). The activities of the firms and its lifespan were clearly specified. This gave the parliament the ability to pursue new business opportunities without the burden of an inefficient and archaic monopoly. Overall, this control allowed the parliament to preserve its own revenue by controlling the profitability of corporations (Patterson & Reiffen 1990: 166).

By the beginning of the eighteenth century this parliamentary power, and the revenue received from it, was being undermined (Patterson & Reiffen 1990: 167). Speculation was becoming regular, and numerous implausible companies were being presented to the public for shareholding (DuBois 1971: 1-85; Williston 1968: 202). The failure of investors to distinguish between the shares of legitimate and illegitimate companies (usually due to misinformation) meant that parliament was missing out on revenue. Some of the illegitimate, unincorporated companies were waiting for charters to be approved and others claimed to be waiting (Patterson & Reiffen 1990: 167). Additionally, a trade began in 'used' corporate charters. By buying up the shares of failing corporations and thus obtaining its charter, business interests were able to avoid applying for grant of a charter (Patterson & Reiffen 1990: 168). This meant that parliament was unable to receive wealth from the sale of new charters, as it did not receive anything

from the sale of the used charter (Patterson & Reiffen 1990: 168). Less regulated corporate activity was taking place, the profits in which the parliament was not entitled to share (Patterson & Reiffen 1990: 168).

In an effort to regain control and revenue, the Parliament's response was a statute entitled: *An Act to Restrain the Extravagant and Unwarrantable Practice of Raising Money by Voluntary Subscriptions for Carrying on Projects Dangerous to the Trade and Subjects of this Kingdom* 1720. It is now commonly referred to as 'The Bubble Act'. Under this act, the transferring of shares was made more difficult, the terms of corporate charters strictly enforced, and businesses illegitimately claiming to be corporations were made unlawful (Patterson & Reiffen 1990: 169-170).

A few months later public credit collapsed and only a few corporations survived (Harris 1994: 613). From this point, corporations in England arose at a much slower pace and were primarily engaged in essential works (Williston 1968: 203). As such, the most significant corporate legal and organisational developments from the late eighteenth century onward took place in the early American republic.

Corporations in the Early American Republic

There were few corporations in the early American colony. Davis (1917: 58) argues that this could have resulted from the Bubble Act, but was also due to the psychological and economic conditions that were not conducive to their development. Until the late eighteenth century, Davis (1917: 59) claims there were few relationships outside of the local in the colony, thus truly productive and wide-reaching corporate activity was difficult to achieve and large amounts of capital were more difficult to accumulate. In addition technical progress was slow, industries were monopolised, and the colony was more concerned with war than business (Davis 1917: 5-7). Post-revolution, much changed. As independence became a reality, communications, banks, and manufacturers were

required; these businesses needed to be stable and of a considerable size (Davis 1917: 6-7). The end of the war was also economically advantageous for business. Capital that had been accumulated throughout the war was available for use and there was a strong labour supply available with the disbanding of the army and increased immigration (Davis 1917: 7). Corporations were the business organisation of choice for large-scale projects as they allowed for the accumulation of capital from various sources. In addition to this, Davis (1917: 7) believes there was a psychological change within the country, one that fostered the development of corporations on a scale previously unseen: 'Political precedents had been broken and new political expedients were being tried. Economic 'speculations', new economic devices, likewise came naturally to the fore' (Davis 1917: 7). It is from this developing, enterprising society that modern corporations find their historical counterparts.

Scientific developments saw the machinery and tools used in production processes become more intricate and costly. Polanyi (1965: 73-75) argues that this shifted production from a process that could be inexpensive and small scale to one involving complicated and large-scale processes. He claims that increases in the cost of plant and machinery and the development of the factory production system resulted, placing a greater emphasis on industry (Polanyi 1965: 75). Industrial production required more than buying and selling, it required long term investment in machinery and absorption of the risks associated with this investment. This system of production and its focus on industry facilitated the rise of the corporate business form. It was rare that individuals were able to raise sufficient capital to purchase the machinery they required to remain competitive (Williston 1968: 203). Accordingly, the pooling of resources was essential to the technical developments seen at this time.

Public/Private Characteristics of the Corporation

These social and scientific factors created a corporate environment that was focused on the development needs of the early American republic. Seavoy (1982:

50) developed a fourfold typology of early American corporations. First, internal improvement corporations concerned with structures such as turnpikes, canals, bridges; second, monied corporations involved in banking and insurance; third, manufacturing corporations which traded in materials such as textiles and steel; and fourth, regulatory corporations invested with the responsibility to supervise a particular area or industry and to act as advisers for the legislature, for example, the New York County Medical Society.

Of these, it was the internal improvement corporations that were the most prolific. This was related to the level of development within newly independent America. An area of high incorporation was the construction and maintenance of turnpikes, which were most useful for extending trade possibilities (Seavoy 1982: 40). Shares in turnpike corporations were of low value and were widely dispersed (Seavoy 1982: 41). This example highlights the link between corporations in their early modern history, social need, and government:

Improvements in overland transportation were the greatest need of the time. The people expected their representatives to facilitate these improvements. Turnpikes were popular investments, not necessarily because they were expected to be profitable, but because they improved access to markets, raised local land values, and lowered the costs of goods that had to be teamed in (Seavoy 1982: 41).

At this point in corporate history, charters were still being examined by the legislature, a process that may have contributed to the public spirit of the corporations at that time.

Seavoy (1982: 47, 256) claims that the early US corporations significantly improved the welfare of the population, in terms of employment and increased wealth, thereby filling the gap where government had not sought to act, or had not succeeded. Despite this, business corporations were not the majority of

incorporated bodies; others included religious institutions, educational institutions, charities, and bodies politic (Maier 1993: 53).

Organisations in the early American republic were only incorporated if they owned real property or performed a regulatory function (Seavoy 1982: 32). Additionally, the public nature of the corporation was vital, albeit in a different sense to the current meaning of 'public' in relation to corporations. It was a legislative requirement in the early American republic that corporations serve a public purpose (Maier 1993: 55). Accordingly, corporate activity was tied to social need. This also affirmed the connection between corporations and government. Since the government had these requirements, corporations in the early American republic were, to a degree, acting as agencies of government (Maier 1993: 55; Seavoy 1982: 47).

However, the public purpose of incorporation was not always fulfilled; some corporations and their owners found legal loopholes that enabled them to make massive profits and little else. Maier (1993: 66) argues that these situations showed corporations to be houses of privilege contrary to the egalitarian spirit of the early American republic.

Legal debate through to the early nineteenth century questioned whether the corporation was a public or private body. The ramifications of a decision between the two were understood. If the corporation was public, this severely restricted the types of business that it could enter into. It must have a public purpose and would be subject to legislative attempts to change its charter. Conversely, the private corporation would have much fewer restrictions on its business activities and its charter. The decision between the two was a decision about the acceptable degree of state control and was to have significant implications for the development of corporate activity.

Until 1819 the US legislature retained the right to alter and revoke corporate charters, thereby maintaining the public nature of the corporation. In 1819, the decision in *Trustees of Dartmouth College v Woodward* 17 US 518 (1819) 636, reversed this parliamentary capacity and held that a charter could not be amended by the legislature. This case gave the final distinction between public versus private rights in the corporation. The judgement held that corporations were private if they owned private property, and were public only if they were overtly aligned with government (Handlin & Handlin 1969: 156). In the judgement, Justice Story said that while educational institutions and other similar organisations may have a public character, they are often private because the investments are private. It is only when a corporation is charged with a governmental or administrative function that it is public (Handlin & Handlin 1969: 156). Further, it is only when a corporation is public that the state has the power to change the corporate charter. Millon (1990: 208) claims that reducing state power and making incorporation available to anyone eliminated legislative discretion and favouritism in the creation of corporate charters.

Developments in general incorporation law were related to the public/private distinction. General incorporation laws, whereby a corporation is able to form without a charter from the legislature, began to develop in various states from 1795²⁹ and continued through to the late nineteenth century. States in the US began to use corporate law competitively in an effort to attract corporate revenue. Alongside generous taxation systems, general incorporation laws were important to attracting corporations.

However, general incorporation laws were not unconditionally enacted. Concurrently to the development of general incorporation laws, the courts developed a body of common law that effectively restricted the corporation's scope. The most significant development was the doctrine of *ultra vires*, which specified that a corporation could not act beyond the scope of its charter. Millon

²⁹ North Carolina was the first state to allow general incorporation.

(1990: 209) argues that the development of such laws which limited the corporation's purpose reflected a distrust of the corporation and concern over the business form's capacity to accumulate significant economic power.

From the late eighteenth to mid nineteenth centuries, the differences between corporate regulation in the US and the UK were clear. The US was generally more willing to experiment with the corporate business structure than the UK, which had effectively stalled the development of corporations after the enactment of the Bubble Act in 1720. Laws developed at this time are of continued importance to Australia, as a common law country, and explain the origins of the legal and organisational features of corporations discussed in the previous chapter. In doing so, they indicate the historic basis of corporate dominance, legitimating it as an area of sociological inquiry.

Limited Liability

The public nature of corporate activity in the early American republic was a primary reason for giving shareholders rights such as limited liability. Seavoy (1982: 257) claims that prior to 1815 personal liability was a standard of integrity, while limited liability was regarded as giving business owners an unfair advantage over competitors. In 1815 limited liability was granted to corporations on the basis of their public role:

[corporations] were the legal and moral exception to the accepted standard of business ethics, which required personal liability, but everyone recognised that they had their place in the community because of the public services they performed...Such an exception as limited liability could only be justified by the public service a business performed (Seavoy 1982: 257-258).

While Britain had businesses, they did not assume the corporate form. After the Bubble Act of 1720, the corporation was largely absent from British business. Joint-stock companies in the form of partnerships and proprietorships were much

more common-place (Seavoy 1982: 46). Due to this, the separation of ownership and control was not a concern and so neither was limited liability.

By the mid-nineteenth century, three pieces of legislation loosened the Parliament's control over the corporate form in the UK (Butler 1986: 169-187). The first, in 1825, repealed the Bubble Act. The second, the *Joint Stock Companies Act 1844* (7 & 8 Vict. c.110), gave registered joint-stock companies the benefits of incorporation with the exception of limited liability. The third was the passage of *Limited Liability Act 1855* (18 & 19 Vict. c.133) whereby all registered firms were given limited liability. This meant that shareholders were liable for the corporation's debts only to the value of their shares. Limited liability is one of the most important legal developments in corporate history. By encouraging investment, the creation of limited liability mobilised large amounts of capital and increased corporate activity.

The UK had long resisted the creation of limited liability laws for corporations. Hunt (1936: 97) argues that English law makers believed limited liability laws would expose the public to corporate misconduct by creating a shield over corporate accountability which could, in turn, promote the reckless use of investor's shares. However, he claims that corporations overcame the absence of limited liability laws by carefully phrasing deeds of association and contracts (Hunt 1936: 98-99). By choosing the right words, corporations were able to limit the liability of shareholders to the value of their shares regardless of the absence of limited liability laws.

Hunt (1936: 124-127) claims that limited liability was supported by some commentators as an egalitarian measure; it was seen as giving the working class an opportunity to invest without threatening their livelihood (Hunt 1936: 124-127). Accordingly, opposition to limited liability was construed as il-liberal and anti-competition by limiting the availability of stock ownership.

By 1880, corporations increased in number in the UK. By the early twentieth century, though still outweighed by the partnership, corporations were becoming increasingly involved in manufacturing. Those corporations were predominately private, so while the organisation had the corporate form, the general public were not funding the enterprise. Nonetheless, limited liability was granted to the holders of shares. Today, limited liability remains a central feature of corporations and is what makes the corporate form an attractive one for investing.

The trend of separating ownership from control complicated attempts to resist limited liability laws. The movement of sixteenth century English corporations into overseas production saw these corporations display what is today described as a strictly modern business phenomenon, the development of a managerial hierarchy. These corporations had high volumes of goods or services transacting to a separate geographical border (Carlos & Nicholas 1988: 398). The breadth of their operations saw these corporations create bureaucratic departments and employ salaried managers (Carlos & Nicholas 1988: 400-402). However, Carlos and Nicholas (1988: 402) explain that the early trade companies operated in a different historical epoch, therefore the politics and economics surrounding their operation were considerably different to companies of the nineteenth and twentieth centuries. The managers of these companies often owned more shares than contemporary managers and therefore had a direct stake in the running of the company. However, Hunt (1936: 117-118, 139) argues that the continued separation of management and control was used as a rationale for limited liability; it was seen as unfair that shareholders may have to be liable for actions which they did not themselves direct. It was not until later that the issue of shareholder participation in the corporation would become an important issue.

Shareholder Rights

Early American law regarding corporations gave shareholders an active role in the running of the corporation particularly in the election of company representatives and in major company decisions (Spencer in Hunt 1936: 135-136). The

corporation was envisioned by early law-makers as possessing qualities reminiscent of state democracy, particularly through laws relating to shareholder voting³⁰. In *Taylor v Griswold* (1834) 14 NJL 222 it was ruled that proxy votes were invalid and that every member of the corporation was to have an equal vote in the running of the corporation. In his judgement, Chief Justice Hornblower argues that while the process of proxy voting may be beneficial for members who did not wish to attend meetings, the interests of the corporation and of democracy would benefit from the physical meeting of shareholders. While the judgement asserts the individual and public advantages of active shareholder participation, it also criticises the potential for proxy voting and unequal voting rights to monopolise control of the company by reducing the rights of smaller shareholders. While this judgement identifies democratic qualities in the corporation, it does so by presenting this notion as a fiction, a protection for the corporation against capital's natural tendencies rather than a strong philosophical belief. Judicial recognition of this artificial situation, where democracy had to be codified and enforced, suggests that democratic principles were not ingrained in the incorporator's mind.

These attempts to promote democracy within corporations were looked upon unfavourably by liberalists such as Herbert Spencer (in Hunt 1936: 135-136). Spencer did not adhere to this vision of the corporation because he doubted the corporation's ability to be democratic and to protect shareholder's interests. He argued that while the law specified that corporations follow democratic principles in terms of electing their representatives, this rarely took place. Instead power became centralised, with board members constantly re-elected with little opposition from shareholders. As mass production increased and technology advanced, shares were issued ever more widely. This further diminished the role of the shareholder and enhanced the role of managers.

³⁰ See also *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189. Despite the unprotected status of minority shareholders as a result of this case, the judgements give some indication of the extent to which shareholder participation in corporate decision-making was seen as a true possibility.

The cases of *Broderip v Salomon* [1895] 2 Ch 323 and *Salomon v Salomon* [1897] AC 22 show the tension between judicial interpretations of democracy in corporations and the advantages to capital accumulation available through the corporate form. In *Broderip v Salomon* it was found that corporations run by one person were against the intention of incorporation laws. The company in question was incorporated, but in the view of the judge, its incorporation was illegitimate. This result suggested that the potential involvement of shareholders was important to the running of corporations. Two years later in *Salomon v Salomon* the court found that the statute in question had no such intent and did not specify the extent of a shareholder's interest in the running of the company. Accordingly, a company where shares were distributed amongst a few people, with only one holding a considerable amount of shares, would still be valid. This decision mandated a business' designation as a corporation in law despite the shares having been issued in disproportionate amounts and control of the company lying with the major shareholder. The result of the case vindicated the actions of the chair of the respondent company in establishing a company purely for the economic benefits of limited liability.

Salomon v Salomon is often considered a hallmark case in corporate legal personality due to the court's decision that shareholders need not have a significant role in the running of the corporation. Through this, the decision mandated the centralised running of a corporation. This was official recognition of developments in corporate ownership and control that had been taking place since the mid nineteenth century and a rejection of judicial aspirations for democratic shareholding evidenced in *Taylor v Griswold* and *Broderip v Salomon*. This decision described the corporation's primary purpose as lying in the protection and advancement of capital accumulation; the decision in this case recognises that the most successful way to achieve this in a corporation is through the separation of ownership and control.

The term *managerial revolution* is most commonly associated with this separation of business ownership and business control (Berle & Means 1932). With this separation, a new class of career managers arose who were able to have unprecedented power over the operation of the corporation. The managerial revolution is associated with the rise of the public corporation which distributes shares to populations who are diverse not only in location, but also in kind; institutions hold shares alongside humans. Berle and Means (1932: 33-34) argue that the multiplication of owners makes it difficult, if not impossible, to run a corporation in the 'traditional' way where owners are able to make a contribution to the running of the corporation either in person, or through their elected representatives.

Chandler (1977) also links the shape of the modern business enterprise to the rise of managers in the American railways of the nineteenth century. To cope with the expansion of the railway industry, administrative units and departments were created within railway corporations. Chandler (1977: 185-186) argues that this led to bureaucratised, centralised management instilled with most decision making powers.

Chandler (1977: 185-186) perceives a disparity between the goals of managers and the goals of investors in these railways. He claims that while managers sought to ensure the long-term success of the organisation and are prepared to reduce dividends to achieve this, investors sought to maintain dividends as a priority (Chandler 1977: 186). The question of which prevailed is indicative of the purpose of the corporation. The early corporations understood that to maximise profitability significant amounts of investment and investors were required. With this came the impossibility of shareholder organisation. To ensure that decision-making in the corporation continued, management took on an enhanced role. If the economic function of the corporation was to be given more weight than its public function (as development of limited liability and general registration laws suggest), this situation was inevitable. Berle and Means (1932:

35) argue that the power of shareholders was diminished by management policies of proxy voting, the disappearance of the principle allowing shareholders to remove directors, and provisions in corporate law which allow for the results of a shareholder vote to be valid without the vote of all shareholders. This transfers power to managers. This power is then institutionalised, leading to what they describe as the 'corporate system' whereby corporations exercise significant economic and social power.

Distinguishing between a corporation's managers and the corporation itself allows for power to be institutionalised and to manifest in ways outside of the control of a few key individuals. While this is characteristic of organisations generally (Salaman 1979: 54), it is mandated in common law through corporate personhood laws which, as described in the Chapter Two, assign the corporation a personality distinct from its members. While corporate personhood has existed for centuries, the nineteenth and twentieth centuries saw the refinement of the concept. Industrialisation increased the scope of corporate activity and necessitated the legal clarification of corporate personality; corporations were involved in more numerous and complex legal relationships. While this has been attempted into the late twentieth century, the ambiguity of the concept and its disconnect with the collective reality of the corporation has been legally problematic.

Corporate Personhood

The precise origins of corporate legal personhood are dubious. Most commentators mention the Roman basis of the legal precept but go no further in explaining these origins (Hallis 1930; Seymour 1903: 531-532)³¹. Roman law and

³¹ While concepts of corporate personhood have not fluctuated significantly over time, debate as to the nature of the corporation has. The corporation has been seen in individual, collective, contractual, and fictional ways. In this sense, corporate personhood and the perceived nature of the corporation are different things though the concept of the corporation as a legal person has always influenced debates over corporate personality. These debates will be examined in Chapter Six.

early English law held that corporations had the same legal obligations and rights as human individuals, but that this did not extend to crimes where fault or blame was required (Williston 1968: 196-197, 216). This idea has been refined in contemporary law, but is broadly the same.

The doctrine of corporate personhood cannot be separated from limited liability. Tombs and Whyte (2007: 129) argue that it is limited liability which allows for the formulation of a corporate personality distinct from the individuals who make it up; this has the effect of reducing financial liability for investors, a protection known as the *corporate veil*. Tombs and Whyte (2007: 129) argue that the economic statement that this doctrine makes is clear: property rights are to be protected in order to ensure the generation, accumulation and reproduction of capital. The concept's link to industrialisation and liberal political systems appears to support this contention.

Corporate regulation began during the industrial revolution. Clough and Mulhern (2002: 72) identify the impact of industrialisation on workers and trade as part of the motivation for regulation. Hill and Harmer (1996: 75) identify legal regulation as stemming from the granting of personhood to corporations and the need to articulate the legal responsibilities that emerge from it. As corporate personhood was legally mandated and extended, corporations came to have the same capacities as individuals and yet wrongs were occurring for which it was difficult to apportion liability (Stone 1975: 23). Corporate liability laws attempted to address these issues by refining corporate personhood. The importance of this to consumers, workers, the environment and investors is considerable given the development of the corporate system. Common law has struggled with developing a coherent, readily applied, concept of corporate personhood. Corporate criminal liability laws highlight the imposition of individualist paradigms of responsibility on to a collective institution. The practical effect of this is that the effectiveness of corporate liability laws in locating responsibility for an action and punishing its outcomes is reduced.

Corporate Criminal Personality

The criminal justice system does not focus on corporations. It is no revelation that, for centuries, criminal laws have focused on the regulation of lower class individuals (Tombs & Whyte 2007: 109). To apply these laws to the corporation and the powerful individuals within them was not straightforward. Norrie (2001: 82-83) argues that corporations have been regulated by criminal law in two distinct ways, through either assimilation, where corporations are included in existing legal doctrine, or through differentiation, where corporations are made distinct from other legal actors and existing legal doctrine.

Tombs and Whyte (2007: 129) describe the attribution of criminal liability to corporations as an attempt at assimilating the corporate form into the existing individualist legal system. There have been attempts to apply the concept of *mens rea*, the guilty mind required to constitute a crime, to corporations throughout the twentieth century (see Slapper & Tombs 1999: 26-35; Wells 2001). This has involved applying liability either vicariously or directly to find either a corporation or its employees guilty of a criminal offence.

Vicarious liability means that a corporation can be held liable for the acts of its employees who are acting within the scope of their employment or authority (Tomasic & Bottomley 1995: 271; Tombs & Whyte 2007: 122). Vicarious liability can be applied to corporations in cases where an employer has authorised or aided the commission of an act (Tomasic & Bottomley 1995: 271).

By the beginning of the twentieth century, vicarious liability was the basis for convicting corporations of criminal offences (Clough & Mulhern 2002: 74). At this time, corporations were mainly subject to the civil law for fraud and nuisance (Ford et al. 2001: 683, Clough & Mulhern 2002: 72). The few charges that had been brought against corporations for crimes, for example murder and other crimes against the person, had not been successful (Clough & Mulhern 2002: 74).

Lawyers sought to extend the doctrine of direct liability, where liability is assigned directly to the corporation, as a legal principle (Clough & Mulhern 2002: 74). Under this doctrine, the corporation is not responsible for the acts of its employees; rather the acts of the employees are taken to be the acts of the corporation (Tomasic & Bottomley 1995: 272, Ford et al. 2001: 684). This was met with scepticism by law-makers on the basis that a corporation, as a fiction, cannot have or be given a state of mind. The imputation of an employee's mental state to the corporation was not accepted until the 1944 decision in *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146, where the actions and mental state of a manager of the accused corporation were held to represent the intention of the corporation. This case signalled the development of what is now known as the *identification doctrine*, which is now the primary basis for attributing direct criminal liability to a corporation.

The identification doctrine specifies the type of person the law will look to in attributing direct liability to a corporation. Direct liability can only be assigned to the corporation through someone deemed to be the *directing mind and will* of a corporation. In law, this person's actions and state of mind are taken to be those of the corporation (New South Wales Law Reform Commission [NSWLRC] 2003: 19). While originating in the 1940s it was not until 1972 and the case of *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, that the doctrine was wholeheartedly endorsed in the UK and became a part of Australian law (Tomasic & Bottomley 1995: 274). In this case, Tesco supermarkets had been charged with false advertising after the manager of a store sold for full price a product that was being advertised as discounted. In appealing, Tesco claimed that the acts of the manager could not be attributed to the corporation. This argument was accepted by the House of Lords because the manager was not a directing mind or will of the corporation; therefore his conduct could not be attributed to the corporation:

A living person has a mind which can have knowledge or intention or be negligent and has hands to carry out his intentions.

A corporation has none of these: it must carry out through living

persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company...He is an embodiment of the company, or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company (*Tesco Supermarkets Ltd v Natrass* at 170 per Lord Reid).

The 'directing mind and will' includes a corporation's director, managing director and those who work without supervision (NSWLRC 2003: 19). The full discretion of the directing mind and will is essential, therefore not every employee falls under this doctrine.

This doctrine has been subject to considerable legal debate. In the case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 in New Zealand, a more liberal approach to the identification doctrine was taken by the courts. In this case, two employees acting within the scope of their duties but unknown to directors bought shares using company funds. The question was whether the company had known, or should have known, about the acquisition of the shares (Hicks and Goo 2007: 133-135). The Privy Council found that it did know and that the acts or omissions of the employees could be attributable to the company. This liberal approach declined in the UK and Australia where the decision in *Tesco Supermarkets Ltd v Natrass* has been recently endorsed.

In Australia, this was most clear in *R v AC Hatrick Chemicals* (1995) 140 IR, where a company was found not guilty of manslaughter by reference to the decision in *Tesco Supermarkets Ltd v Natrass*. In this case, an explosion at a chemical plant killed one man and seriously injured another. The prosecution argued for a reconfiguration of corporate criminal liability laws, including the

expansion of the identification doctrine to employees lower in the decision-making hierarchy and the use of aggregation principles, for the company to be found guilty of manslaughter. This argument was rejected by the courts through an explicit endorsement of the identification doctrine and the assertion that the liability tests could only be altered in parliament and not in the courts (Wheelwright 2002).

A similar finding was made in the UK in *Attorney General's Reference (No. 2 of 1999 [2000] QB 796)* where the courts were asked whether a non-human defendant, in this case a corporation, could be found guilty of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of a human individual for the same crime. The courts found it could not, thereby affirming the rule in *Tesco Supermarkets Ltd v Natrass (Attorney General's Reference (No. 2 of 1999 [2000] QB 796 per Lord Justice Rose)*.

While this established the legal rules regarding corporate criminal personality, the application of these rules is another matter. The reason it took so long before a doctrine of corporate legal personality was accepted and the reason for its continued contestability is related to debate surrounding the nature of the corporation's personality. The nebulous nature of corporate personality has meant that these laws, despite general acceptance and their use as the cornerstone of many corporate and criminal laws, are limited in their capacity to be applied and are therefore limited to act as a sufficient deterrent to corporate wrongdoing. Their recent history also indicates that the need to clarify corporate personality laws was a modern development aligned to the proliferation of corporate activity in the mid to late twentieth century.

Conclusion

Laws such as corporate personhood, limited liability and general incorporation are central to the contemporary dominance of corporations because it is these laws which make the corporate form an appealing and accessible one.

Examining these laws in their historical context is important to understanding the shape of the concepts themselves and how they have institutionalised corporate dominance. Giving these concepts a historical grounding further legitimates corporations as symbols of modernity, worthy of sociological critique on this basis.

The corporation, as defined by law, is a fictional body, the history of which indicates much about its creators and their conditions. The scope of government control has been a central theme in corporate history; the differences between regulation in the UK and US in the nineteenth century indicate how lawmakers facilitate corporate dominance through legal constructs. This analysis posits business corporations as fictions; they are creations of the state designed to meet the state's economic and political interests.

Corporate personhood and limited liability indicate the individual focus of law; both assert the existence of a corporate individual distinct from the people who constitute it. While organisational sociology acknowledges the development of an institutional personality emerging from human associations (Salaman 1979: 54), law attempts to embody and contain this personality in individual terms. Historically, individual concepts were applied to corporations to encourage investment in major public works; once needed to provide infrastructure such as railways and bridges, Western countries now rely on corporations for economic infrastructure such as wealth and employment (Bowman 1996: 11-12). The contemporary importance of corporations makes sustaining individualistic laws problematic. Law seeks to maintain an individual image of the corporation despite it being at odds with their collective reality. The next chapter will further examine the individualism of corporate personhood and its theoretical ramifications.

The practical effects of individualising corporations is indicated by the confusion with defining the corporate criminal personality; while individual constructs such

as corporate personhood originated to encourage corporate business, corporations have grown to such importance that its individualist form now challenges attempts to regulate it. The disconnect between the individual legal corporation and its collective reality is a significant theoretical issue and has ramifications for the health of human individuals, communities and environments whose interactions with corporations are mediated by law. This was seen in the case study in Chapter Three and is further explored, in its legal sense, in Chapter Seven.

Chapter Five: Legal Individualism and Corporate Personhood

Corporate personhood laws describe corporations as individuals distinct from individuals within them. As described in Chapters Two and Four, this legal construct makes it easier for corporations and other individuals and groups to conduct business with each other; by asserting the capacities of the corporation itself, corporate personhood can overcome the challenges presented by managerial hierarchies such as locating responsibility and ensuring continuity in business transactions. This allowed for the establishment of the patterns of corporate activity identified in Section One. However, Section One, particularly the case study on James Hardie, indicates that the realities of contemporary corporate ownership structures, work processes and managerial hierarchies do not match the individualist legal paradigm. These operations are collective, especially in the largest and most successful corporations. By attempting to embody corporate personality in individual terms, law denies this collective. This is theoretically problematic; there is little coherency in the application of legal individualism to the corporation when descriptions of both are considered.

This theoretical inconsistency also manifests itself in the problematic application of law to corporations. Despite the expectation that corporate personhood enables corporations to be legally regulated, the tests of liability it necessitates are difficult to apply because of the divide between their individual basis and the collective corporation. The implications of this for corporate regulation and for those in relationships with corporations such as employees, consumers and communities are considerable and are considered in Chapter Seven in relation to the regulation of workplace deaths. On this basis alone, ineffectively regulated corporations pose a threat to these individuals and groups. Legal individualism as a theory and its application to the corporation are the subject of this chapter, which begins to explicate the collective elements of the corporate form identified in future chapters as presenting challenges to corporate regulation.

Liberalism, Individualism and Corporate Personhood

Gray (1986, 1995: xii) describes the liberal legal system in countries such as the UK, US and Australia as individualist in their assertion of the individual's moral primacy against the claims of social collectives. In such a system, an unincorporated collective has limited claim to legal processes, both as an alleged criminal and as victim. Gray (1995: xii) also describes liberal legal systems as egalitarian in their designation of equal moral status to individuals.

In the Australian legal system, the recognition of corporations as legal individuals threatens the integrity of liberalism's egalitarian ideal by denying structural inequalities between people and corporations in the substantive law. This practical difference favours the corporation in terms of prosecution and conviction rates and the application of penalties to corporations and their managers³².

Individualism

Legal individualism defines the individual as the locus of responsibility, the owner of property and a legitimate party to legal interactions. It is a vision of the individual that satisfies liberalist and capitalist ideals (Bobbio 1990: 41, Bowman 1996: 6).

Cotterrell (1992) describes individualism as an absolute view of life which fails to take into account alternative forms of organisation, including the corporation: 'it takes no account of social or cultural factors that may remove the possibility of choice from individual actors, or severely limit the choices available to them, or determine the way these choices are interpreted' (Cotterrell 1992: 119). It is when this ideology is seen as 'common sense' that issues of economic power come to the fore; corporations, while individuals at law, possess more economic

³² See Pearce and Tombs 1998: 289-292.

wealth than most human individuals. However, the extent to which this affects their behaviour is not necessarily a consideration of the courts (Galanter 1974: 98).

Legal individualism in the contemporary context is particularly problematic, as it does not accurately reflect the collective structure and operation of corporations. In its relation to corporate personhood, legal individualism could be described as a pre-corporation economic theory, one well suited to small-scale business forms that were dominant until the nineteenth century but ill suited to the contemporary nature of large-scale, widely owned, corporate business organisation. The structure of these corporations go beyond the reach of any individual, they are collective. When corporations are viewed as players in a network economy, sociological analysis must immediately call their individuality, granted by law, into question.

The maintenance of corporate personhood despite significant changes in levels of corporate dominance speaks to the strength of individualist ideology which Cotterrell (1992: 127) identifies:

(l)egal individualism as ideology has been carried along in legal doctrine to inform the regulation of social conditions in which much has changed – the law, its meanings, its effects, and the environment in which it operates – but not, perhaps, the ideology itself.

Laws based on individuals and their interactions cannot effectively regulate the activities of collectives; the differences between the legal conception of corporations and their operation need to be addressed to ensure theoretical coherency and socially just legal outcomes.

The Collective in Liberal Theory

The collective is the antithesis of the liberal individual. Bobbio (1990) argues that democracy and liberalism, despite having conflicting goals, are able to

coexist because of their joint emphasis on the individual: 'This reciprocal relation between liberalism and democracy is possible because they share a common starting-point: the individual' (Bobbio 1990: 41). He then describes organicism as the enemy of both democracy and liberalism, for where individualism is modern and atomistic, organicism is ancient, classical and holistic (Bobbio 1990: 41). Individualism sees the state as a series of individuals and relationships while organicism sees the state as an overall structure of cooperation and interdependence. This structure, while made up of individual parts, works in unison towards the maintenance of collective life (Bobbio 1990: 41).

The organicist approach can be traced to the earliest political writings of Western European thought. Aristotle explains the principles of organicism in the relationship between the state and man in *The Politics*:

the state has a natural priority over the household and any individual among us. For the whole must be prior to the part. Separate hand or foot from the whole body, and they will no longer be hand or foot except in name...That will be the condition of the spoilt hand, which no longer has the capacity and the function which define it...It is clear then that the state is both natural and prior to the individual. For if an individual is not fully self-sufficient after separation, he will stand in the same relationship to the whole as the parts in the other case [limbs and whole body] do...Among all men, then, there is a natural impulse towards this kind of association (Aristotle 1990: 1253a18; 1253a29: 60-61).

However, this is just one conception of the origins of association. Hobbes' conception of the birth of the state as being based in individual action is the opposite of Aristotle's. Bobbio (1990: 42) argues that it was Hobbes who gave rise to the liberal individual and the liberal critique of organicism. The

dominance of liberalism and its attendant emphasis on capitalism in countries like the US, UK and Australia, has given individualism a legitimate legal emphasis. In corporate law, this is embodied in corporate personhood.

For liberalists, organicism is the opposite of everything that is valued. This makes it difficult for liberalism to rationalise bodies without individual ideals at their core:

As far as liberalism is concerned, a coherent organic conception in which the state is held to be a totality anterior and superior to its part can allow no space for spheres of action independent of the whole; it can recognise no distinction between private and public spheres, nor can it justify the abstraction of individual interests, satisfied in relations with other individuals (through the market), from the public interest (Bobbio 1990: 42).

Here, Bobbio touches on the role of the market economy in creating legal individuals. The economic aspect of individualism is pertinent when discussing corporations because of the economic power they hold and the way this is achieved through legal individualism and corporate personhood. Understanding corporate personhood as a commodity highlights the economic utility of the concept, but remains unable to rationalise it.

The Impersonality of the Market and its Relation to Commodification

Weber ([1922] 1968: 636) describes the capitalist market as a networked enterprise involving relationships between many individuals. He argues that market relations are based on rational social action of association through exchange (Weber [1922] 1968: 635, see also Roth 1968: LXXX). These relationships exist until goods are exchanged after which the relationship is finished or is maintained for the sake of future exchanges. In both cases, there exist formal, rational laws that regulate the relationships and form part of what Weber ([1922] 1968: 636) calls the *market ethic*.

Central to the market's impersonality is its focus on the commodity which, combined with the rational pursuit of individual interests, creates and maintains the capitalist market. This leads Weber to characterise the market as one of the most impersonal, and depersonalising, associations in human experience:

Where the market is allowed to follow its own autonomous tendencies, its participants do not look toward the persons of each other but only toward the commodity; there are no obligations of brotherliness or reverence, and none of these spontaneous human relations are sustained by personal unions. They all would just obstruct the free development of the bare market relationship, and its specific interests serve, in their turn, to weaken the sentiments on which these obstructions rest (Weber [1922] 1968: 636).

In contrast to other theorists, Weber does not see this impersonality as problematic. For Weber, markets work most efficiently through bureaucracy, therefore commodification is essential. Alternatively, Marxist scholars see commodification as a highly problematic process. Russian scholar Evgeny Pashukanis extended Marxist critiques of commodification to focus on legal personhood.

Pashukanis: Commodity and Subject

Pashukanis wrote widely on law and Marxism, most notably through the 1920s, until he was killed by the Stalinist regime in 1937. His work was concerned not only with law in Soviet Russia, but also with European and Western law generally. Pashukanis' writing was a hallmark for the era and is the most comprehensive work on Marxism and the law to date (Cotterrell 1992: 117).

Pashukanis (1978: 110) argues that an understanding of the subject in law would allow for an understanding of the law as a tool of dominance. While Pashukanis acknowledges that Marx did not overtly address the issue of the legal subject he stood by the importance of that which was said: 'these hints [in Marx's work] contribute far more...than any of those bulky treatises on the general theory of

law' (Pashukanis 1978: 111). In addition to his writings on law, Marx's general economic theories provide a valuable insight into two of the most influential social structures: law and capitalism. Given the difficulty of ascertaining a legal argument from his original work it is Pashukanis' Marxist analysis, rather than the words of Marx himself, that will form the basis of this review.

Pashukanis sees the relationship between the subject and law as involving possession and property; this relationship makes legal individualism the juridical analogy and fulfilment of the commodity form (Cotterrell 1992: 117). As a result, he sees the legal individual as a historical fiction, 'the pure product of social relations...an exclusively social phenomenon' (Pashukanis 1978: 113-116). Central to Pashukanis' analysis of legal personhood is the exchange of goods. Since commodities cannot exchange themselves, those wanting to become involved in the process of exchange needed to consult the guardians of these commodities (Pashukanis 1978: 122). These guardians are given value, in the form of legal status, due to the value of their possessions: 'At the same time, therefore, that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights' (Pashukanis 1978: 112). For Pashukanis, liberal notions of individuality are derived from the process of commodity production:

The idea of the isolated and self-contained nature of the human personality...corresponds exactly to commodity production, where the producers are formally autonomous, linked only by the artificially created legal system. This legal condition itself...is nothing but the idealised market, transported to the nebulous heights of philosophical abstraction' (Pashukanis 1978: 114).

He is critical about the jurisprudential impact of individualising the non-human entity solely on its involvement in the market, arguing that it is an objectifying status:

At this point the capacity to be a legal subject is definitively separated from the living concrete personality, ceasing to be a

function of its effective conscious will and becoming a purely social function...The legal subject acquires a double in the shape of a representative, and himself attains the significance of a mathematical point, a centre in which a certain number of rights is concentrated (Pashukanis 1978: 115).

Pashukanis (1978: 113) argues that this status gives legal individuals 'no greater significance than objects'. This separates the liberal vision of the individual from conceptions of individuality: 'All concrete peculiarities which distinguish one representative of the *genus homo sapiens* from another dissolve into the abstraction of man in general, man as a legal subject' (Pashukanis 1978: 113). Cotterrell (1992: 123-124) posits that it is this abstraction that makes the category of 'legal person' a flexible one; it has allowed for conceptions of legal personhood to become elasticised so as to include corporations and other non-human entities.

Pashukanis' theory recognises corporate legal individuality as a manifestation of economic power. Given that the commodity form dominates law and economic relations, it is natural that those individuals with the most commodities would have an enhanced social role. Most individuals will always have some property in their labour, however those with additional transferable commodities, such as goods and money, can more actively participate in commodity exchange. While continuing to be defined by these transactions, they undertake more or larger transactions than other individuals. By harnessing the labour of multiple individuals, the corporation is still able to present itself as an individual at law and in transactions. This individualises aspects of its success that are drawn from its collectiveness, such as its size and scope.

The features of legal individualism, and its link to liberal political and economic systems such as those in Australia, show at once both the impossibility and the inevitability of corporate legal personhood. On the one hand, the organisation and form of corporations is so incommensurable with that of humans that their legal label as individuals appears nonsensical. Conversely, as Pashukanis'

theory indicates, legal relations based on commodity fetishism necessitate the inclusion of the most economically powerful bodies as legal individuals. This dichotomy indicates the connection between legal individualism and economics.

Legal Equality - A Prop for Individualism

Equality before the law is a fundamental tenet of liberal law; it complements the liberal vision of society being constituted by individual subjects (Bobbio 1990: 34; Ross 1974: 286). Under this doctrine, no legal individual is given favour as a party in legal processes due to their gender, race or economic status (Bayles 1987: 359; Bobbio 1990: 34). The law is applied impartially and without recourse to these features.

As a theory, legal equality is an ideal type; it assumes that power can be constrained by rules despite legal services being sold in the marketplace (Bignold 1995: 6). Roshier and Teff (1980: 3) claim that this idealism, in conjunction with the procedural rigidity specified by the theory, necessitates societal inequality: 'where there is structural inequality, the extension of procedural equality is prone to mask and perpetuate substantive injustice'. The inclusion of corporations as legal individuals indicates the extent of this inequality; procedural equality favours the protection of corporations from the criminal law by insisting that they are individuals equal in capacity to a single human being. This ignores the fundamental advantages of form that corporations have in comparison to humans and the advantages they have in attaining resources to fight criminal charges (Galanter 1974). Whilst the maxim of equality before the law proposes that these differences are irrelevant in the eyes of the law, they are of a substantial enough nature to have a real effect on legal outcomes. Equality before the law is a problematic doctrine to enact in a capitalist society; in its application to corporations, it has lost its theoretical value and has become a crutch for the furtherance of individualistic ideology.

Galanter (1974: 98) claims that corporate offenders often have access to economies of scale rarely enjoyed by individual offenders. Whilst this on its own does not create inequality, the use to which the money is put has a real impact on legal proceedings. The economic dominance of corporations over individuals and other organisations, and which results from its collective operations under an individual guise, means that corporations can afford the best legal advice and expert testimony. While these do not alter the substance of the law they can engage the courts in lengthy questions of process thus delaying any decision, or even leading to the case's dismissal (Galanter 1974: 114, 124). Galanter (1974: 124) argues that the complexity of law means that the quality of legal services is particularly relevant to legal outcomes despite the courts' insistence on equality before the law. Corporations are also able to absorb the cost of litigation as a 'business cost', may have connections with institutions such as government, can cause lawful delays and are often 'repeat players' in the legal system whose representatives know what to expect in law and in the courtroom (Galanter 1974: 114, 125; Stone 1975).

When these structural advantages are combined with the individualist legal rules applied to corporations, society is faced with an individual able to avoid legal liabilities. The corporation is not an individual; its construction as such, and its absorption into an individualist legal system with values such as equality before the law, is problematic because of its collective features (Bignold 1995: 6; Unger 1976: 175-178).

Liberalism and the Corporation: Points of Departure

Using Gray's (1986, 1995) typology of liberalism as being universalist alongside individualist and egalitarian, the internal workings of the corporation can be described as antithetical to the liberal vision. Universalist aspects of liberalism give the human species moral superiority over collective associations (Gray 1986: x).

The corporation as a structure and as a legal individual cannot fulfil this element of liberalism. If individual liberty is contingent on the existence of a free market, as most classical liberal thinkers argue (Gray 1986: 62), the contemporary operation of corporations does not foster the requisite freedom in transactions. The ownership structures of the largest corporations demonstrate significant levels of concentrated shareholding by other corporations, thereby limiting the active participation of other individuals and concentrating power amongst corporations and their managers. In addition to this, effective competition amongst corporations is often thwarted by the existence of monopolised or oligopolised industries.

The relationship between liberty and the free market is rationalised by liberals on the basis that private property and the market economy are able to non-coercively form and protect individual liberties (Gray 1986: 62). Gray (1986: 62-72) draws out this argument, starting with the classical liberal contention that owning property in your person is linked to liberty: 'For anyone to have a property in his person means, in the first place and at the least, that he has disposition over his own talents, abilities, and labour' (Gray 1986: 63). Without self-ownership he argues that the individual is a chattel, either of another or to the community, and submits to the goals and values of another person or group of people (Gray 1986: 63).

In this regard the corporation is not an individual, as it does not own itself. The corporation is owned by its shareholders and legal doctrine makes it clear that the shareholders are not the corporation. The corporation does own assets but not itself. Iwai (1999) has labelled this the 'person/thing duality' whereby the corporation is both a 'person' through law, able to own property, but also a 'thing' through law, owned by other legal persons. Its complete subjectivity, where a corporation owns itself, is not possible. Iwai (1999: 5980) explains that only in the case of extreme corporate cross-ownership would it be possible for corporations to eliminate human legal persons from ownership. While the

corporation's qualities as a 'thing' mean that it cannot be a part of liberal conceptions of the individual, it does mean that a corporation can be a commodity.

Important to liberal thought on this issue is the linking of private property to decision-making. Gray (1986: 64) claims that each person has a stock of practical knowledge from which they draw in making a decision. In a liberal system individuals are able to use their knowledge with little interference from other individuals (Gray 1986: 64). Gray (1986: 64) argues that given the practical nature of this knowledge, its transmission through methods other than use is impossible; it cannot be collected and transferred to a collective body. He explains that such knowledge is evident in collective institutions such as the business corporation, but that it is thinned and diluted, it is 'depleted and wasted in institutions which devolve decisions away from individuals, who are the carriers or bearers of tacit knowledge, to collective decision-procedures' (Gray 1986: 64).

In this sense, the corporate form is at odds with liberalism. As a collective organisation, the corporation relies on the pooling of human resources, from its employees to its shareholders. This detracts from the full realisation of individual freedom as described by liberalism. The contradictions between liberalism and the corporate form are challenges to the ideology's dominance in contemporary Western countries. The practical effect of this was seen in Chapter Two in the discussion of industry concentration, where neoliberal policies of de-regulation have worked to further concentrate key industries. It appears that these contradictions can be overlooked insofar as legal individualism assists in the commodification of the most economically powerful bodies and the creation and sustaining of capital accumulation mechanisms.

Conclusion

There are benefits associated with corporate personhood laws that were a reason for their historical application. Describing the corporation as a legal individual makes undertaking business transactions easier than if they involved a complex organisation. However, most features of contemporary corporations are not individual; ownership structures, managerial hierarchies, possession and use of knowledge and the resources owned by corporations, are more accurately described as collective. The contemporary dominance of corporations is largely attributable to these collective features. Section One explored these features and their potential effects.

Liberalism cannot rationalise the inclusion of collective bodies into an individualist legal system. The contradictions between the two are theoretically problematic. However, as Pashukanis' analysis of legal personhood suggests, the advantages of the corporate form to capital accumulation necessitate their inclusion into the legal system.

The theoretical inconsistency has practical effects. Ideological commitment to individualism entails the decay of other liberal values, namely equality before the law and universality. Describing corporations as legal individuals, and maintaining that legal individuals are equal before the law, overlooks the fundamental and significant differences between humans and corporations. The economic resources of corporations, in contrast to human legal individuals, have a real impact on legal outcomes (Galanter 1974: 124).

The tension between liberal theory and the desirability of corporations for capital accumulation are also found in legal, economic and sociological accounts of the corporate form, which are examined in the next chapter. The dominant theory of corporations attempts to describe the corporation in individual terms, thereby rationalising its inclusion into the liberal legal system. The collective element of corporate operation is denied or downplayed in all but two of these theories.

Theoretical accounts of the corporation are important to consider given the impact they have on legal regulation; they constitute a part of the legal system that makes corporate regulation difficult because of its individual focus and contribute to the patterns of corporate dominance which make their regulation imperative.

Chapter Six: Theories of the Corporation

As explained in the previous chapters, the Australian legal system recognises corporations as legal individuals³³. This means that a corporation is able to exercise legal rights and assume legal responsibilities as a human individual such as owning property, making contracts, committing crimes, suing and being sued. Without this legal endorsement, use of the corporate form for business transactions would be limited and the form could not have developed as it has. The inclusion of corporations into legal systems legitimised the corporate form as a tool for capital accumulation. In this sense, the corporation is a legal creation whose relationships are legally mediated. The centrality of law to the corporation emphasises law's place in contributing to the corporate dominance described in Section One. The facts of the James Hardie case study prove the very practical nature of this contribution; legal constructs enabled James Hardie to grow and were also what protected its restructure from paying for its asbestos liabilities.

The legal recognition of corporations is reflective of trends in Western legal systems whereby legal personhood is extended beyond humans (Cotterrell 1992: 124). In the history of common law, animals, temples and idols have been considered legal individuals, just as women, children, the disabled and Aborigines once were not (Cotterrell 1992: 124). These categorisations are imbued with meanings that are time and context specific (Cotterrell 1992: 124; Millon 1990: 202). Given the predominance of corporations in contemporary Australian society, the granting of legal individuality to these collectives is particularly telling of the role of corporations in contemporary times, particularly their vital role in the functioning of the capitalist economy.

The notion of corporate personhood has serious implications. An examination of the dominant theories of the corporation helps to explain the development of the

³³ 'A company has the legal capacity and powers of an individual both in and outside this jurisdiction' *Corporations Act 2001* (Cth) s 124(1)

doctrine and sheds light on its implications. Following from the previous chapter, this chapter further examines the inconsistencies between the legal theory and practice of corporations evident within some theories that attempt to endorse legal individualism. Overall, this analysis highlights the artificiality of current corporate legal structures thereby emphasising the possibility for reforming them when they are found to be ineffective. The imperative of doing so is indicated by the James Hardie case study which highlights the potential damaging scope of corporate activity.

Throughout its legal history the theoretical status of the corporation has been problematic; at different times different perspectives on the 'nature' of the corporation have prevailed. Iwai (1990: 600; see also Millon 1990: 242) argues that a review of these theories is fundamental to developing an understanding of the regulation of corporations because of the interdependency of theory and law. The historical analysis of the theories presented in this chapter highlight this; they have all either shaped legal approaches to regulating the corporation or were developed as a response to the legal regulation of corporations. In this chapter I examine five of those perspectives: fictionalism, fellowship, natural entity theory, managerialism and contractarianism. The theoretical content of this chapter is contextualised in the following chapter where I examine the effect of individualism in the application of law to corporate liability for workplace deaths.

Seen historically, the focus of these theories have shifted from the state, to the collective and to the individual. This demonstrates the contextuality of theory as well as law, and the dynamism of both, thus affirming the contestable nature of corporate laws. The earliest nominalist theories, such as fictionalism and natural entity theory, were concerned with the relationship between the state and the corporation. This is due to the significant direct power that states exercised over corporations in terms of their creation and operation. As general incorporation laws developed, this direct power was reduced and the corporate form continued to grow; corporations were becoming larger and more widely owned. This

facilitated a growth in the significance of managers to the interactions and direction of corporations. Theories which accompanied growth of the corporate form and the rise of the manager reflect these trends; both managerialism and contractarianism, though very different theories, seek to reconceptualise the corporation in light of the enhanced role of managers.

Fellowship and managerialist theories of the corporation, while significantly different, describe the corporation as a collective. Further, they each identify this collectiveness as a key reason for corporate power. The perspective of these theories most accurately reflect the data presented in Chapter Two and the facts of the James Hardie case study. Contractarianism, the latest of the theories examined here, takes the extreme counterview by examining the corporation as a collection of individual contracts.

The design and acceptability of a particular theory is dependent on its social and historical context. There are clear moral, political and rhetorical notions within which theories of the corporation sit. Millon (1990: 245-251) argues that it is these 'conventional notions' which determine the quality of a theory for a particular social and historical epoch. As if to illustrate Millon's point, the theories presented in this chapter seemed to be 'common-sense' at their peak. All were particular to different historical, political and social conditions, each had a significant impact on the design of legal rules and each experienced challenges to their dominance. Most often, these challenges meant the theory was soon superseded by another, indicating the dynamism of the legal theory/legal doctrine relationship that Millon describes.

Millon (1990: 248-250) argues that theories are challenged for two reasons. First, the available range of interpretations of a dominant theory, and the existence of alternative theories, means that there is always the possibility for a 'strongly subversive normative argument' to be sustained (Millon 1990: 248, 262). Second, theories will be presented with such fundamental challenges, particularly in

regards to practical application, which necessitate their revision: 'the interpretive context is ever shifting in response to concrete, practical application' (Millon 1990: 250). They may suffer, in Gramscian terms, a legitimization crisis.

While Millon presents these possibilities for theoretical critique and shift he also acknowledges the potency of theories; their strength is such that a complete analysis of them, particularly from *within* them, is very difficult (Millon 1990: 248). It is usually only after a theory fails to survive a public policy challenge that its doctrinal and socio-historical roots become evident. This indicates a challenge for the theories under examination that have attempted to overcome the perceived shortcomings of their predecessors and for the process of examination itself.

The contemporary approach to corporate regulation in Australian law draws on theories of the corporation that satisfy the liberal vision of individualised social interactions. The dominance of legal individualism is evident in theoretical debates as to the corporation's personality that seem trapped within the individual, liberal paradigm. However, this is far from problematic; while the focus in this chapter is on theoretical perspectives and inconsistencies, the many practical effects of this are considered in the following chapter.

Fictionalism

Fictionalist theory, which sees corporations as legal fictions created by the state, has the general endorsement of judges, legislators and legal theorists (Bratton 1989; Tomasic et al. 1996: 88). The fictional corporation exists separately from the individuals who make it up, but does not have an existence in itself. Since the theory considers humans to be the only individuals with actual rights, the corporation acts as a 'mask' for humans. This traditional approach reifies the corporation but does not attribute meaning to it; the corporation is seen as an artificial body with no real life in itself. Central to fictionalism is the dominance

of the state; individual initiative and private interests disappear within this analysis (Millon 1990: 206).

The fictionalist framework was initially presented by Sir Edward Coke, a noted jurist and legal scholar, in the *Case of Sutton's Hospital* (1612) 10 Rep. 32. He described the reified corporation as an artificial creation for the housing of individuals, subject to the rule of the state, perpetual in existence and limited in its legal capacities: '[the corporation is an] aggregation of many...is invisible, immortal, and reflects only in intendment and consideration of the Law...it is not subject to the imbecilities or death of the natural body'. This theory has had a continued influence on conceptions of the corporation in the centuries since, particularly in the eighteenth and nineteenth century as the corporate form began to proliferate. William Blackstone, an English jurist and professor, in his influential common law text *Commentaries on the Laws of England* (1765 in Stevens and Henn 1965: 7-14), similarly described key elements of incorporation as perpetuity, the aggregation of many people for a corporate purpose, the consent of the king. The theory continued to be endorsed in case law. In *Trustees of Dartmouth College v Woodward*, Chief Justice Marshall described the corporation as:

an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it...a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.

The historical context of fictionalism explains much of the theory's development. As Chapter Four outlined, corporations of the early nineteenth century were developing rapidly but were different in kind to contemporary corporations; Bratton (1989: 1483) describes the atomisation of most economic units and the involvement of mainly individual players who sold and bought goods in the

market. Western societies were capitalist in Adam Smith's sense of the term, with competition seen as a way of reducing greed and incompetence in the marketplace. The individualism of this society was reflected in business laws which advocated the primacy of individual enterprise (Bratton 1989: 1483). At this time there were few corporations. Charters were granted by parliament and many corporations fulfilled a public purpose by acting on behalf of the state. This made corporations distinct from other business structures. Bratton (1989: 1484) claims that this difference mandated the regulation of corporations 'outside of the market system'. As a result, close state regulation of the corporate form followed through special chartering requirements³⁴ (Millon 1990: 207). These differences supported the fictionalist account of the corporation.

Tomasic et al. (1996: 88) explain that the fictionalist approach has been criticised for being too simplistic in its definition of personality by leaving categories between natural and juristic persons uncriticised. Hager (1989: 583) argues that nineteenth century criticisms of fictionalism saw it as a failed attempt to incorporate a collective into an individualistic legal framework. Fictionalism was seen not only as an intellectually inadequate way of integrating corporations into the law, but as a potentially dangerous doctrine which allowed corporations to take advantage of, and damage, the natural and social environment by masking the people who acted within it (Hager 1989: 583).

In the late nineteenth century, German historian Otto von Gierke ([1868] 1990: 113) argued that the fictionalist approach to the corporation endorsed the 'lordship of capital', where assets become the basis of the corporation thereby negating the personalities of the people who make it up. These personalities are supplemented by asserting the legal personality of the corporation itself (von Gierke [1868] 1990: 113). Fictionalism does this by giving what von Gierke sees

³⁴ Special chartering laws were administered directly by the parliament and governed the formation, operation, and winding up of a corporation. They are contrasted to general incorporation laws (which began to develop through the nineteenth century) which made incorporation a purely administrative affair quite separate from the legislature.

as undue emphasis to capital. This has the effect of making the corporate personality 'that of a foundation or institute, and the corporation into a 'trading institution'' (von Gierke [1868] 1990: 113). Von Gierke argues that this conception of capital is misplaced, for without the strength of individual or collective personality, the corporation is nothing: 'Capital, which has been set aside for a specific purpose, self-contained, is in itself lifeless and motionless' (von Gierke [1868] 1990: 114). His theory of corporate realism presented an alternative vision of corporate personality based on group life and the realities he saw emerging from it. In doing so, it directly challenged the individualism of fictionalist theory.

The Corporation as a Fellowship

Von Gierke claims that while the individual may only have a role in a corporation due to their capital, they remain a personality able to have a legitimate impact on the running of the corporation:

if this collective personality draws its vitality only from its members, but is in no way alien to its members, and exists rather for their sake alone, reverting to its constituent parts when it ceases to be... [it is a corporation] based on fellowship (von Gierke [1868] 1990: 115).

In von Gierke's view, capital does not solely determine the existence of a corporation; it is complemented by the presence of a collective will. This component is vital, without it: '[the corporation] would simply remain a chance legal community...of several members with capital' (von Gierke [1868] 1990: 115). For von Gierke, it is the organisation of the corporation that allows for its emergence as a 'living whole' (von Gierke [1868] 1990: 115).

This perspective is central to von Gierke's theory of corporations. Black (1990: 5) explains that von Gierke saw the corporation as valuable not only for maximising profit, but also for realising the personal potential of the individual (Black 1990: 5). This entails that the corporation is not a fiction in terms of its personality or

legal status, but is an association of real people (Black 1990: 5). In this tradition, ownership and control of the corporation are unlikely to be separated as capital is only one of the corporation's components; more important in its organisation is the collective will of the people who make it up (von Gierke [1868] 1990: 115). Corporations built on these principles are not, von Gierke argues, able to fit into Roman juridical constructs but are instead based on German law (von Gierke [1868] 1990: 113). This is an important point given the Roman origins of common law systems. As a legal system built on Roman constructs, this was a difficulty in the application of von Gierke's principles to British and American corporations.

Von Gierke believes that a fellowship corporation could address issues of the public sphere such as the individual, society and power 'by generating truly willed and therefore truly free forms of association' (Black 1990: 6). He sees true individual freedom arising from involvement in voluntary associations: 'the modern association is the immediate outcome of a free society, which indeed can only be sustained if human beings do in fact form voluntary associations' (Black 1990: 6). Black claims that von Gierke believed the state to be too large for individuals to meaningfully participate in its activities:

states being so large, it is only in lesser associations that most individuals can develop as political beings...Gierke saw participation in public affairs as essential to moral and intellectual development, and multiple associations make this far more widely available (Black 1990: 6).

Von Gierke saw the fellowship corporation as an accessible vehicle for political participation (Black 1990: 6).

While the concept of the corporation as a fellowship has never been completely endorsed in the modern Roman-based legal systems, it has been influential in corporate history, particularly in the formation and proliferation of corporations in the early American republic. In the late nineteenth century, when there was

much debate over the nature of corporate personhood, Hager (1989: 583) claims that von Gierke was seen as someone who could remedy the 'damages' of fictionalism such as the increases in managerial power and the upholding of capital above all else. By the 1920s several critiques of the fellowship model had emerged which again advocated the fictionalist view and led to the theory's decline (Bratton 1989: 1491).

The history of common law corporations is not sufficiently explained within von Gierke's fellowship theory, however it remains useful as a challenge to the individualism of the dominant fictionalist perspective. Early American and English corporations were seen in law as having democratic features that, in theory, gave shareholders an active role in the running of the company. However, the actual function of corporations was not democratic and, as the data in Chapter Two indicates, is even less so today. While shareholders had the right to elect their representatives, this rarely happened in a democratic way (Hirst 1979: 133; Spencer in Hunt 1936: 135-136). There was a gap between legal conceptions of the corporation, as possessing some qualities of Von Gierke's fellowship, and the actual operation of a corporation. The historical opposition between the legal and actual running of the corporation suggests that events such as the managerial revolution and the separation of ownership and control were inevitable to the history of corporations. Nonetheless, these inherent features were exaggerated as the corporation developed. Increasingly, mass production and advancing technology came to be the purpose of corporate activity and this was best served by the lordship of capital. This mandated the wide issuing of shares, thus facilitating the separation of ownership and control. This led to the final demise of fellowship principles in common law, and, in von Gierke's terms, the triumph of lordship.

Despite this occurrence, these things would never have happened had principles of fellowship been strongly influential in the shaping of corporations and corporate law. The fact that ownership and control were and continue to be

separated suggests that personality, in von Gierke's sense of the term, was never pivotal to American and English corporate law. This attests to the power of the individualist vision presented by fictionalism and the persistence of the laws that embodied this perspective.

Bratton (1989: 1491) claims that the disappearance of corporate realism was followed by the near disappearance of the discussion of legal theories of the firm. An influential article by Dewey (1926) questioned the jurisprudence of corporate personality and its relevance to legal, academic and social discourse.

Dewey (1926: 661-662) argues that it is important to consider whether or not a corporation is a legal subject, but that this is a factual, rather than verbal, matter. According to Dewey, debates as to whether or not a corporation should be described as a 'person' fall into the latter category and are largely irrelevant on account of their indeterminacy. He acknowledges the impact a theory can have on the design of the law: 'the intellectual and scientific history of western Europe is reflected in the changing fortunes of the meanings of 'person' and 'personality'' (Dewey 1926: 665), however he calls into question the reason for this importance. He finds that debates around corporate personality are housed in political and economic interests: 'the underlying controversies and their introduction into legal theory and actual legal relations...express struggles and movements of immense social import, economic and political.' (Dewey 1926: 664). For Dewey, whether the theory is fictionalism or corporate realism is irrelevant as they both attempt to impress upon the law some political or economic agenda: 'Nothing accurate or intelligible can be said [about corporate personality] except by specifying the interest and purpose of a writer, and his historical context of problems and issues' (Dewey 1926: 673). Dewey (1926: 671-673) identifies divergent interests within these theories themselves; conflict he believes necessitates the abandoning of theories of the firm until factual elements of the corporate personality are attained.

Dewey's account recognises the ideological basis of theories of corporate personality, but the call for abandoning a consideration of these theories ignores the impact of these theories and their legal manifestations. Dewey goes some way in explaining the social problems which may arise from fictionalist theory, but fails to recognise this as a potential rebuttal to his central argument where he advocates for the irrelevance of theoretical debates as to the corporation's personality. In discussing fictionalism, Dewey (1926: 668) points out:

When it is difficult to lay hands on the single persons said to be the only 'real' persons, it is very convenient to do business with a fiction. With respect to property, the fictitious entity has a clear title as an entity; with respect to its liabilities and burdens outside of property and contract, its position is not so clear; its fictitious character may be cited to relieve it of some obligations usually regarded as moral, and yet legally enforceable as regards single persons.

Here Dewey demonstrates a clear understanding of the potential ramifications of fictionalism yet somehow maintains by the end of his article that the discussion of corporate personality theory should stop. This perspective has been adopted by legal realists since this time (Conard 1976: 420, 423) but has been questioned by others such as Horwitz (1985: 173-224) who argues that while theories may well be indeterminate, this has not stopped them from having a real impact on the nature of the corporation at law and in practice.

The Rise of Natural Entity Theory

By the late nineteenth century, corporations had become much larger than their predecessors. Mass production had been successful and many goods were cheaply available (Bratton 1989: 1487). At this time, ownership and control became increasingly separate as shares in corporations were widely dispersed. This was the cheapest method of doing business in large corporations and it quickly became a dominant ownership structure (Bratton 1989: 1487-1488). It facilitated the rise of the manager as a central player in corporate interactions and

as the facilitator of the multitude of relationships of which the corporation was party to.

Bratton (1989: 1489) identifies the increasing importance of the natural entity theory of the corporate personality. This theory was individualist in that it saw the corporation as a contractual body comprised of the separate relationships of individuals rather than a collective endeavour. By opposing state regulation, this theory replaces the sovereign of fictionalist theory with 'freely contracting individuals' (Bratton 1989: 1489; see also Millon 1990). As the corporation was developing, the primary contractual relationship of concern was that between managers and shareholders.

Millon (1990: 211) explains that by emphasising the origins of the corporation in the actions of individuals, natural entity theory rejected fictionalism's focus on the state and its conception of the corporation as artificial. Within this theory, the power of a corporation is located in its shareholders (Millon 1990: 211). The rise of this theory is associated with the development of general incorporation laws. As states began to change their role in the creation of corporations from direct to one mediated through administration, the relationship between corporations and the state was subject to renewed theoretical consideration (Millon 1990: 211).

The twentieth century saw the decline of the doctrine of *ultra vires* and other traditional laws that limited the corporation's operation to the state in which it was chartered (Millon 1990: 212-213). Corporations were growing rapidly and state power over them was being diluted. Millon (1990: 213) claims that this encouraged theorists to see corporate economic power as coming not from the state, but rather from individual action and market forces, a perspective that endorsed natural entity theory.

Natural entity theory had a significant impact on the construction of corporate legal personhood. Millon (1990: 213-214) argues that as state action in regards to

the corporation was seen as less relevant to its operation, it was seen as less necessary to regulate the corporate form through special laws. Due to this, the regulation of the corporate person became similar to the regulation of the natural person. This signalled a significant shift in the public/private debate over the corporation's character that led to a general shift of legal attention from the external relationships of the corporation to its internal governance (Millon 1990: 213).

Millon (1990: 213-214) claims that this enhanced the private property rights of corporations. If the corporation was simply an aggregate of individuals, additional regulation of their corporate financial interests was inequitable. Millon (1990: 214) argues that corporations in the US were granted due process rights under the fourteenth amendment because of this. This eventually led to them being granted legal personhood equal to that of natural persons.

According to Bratton (1989: 1490), natural entity theory faded in the early twentieth century due to its adherence to classical economic models that were unable to describe the corporate entity. Aggregation principles evident within the theory, the same principles which led to corporations receiving significant property rights and legal personhood, could not account for the increasing separation of ownership and control within corporations. The dispersion of share ownership which accompanied the increase in the size of corporations did not support entity theory's vision of the corporation as an aggregate of individuals (Millon 1990: 214). Increasingly, the internal relationship between managers and shareholders, and the power that managers held in this relationship, became of primary concern. These concerns highlighted the inadequacies of the individualism of natural entity theory and speak to observations of the collective in corporations; they were borne from the perception that corporations were becoming dominant social institutions capable of influencing economies, individuals and communities by virtue of their collective human and monetary resources.

The Managerial Corporation

Adam Smith (1937) made the first criticisms of the separation of ownership and control through his critique of the original joint-stock companies (Smith 1937; see also Burnham 1992; Berle and Means [1932] 1968: 303-304, Williston 1968: 203). He was sceptical of the possibility for joint-stock companies to partake in long-term trade without possessing monopoly powers antithetical to capitalist principles (Smith 1937: 596-606). According to Smith (1937: 714-715), only businesses in banking, insurance and water supply could take on the corporate form due to the routine nature of their operations. Presumably, this would reduce the scope for managerial discretion in using shareholder funds.

Characteristically, his perspective is one of the harm caused to the economy and the economic liberty of the individual and is not concerned with the impacts of corporate activity on areas such as pollution and worker safety so long as they are outside the strictly economic sphere. However, Smith's analysis of the monopolised environment in which the first joint-stock companies operated continues to be a concern in contemporary research, as discussed in Chapter Two, which argues that corporate monopoly powers exist to the detriment of the economy and society (Berle & Means 1968; Kaysen 1961: 87-88).

As outlined in Chapter Four, the proliferation of corporations in the early twentieth century precipitated the dispersion of ownership of the corporations. This led to the development of hierarchical management structures, which Bratton (1989: 1492) claims became the norm by 1960. The legitimacy of the managerial role that emerged was often brought into question, most notably by Berle and Means (1932) who argued that ownership of the corporation had become separate from control of the corporation. Tsuk (2005) classifies Berle and Means as *legal pluralists*, scholars in a tradition which recognises power in institutions other than law; this means that they saw corporations as not only being subject to law, but also as law-making and law-applying: 'centres of coercive economic

power' (Tsuk 2005: 192). Legal pluralists conceive of the democratic state as constituted by collectives, such as corporations and trade unions, which possess political and economic power often equivalent to that of the state (Tsuk 2005: 181, 190; Berle & Means [1932] 1968: 313). The concern of legal pluralists is the possibility that this power is excessive or abused, particularly at times when collective institutions are growing rapidly. Legal pluralists see power as being kept in check through the articulation of legal doctrine which limits the exercise of power by collectives (Tsuk 2005: 181).

Berle and Means' thesis states that as corporations increased as a proportion of businesses, ownership and control were separated ([1932] 1968: 112-113). From this, the managerial class emerged made up of people who were trained in management, rather than born into it (Gilding 2005: 30). Berle and Means ([1932] 1968: 4-5) identified the increasingly public nature of corporate ownership as a primary reason for the division between ownership and control in the twentieth century corporation. They placed this in opposition to the corporate form evident in prior epochs. In previous times, corporations were evident as forms of business organisation, but were smaller on account of their private nature, shares in these companies were not publicly available. These corporations were often controlled and owned by families or other small groups. With the development of technologies and the factory system, production became more complex and required more investment than a family or small group could supply (Berle & Means [1932] 1968: 5; Polanyi 1965: 75). It is from this need that the public corporation came to fruition. The dispersion of ownership meant that a central directorate was required to make business decision; hence the rise of the manager.

The increasing role of the manager was also legally endorsed through changes to shareholder voting rights that had the effect of moving managerial power over the corporation from shareholders to management (Millon 1990: 215). Millon (1990:

215) argues that shareholding became more passive, thus further dissolving the natural entity view of the corporation as an aggregate.

Central to Berle and Means' thesis is the divergence of aims between those who control the corporation and those who own it. They argue that the interests of owners are relatively clear and uniform. Owners seek to earn the maximum profit possible, have this profit distributed in the form of dividends and have shares in the corporation available for sale at a fair price (Berle & Means [1932] 1968: 114). In contrast, the interests of those who control the corporation are not so clear, but when they are discernable they appear to be too distant, and sometimes counter, to the aims of the owners. The primary aim of management which Berle and Means ([1932] 1968: 114) identify is the desire for personal profit, a motivation which they argue is in opposition to the interests of owners. They draw on instances in the US between 1900 and 1915 where railways went into receivership as a result of financial mismanagement as examples of the disjunction between the interests of owners and controllers (Berle & Means [1932] 1968: 115).

In making their argument, Berle and Means draw on empirical research that showed how ownership interests in corporations were rarely related to controlling interests (see Berle & Means [1932] 1968: 78-84). They are so concerned with the divergence of these interests and the potential effect on shareholders that they argue for political, economic and social checks on managerial power (Berle & Means [1932] 1968: 114). They acknowledge that the aims of managers and owners could converge but that the increasing dominance of corporations make the potential for the pursuit of managerial interests more harmful than ever (Berle & Means [1932] 1968: 4). In their view, managers are less accountable and have less to risk than owners of the corporation. This, combined with the large economic resources of corporations, is of great concern to Berle and Means:

...the corporation is a means whereby the wealth of innumerable individuals has been concentrated into huge aggregates and

whereby control over this wealth has been surrendered to a unified direction...The direction of industry by persons other than those who have ventured their wealth has raised the question of the motive force back of such direction and the effective distribution of the returns from business enterprise (Berle & Means [1932] 1968: 4).

The concerns of Berle and Means extend beyond the potential for a breach of fiduciary powers by managers and economic losses for shareholders. In particular, Berle and Means are concerned with the concentration of power by corporations. They outline this concern through a series of statistical studies that examine the ownership structures of the largest corporations, industry assets and industry concentration amongst others. Overall, the statistics indicate a concentration of controlling interests in US corporations in the early twentieth century, the value of which represented a significant portion of the general US economy at the time (Berle & Means [1932] 1968: 86).

Berle and Means ([1932] 1968: xxvi, 250-251, 304-305) describe investors in such companies as owners of *passive property*. In doing so they establish a significant point of departure for twentieth century economic theory from traditional economic theories. Adam Smith's vision of the economy, they argue, is no longer accurate:

Private property, private enterprise, individual initiative, the profit motive, wealth, competition, - these are the concepts which [Smith] employed in describing the economy of his times and by means of which he sought to show that the pecuniary self-interest of each individual, if given free play, would lead to the optimum satisfaction of human wants...these terms have ceased to be accurate, and therefore tend to mislead in describing modern enterprise (Berle & Means [1932] 1968: 303).

Berle and Means realise the distance between traditional, individual conceptions of property and property ownership and their contemporary, collective

counterparts. Smith assumed the combination of ownership and control which Berle and Means contrast to the passive property ownership of shares in stocks or bonds. Passive ownership, while entitling the possessor to an economic interest in an enterprise, does not give them much control over it (Berle & Means [1932] 1968: 304). In contrast, *active property*, that is machinery, organisation and good will, are controlled by individuals who have minor ownership interests in the corporation (Berle & Means [1932] 1968: 304). Neither passive nor active property owners have much responsibility or duty in the running of the business (Berle & Means [1932] 1968: 304-305). Berle and Means ([1932] 1968: 305) argue that when ownership and control are separated, private property is no longer an apparatus of production. Passive property is private property, albeit a significantly different, less tangible form than that described by Smith. For Berle and Means ([1932] 1968: 305) shares are nothing more than tokens of 'ill-protected rights and expectations'. Berle and Means ([1932] 1968: 252) argue that it is very rare that investors are interested in exercising these minimal rights of participation (in the form of voting and pre-emptive rights to new stock) as far as they fall outside of entitlements to dividends. Shares maintain a feature of private property, the ability to be traded, but it is only the possession of the rights and expectations which arise from them which is able to be transferred (Berle & Means [1932] 1968: 305). Instruments of production, Berle and Means argue, are rarely affected by these transfers. Berle and Means ([1932] 1968: 250) refer to this as *liquid property*; shares are mobile because they have no physical existence, they have a freedom of movement from person to person, or institution to institution, which traditional property such as land, mines and machinery cannot have. For Berle and Means, this liquidity changed the nature of property ownership. They identify two characteristics of liquid property ownership that distinguish it from the property ownership described by classical economists. First, the relationship between the property owner and the property shifts from being a physical, time-consuming, almost debilitating relationship to being one requiring little participation or contribution aside from capital (Berle & Means [1932] 1968: 249-250). Berle and Means ([1932] 1968: 249) use the example of

a farmer who lives and works with his or her property and is intensely and physically involved in its day to day functioning. In this instance, the owner has considerable responsibility for their property; they must manage their wealth to ensure its continuance. In contrast, the very existence of liquid property requires a severing of this responsibility:

For property to be easily passed from hand to hand, the individual relation of the owner to it must necessarily play little part. It cannot be dependent for its continued value upon his activity. Consequently, to translate property into liquid form the first requisite is that it demand as little as possible of its owner (Berle & Means [1932] 1968: 250).

Impersonality is the second feature of liquid property identified by Berle and Means. The means by which this property is given value is equally intangible. Little recourse is made to physical elements in determining the value of stock; in fact the very liquidity of stock gives it value (Berle & Means [1932] 1968: 251). The value of stock can be based on management performance, speculation, or can be false (Berle and Means [1932] 1968: 251). Regardless, Berle and Means ([1932] 1968: 251-252) argue that it is the divisibility, mobility and impersonality of liquid capital which make it appealing. This type of corporation is a financial intermediary between those who have money, the investors and those who need it to engage in business, namely the managers and workers (Hessen 1983: 286).

Berle and Means' Approach to Regulating Corporations

Having outlined their concerns in regard to the exercise of corporate power in light of the separation of ownership and control, Berle and Means ([1932] 1968: 309-313) describe three ways in which power could be exercised responsibly by managers. First, passive owners could be given strict property rights over the corporation and managers would be trustees acting only for the benefit of the shareholders (Berle & Means [1932] 1968: 310-311). This is based on traditional ideas of corporate ownership in law and is linked to natural entity theory. Second, Berle and Means claimed that strict contractual rules could be applied to

regulate relationships within and across corporations (Berle & Means [1932] 1968: 311). Berle and Means were concerned for the potential of such an approach to rationalise the use of shareholders' assets by managers for their own interests: 'since the new powers have been acquired on a quasi-contractual basis, the security holders have agreed in advance to any losses which they may suffer by reason of such use' (Berle & Means [1932] 1968: 311; see also Tsuk 2005: 188).

Their third solution draws upon their interests as legal pluralists and is the aspect of their argument which is now the least considered. Since shareholders gave up control and responsibility of their property in favour of the economic gains of its passivity, Berle and Means ([1932] 1968: 311-312) argue that they have also given up the right for the corporation to be run in their interest. This does not mean that managers have unequivocally gained power; instead, in creating a gap between ownership and control and thereby widening the possibilities for controllers and limiting the possibilities for owners, the public corporation allows for the prospect of alternative interests, such as the interests of communities, to be considered in corporate decision making:

The control groups have...cleared the way for claims of a group far wider than either the owners or the control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society (Berle & Means [1932] 1968: 312).

Provided that there exists some common conception of 'community interests', Berle and Means see the satisfaction of this interest by corporations as inevitable:

Should the corporate leaders, for example, set forth a programme comprising fair wages, security to employees, reasonable service to their public, and stabilisation of their business, all of which could divert a portion of the profits from the owners of passive property, and should the community generally accept such a scheme as a logical and human solution of industrial difficulties,

the interests of passive property owners would have to give way
(Berle & Means [1932] 1968: 312).

This vision recognises the corporation to be a complex organisation, the intersection of many interests, individuals and communities. Maintaining balance between these interests may require use of the corporation's monetary resources. In this way, Tsuk (2005: 188) argues, the separation of ownership and control is the solution to corporate power as well as the cause.

Berle and Means' conception of property has been criticised for being ahistorical (Hessen 1983: 282). By using interests in land or animals as examples of property ownership, Hessen (1983: 282) argues that Berle and Means appeal to a model of private property in history that does not take into account the existence of 'commingled property rights' in previous epochs. He acknowledges that these historical examples are different in degree to modern corporations but argues that for Berle and Means' analysis of private property to be correct, and for their approach to legal regulation to be effective, a difference in *kind* needed to be proven:

Berle and Means showed, at best, a change in degree [of private property] than a change in kind. This is a significant failing, because Berle and Means offered the supposed change in kind as the basis for a fundamental change in legal rules (Hessen 1983: 283).

Tsuk (2005: 204) identifies Berle and Means' conception of property as a significant difference between their analysis of the corporation and other theories' analyses. It is a collective vision, distinct from the vision of property conveyed by more contemporary theorists and probably distinct from that which Hessen envisages. While his is an important criticism, the criticism itself should be subject to scrutiny as evidence of the context of theoretical debates over the corporate form.

Hessen (1983: 283) also criticises Berle and Means' analysis for its failure to discuss alternative forms of business organisation and the separation of management and control within these alternative forms. However, he acknowledges that the size of corporations could be a reason to give them special consideration as a form of business organisation. Given the empirical component of Berle and Means' work, it seems they are preoccupied with size as a distinguishing feature of the corporate form of business organisation and that this preoccupation would be justification enough for them not to consider the management and ownership structures of alternative forms. Aside from this, Hessen's criticism does not account for the theoretical inclinations of Berle and Means. In their attempts to highlight the relationship between property and power, Berle and Means were also attempting to shape a legal pluralist vision of the state (Tsuk 2005: 189). Their vision of property is bound to their concept of the state and the allocation of power in society.

Putting Berle and Means in Context

Tsuk (2005: 181, 187) argues that Berle and Means were primarily concerned with 'the allocation of power in society' and how the concentration of power could lead to its inefficient use. They sought to reveal ways to contain this risk. This entailed a particular conception of corporate power as being held 'in trust' for society at large (Berle and Means [1932] 1968: 311; Tsuk 2005: 182).

In this sense, the separation of ownership and control was more of a case study for Berle and Means than an argument in itself. Berle and Means were concerned with the regulation of this area of corporate activity from a broader concern with the allocation of power in society. Tsuk (2005: 217) distinguishes the issues by labelling them 'microeconomic' and 'macroeconomic' questions. She does acknowledge that their definition of power was a theoretically simple one and was not explored at depth in their work (Tsuk 2005: 187). What they did describe was a theory of power with two dimensions; internal power focused on the power corporations had over individuals within them and external power

referred to the impact of corporations on wider society (Bowman 1996: 207-208; Tsuk 2005: 187). These were taken to illustrate the scope of power that corporations held in comparison to the state (Berle & Means [1932] 1968: xxvi; Bowman 1996: 214-217; Tsuk 2005: 188). This highlights the link between context and theory which Millon (1995) describes and thus draws attention to the contextuality of law itself. Berle and Means were approaching the corporation from an identifiable theoretical positioning; this determined their area of interest, their analysis and their solution.

The perspective of Berle and Means had considerable impact on the politics of the day with their text *The Modern Corporation and Private Property* referred to as the 'bible' of New Deal programmes that sought cooperation between economic organisations such as business, government, consumers and labour³⁵ (Hessen 1983: 278-281; Tsuk 2005: 182). Hessen (1983: 279) claims that Berle and Means' central arguments were not original, but that the Great Depression created a receptive environment for the previously marginalised ideas (Hessen 1983: 279). Tsuk (2005: 179-229) argues that the theory began to wane in popularity by the end of World War Two as individualism began to increase. Tsuk (2005: 182) also identifies scepticism toward New Deal policies and anxiety about socialism as the forces behind the academic focus on individual rights within the free market. Eventually the managerial thesis was replaced by contractarian theories and the text was read through individualist eyes that removed its legal pluralist core (Tsuk 2005: 183, 215-218). Tsuk (2005: 183) claims that instead of being an analysis of corporate power, it became seen as a work about corporate profit and efficiency in light of the separation of ownership and control.

It is vital to return to the theoretical direction of Berle and Means' work when analysing it. The legal pluralist approach and its focus on the use of power, with

³⁵ Hessen (1983: 279) credits Berle and Means with the enactment of the *Securities Act 1933* in the US, an act 'which required full disclosure of facts relevant to the value of corporate securities'. See also Tsuk (2005: 195).

the state as the measure of power, meant that Berle and Means saw corporations as social institutions as well as business organisations:

Berle and Means...viewed corporations – with their multiplicity of owners, financial complexity, managerial control, and immortality – as centres of real, potentially coercive power in society. Corporate structure resembled government structure. Corporate financial capacities resembled sovereign economic powers. Like government authorities, corporate managers exercised power by means of a rationalised system of control and administration. Like the sovereign state, large corporations formulated laws and policies affecting individuals and groups. Like states, corporations were social, economic, and political entities (Tsuk 2005: 192).

For Berle and Means, these similarities warranted a focus on the business corporation. It is these institutional tendencies that have inspired this study into corporate dominance. Berle and Means identified the complexity of corporations and their institutional nature as presenting real challenges to the allocation of power in society. As the data in Chapters One and Two and the case study of James Hardie indicated, these concerns remain valid and, in light of the increased complexity of the network economy, more important to protecting the health and safety of individuals and communities.

The business corporation which Berle and Means envisaged was not a fiction, nor was it self-regulating, or able to be controlled entirely by the state (Tsuk 2005: 193). Instead, Berle and Means saw the corporation as a location of distributed sovereignty where managers are the central allocators of power (Tsuk 2005: 193).

A key issue with their thesis, which has contributed to it being dismissed in the post-war period, was its insistence on a legally described and proscribed vision of the 'social good'. This gave the state significant scope in regulating social life. While this was perfectly in line with Berle and Means' legal pluralism, Tsuk (2005: 197) argues that it was a problematic perspective by the end of World War

Two as scholars became increasingly concerned 'about the relationship between statism and tyranny'. In addition to this, an array of corporate laws had developed between when the text was written and the mid 1940s, partly as a result of the text itself. Laws relating to shareholder relations, labour and trade had developed which sought to protect the various interests within a corporation. Tsuk (2005: 197) argues that this changed the nature of the corporation by giving it a different 'legal appearance' from the one described by Berle and Means.

A general trend away from legal pluralism and its focus on collectives and toward a focus on the individual was another reason for the decline of Berle and Means' vision of the corporation. Tsuk (2005: 198) sees the acceptance of Keynesian economics as pivotal to this shift and to the long-term maintenance of individualism. Central to this was the idea that states could not define what was in society's interest. Instead, the individual became the focus of political and economic theory as either group member or consumer (Tsuk 2005: 198). The formation of group interests, such the corporation, was attributed to the individual with benefits flowing from collectives seen as resulting from the pursuit of private interests (Balkin 1990: 391; Tsuk 2005: 199).

Tsuk (2005: 199) identifies changes in the discourse of rights from the late 1930s as pivotal to the rise in individualism. She argues that the New Deal administration endorsed, in its emphasis on the right of the individual to work, welfare and economic independence, a view of rights that was compatible with collective rights (see also Forbath 2000: 698). However, she identifies a trend amongst constitutional law academics, starting from the late 1930s, which began to focus on the rights of ethnic minorities rather than the rights of collective institutions and issues of social citizenship. The individual's right to be *different* became a new assertion (Forbath 2000: 699; Tsuk 2005: 199-200). Academics sought to affirm these rights, particularly in reaction to what they saw as the excessive power of governments. Tsuk (2005: 200) argues that this concern was translated to scepticism over the power of collectives generally; the theoretical

focus of Berle and Means had fallen out of favour and was replaced by a theory of corporations, contractarianism, which fit with the new emphasis on individualism.

The re-writing of Berle and Means' thesis by advocates of contractarianism undermined the legal pluralism of their argument to enhance their individualist perspective (Tsuk 2005: 209-218). The social changes that attended the theoretical shift are important to note as they further highlight the context of theoretical debates around the nature of the corporation and the strength of individualism, though they by no means alter some of the realities of corporate activity that an individualist framework cannot hope to comprehend.

The New Economic Theory of the Corporation: Contractarianism

From the end of World War Two, a different theory of the corporation emerged. Contractarianism, or new economic theory, came to its peak in the 1980s when it received strong legal and academic endorsement. The theory is strictly economic and as such was able to skirt over the issues surrounding managerial hierarchies which had challenged alternative theories. It sees interactions between corporations and other groups or individuals such as employees, suppliers and consumers as being governed by the law of contract rather than corporate law (Easterbrook and Fischel 1989: 1426-1428). The contracts are voluntary with each participant is able to rely on the market, as opposed to law, to defend their interests (Winkler 2004: 122). The terms that are chosen for these contracts can determine the success or failure of the corporation in competing for capital (Easterbrook and Fischel 1989: 1429). Millon (1990: 231) argues that contractarianism has clear links to natural entity theory's emphasis on aggregation. However the contractarian vision of aggregation is more complex because it looks beyond the relationship between shareholders and managers to consider external relationships in which a corporation is a party.

Tsuk (2005: 209-210) claims that the shift from collective to individual rights, and decreasing confidence in central governments, reintroduced law to economics after a period of stark distinction between the two. In doing so, Tsuk (2005: 211) claims, contractarians reinterpreted the work of Berle and Means. Focussing on the separation of ownership and control detracted from Berle and Means' concerns about the exercise of corporate power. Tsuk (2005: 214) argues that by re-orienting the concerns of Berle and Means' argument from corporate power to the rights of shareholders to corporate profits, contractarians were able to respond to what they identified as the authors' main concerns. For contractarian theory, the separation of ownership and control was an irrelevant concern; investors knew how to defend their interests contractually, and, regardless of this, the separation was a more efficient and therefore profitable way to conduct business. Tsuk (2005: 214-215, 213) claims that this approach enabled contractarians to discredit the legal regime proposed by Berle and Means:

...reading *The Modern Corporation and Private Property* as a book about the separation of ownership from control helped minimise the concerns that Berle and Means expressed about corporate power and negate Berle and Means's regulatory solution, which viewed corporations as public trustees. At the same time it also helped legitimate a different solution – a market-oriented solution (Tsuk 2005: 214-215).

In attempting to detract from the collective vision of Berle and Means, and to legitimise their emphasis on the individual, contractarians deconstructed the corporate entity. Only individuals can contract, therefore there are only individual interests at stake in the corporation: 'Since no cognizable corporate collectivity appears amidst the nexus of contracts, no tension arises between collective and individual interests' (Bratton 1989: 1499). Bratton (1989: 1499) claims that this has the effect of dissolving management hierarchies and replacing them with 'networking transactions'. Additionally, he argues, the separation of

ownership and control becomes irrelevant because the concept of 'ownership' is irrelevant; capital is merely one input among many others (Bratton 1989: 1499).

Contractarianism individualises corporations to such an extent that it becomes a simplistic description of corporations in contemporary society, one which cannot account for the real, fact based consequences of corporate activity. Interpreting social interactions as the coincidence of individual contracts results in a closed analysis of these interactions and the dimensions of collective power involved in them. The case study of James Hardie, particularly the social reaction against the company, cannot be understood through such a paradigm. Contractarianism also ignores real legal developments in areas such as environmental law and labour law, which have partially evolved due to the failures of a contract based approach to corporate regulation.

The Contractarian Perspective on Law

Most contractarian analyses focus on explaining the shortcomings of law rather than explaining the specific functioning of a contract based corporation. Contractarians see corporate law as a vague body of law with no core: 'Corporate law is nothing more than a series of default rules, an off-the-rack vehicle whose features are binding to no one' (Branson 1995: 93). However, contractarians consider the law to be useful in saving some of the costs associated with contracting:

There are lots of terms...that almost everyone will want to adopt...Corporate law...fills in the blanks and oversights with the terms that people would have bargained for had they anticipated the problems and been able to transact costlessly in advance (Easterbrook and Fischel 1989: 1444).

In this way, contractarians Easterbrook and Fischel (1989: 1417) argue that corporate law is 'enabling', allowing for participants in the corporation to pick the terms which will give them the legal entity which most closely matches their

aspirations. This allows for managers, investors and the board of directors to exercise significant discretion and is reflected in the *business judgement doctrine* of common law. This rule gives directors a defence for their actions when a breach of duty or skill and diligence is claimed (Fisher et al. 2001: 146). While it may encourage entrepreneurship, it can also be abused (Easterbrook and Fischel 1989: 1417). Easterbrook and Fischel (1989: 169-170) argue that this discretion is kept in check by contractual interactions between managers and other actors. They explain that corporate law is a complement to contracting but will never displace the bargaining process (Easterbrook and Fischel 1989: 1445).

Contractarians see law operating at two points; first when the corporation is formed and a charter adopted, and secondly when an amendment to the charter is made (Gordon 1989: 1555). Gordon (1989: 1585-1593) characterises these rules as procedural, power allocating, economic transformative and fiduciary standard setting. Procedural rules constitute precedents which give predictable guidelines for particular situations. Power allocating rules distribute power mainly between shareholders and directors; economic outcomes are particularly sensitive to changes in this balance (Gordon 1989: 1592). Economic transformative rules govern the significant though unique changes in the formation of a firm, for example, mergers³⁶:

These occur once in the life of a firm. The uniqueness of such an event for any single firm and the potential for widely different outcomes turning on the application of different terms are strong reasons to have a standard form' (Gordon 1989: 1592).

Gordon (1989: 1593) argues that fiduciary standard setting operates on a similar rationale, namely that the existence of standards found in corporate law allows for the development of 'a stable conception of fiduciary duties'. This reduces the

³⁶ This perspective recognises the differences between corporations. While it is true that corporations are different from each other, they also have similarities which make an assertion of their uniqueness as a basis for the ineligibility of corporate law hyper-individualist. Human beings are also different across jurisdictions and from one to the next, but this does not mandate the erosion of a legal system which regulates human interactions.

opportunity for those inside corporations to diminish the fiduciary standards which control them and which determine their liability (Gordon 1989: 1593).

Gordon (1989: 1549-1598) claims that these rules are rationalised mainly due to judicial, political and community concern with the type of behaviour that would emerge from corporations if they were subject only to the law of contract. The decline of corporate law would make shareholder information, charter terms and the organisation of businesses depart from any basic principles. Gordon (1989: 1564-1565) believes that this would result in information asymmetry, the imposition of externalities and opportunistic charter amendment. Contractarians such as Easterbrook and Fischel (1989: 1444-1445) accept the call for standardisation as a rationale for the existence of procedural corporate law; this acceptance could also be seen as a resignation to the continual existence and expansion of laws which regulate corporate activity without having to acknowledge the failures of the contractarian approach.

The History of Implicit and Explicit Corporate Contracts

Contractarians describe two different types of contracts which corporations may be party to, explicit and implicit contracts. Chandler (1977: 93-94) describes the explicit contracts evident in the railroads of the early American republic.

Engineers of the railroads were contractors who supplied equipment, recruited labour and subcontracted parts of the construction. These contractors became heavily involved in the financing of railways. This type of contracting then became popular in urban construction (Chandler 1977: 45, 92-93). Similarly, the extra-legal trading of time bargains from the eighteenth century can be seen as a type of implicit corporate contract: 'Although not illegal, they were unenforceable at law, which forced the parties executing them to rely on each others' personal honour and credit' (Werner and Smith 1991: 28).

To contractarians it is evident that explicit contracts between corporations and other agents continue to be drawn up between corporations and employees,

suppliers and governments. Meanwhile, the incidence of implicit contracts has increased significantly in proportion to the corporation's influence in society. Implicit contracts between corporations and other agents happen in many instances, often alongside explicit contracts. One example is the labour contract and the terms it may imply. Millon (1991: 234-235) gives the example of an implicit labour contract whereby employees take reduced pay in return for job security and an understanding of future increases in pay. He argues that such a contract is easily broken due to its implicit, and thereby legally unenforceable, nature. Corporate law will often override the implicit contract; hostile takeovers, while legally regulated, can result in job losses for people with implicit labour contracts as described by Millon (1991: 235).

The status of implicit contracts is increasingly important to discern for matters of public policy. These contracts, if they are seen as such, are now commonly known in business discourse as *externalities*. Communities often depend on the continued operation of a corporation for their welfare, primarily through employment and contributions to public works through taxes (Millon 1991: 235). In return, the community may refuse to allow the corporation's competitors into the area, or may grant the corporation tax exemptions. The movement of corporate activity from one locale to another can have ruinous consequences. Despite the development of the community's reliance on the corporation, rarely will communities be able to legally force the corporation to continue its business. The corporation can legally decide to leave the area. The implicit contract, if it is accepted as such, can be broken with significant consequences for which there is no direct legal remedy.

The explicit/implicit contract dichotomy presented by contractarians acknowledges the multitude of relationships in which a contemporary corporation is party. However, the contractarian characterisation of these contracts is problematic in theory and practice. The subordination of implicit contracts to corporate law presents a serious challenge to the contractarian

position. The existence of implicit contracts, their revocable nature in comparison to law, and the potential consequences of breaking implicit contracts have been recognised at law and have led to law reform. In corporate law this is signalled by changes to director's duties which encourage company directors to consider stakeholders such as the community and the environment in decision making³⁷ (Millon 1991: 225-226). This is also seen in domains outside of corporate law such as labour law and environmental law which set rules which corporations must adhere to. For contractarians, these developments could signal official acknowledgement of the corporation's contractual base and the desire of lawmakers to regulate the contracts. But in doing so, these laws are also acknowledging the failure of implicit contracts to achieve just and fair outcomes. As corporations have grown in size so too has the potential for a breach of their contracts, either explicit or implicit, to have widespread consequences such as those seen in the James Hardie case study. The equation of 'externalities' with implicit contracts would make both terms meaningless. It cannot be said that a corporation has an implicit contract with everyone whose lives it could potentially affect; rather it has a responsibility to acknowledge and understand the breadth of this potential. As corporations become more socially embedded, their networks of influence spread (Castells 1998, 2000). Arguably, there is no such thing as an 'externality' anymore. Such a description risks making the notion of 'corporate influence' so esoteric that it loses meaning. However, global examples of corporate influence are readily found³⁸, thereby ensuring the empirical base of the description.

³⁷ This is most clearly stated in British legislation, the *Company Law Reform Bill 2007* which dictates that a director must consider the interests of stakeholders as a whole, including shareholders, suppliers, employees, and the environment in decision making as far as is 'reasonably practicable' (Attenborough 2006: 162-169). While this is aimed at increasing accountability, the qualification of 'reasonably practicable' makes the provision a highly contestable one, subject to management discretion and judicial interpretation (Attenborough 2006: 167).

³⁸ Some examples include the hundreds of thousands of people who died or were injured as a result of a BHP chemical spill in Bhopal, India, unemployment resulting from the closure of the NSW Newcastle steel works, environmental damage following the Exxon Valdez oil spill in 1989, and significant financial losses due to the collapse of HIH in Australia in 2001.

Law reform recognises corporate influence and is an attempt to control it. In discussing changes to director's duties that encourage directors to consider the interests of non-shareholders, Millon says:

the new [director's duties] statutes suggest a more complex notion of the corporation's role in society. At the core of this new conception...is the recognition that a number of nonshareholder constituencies depend upon the corporation for their welfare and are therefore affected directly by the manner in which management conducts the corporation's affairs (Millon 1991: 225).

The need for such laws came from corporate activity in the 1980s which saw the rapid development of a market for hostile takeovers (Millon 1991: 224-225; Winkler 2004: 122). This activity was often financed with debt and sometimes led to unemployment and corporate collapses (Winkler 2004: 123). In the US, concern over the effects of hostile takeovers led to the enactment of new legislation encouraging directors to consider the impact of their business' activity on non-shareholders (Winkler 2004: 123). This highlights how untenable the contractarian thesis has become. It is an inadequate theory of the corporation and corporate governance in a world whose environment and people have been damaged by, as well as benefitted from, corporate activity.

Regulation through the Market

Contractarians believe that the market is the best regulator of corporate contracts (Winkler 2004: 122). Markets have an important role in determining the 'structure and behaviour' of the corporation. Gilson (1981: 837) identifies several market mechanisms that can help ensure that corporate managers function for shareholders. These include the self-interest of management as a constraint on decision-making, competition amongst managers as an incentive for efficiency and the price of the corporation's stock as a reflection of managerial efficiency (Gilson 1981: 837). These are believed to be low cost regulations as they are seen as a natural offshoot of competitive capitalism. The interaction of the

manager's self-interest and the capitalist market in which the corporation is operating can ensure shareholder primacy.

While this may satiate shareholders, it has little relevance for non-shareholders. This conception sees corporate activity happening in a vacuum. Its vision of the corporate personality is too simplistic for both contemporary society and for the real operation of the corporation itself:

the contractarian approach contemplates a world relatively free of the friction of social structure and politics... [however] systematic empirical work found pervasive influences of both on the operations of corporate governance mechanisms (Davis 2005: 149).

While aspects of the corporation involve explicit and implicit contracts, to see this as the basis for corporate activity is myopic. The corporate form is influenced by, and influences, social worlds beyond the terms of its charter. There is growing recognition of this in communities, the legislature and in corporations themselves. Not only are businesses expected to acknowledge the effects they can have on worlds outside of their contracts, they are also expected to take legal responsibility for these actions through legislation outside of corporate law. Law now seeks to regulate relations between corporations and employees, communities and the environment in ways that explicit or implicit contracts failed to do. However, the facts of the James Hardie case study indicate that law is not able to do this in a complete and timely fashion.

Despite the shortcomings of the contractarian approach, the epoch from which the theory emerged is of continued relevance to an examination of the corporation. Contractarianism has its theoretical roots in legal individualism. However, the individualism that necessitated the abandoning of fellowship and pluralist theories goes beyond the contractarians. Tsuk (2005: 182) argues that there were more general forces that saw the individual rise to the forefront of academic and political concern. Liberalism, with its emphasis on the individual,

readily describes this. Liberalism's enduring influence on law can be seen in the individualism of corporate personhood and liability laws. Corporations need to be individuals if they are to be included in the legal and economic system. However, as the previous chapter examined, the use of liberalism and its ideals to allow for the inclusion of corporations into the legal and economic system is a selective and inaccurate use which allows for the establishment of the patterns of dominance identified in Section One. The direct implications of the individualised vision of corporate activity in law and theory are explored in the next chapter.

Conclusion: The Current Legal Perspective on Corporate Personality

While the corporation is construed as a fiction in most current legal and academic discourse, less emphasis is given to the role of the state as central to the corporation's existence than in traditional fictionalist theory. In this sense, current conceptions of the corporation differ from traditional fictionalism in their absorption of elements of natural entity theory and its movement away from the state and toward individual relationships. This can be partly explained by the way corporations appear to eclipse the boundaries of the state to operate globally (Castells 2000: 56). Von Gierke's theory of fellowship, while rarely used to explain the current corporate form, remains a counterpoint, albeit an extreme one, for critiques of the corporation. Contractarianism has succumbed to considerable critique, particularly as the notion of 'corporate social responsibility' arose. However, it remains important to economic analyses of the corporate form and attempts to support its designation as a legal individual.

The fellowship principle is largely redundant as an alternative legal theory due, not to liberalism, but rather to the dominant political and economic system's focus on capital. Von Gierke's analysis is liberal in its emphasis on the advantages available to individuals involved in fellowship-based associations and this distinguishes him from the predominant liberal paradigm in terms of means, not ends. Von Gierke saw individual freedom as being nurtured through

collective fellowship associations whereas most liberals see individual freedom arising from individual action (Bobbio 1990: 41; Spencer in Hunt 1936: 135-136).

The theories presented here have one common element; all rely on historical, social and political conditions, rather than any 'reality' of the corporation, for their substance. This highlights the political nature of the corporation and the dynamism of this politicism.

This range of theories gives the corporation an academic history. All the theories have been challenged and will continue to be challenged; individualism for example saw the rise of contractarianism, heralded the decline of the fellowship and pluralist approaches to the corporation, and has sustained the fictionalist and natural entity theories, albeit in a less state centred way. Similarly, social experiences of corporate activity, not all of which have been positive, have led to the re-absorption of elements of legal pluralism, particularly the role of the state³⁹, into debates around corporate governance to the detriment of the extreme individualism seen in contractarianism. These developments have occurred in response to problematic instances of corporate dominance, for example where environmental damage or human deaths have resulted, which have led to questioning of the role of the corporation. However, these developments have had limited impact as they attempt to operate within the faulty legal framework provided by nominalist theories. It is vital to return to Dewey's methodology to question the historical and ideological basis of fictionalism and natural entity theory to understand the true nature of the theories' consequences. This is the subject of the following chapter where I investigate the practical manifestation of legal individualism through an examination of corporate liability structures.

³⁹ See Fligstein (1990).

Chapter Seven: The Legal Regulation of Corporations: Corporate Liability Laws

Rather than attempting to extract some 'truth' about the corporate form from theories of the corporation, Dewey (1926: 664-665) claimed that there was more to be learnt from the political and economic interests that determined them. In acknowledging the impact that theory can have on legal doctrine, Dewey's argument presents the possibility for an understanding of law and theory as rhetorical tools. In the previous chapter I sought to explore this with reference to theory. Having described the contemporary legal system as taking a modified nominalist perspective on corporate personality, predominately informed by individualism, in this chapter I focus on the implementation of this perspective in legal doctrine as it relates to corporate liability.

In doing so, this chapter outlines the nature and purpose of the legal regulation of corporations in Australia⁴⁰. The corporation is treated as a special actor in some laws that are particular to the corporation and its operation, for example shareholder and management relations. Some of these rules go to the heart of organisational structure and decision-making. However the scope of these special laws is generally limited to regulating the relationship between the corporation's managers and its investors; the interests of consumers, citizens and the environment are not as well regulated (Stone 1975: 27). In most legal doctrine, the corporation is legislated for alongside other legal individuals such as humans.

The impact of individualism on law is clearly seen in the development of corporate criminal liability laws. Their human, individual focus remains despite the corporation's non-human, collective features. Evidence of individualism's

⁴⁰ The details of this chapter can be generalised to other common law countries such as New Zealand, the United Kingdom, and the United States. However, the references in this chapter are only intended to describe the legal regulation of corporations in Australia.

inability to acknowledge the structure and claims of the collective is found in the maintenance of personal fault elements of the law applicable to humans when developing corporate liability. The criminal law adopted and developed civil law principles of liability that seemed to best regulate the corporation within the specified framework (Clough & Mulhern 2002: 72; Tomasic & Bottomley 1995: 17). However, there are many structural features of the corporation that render these principles ineffective, namely the diffusion of responsibility within the corporation and the management hierarchy. These features, explored in Section One, indicate the collectivism of contemporary corporations. This, in conjunction with the artificiality of corporations, makes it difficult for them to be regulated (Clough & Mulhern 2002: 72).

There has been consistent and continuing reluctance by law makers to create specific law and legal tests for corporations which acknowledge these structural features. Instead, Norrie (2001: 82-83) argues that corporations have been either *assimilated* or *differentiated* at law (see also Tombs & Whyte 2007: 110).

Assimilation of corporations involves determining the liability of a corporation by establishing the liability of its representatives (Norrie 2001: 95). Known as the *identification doctrine*, Norrie (2001: 105) claims that this method of attributing corporate liability highlights the individual emphasis of the law. Differentiation, on the other hand, involves the development of special tests of liability for the corporation. In common law, this is found in the doctrine of *strict liability*, which does not require any evidence of *mens rea*, a guilty mind. This rule is partly a reflection of nominalist theory which would claim that such a rule is necessary for the essentially amoral nature of corporate activity (see Norrie 2001: 99; Tombs & Whyte 2007: 131). Norrie (2001: 82-86) goes further in arguing that an historical analysis of strict liability indicates the political nature of strict liability and of law in general. He argues that strict liability was first established in the Factories Acts which were the first to criminalise men who were 'not on the periphery of moral life' (Norrie 2001: 85), the employers. The structural position of these individuals made others in their class, magistrates, reluctant to prosecute them. The

development of strict liability laws allowed employers to escape the stigma of a criminal offence and prevented those with legal power from having to strongly discipline their own class. Norrie (2001: 85) argues that this history has established a pattern in regards to employer criminality which has continued to the contemporary attribution of liability to corporations:

[the Factories Acts] established a pattern...that in particular reveals the *sociological* ambiguity of the concept of employer-criminality.

It is this that underlies the *legal* ambiguity of strict liability.

This analysis, supported by Tombs and Whyte (2007: 114-115), clearly identifies these laws as capital-friendly and corresponds with the analysis of liberalism, legal individualism and corporate personhood presented in Chapter Five.

Strict liability offences are now found in regulatory laws, such as occupational health and safety (OHS) legislation, which have different aims, procedures and punishment schemes than criminal laws, where imputed corporate liability remains the standard. The differentiation of corporate legal individuals from human legal individuals now goes beyond liability structures and permeates the nature of the regimes that regulate them. This leads to a construction of differentiated liability and the crimes associated with it as being what Tombs and Whyte (2007: 115) term 'second class offences'.

Both assimilative and differentiating liability tests appear to operate quite apart from any accurate conception of corporations, their operation and social significance. They indicate the political nature of law and draw attention to its individual basis. In this chapter I examine both forms of liability as they are present in Australian common law and use Norrie's analysis of liability as reflective of legal individualism in the case of assimilative laws, and reflective of the desire to protect capital in the case of laws that seek to differentiate the corporation.

To illustrate the differences between the two and the problems of both, an analysis of the regulation of workplace deaths in NSW is undertaken. Workplace deaths in NSW can be controlled and prosecuted for under both regulatory and criminal law; in relation to corporate negligence, regulatory law is the dominant form of control. Johnstone (1996) argues that the differences between regulatory and criminal law are so extreme that an emphasis on regulatory law has the effect of distancing regulatory crimes from breaches of criminal law. In relation to OHS she argues that these differences have the effect of making regulatory law ineffective in preventing and accounting for workplace deaths (Johnstone 1996: 2). The following analysis of legislation, punishment schemes, conviction rates and penalties supports this conclusion. However, I argue that the criminal law is no more effective at preventing workplace deaths without extensive reformed because of its individual focus. A discussion of corporate structures and hierarchies is used to highlight the difficulty that an individual approach to establishing corporate criminal liability faces.

This chapter concludes by examining the possibility for corporate liability law reform through a case study of attempts in NSW and the ACT to reform corporate criminal liability for workplace deaths. The varying nature, reception and success of these attempts at reform highlight the political nature of law and the strength of legal individualism. I posit law reform proposals in NSW as inherently limited because of its failure to question the individualism of corporate laws. As long as law maintains its individual focus, its ability to regulate collective bodies is restricted. Overall, this chapter stresses that while corporate legal individualism established the patterns of dominance identified in Section One of the thesis it also has very direct consequences itself.

Law as a Social Control

Law is one part of a system of social control. In needing to be both comprehensive and general, law is unable to account for every situation of conflict. In addition to this, Norrie (2001) argues that law is both a reflection and

a tool of state politics and ideology. These factors limit the effectiveness of law. As a social control mechanism, law need not be flawless. In most cases it can be supplemented and sometimes replaced by alternative controls, informal controls such as religion and the market. On this basis, Stone (1975: 35-36) argues that law is particularly ineffective in controlling corporations in contrast to its effectiveness in controlling human legal individuals; while humans are constrained by alternative, often internal, controls such as guilt, shame, morals and religion which he argues minimise the individual's reliance on law as a control on their behaviour, the corporation is not subject to such alternatives.

This is the greatest challenge presented to the effectiveness of law, which has granted corporations the same legal rights and responsibilities as human beings. In doing so, lawmakers have sought to maintain law's traditional, individual, human focus and apply it to a morally nebulous collective. It is in this situation that the inadequacies of law become relevant. If it is the primary control on an individual's behaviour, then its operation needs to be closely examined in order to ensure its effectiveness.

For Stone (1975: 35), the extra burden of controlling the corporation in comparison to controlling the individual comes from two issues. First, individuals within the organisational structure tend to be less affected by internalised social controls. The corporate structure acts as a shield between social controls and the actors within the corporation. Second, when the law looks to the corporation itself for a mind or conscience distinct from that of its members, there are a multitude of questions as to what it is that the law is looking for. Stone (1975: 35) argues that it is not theoretically impossible to locate notions of guilt, shame and responsibility within the corporation. Contemporary law's reliance on nominalist theories of corporate personality, as discussed in the previous chapter, makes this presently impossible.

The intersection of faulty theoretical principles in law presents challenges to corporate regulation. These challenges become particularly significant when law is relied upon to control corporations through these principles. As corporations increase in size and prevalence, they also increase in social significance. Section One indicated that corporations are now major employers, shareholders, producers, suppliers and consumers. The amount of social relationships in which they are engaged has also increased. These relationships are predominately, though not exclusively, regulated through law. Section One stressed, primarily through the case study of James Hardie, that these institutional dimensions of contemporary corporations make the effective regulation of their activities imperative because as corporate influence increases, so too does the potential for corporations to do harm.

What is Legal Regulation Hoping to Accomplish?

Before making an evaluation of legal regulation, Stone (1975: 30-35) argues that it is important to consider what the law attempts to achieve in regulating corporations. He describes the law as having three general goals that apply to the regulation of corporations. First, law has a reductive aim whereby it seeks to prevent harmful behaviour. Second, it attempts to link behaviour to harm. Third, law has a distributive aim in attempting to compensate legal individuals for their losses. Stone claims that there are two types of behaviour that could be classified as 'harmful': absolutely disfavoured conduct, such as murder, and qualifiedly disfavoured conduct such as pollution. Qualifiedly disfavoured conduct is disfavoured by the law but cannot be eliminated without significant social losses. Judicial decisions in this realm are particularly problematic, as many interests, some of which are qualitative, need to be considered. Stone (1975: 31) explains that the distinction is important, as illegal corporate behaviour will often fall into the problematic second category. Pollution, he argues, is sometimes seen as a necessary result of production and cannot be unqualifiedly disfavoured: 'if we aim to make pollution unqualifiedly disfavoured, we risk bringing certain useful activities to a halt, perhaps costing us more than we gain'

(Stone 1975: 31). Excusing corporate behaviour on this basis highlights the integration of contemporary corporations. Regulating a corporation effectively may adversely impact upon employees, consumers and communities.

Stone's typology, while useful, does not place enough emphasis on the law's deterrent, retributive and rehabilitative elements. There has been considerable debate about which of these three aims should be given emphasis in legal systems (see Blumstein, Cohen & Nagin 1978; Hudson 1996). It is accurate to say that most legal systems attempt to incorporate all three in different measure and that these variations occur not only across jurisdictions, but also across different laws within the same jurisdiction. A consideration of these is central to determining the aims and effectiveness of legal regimes.

Deterrence theories of punishment assume that the individual makes a decision about whether or not to break the law based on a rational assessment of the costs and benefits of such behaviour (or omission). While there is debate over the human individual's capacity to make a rational decision on this basis⁴¹, Tombs and Whyte (2007: 170) argue that it is plausible that such a model of decision-making could apply to a corporation:

companies and their senior officers do have some motivation to consider the long term consequences of their decisions, and the costs of punishment to their business and social position. They are more likely to commit crimes only after making a reasoned assessment and choice to act rationally.

Deterrence theory is the most influential theory of punishment in common law countries (Hudson 1996: 4; Tombs & Whyte 2007: 171).

In the corporation, this theory is found in the cost/benefit analysis, the widely known business test whereby the course of action is determined by weighing the cost of a particular behaviour against its benefits. The danger with relying on this

⁴¹ See Tombs and Whyte 2007: 169.

perspective to prevent breaches of law is that there may be times when adherence to the law will lose out. As the contractarian position described in the previous chapter stresses, corporations are constituted by a variety of interests and are party to many relationships. In this context, Stone (1975: 40-44) argues that law is often just another threat, alongside many others, that management must consider in decision-making. He describes how the profit that is lost through a lawsuit does not necessarily involve the same consequences for management as a significant loss of share value that occurs independently of illegal activity (Stone 1975: 40). Corporations may consider the law from an economically rational viewpoint, that is, the possibility of losses from legal action as opposed to the gains from potentially harmful and potentially illegal behaviour can be calculated on the basis of a cost benefit analysis. The most famous example of this is the Ford Pinto case, where it was revealed that Ford had decided during production of the vehicle that it would be cheaper to pay compensation for burn deaths, serious burns and burned vehicles than to alter the Pinto's faulty fuel tank. This resulted in deaths, serious burns, a multi-million dollar court case that ended up costing the company three times Ford's original cost analysis and the exposure of Ford's economic reasoning (Wolfe 1990: 10). As a result of this, Ford also became the first American corporation to be charged and prosecuted for reckless homicide. While Ford's actions were made public and exposed the company to both criminal and civil actions, it can be assumed that this type of reasoning occurs on smaller scales and in other realms such as workplace safety and the environment (Pearce & Tombs 1998; Tomasic & Bottomley 1995: 277).

A common element of deterrence theory is the incapacitation that is supposed to accompany punishment. In the case of human offenders, this can involve prison sentences which have the effect of protecting potential victims by removing the offender from the society which they are seen to present a danger to (Hudson 1996: 32; Tombs & Whyte 2007: 172). Tombs and Whyte (2007: 172) argue that the effect of this on the individual can be violent and counter-productive:

the key problem with this approach is that it disconnects the criminal conduct from the motivations or conditions that gave rise to the crime in the first place and instead superimposes upon the offender another set of harsh and brutalising conditions. In the corporate context however, there are suggestions that this could be an effective approach to regulating both managers and corporations. Tombs and Whyte (2007: 172) suggest that managers convicted of a crime could be prevented from employment in particular industries and companies and offending corporations could have operating profit withheld from them. In these instances, it is privilege that is incapacitated 'since it is from a position of privilege that safety crimes are committed'; accordingly, these punishments are well connected to 'the specific conditions that [gave] rise to the crime' (Tombs & Whyte 2007: 172).

The legal system also displays elements of retributive, or just deserts, punishment theory whereby punishment is rationalised on the basis that it is deserved; it is a way for the criminal to repay society for breaking the rules (Hudson 1996: 38; Tombs & Whyte 2007: 171). Hudson (1996: 38) explains that such a system requires that punishments be appropriate for the crime committed as opposed to punishment theories that focus on the potential for future harm. This focus necessitates that the severity of the punishment accurately reflect the social cost of the crime (Hudson 1996: 38).

In contrast, the rehabilitative theory of punishment attempts to reform the criminal and re-integrate them into society through punishment (Tombs & Whyte 2007: 171). Such an approach is contrary to most legal punishments, which seek to isolate and stigmatise the offender. However, it is an approach that has been proposed by Braithwaite (1983, 1989 in Tombs & Whyte 2007: 171-2) for application to corporate offenders. His *re-integrative shaming* thesis uses public

shaming to bring the offender back into the community. Braithwaite and Fisse (1983) argue that this could be particularly successful as a punishment regime for corporations to whom image is important. While this has been posited as an alternative way of regulating corporations by the New South Wales Law Reform Commission (NSWLRC 2003: 48-52), it has not been incorporated into the Australian legal system.

Elements of each of these approaches are evident in the Australian legal system and are readily seen in punishment regimes. They are important to consider because punishment regimes have an important role to play not only in the punishing of crime, but also in its prevention. A suitable system of punishment should be able to reduce the need for investigations and prosecutions because of its preventative elements. However, current sanctions against corporate offenders generally fail in meeting the aims of these theories. In Australia, evidence of this is found in the generally constant rates of workplace deaths and the patterns of investigation, prosecution and punishment of corporations for these deaths. Corporations are not held to account for these deaths in the criminal law and are prosecuted in a minimal way through OHS legislation. In relation to this issue, the present legal regime cannot effectively enact any of the aforementioned rationales for legal regulation. This is due to the faulty conceptualisation of corporate offenders by law which fails to acknowledge the collective operating realities of corporations. The following examination of corporate liability structures as involving either assimilation or differentiation of corporations to humans highlights this. In doing so, the image of the collective corporation, introduced in Section One, is further explored and legal images of the corporate individual again called into question.

The Application of Criminal Liability to Corporations: Assimilation

As discussed in Chapter Four, the Australian legal system attributes criminal liability to corporations with the satisfaction of the identification doctrine whereby the acts or omissions of a 'controlling mind and will' are held to be those of the

corporation (NSWLRC 2003: 19; Tomasic & Bottomley 1995: 274). The 'controlling mind and will' must be someone who exercises discretion over their activities such as a manager, director, or CEO (NSWLRC 2003: 19).

There are several other issues that need to be considered before an attempt to identify a 'controlling mind and will' can be made. Central to the attribution of liability is the question of whether a corporation can behave in a particular way. Courts have held that crimes such as perjury cannot be committed by a non-human entity (Ford et al. 2001: 685; Tomasic & Bottomley 1995: 272). This is a reflection of fictionalist theories of corporate personality.

Assuming that a corporation can commit a criminal offence, the terms of a particular legal instrument need to be considered to ascertain whether or not it applies to a corporation. When deciding if an Act, regulation or other legal instrument applies to corporations, the available modes of enquiry hinge on the intention of the law makers and whether the statute was designed to extend to corporations (Ford et al. 2001: 100). Statutory references to 'person' are defined either within the instrument or by reference to the interpretation acts of the particular jurisdiction⁴².

For a criminal conviction against a corporation to hold, the crime must have provisions for the alternative punishment of corporations, as a corporation cannot be imprisoned. Most common law jurisdictions, including Australia, do this through the allocation of fines⁴³. Provided that the criterion for punishment is met, the next stage in attributing direct liability is to establish whether the

⁴² In NSW, section 8(d) of the *Interpretation Act 1987* precludes the omission of corporations from particular legislation. In addition to this, section 10(1) of the *Criminal Procedure Act 1986* specifies the process for the indictment of bodies corporate. As this statute makes explicit, use of the word 'person' in legal instruments prima facie includes corporations, though it is possible to prove that the provisions of the instrument were intended to apply only to natural persons (Ford et al. 1999: 100).

⁴³ Section 16 of the *Crimes (Sentencing Procedure) Act 1900* (NSW) allows for fines to be allocated to corporations when imprisonment is the only other punishment. Currently the maximum fine is \$220,000.

corporation displayed the relevant state of mind in committing the offence by attempting to apply the identification doctrine⁴⁴.

Research has identified many problems with this approach to corporate criminal liability, problems which have led to the failure of criminal cases against corporations (NSWLRC 2004; Stone 1975; Tombs & Whyte 2007: 131-132). The identification doctrine requires one person, or a few people in the corporation, to have adequate knowledge of the corporation's activities and substantial authority over the direction of the business. Stone (1975: 52, 60) argues that corporations rarely invest total knowledge or authority in one person and that because of this there is not enough knowledge held by one or a few people to satisfy liability laws. For example, in large corporations there are many roles for managers that are specialised in terms of department or geographical area. Fragmented knowledge is made whole through the actions of individuals and departments within the corporation. While individuals within a corporation can accurately claim to have limits to their knowledge due to its specialised nature, the knowledge of the head of the corporation can also be reduced through the responsibilities designated to managers. This can be a result of organisational complexity, but Stone (1975: 61-62) argues that it can be manufactured for the purposes of avoiding liability. While it may reasonably be expected that the head of a corporation will have a good understanding and authority over the complete operations of the corporation, it is possible for this to be denied by recourse to the specialisation of subordinates. Those whose behaviour is subject to the identification doctrine can claim to have been given inadequate information which was inadequate not because of the incompetence of subordinates but rather due to the specialised and diffuse nature of corporate organisation. The veracity of such claims can rarely be certain in the absence of explicit documentation or testimony.

⁴⁴ For Australian examples of the application of the identification doctrine see *Dempster v NCSC* (1993) 11 ACLC 576, *Beach Petroleum NL v Johnson* (1993) 115 ALR 411, *Holpitt Pty Ltd v Swaah* (1992) 10 ACLC 64, *Collins v State Rail Authority of New South Wales* (1986) 5 NSWLR 209 (cited in Hill & Harmer 1996: 80fn).

This is related to the limitations associated with implementing the law which relate to issues of organisational design which Stone (1975: 103) identifies. In order for the law to be effectively applied, the facts of the case need to be clear, the accused needs to be identifiable, the nature and extent of injury needs to be evident and causality needs to be plausible (Stone 1975: 33). While these can be applied to a more traditional use of the law, that of conflict between two individuals, these traditional legal paths of enquiry cannot be applied as easily to the more complex nature of corporate activity (Lee & Ermann 1999: 30-31; Stone 1975: 104). In claims for injury, for example, courts respond most readily to physical harm (Stone 1975: 99; Tombs & Whyte 1997:119). It is able to be observed and quantified, and thus is deemed objective. However, corporate harms do not necessarily manifest physically. Psychological harm⁴⁵ is an example which does not fit into the paradigm of harm most supported at law, but which is sometimes evident in the actions of corporations (Stone 1975: 95). In addition to this, there are corporate crimes from which harm may not arise for many years after the harmful behaviour. Workplace diseases brought about by corporate negligence, for example lung diseases and cancer in asbestos workers, are examples of what could be called 'long latency' corporate harms. Such diseases may become evident up to forty years after the original exposure, making corporate liability more challenging to prove. Aside from this, the parties to the claim may no longer be representatives of the corporation in question, may be deceased or otherwise incapacitated, or the statute of limitations may have expired. The James Hardie case study highlighted the potential impact of these factors on public health. The case study and these factors indicate the collective nature of corporations and corporate work practices, further highlighting the inappropriateness of regulating corporations through individualistic liability laws.

Tombs and Whyte (2007: 131) found that instances where the identification doctrine lead to the successful criminal prosecution of a corporation involved

⁴⁵ For example depression and suicide brought about by job losses, see Price, Choi, Vinokur 2002: 302-312.

small corporations where managers were directly involved in the corporation's negligence and were easy to identify as a 'controlling mind and will' of the corporation⁴⁶. In larger corporations, the identification doctrine currently allows for individuals within organisations to conceal their role in the corporation by referring to the organisation's complexity. Tombs and Whyte (2007: 134) argue that these structural reasons for the occurrence of corporate crime are the same reasons that can prevent the corporation from being accountable for that crime.

Incorporating the notion of *aggregation* into existing liability structures is a possible solution to determining knowledge. Aggregation allows for the conduct of the corporation to be deemed negligent by combining the conduct, state of mind, or culpability of two or more individuals classified as the directing mind and will of the corporation (NSWLRC 2003: 22). The aggregation model of corporate intent is in place in America, but has been consistently rejected by English, Scottish⁴⁷ and Australian state and territory courts, with the exception of the ACT. The Commonwealth Attorney General's Office of Australia has called for the principle to be implemented across Australia (NSWLRC 2003: 23). The aggregation principle can be found in the Federal *Criminal Code Act 1995* (Cth) s. 12.4 (2). It specifies: 'that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents, or officers)'. The section is used in the application of Federal law, so it would not be applied to cases in state or territory jurisdictions; a workplace death that occurred in one of the states or territories would be in the jurisdiction of the criminal and OHS laws of that state or territory. However, it does apply to the administration of corporate laws and the calculation of corporate negligence when those laws are contravened.

⁴⁶ For example, *R v Denbo Pty Ltd* has been the only successful prosecution of a corporation in Australia for negligence leading to a workplace death. In this case, the corporation was small and its director was directly involved in the corporation's negligence.

⁴⁷ See Tombs and Whyte (2007: 25) for a description of the circumstances surrounding the Transco case where the prosecution against a company for the death of a family of four was rejected by upholding the identification doctrine and denying the applicability of aggregation principles to Scots law.

It is thought that this model enables the legal system to better regulate corporations by acknowledging the collective nature of corporate decision-making structures. Tombs and Whyte (2007: 134) claim that aggregation sees the corporation as 'an integrated decision maker for the purposes of [determining] criminal conduct'. Similarly, the NSWLRC, in a 2003 report on the sentencing of corporate offenders, argued that aggregation would allow the courts 'to deal with cases involving events that result from complex processes and structures in corporations where decisions are made by a number of different levels of management' (NSWLRC 2003: 24).

Such a perspective on corporate liability would have two effects. First, the possibility of a conviction is increased and the threat of punishment is enhanced. Second, conviction rates would increase. Both effects enhance the deterrent, retributive and rehabilitative elements of law. However, it is not sufficient to introduce principles of aggregation whilst maintaining other elements of law such as strict liability and punishment through the allocation of fines. While the Australian example is a considerable development, the incorporation of aggregation principles into the *Criminal Code Act 1995* (Cth) could not be described as bringing justice to cases of corporate crime. This maintenance of faulty legal principles undermines the potential for the aggregation principle to reform corporate law. There would need to be a comprehensive reassessment of many elements of law if any reform, such as the acceptance of aggregation principles, is to be successful. Most common law jurisdictions are unlikely to impose such stringent regulations on business.

The Investigation, Prosecution and Punishment of Workplace Deaths in NSW under the Criminal Law Regime

In NSW, behaviours which fall under the general criminal law are regulated in the *Crimes Act 1900* (NSW). This legislation regulates all legal individuals including corporations. Continuing Norrie's dichotomy, this legislation seeks to assimilate corporations into existing liability structures.

The granting of legal personhood to corporations allows them, theoretically, to be convicted of manslaughter for the death of a worker. Manslaughter is defined in section 18 of the *Crimes Act 1900* (NSW) as follows:

18. Murder and Manslaughter Defined

(1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

Manslaughter can be of two types; voluntary and involuntary. Voluntary manslaughter allows for partial defences such as provocation and substantial impairment by abnormality of the mind to be used. Involuntary manslaughter is for situations where the accused does not have the requisite mens rea. When pursuing a corporation for a workplace death under the *Crimes Act 1900* (NSW), it will most likely be charged with involuntary manslaughter (GPSC1 2004: 124). Of this, there are two types of involuntary manslaughter (GPSC1 2004: 124-5). First, manslaughter by dangerous and unlawful act which carries a palpable risk of injury, and second, manslaughter by criminal negligence where the level of risk of death or injury was so high that criminal punishment is merited (GPSC1 2004: 125). The NSW Director of Public Prosecutions (DPP), Nicholas Cowdery, has indicated that a charge of manslaughter by criminal negligence is most appropriate for a corporation (GPSC1 2004: 125). The elements of this offence are that the accused:

- 'Was under a duty of care for the deceased
- Was grossly negligent (or perhaps reckless) and failed to perform that duty; and

- As a result of the failure to perform the duty, whether through act or omission, death was occasioned or accelerated' (GPSC1 2004: 125)

The absence of a requirement for mens rea in this offence is an example of differentiation within the general criminal law. The development of such a law and the recommendation by the DPP that it would be the most appropriate charge of manslaughter against a corporation indicates the problems associated with assimilating corporations into the legal system through the use of the identification doctrine.

In all criminal cases the onus is on the prosecution to prove that the corporation committed the offence. If the corporation is found guilty in NSW it will face a maximum penalty of \$220,000. Conversely, natural persons can be imprisoned for up to 25 years.

In NSW there has been no successful prosecution through the *Crimes Act 1900* (NSW) of a corporation or its representatives for a workplace death. Victoria is the only Australian jurisdiction which has brought charges against a corporation for manslaughter. There have been four corporations charged with manslaughter in Victoria. In only one of these cases, *R v Denbo Pty Ltd* (1994) 6 VIR 157, was the defendant corporation found guilty by establishing the guilt of its representative, in this case the director of a small company who had been directly involved in the corporation's negligence⁴⁸.

There have been some attempts to make regulation easier and more effective without dramatically reforming the legal system. The most common attempt is through regulatory agencies. These are evident in all common law countries and derive from a perceived inadequacy in general law approaches to industry regulation. In Australia, it is through these agencies that the strict liability laws,

⁴⁸ England and Wales have had a similar experience, with only forty cases brought against individuals and companies for manslaughter following a workplace death. Most of these cases have been unsuccessful (Tombs and Whyte 2007: 23).

which Norrie (2001: 85) describes as differentiating corporate liability from human liability, are enforced.

The Application of Criminal Liability to Corporations: Differentiation

As previously mentioned, strict liability offences are those where no evidence of a guilty mind is required to secure a prosecution. Norrie (2001: 87) and Tombs and Whyte (2007: 114-115) attribute the development of strict liability laws to the Factories Acts introduced in Britain in the nineteenth century. Their work highlights the historic link between strict liability laws and workplace safety. Factory owners routinely breached the Factories Acts; had the acts been strictly enforced, Carson (1979: 48 in Tombs & Whyte 2007: 114) argues there would have been a 'collective criminalisation which extended far beyond some opprobrious minority'. Norrie (2001: 85) asserts that the class relationship between factory owners and lawmakers made judges reluctant to prosecute them. Similarly, Tombs and Whyte (2007: 114) claim that the perception of factory owners as belonging to the 'respectable' class led to the selective application of law. The eventual development of strict liability offences in the 1844 Factory Act did not require mens rea and, further, allocated what Tombs and Whyte (2007: 115) call 'low-level administrative penalties'. The effect of this, they argue, is that these offences were construed as administrative or technical breaches as opposed to being 'unambiguously criminal' (Tombs & Whyte 2007: 115). Tombs and Whyte (2007: 115) identify the creation of strict liability offences as central to the decriminalisation of health and safety offences.

Corporate liability for workplace deaths and injuries is further distanced from the criminal law by their differential regulation through regulatory agencies.

Regulatory agencies are government organisations established through legislation to create, monitor, enforce and reform regulations relating to the private sector of a regulated industry. Their regulations have the force of law and operate independently of external supervision. In NSW, workplace deaths and injuries, while able to be regulated under the *Crimes Act 1900* (NSW), are primarily dealt

with by the regulatory agency WorkCover which administers the *Occupational Health and Safety Act 2000* (NSW).

The Investigation, Prosecution and Punishment of Workplace Deaths in NSW under Occupational Health and Safety Legislation

WorkCover is invested by the state with powers to regulate the health, safety and compensation systems of NSW industry in accordance with the *Occupational Health and Safety Act 2000* (NSW). This legislation resembles the Factories Acts in terms of the constitution of offences, the use of strict liability laws and the administration of penalties for breaches. Under the *Occupational Health and Safety Act 2000* (NSW) it is not the workplace death itself that is investigated, prosecuted and punished, but rather the systems of work that led to the death. Section 8 of the Act requires that employers ensure the health, safety and welfare of all their employees by providing safe premises, safe plant and substances, safe systems of work and health and safety training and facilities. Under section 86 of the Act, employers are required to notify WorkCover of serious incidents in the workplace. This has to be done within seven days of the incident. Proceedings for offences must begin within two years of the incident⁴⁹ otherwise there cannot be a charge for that breach though there may be an investigation into a breach of reporting guidelines. An inquiry into serious injury and death in the workplace commissioned by the NSW legislative council heard a submission about how a corporation avoided prosecution for OHS breaches by failing to report a serious incident within the time frame (GPSC1 2004: 93-94).

Once WorkCover is advised of a workplace fatality, an inspector is sent to the workplace to investigate the matter. All investigations into the circumstances of the death at this stage involve collaboration between WorkCover and the NSW Police. If there is evidence of criminal conduct the police begin an independent investigation into possible criminal charges. Information can be exchanged freely

⁴⁹ See s.107 *Occupational Health and Safety Act 2000* (NSW).

between WorkCover and the police throughout the course of investigations (GPSC1 2004: 95-96). This can be advantageous for the police investigation as WorkCover inspectors have greater search, seizure and investigation powers than those held by the police (GPSC1 2004: 96).

If there is a strong prospect of a successful prosecution for conditions leading to a workplace death, WorkCover may decide to commence a prosecution. In the financial year 2005/06, there were 482 successful OHS prosecutions (WorkCover 2006: 16), in 2006/07 there were 300 successful prosecutions resulting in \$1.1 million in fines being collected (WorkCover 2007: 9). Most defendants in WorkCover prosecutions enter a guilty plea which normally entails a discount off the sentence in the range of ten to twenty five percent (GPSC1 2004: 105).

The Divorce of OHS Law from the General Criminal Law

Workplace fatalities are differentially regulated within the *Occupational Health and Safety Act 2000* (NSW) and in the *Crimes Act 1900* (NSW). Whilst a breach of either act is, at law, criminal, the differences between have a significant impact on the administration of the law in relation to workplace fatalities. Primarily, the differences are found in language, investigation and administration. The differences between the two regimes indicate the extent to which differentiation of human and corporate offenders has been extended from liability structures to legislation, investigations, prosecutions and punishments. This has the effect of constructing health and safety violations as distinct from the ambit of the general criminal law, as second-class offences (Johnstone 1996: 2; Tombs & Whyte 2007).

Jurisdictional Variations in OHS Legislation

The state lacks enthusiasm for regulating workplace deaths. This is reflected on many levels, the most basic being the invisibility of these deaths. There are numerous failings in the collection of data which mean that deaths are excluded

from official statistics because they are uncompensated. This can occur because the deceased was self-employed, has no beneficiaries to claim compensation, or died from a dust disease⁵⁰ (WorkCover 2002: 19). In addition to this, OHS law in Australia is the responsibility of the state and territory governments. Each jurisdiction has different definitions of terms such as *employee* and *injury* thus including and excluding people on the basis of definition and making the collection of comprehensive national statistics more difficult (GPSC1 2004: 14). While the crimes acts of Australian states and territories also vary, this seems to have less impact upon the collection of statistics and the formulation of definitions of crime. This is evidenced by the establishment of the Australian Institute of Criminology whose mandate includes a consideration of white collar and corporate crime but whose focus has been on human crimes involving violence, theft and drugs. The lack of federal and state interest in developing a national workplace injury and death database seems to be constant despite changes in leadership. The fact that many of the deaths are not counted at all has significant implications for their likelihood of being counted as resulting from criminal activity. This invisibility occurs at political, social and academic levels and has been identified by Tombs and Whyte (2007: 66) as a reason for the general invisibility of corporate crime:

safety crimes remain socially, politically, and academically invisible in ways which mirror the invisibility of corporate crimes in general...in simply not considering occupational deaths and injury within crime, law and order discourses, the difference between the former and real crime has been further cemented.

There appears to be little political interest in the wrongdoings of corporations. The absence of good quantitative data on workplace deaths could be considered the starting point from which regulation fails. It certainly illustrates the lack of political will to regulate corporations and to protect workers, a situation which is exacerbated by conceptual, investigatory, and administrative problems.

⁵⁰ Dust disease fatalities resulting from working in coal mines are accounted for due to special legislation (WorkCover 2002: 19).

The Nature of the Offence: Removal of Concepts of Harm in OHS Law

The Acts are different in their classification of what constitutes an offence. Under the *Occupational Health and Safety Act 2000* a workplace death is investigated and brought to trial not as a suspicious death, but as a breach of safety conditions as specified in the Act. For example, if a worker falls into and is killed while cleaning out a garbage compacter, the employer may be investigated and prosecuted over failing to ensure that there was a safe system of work in place, in this case perhaps the failure to install an emergency switch or failure to ensure that there was more than one person on duty. The charge, conviction and punishment are the same as it would be had someone been injured rather than killed. By contrast, the criminal law is after the fact. Hence, in the same example, the corporation may be investigated and prosecuted on the basis of their involvement in the factors leading to the worker's death. But in this case, the corporation is charged indirectly for failing to ensure that the work situation was safe, by being found responsible for the death that resulted from their negligence.

By virtue of these features, offences of the *Occupational Health and Safety Act 2000* (NSW) are known as *inchoate offences*. These are preliminary offences which do not necessarily require any consideration of the outcomes⁵¹; references to actual harm caused by faulty 'systems of work' need not be raised. The attribution of liability without referring to the harm caused by an act or omission is known as *inchoate liability* (Tombs & Whyte 2007: 118).

The separation of concepts of harm from offences in OHS law has been justified by reference to the preventative nature of OHS law (Wells 2001: 5-6). Tombs and Whyte (2007: 118) argue that this significantly separates OHS law from the general criminal law and contributes to the framing of safety crimes as less serious, or less criminal, than other crimes: 'This process of disconnecting harm from offence is crucial in reframing the 'criminal' nature of the offence'. This approach, they argue, ignores the jurisprudential emphasis on concepts of harm

⁵¹ Examples include conspiracy and incitement.

throughout legal history, particularly harm as a precondition for the state's intervention in the life of the individual (Tombs & Whyte 2007: 118). When legal constructions and their practical enactment fail to describe the harmful elements of corporate activity, the harm and the crime become socially invisible: 'In cases where the 'harm' is separated from the 'crime', we begin to lose sight both of the gravity that is attached to the offence and, at the same time, of the legitimate basis for state intervention' (Tombs & Whyte 2007: 118).

However, Tombs and Whyte (2007: 119) claim that there is evidence that harm is a consideration of regulators and courts in the investigation and sentencing of corporations. They found that the decision to prosecute and the highest fines allocated under the *Health and Safety at Work Act 1974* in England and Wales are typically for offences involving fatalities. This is reflected in case law which has established that the courts consider increasing penalties in accordance with levels of physical harm (Tombs & Whyte 2007: 177). From this, it appears that concepts and measurements of harm remain relevant to the prosecution of workplace deaths. However, this is not recognised or supported by the structure of OHS law itself.

The Investigation of Breaches

The investigation of breaches of the *Occupational Health and Safety Act 2000* (NSW) by agencies other than the police further differentiates it from the general criminal law (Clough & Mulhern 2002: 21; Conklin 1977: 123; Johnstone 1996: 2). While this is partly a response to the specialisation required in dealing with certain industries, it also constructs health and safety offences as less serious than crimes investigated by the police (Clough & Mulhern 2002: 21).

NSW WorkCover has one of the largest safety inspectorates in Australia with a total of 290 inspectors in 2006/07. These inspectors are responsible for more than 400,000 workplaces across the state (GPSC1 2004: 65). In addition to the heavy workload there are concerns that a recent restructure of WorkCover, which

now encourages inspectors to work across many industries rather than one, has meant that inspectors do not have enough specialist knowledge, skills or experience (GPSC1 2004: 67). This, combined with poor co-ordination with the police, ambulance services and the State Debt Recovery Office, could mean that many workplace deaths involving criminal negligence are not recognised as such.

The organisation of regulatory agencies such as WorkCover means that they are more specialised in terms of fact-finding procedures and rule-making (Stone 1975: 107). This is an appealing and promising idea but agencies have many problems with fulfilling their mandate. They face what Stone (1975: 108) terms 'accidental shortcomings', problems imposed on the agencies rather than inherent to them. He argues that accidental shortcomings are usually the result of poor funding, including staff problems, budget shortages and lack of communication with government (Stone 1975: 108). These problems can be addressed usually by increasing the funding available to agencies. However Stone (1975: 108-110) argues that there are also inherent problems with regulatory agencies which impede their ability to ever be useful in controlling corporations.

Stone (1975: 108-109) claims that regulatory agencies generally operate under loose mandates and vague rules defined by the state. He argues that the very purpose of regulatory agencies suggests that the state was unable to control a particular industry and enforce particular rules effectively (Stone 1975: 108-109). The ability of that same state to issue a clear mandate to agencies is questionable. This, Stone argues, is not something that can be remedied; it is an inherent problem of regulatory agencies:

if such generalities were products of carelessness or lack of attention, they could be remedied. But a good deal of the vagueness is more deep-seated...The very situations that give rise to agencies are those where congress could not lay down hard and fast rules; if it could have, it would have (Stone 1975: 109).

Conklin (1977: 123) is equally sceptical of the role of regulatory agencies in investigating business crime. He is concerned about the possibility for corporations to exercise influence over the legislature, primarily through legitimate political donations. For Conklin this is manifested in the ineffectiveness of regulatory agencies. He questions the relationship between the regulated and the regulators by arguing that the requirement for expert staff allows for corruption: 'it is...likely that they will be less energetic in the enforcement of regulations because they are sympathetic with and have personal connections with those in the industry' (Conklin 1977: 123). Stone (1975: 107) agrees with this, arguing that agencies have a tendency to protect the industries they are charged with regulating. He separates 'corruption' and 'influence' but argues that both play a part in the inconsistency and ineffectiveness of regulatory agencies' policies (Stone 1975: 107). When regulatory agencies are staffed with industry personnel, they may have enough knowledge of the industry to push for favourable legislation and may also have personal connections with those in the industry and thus have a personal or social interest in the creation of particular legislation (Conklin 1977: 123; Stone 1975: 95). Stone (1975: 95) argues that this relationship between regulators, corporations and lawmakers is not always a sinister exercise of power. Rather, corporations may be involved in the lawmaking process by regulatory agencies simply for convenience:

the real roots are more cumbersome, more bureaucratic, more 'necessary', and therefore more difficult to remedy: the regulating body is considerably outstaffed and relatively uninformed; it knows that it has to 'live with' the industry it is regulating; it does not want to set standards that it will always be having to fight to enforce (Stone 1975: 95).

Given this involvement in the law-making process, Stone (1975: 95) argues that it is 'absurdly circular' to expect adherence to the law to be sufficient in controlling the corporation. Aside from incidences of corruption and influence, the relationship between regulators and the regulated is always problematic and

difficult to balance: 'Be too helpful and risk incrimination; be too cautious and risk a poor relationship with the regulat[ed]' (Clough & Mulhern 2002: 21).

The absence of police involvement in the investigation of breaches of OHS law has been identified by Tombs and Whyte (2007: 93-94) as an example of the exclusion of OHS offences from 'real crime':

Constructing safety crime as something that has to be acted on and counted not by police forces...but by regulatory agencies, reinforces the idea that safety crime is not 'real crime'...This has an important bearing upon how safety crimes are regarded by their perpetrators, victims, and the wider public (Tombs & Whyte 2007: 92-93).

This contributes to the construction of OHS crimes as being second-class offences, less serious than breaches of criminal law. Tombs and Whyte (2007: 94-97), drawing on the work of Edwin H. Sutherland (1945), argue that there is no distinction between the offences of legal individuals who breach the general criminal law (i.e. human legal individuals) and those who breach regulatory law (i.e. employers, business and corporations) which warrants such separate approaches to regulating the same thing:

there are good reasons for suspecting that the differential application of law, the development of different legal categories, and distinct enforcement *modus operandi* for 'street' and corporate offenders are not rooted in any intrinsic differences in the offences *per se*.

A consideration of class power is central to their perspective and to their interpretation of Sutherland. This was discussed by Tombs and Whyte (2007: 114-115) and Norrie (2001: 85, 87) in relation to the Factories Acts and the reluctance of law makers to consider factory owners as anything other than 'respectable'. It is seen again here in the designation of 'degrees of criminality' by lawmakers. By placing OHS violations in a separate realm to other crime, lawmakers are doing the same with those who commit these crimes.

Administrative Differences: Court Processes, Liability, Onus of Proof

Breaches of the *Occupational Health and Safety Act 2000* (NSW) are regulatory in nature. Matters regarding the legislation are heard summarily before either a magistrate or a single judge of the Industrial Relations Commission (McCallum, Hall, Hatcher, Searle 2004: 31). There is no jury involved in the court process and any appeals against a conviction are again dealt with summarily. This process significantly distances the administration of the law for OHS offences from the criminal process where prosecutions and appeals can be heard at many levels in the court hierarchy and before a jury.

Further administrative differences are found in the mode of liability and the location of the burden of proof. Offences under the *Occupational Health and Safety Act 2000* (NSW) are strict liability and have a reversed onus of proof. Thus a corporation is deemed to be guilty of a breach until it can mount a successful defence to show that it is not. In addition to this, if a corporation is prosecuted for breach of the Act, liability is automatically conferred onto directors and managers⁵². Again, the onus is on the defendant to prove either that they were not in a position to influence the conduct of the corporation in relation to the breach or, if they were in such a position, that they used due diligence to prevent the breach.

Wells (2001: 8) and Tombs and Whyte (2007: 114-115) claim that strict liability laws considerably alter jurisprudential and social perceptions of crime. Strict liability offences are usually associated with administrative penalties. This has significant consequences for both conceptions of corporate liability and for the people intended to be protected by occupational health and safety legislation: 'The courts – by ensuring that a separate, lower level of offence was created – assisted in decriminalising breaches of health and safety law in the eyes of the law and thereby legitimated the conventionalisation of those crimes in the workplace' (Tombs & Whyte 2007: 115).

⁵² *Occupational Health and Safety Act 2000* (NSW) s 26(1)

While strict liability offences speed up the legal process by giving substantial discounts off guilty pleas, thus virtually ensuring a conviction, these offences are a significant departure from the principles of criminal law as guilt, rather than innocence, is assumed (GPSC1 2004: 106). This suggests that a wrongful conviction for a breach of the *Occupational Health and Safety Act 2000* (NSW) is not as serious as a wrongful conviction under the *Crimes Act 1900* (NSW). Due to this, it suggests that a conviction under regulatory law is not as serious as a conviction under the criminal law. Overall, it is the administrative nature of these offences which distance them from the stigma of criminal offences. This stigma often acts as a deterrent or assists in the rehabilitation of offenders. The question of justice is also raised, as the retributive element of punishment is rarely satisfied by the finding of responsibility through strict liability. There are many reasons for this, from the fact that court action is often a last resort in disciplining offences, to the low level of fines allocated to convicted offenders.

Punishment Regimes: Fines and Imprisonment

The maximum penalties for breaches of the *Occupational Health and Safety Act 2000* (NSW) are \$55,000 for an individual's first offence, \$550,000 for a corporation's first offence, \$82,500 or two years imprisonment (or both) for a subsequent offence by an individual and \$825,000 for a subsequent offence by a corporation⁵³. These are the highest fines in Australia. However, a significant criticism of the courts that deal with breaches of OHS law is that the fines allocated represent only a small percentage of the maximum fine (GPSC1 2004: 109-120). Most cases involving workplace fatalities administered between 1986 and 2003 under the previous legislation *Occupational Health and Safety Act 1983* attracted ten to twenty per cent of the maximum penalty, nine per cent of cases attracted 50% or more of the maximum penalty and no cases received a fine of 80% or more of the maximum penalty (GPSC1 2004: 109-110; McCallum et al. 2004: 7). Recent research suggests that this is continuing under the

⁵³ *Occupational Health and Safety Act 2000* (NSW) s 12 and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

Occupational Health and Safety Act 2000 (see McCallum et al. 2004: 7-8). There have been no imprisonments for breaches of either the 1983 or 2000 acts (GPSC1 2004: 110). Despite the increases in the maximum penalties, actual penalties do not increase at the same rate. A report into workplace deaths commissioned by WorkCover instead found that 'actual penalties as a proportion of maximum penalties have tended to decrease' (McCallum et al. 2004: 7-8). Since this is an issue for the courts rather than the legislature, it has been used to deflect attention away from the performance of WorkCover and hence away from the Government. The leniency of fines has been particularly frustrating for the families of victims when an OHS conviction is the only way their loved ones' death will be recognised as legally wrongful.

This is not a new phenomenon in the realm of safety crimes. Tombs and Whyte (2007: 114) describe the allocation of fines under the Factory Acts in early nineteenth century Britain as being equally minimal. They describe the discretion of the courts during that time as indicative of 'a major problem of political will to enforce the law' (Tombs & Whyte 2007: 115). Tombs and Whyte (2007: 109-124) attribute the difficulties in implementing the Factory Acts to the state's reluctance to criminally sanction wealthy factory owners. They identify this as a key issue even in the contemporary context; if the criminal justice system is designed to regulate the activities of lower class individuals, its ability to be extended to regulate the wealthy and powerful individuals and corporations is questionable (Tombs & Whyte 2007: 109).

Aside from issues relating to class and capital interests, there exist many organisational features specific to corporations that make the allocation of fines as punishment questionable in terms of its deterrent, retributive and rehabilitative values. The following criticisms relate to punishment schemes under both the OHS and criminal law regimes as both rely on fines as a punishment for corporations found guilty of an offence.

As Stone (1975: 30) suggests, the allocation of fines as a punishment for corporations stems from the law's deterrent and compensatory aims. It has been argued that the law can regulate corporations effectively by increasing the level of fines applicable to breaches of the law (McCallum et al. 2004). However, the current situation and any attempts to raise fines in the future face serious problems, all of which prove that this is an inadequate approach to dealing with corporate wrong-doing. Fisse (1986: 27) argues that proposals to increase the level of fines are limited to the extent that money can satisfy the deterrent, retributive and rehabilitative features of the law. He argues that fines alone are not always able to do this. There are several reasons for this, namely the existence of organisational structures which enable the corporation to avoid feeling the effect of the fine and the existence of non-financial imperatives which alter the corporation's perspective on fines and deterrence (CAMAC 2000: 3; Fisse 1986: 28; GPSC1 2004: 120; Stone 1975: 24, 49-50).

Given that laws aim to deter the incidence or repeating of particular behaviours, fines are often considered to be an inadequate penalty for corporations (Ford et al. 2001: 682; NSWLRC 2003: 33). The level of fines, as determined by the legislature, is often insufficient to act as a deterrent to corporate wrongdoing, as the fine is either insubstantial given the corporation's value⁵⁴, can be paid for by increasing the cost of goods or services or by dismissing employees, or, where ownership is separated from control, the fines may fall on the shareholders in the form of lower returns on investment (Fisse 1986: 33-34; Ford et al. 2001: 682; Tomasic & Bottomley 1995: 277; Tombs & Whyte 2007: 26, 176-177). Where the corporation is asset rich, the fine may be incorporated as a business cost prior to the commission of the offence (Tomasic & Bottomley 1995: 277).

⁵⁴ Tombs and Whyte (2007: 176) give the example of a record £15 million fine given to Transco Corporation for OHS offences. While this was a record fine under the British OHS legislation, it constituted two per cent of the company's previous year after-tax profit. The authors calculate that this is equivalent to a £40 fine for someone earning £25,000 a year.

Corporate personhood can also be manipulated in order to avoid the payment of fines. A trend has been identified whereby corporations have deliberately gone into receivership in order to avoid their legal obligations, including the payment of fines, only to commence business soon after under another trading name (GPSC1 2004: 120). In evidence given to the General Purpose Standing Committee (GPSC1) for its report into serious injury and death in the workplace, Andrew Ferguson from the Construction, Forestry, Mining and Energy Union (CFMEU) commented on these corporations, known as *phoenix companies*:

One would think if you kill, you're penalised, our costs go up – that's not the case. You fold your business. WorkCover [the occupational health and safety regulator] doesn't track it. You set up another company. I know one building company that's had twenty companies. They used to be the directors. Then they used their wife as the director. I think now they're using their grandkids as the directors of the building company. They don't pay the fines (GPSC1 2004: 120).

This is a particularly disturbing by-product of corporate personhood whereby a corporate individual can disappear only to re-emerge identical in form (possibly including managers and owners) but with a new legal identity and is thereby able to avoid previous liabilities.

Not all problems relating to fines are based on the insignificance of fines to the corporation. Tombs and Whyte (2007: 176) point out that there are higher charge and prosecution rates against smaller corporations where the links between an act or omission and a 'controlling mind and will' are more discernible than in a larger corporation. However, they claim that it is these firms which are also the least able to pay fines; the result is an inequitable application of punishments to organisations based on their size (Tombs & Whyte 2007: 176). Fisse (1986: 27) also identifies some corporations that are unable to pay the fines that would, in the court's view, act as an effective deterrent or provide adequate retribution. This argument points to the range of business capabilities, from being unable to

pay a fine to barely feeling the impact of a fine on profits. A contrast is readily evident between this and the physical and psychological capabilities of human individuals whose interests and capabilities are arguably less divergent amongst the species. Most human individuals generally fear imprisonment, physical harm, or death and are (without accounting for differences in punishment regimes across jurisdictions) able to be subject to all three alongside various other punishments, in relatively equal measure.

Deterrence is a significant factor for punishment by way of fine if the corporation is owned by people who control its management. In this situation the threat of conviction may encourage self-regulation (Ford et al. 2001: 682; NSWLRC 2003: 38). However, in most corporations, management and ownership are separated. An example of this is found in corporate decision-making. Stone (1975: 40) describes the plethora of relationships to which the corporation is a party, the fulfilment of which can be more important, in terms of profit and business sustainability, than the fulfilment of legal obligations. Managers must consider employees, suppliers, creditors, competitors and the market amongst others all of which present opportunities and threats to the corporation's profit:

there are any number of areas from which profits may be enhanced or threatened, each of which competes with the law for the interests of the corporation. And of these, law is not likely to occupy the foreground of the businessman's attention (Stone 1975: 40).

In regards to compensation, Stone (1975: 43-46) argues that the possibility of future compensation can be so distant, often more than five years into the future given the delays associated with litigation, that it is not even a valid business consideration. The short-term nature of capitalist enterprise – the immediate fulfilment of immediate desires – means that such long-term issues, which may not even eventuate, are simply not a business reality. This situation is exacerbated due to the contemporary business structure which is diffuse in terms of the labour process and decision making. When labour is divided, workers are

less likely to see their particular process as part of a larger corporate scheme⁵⁵. Stone (1975: 44) refers to these workers as part of the corporation's *subsystem*, with each division given their *subgoals*. These subgoals are to be met by a specific time and are not always clearly referenced back to the corporation's profit goal. Accordingly, while it may be in the corporation's economic interest to stop the production of a faulty product part, the subsystem's goals and targets are more immediate than any safety concerns and are the immediate concern of the worker who presumably aims to progress in the workplace due to their success in meeting the subgoals (Stone 1975: 43-44; see also Lee & Ermann 1999: 30).

This network element of corporate organisation is evident not just in labour processes through the hiring of casual or sub-contracted labour, but also in the organisation of industries. The construction industry, for example, is constituted by many small companies linked through sub-contracting systems and long supply chains (Tombs & Whyte 2007: 11). Such organisation, while advantageous economically, has significant effects on the applicability of law. In complex corporate groups, responsibility and accountability are difficult to locate, making individualistic laws more difficult to apply. The GPSC1 heard evidence in its inquiry into serious injury and death in the workplace that there is 'considerable confusion' between contractors and sub-contractors on work sites in NSW as to responsibility for workplace safety (GPSC1 2004: 32).

Corporate groups present the same issues in regards to locating liability. Decreasing the risk of legal liability has been identified by the Companies and Markets Advisory Committee (CAMAC 2000: 3) as a primary economic and commercial benefit for conducting business through a corporate group structure. In such instances, particular companies in the group will be assigned high liability risks in order to protect the high value assets of other businesses in the group.

⁵⁵ Tombs and Whyte (2007:19-21) describe the 'marginalisation of workers' expertise' as a reason for the failure of safety systems following the explosion of the Piper Alpha oil production platform in the North Sea in 1988 which saw 167 people killed.

The corporation possessing the highest value assets is usually the parent company. Fisse (1986: 32) describes parent companies as using subsidiary companies as 'cushions' for fines received. Incorporated subsidiaries have separate legal identities to their parent companies. Consequently, parent companies are not responsible for fines incurred by subsidiaries; instead subsidiaries must meet their own legal obligations. Through such a structure, parent companies have the potential to operate through their subsidiaries, thereby distributing liability and the punishments associated with it. According to Fisse (1986: 33), this is a serious impediment to the administration of fines.

Fisse (1986: 28) and Stone (1975: 49-50) outline another reason for the inadequacy of economic penalties; namely that the motives of managers cannot always be reduced to economics. There are many other non-financial goals of corporations which influence decision-making. Corporate personnel may have goals which deviate from the profit goals of the corporation. Fisse (1986: 28-29) argues that these non-financial goals include the desire for prestige, power, creativity and security. The search for these, he argues, is not always compatible with the 'satisfaction of monetary want'. Accordingly, fines against corporations cannot sanction the wrongdoing that may emerge from the search for these things, nor can the law compete with these alternative imperatives.

Aside from their practical impotence, the theoretical value of fines is questionable. Fisse (1986: 29) argues that fines do not adequately express the social sentiment that exists around a particular action being seen as abhorrent. Instead, he argues, fines are seen as giving permission to the commission of crime by virtue of their detachment from notions of shame and gravity:

Given that many kinds of corporate offences are patently unwanted by the community, it seems insensitive to make fines available as the only punitive sanction for such offences. Fines do not emphatically convey the message that serious offences are unwanted. Rather, the impression fostered is that the commission

of crime is permissible provided there is willingness to pay the going price (Fisse 1986: 30).

While this is not limited to the fines allocated to corporations and could include many human offences, such as speeding, for which fines are allocated, this suggests that what is required from the punishment of corporations is the sense that a wrong has been acknowledged and that in acknowledging the wrong, some long term effect is felt by the corporation which will discourage them and others from repeating the action. This combination of deterrent, retributive and rehabilitative effects within punishment is not possible through the allocation of fines.

Fisse (1986: 31) argues that theoretically, fines are intended to have a rehabilitative effect by encouraging organisational reform through the development of better internal compliance systems. However, this aspect of the punishment is left to the corporation's discretion, making self-regulation appear optional and less serious an aspect of punishment than would be if it were enforced by the state (Fisse 1986: 32; Tasmanian Law Reform Institute 2007: 59).

There have been proposals for alternative punishment schemes such as adverse publicity and public shaming to be introduced for corporate offenders. These punishments concentrate on the importance of public image and prestige to corporations but as yet have not been endorsed by the legislature or the courts for incorporation into the law of NSW (NSWLRC 2003: 48-52). In some cases, the Federal Court or the NSW Supreme Court can order a corporation to be wound up in the interest of the public, the corporation's members, or the creditors (Ford et al. 2001: 686). However, given the difficulty of securing a criminal prosecution against a corporation, these alternatives are unlikely to be pursued by the courts.

In terms of punishment, the real question is not what alternatives should be available, but rather alternative modes of calculating corporate liability.

Regardless of how a corporation will be punished, concerns must first be directed at enabling the law to convict a corporation. The liability structures not only affect punishment, but also deterrence. If it seems as though a punishment such as the winding up of a company is a reality in terms of legal tests, this may act as a real deterrent for the corporation.

The differentiation of corporate legal individuals from human legal individuals has been extended from the liability structures which were discussed at the beginning of this chapter to the very nature of the acts which regulate them; not only are corporate crimes in the realm of OHS considered to be strict liability, they are also regulated by a regime with different standards of investigation, administration and prosecution to the general criminal law. Given these discontinuities, the perception held by the public, law-makers, judges and employers is that convictions under health and safety legislation are different to convictions under the criminal law, they are less serious, 'less deserving of moral stigma' (Cotterrell 1992: 270). These distinctions favour corporations not only because they are difficult enough to hold criminally accountable, but also because the Act under which they are most likely to be convicted for workplace deaths, the *Occupational Health and Safety Act 2000* (NSW), is problematic in its form and administration. This situation both reflects and reinforces the jurisprudential shortcomings and struggles in relation to controlling the corporation.

The primary aim of Australian law in penalising certain behaviour is to deter individuals from committing or repeating prohibited acts or omissions (NSWLRC 2003: 44). When the law is effectively immobilised there is no incentive for corporations to strictly obey it: 'when low certainty of punishment is combined with relatively lenient sanctions, deterrence is almost completely lacking' (Conklin 1977: 137). The likelihood of a corporation being convicted of manslaughter in Australia is small even if a worker was killed due to clear negligence. In theory, OHS legislation and WorkCover are the best equipped for criminally prosecuting corporations as they are tailored toward industry and thus

are limited in individualism as evident in the general law. However, the potency of this legislation and the agency that administers it is questionable given its divorce from the general criminal law and processes.

Industrial Manslaughter Legislation

There have been calls for the inclusion of a specific crime of corporate manslaughter or industrial manslaughter into criminal and OHS laws in Australia and other common law countries⁵⁶. In November 2003, the NSW Legislative Council commissioned an inquiry into serious death and injury in the workplace. Part of the mandate issued by the Legislative Council was to examine criminal liability for workplace deaths and the role and performance of WorkCover. The final report was presented in May 2004⁵⁷. Among its recommendations was the inclusion of a crime of corporate manslaughter and corporate negligence.

Recommendation 26 of the report read as follows:

That as a matter of urgency, discrete and specific offences of 'corporate manslaughter' and 'gross negligence by a corporation causing serious injury' be enacted in the *Crimes Act 1900* (NSW)⁵⁸.

This recommendation was reached following an analysis of criminal and regulatory law. The inquiry found that Australian corporate criminal liability laws were in need of amendment as they often prevented liability for workplace deaths being realised (GPSC1 2004: 144). It also found that no corporations in NSW had been charged for the death of a worker despite the existence of provisions for this in the *Crimes Act 1900* (NSW) and the *Occupational Health and Safety Act 2000* (NSW). The inquiry linked this directly to the individualistic design of corporate criminal liability laws. Importantly, the inquiry noted the need for legislative

⁵⁶ See Glasbeek (2002: 181-182), GPSC1 (2004: 135-142), Tombs and Whyte (2007: 138-139) for a discussion of attempts to introduce such legislation in Canada, Victoria (Australia), and the United Kingdom.

⁵⁷ General Purpose Standing Committee 1 (GPSC1) (2004) *Serious Death and Injury in the Workplace*. Sydney, Legislative Council of NSW.

⁵⁸ The Committee preferred the term 'corporate manslaughter' over 'industrial manslaughter' as it was taken to be more inclusive across industries when discussing corporate liability for deaths (see GPSC1 2004: 124).

reform of corporate criminal liability laws if corporate manslaughter provisions were to be successful (GPSC1 2004: 144).

In January 2004, WorkCover commissioned a report into various occupational health and safety matters including whether a new offence relating to workplace death was required. The report was investigated and written by legal professionals and was released soon after the Government inquiry in June 2004⁵⁹. The reports are vastly different in their analysis, findings and recommendations. The WorkCover report does not consider the inclusion of an industrial manslaughter offence into the *Crimes Act 1900* (NSW). It is rejected on the grounds that OHS law should remain a specialist jurisdiction. The deterrent value of industrial manslaughter provisions is also questioned in the report which argues that there would be few convictions under such legislation given the high standard of proof required to secure a conviction (McCallum et al. 2004: 17-18). Instead, the report advocates the introduction of a new offence of workplace death within the *Occupational Health and Safety Act 2000* (NSW) (McCallum et al. 2004: 7). The report calls for higher penalties and more penalty options for corporations convicted of the new offence (McCallum et al. 2004: 12). The report's authors stress the preventative nature of OHS legislation and the difference between this and an offence of workplace death, however the new offence is justified by reference to the inadequate sentencing patterns and the failure of deterrence in cases involving workplace deaths (McCallum et al. 2004: 11).

The report does not recognise the failures of existing law as lying with faulty principles of corporate criminal liability and does not suggest a review of these laws. Instead, problems with sentencing and deterrence are seen as administrative issues, the responsibility for which lies with the judiciary.

⁵⁹ McCallum et al. (2004) *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation and Other Matters*. Available from: <http://www.workcover.nsw.gov.au/NR/rdonlyres/CA20497D->

Following the publication of the WorkCover report, the NSW Government introduced a new crime into the *Occupational Health and Safety Act 2000* (NSW) section 32A of 'Reckless conduct causing death at a workplace by person with OHS duties' in June 2005. The new offence allows for managers, directors, suppliers of plant and substances, and corporations to be found liable for a workplace death. It increases the maximum penalty to \$1,650,000 for corporations and \$165,000 or five years' imprisonment for individuals. There are no special tests of liability; however the automatic implication of directors and managers in corporate breaches of OHS law does not apply to this section⁶⁰ and the offence is not one of strict liability. The new law remains subject to the limitations of the identification doctrine and is only to be heard summarily, without a jury, before the Industrial Relations Commission⁶¹. The new law is still significantly distanced from the gravity of the criminal law and remains tied to the theoretical and practical problems associated with regulatory law and the liability of corporations. Aside from its symbolic value, which is not inconsiderable, Glinatsis (2006: 11) affirms that the new legislation will be faced with the same problems as previous regulation.

Industrial Manslaughter Legislation in the Australian Capital Territory

During the 2001 territory election campaign, the Labor Party in the ACT committed to introduce a crime of industrial manslaughter into the general criminal law should they be elected to office. The Party was elected and in 2002 began to formulate the legislation. The *Crimes (Industrial Manslaughter) Amendment Bill 2002* (ACT) was passed in November 2003 and became effective in March 2004. Section 49C of the *Crimes Act 1900* (ACT) specifies the employer offence of industrial manslaughter and significantly increases the penalties of fine

⁶⁰ See *Occupational Health and Safety Act 2000* (NSW) s 32A (6)

⁶¹ See *Occupational Health and Safety Act 2000* (NSW) s 32B. If an individual is convicted under this section they have the right to appeal to the full bench of the Industrial Relations Commission and then to the Court of Criminal Appeal. A corporation may only appeal up to the full bench of the Industrial Relations Commission.

and imprisonment. It applies to all industries, employers and organisations. The offence reads as follows:

s. 49(C) Industrial Manslaughter – Employer Offence

An employer commits an offence if –

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

Maximum penalty: \$5,000,000, imprisonment for 20 years or both.

The legislation, while applying to all organisations and employers, has been designed for corporations. In 2003, Ms. Katy Gallagher, the Minister responsible for introducing the legislation acknowledged this: 'the new offences will not impose any new or different liabilities on employers, but will allow employers who are corporations to be effectively prosecuted' (Gallagher 2003: 1).

The capacity of the legislation to achieve this is enhanced by section 52 of the *Criminal Code 2002* (ACT) which allows for the negligence of a corporation to be proven by aggregating the conduct of its representatives. This is a significant departure from common law principles of corporate criminal liability and is another example of differentiation within the largely assimilative regime of the general criminal law resulting from inadequacies in the identification doctrine.

While it makes regulation easier, it is also a more accurate legal description of the corporation. Aggregation recognises the distinctions between the corporate and human forms and the advantages that corporations often have in avoiding liability because of their diffuse structures and decision-making chains (NSWLRC 2003: 24). Allowing for corporate liability to be formulated through aggregation minimises this corporate advantage and makes the criminal law more equitable in terms of its design, administration and outcomes. The incorporation of this principle into the law of the ACT, along with the development of industrial manslaughter legislation, makes it clear that reform of corporate liability is recognised by the ACT Government as an issue which needs both attention and new approaches⁶².

Conclusion

The fundamental problem with existing concepts of corporate liability, particularly direct liability and the identification doctrine, is that they cannot recognise the holism of organisations: '[they try] to establish group responsibility for group behaviour by adapting laws and concepts (such as mens rea) that are oriented towards individual human defendants' (Tomasic & Bottomley 1995: 281). The law insists on seeing the corporation as an individual in order to harness its economic power. This power, described in Section One, would be different in kind if the corporation was viewed and regulated as a collective organisation. However, as this chapter indicated, these laws, alongside assisting in the development of corporate dominance, are problematic in themselves. The corporate form is ultimately at odds with the individualistic partiality of the common law which will always be unable to provide the impetus for the reform of corporate liability principles, despite having been inventive enough to create it in the first place.

⁶² There have been no corporations prosecuted under section 49C, but this is largely due to the low workplace fatality rate in the ACT. The ACT has always had very few workplace fatalities due to its smaller population. In 2001, there were two workplace deaths in the ACT (NOHSC 2001).

While alternatives have been posited, for example control through regulatory agencies, these are limited so long as they remain within the existing liability framework. The law's deterrent, retributive and rehabilitative components are rarely a threat to the corporate form. There are simply too many features of the corporation as a collective organisation which entail that the law is difficult to apply and relatively easy to avoid. The regulation of workplace deaths is one area where establishing corporate liability is a challenge. However, the very design of the law, which attempts to make corporate regulation easier, also has the effect of creating a second-class law. This is especially the case when regulatory law and agencies are charged with regulating corporations. This invariably involves different legal standards, modes of investigation and administration.

All of these differences serve to construct breaches of regulatory law as less serious than a breach of criminal law. This significantly challenges the deterrent value of regulatory laws. When regulatory laws are concerned with such an important area as occupational health and safety, those who the laws are intended to protect must rely on this second-class legal system. It is a system which has proven to be ineffective and yet which persists. This paradigm has not been unchallenged and political recognition of it is evidenced by the introduction of industrial manslaughter legislation in the ACT. However, large scale shifts in the design of corporate criminal liability laws are unlikely to happen even when the effects of the faulty laws become clear through injury and death.

The upholding of problematic liability structures indicates the transmitted nature of law. Just as there is nothing 'natural' about the legal shape of corporations, law itself has no objective existence. Tombs and Whyte (2007: 141-142) argue that law is created by the state and is designed to reflect the intentions of the state. The attributed legal characteristics of corporations, and legal orders themselves, can be contested and reformed. Pearce and Tombs (1998) and Tombs and Whyte (2007) argue that this requires researchers to look beyond definitions of corporate

crime provided by the state. For these and other authors in sociology and criminology, attempts to understand and control corporate wrongdoing can only be effective in the extra-legal realm as opposed to working within state-defined parameters. Central to this is acknowledging the rhetorical nature of law that individualises the corporation and reluctantly regulates it, and instead affirming the holism of the corporate form and its potential to harm workers and communities beyond that of any human individual.

Chapter Eight: Conclusion

In this thesis I attempted to trace the origins of contemporary patterns of corporate dominance by analysing their legal structure. This began by establishing economic, legal and organisational patterns of corporate activity. The scale and frequency of these patterns, alongside theoretical and empirical studies of corporate activity, support a description of them as patterns of corporate dominance. Corporations are economically significant in employment, industry and asset ownership. This economic dimension to their dominance integrates corporations into other realms of society such as politics and community welfare; a dependency on profitable corporate activity has developed which goes beyond material existence and toward fundamental elements of life such as health and meaning attained through work (Calhoun & Hiller 1988: 162-181). The scope of this integration requires that corporate activity be good, as the effect of harmful corporate activity could be, and has proven to be, widespread and damaging. The case study of James Hardie asbestos operations presented in Chapter Three indicated the extent to which corporations are embedded in society and the potential harmful effects of this. Central to this perspective is an analysis of state law, often neoliberal state law, as the foundation of corporate dominance; the James Hardie case study highlighted the role of the state in creating the legal conditions favourable to corporate dominance.

Section Two of the thesis explored this further through an examination of corporate law's theoretical and legal history. This focused on what was deemed to be the legal cornerstone of contemporary corporate dominance, namely legal individualism. The maintenance of individualistic laws such as corporate personhood and limited liability has ramifications for the theory and practice of corporate regulation. In describing the corporation as an individual, the law ignores the collective elements of corporate operation. Corporate ownership structures, work processes and managerial hierarchies do not correspond with the

individualist legal paradigm; they are, particularly in the largest corporations, collective operations. Throughout the thesis, I posited this collectivism as a major source of corporations' success and to the patterns identified in Section One. This collectivity presents a challenge to legal individualism and its application to the corporation which theory has struggled to address.

Liberalism and capitalism are part of the mandate for legal individualism (Bobbio 1990: 41; Bowman 1996: 6). The dominance of liberalism and capitalism in countries such as the US, UK and Australia, has legitimated the legal emphasis on individualism. However, the corporate form cannot be wholly rationalised by liberal theory and remains counter to its emphasis on individual liberty (Gray 1986: 64). The pooling of human resources happens at all levels of a corporate organisation, from employees to shareholders and is central to the form's success. Individual freedom cannot be realised within this structure, which transmits knowledge and resources from the individual to the collective. This contradiction challenges the dominance of both liberalism and the corporation in Western countries. However, insofar as legal individualism allows for the commodification of the most economically powerful bodies, it seems that this contradiction can be overlooked. If corporations were to become less profitable, or more harmful, they may suffer a legitimisation crisis that exposes this contradiction and forces a reassessment of their contemporary role.

The dominant theories of the corporation, namely fictionalism, natural entity theory and contractarianism, represent the theoretical equivalent of liberal individual corporate law. They describe the corporation as a creature of the state, with an individuality that enables it to take part in the individualised social interactions envisioned by liberalism and capitalism. Theories that attempt to move beyond this to describe the corporation as a collective, namely Gierke's fellowship theory and Berle and Means' managerial thesis, identify not only the collective nature of corporate operations, but also the basis which corporate

dominance has in its collectiveness. However, these theories have been the least popular amongst lawmakers and legal theorists and have faced significant opposition for being il-liberal. The content and acceptability of a particular theory is indicative of the political and rhetorical times in which it was influential. The enduring success of statist and individualist theories over the collective theories indicates the longitudinal individual emphasis of common law.

Theory's inability to reconcile the corporate form with individualist laws is also found in the practical apportioning of liability to corporations. The liability tests which corporate personhood necessitates are difficult to apply to corporations. Tests based on the personal fault of key corporate personnel indicate liberal law's inability to acknowledge the structure and claims of the collective. While this satisfied the theoretical mandate for individualist laws, the structural features of corporations such as the diffusion of responsibility and the management hierarchy render these principles ineffective. These features, in conjunction with the artificiality of corporations, make it difficult for them to be regulated (Clough & Mulhern 2002: 72).

In instances where law attempted to develop a regulatory approach to corporations, jurisprudentially distinct bodies of law have developed. The differences in the language, aim, administration and perception of regulatory and general law construct corporate crimes as less serious than breaches of the general criminal law. The divide between the investigation, prosecution and punishment of workplace deaths in Australia under OHS legislation and the criminal law is an example of how an important area of law can be challenged by the problems of regulatory law and the inadequacy of individualist criminal laws.

Alternative Critiques of Corporate Regulation: Resisting Anthropomorphisation and Affirming the Individual

Corporations and their economic contexts present society with a multitude of falsehoods, convenient fictions which enable the smooth running of liberalism,

capitalism and their associated institutions. The fictional nature of capitalism's main commodities, originally identified by Polanyi, and the fictional legal status of the corporation are strong examples of this. Some corporate governance studies are significantly distinguished from other analyses of the corporation by virtue of their insistence on the human reality of the corporation; they seek to assert the human basis of corporations and act against the anthropomorphisation of the corporation. One such theorist, Bower (1974: 178-213), describes what he calls the amorality of the corporation as something produced by humans and able to be controlled by humans, particularly those involved in the governance of corporations. By focusing on management as central to the existence of the corporation, its human basis is asserted, therefore opening up possibilities for its theoretical reconfiguration. In doing so, the possibilities for effectively regulating the corporation are also increased. This work was most famously pioneered by Berle and Means ([1932] 1968) whose work was discussed throughout this thesis. However, the re-writing of their argument by contractarians and the fragmentation of research into corporations, as discussed in Chapter Six and Chapter One respectively, mean that theoretical and practical solutions to the regulation of corporations are yet to be achieved:

Although...studies provide useful insights into the concrete operations of some of the institutions for corporate governance...they have not yet generated a robust sociological and institutional alternative to [dominant theories] (Davis 2005: 153).

Davis (2005: 156) argues that sociologists are largely absent from discussions about the firm, most of which are functionalist in their analysis of corporations. His argument echoes that of Bower (1974) who calls for an end to theories which see the corporation impersonally and as a reification. Like Bower, Davis (2005: 156) insists upon the human basis of corporations: 'the institutions of corporate governance at both the micro level...and the macro levels...are self-evidently human constructions'.

Bower (1974: 178) argues that the anthropomorphisation of the corporation leads critics to focus on the corporation as the origin of social ills. This diagnosis is based on the idea that the large corporation is 'a malevolent conscious force' (Bower 1974: 178). Instead, Bower (1974: 179) argues that corporations are amoral in that they are tools for human action and do not possess any intent themselves. In this way, the corporation acts as a house for the intents of the individuals who make it up, an analysis which mirrors the fictionalist approach to corporate regulation. Under the current legal regime, corporations yield significant economic advantages from being socially amoral.

Bower (1974: 179) argues that if economic efficiency is the standard of worthiness, then the corporation can be considered partly moral. However, when contemporary corporate activity is involved in other realms of social life, a different type of morality is required from the corporation which simply does not exist. The networks that exist in contemporary society mean that corporations and the individuals who work within them now have an impact, sometimes negative, on environments, public safety, and resource allocation (Bower 1974: 206).

For Bower, the key to changing the corporation's moral status lies in changes to corporate governance. He criticises sociological approaches which see the corporation as a monolith thereby denying the complexity of the corporate structure and the importance of the individuals within it (Bower 1974: 182, 184, 210). Instead, he sees the reformation of faulty legal principles as lying in the reconfiguration of managers' duties, the current legal description of which he describes as impersonal and character denying (Bower 1974: 179, 206). Bower (1974: 206) supports legal regimes which seek to pierce the corporate veil, thereby abolishing corporate anonymity and increasing individual responsibility. However, before this is successful, fundamental principles of corporate governance need to be reconfigured. Bower (1974: 206) calls for an increase in the legal emphasis on managers as responsible for corporate activity.

This argument plays to, rather than against, the individualism which is characteristic of contemporary society and which has been examined and criticised at length in this thesis. While the inclusion of corporations as individuals into the legal system is an attempt to satiate the demands of liberalism, it is also a fiction. Bower's approach to corporate regulation through stronger corporate governance deconstructs the corporation and confirms it as a structure of human creation, and, going further than this, as a structure of individual action. His argument is based on the potential for an assertion of individualism to lead to better social outcomes:

What is needed is a new recognition of the important role individual values can play on organisational behaviour. By stressing the role of the individual we can capitalise on our cultural heritage of individual morality. But in order to accomplish this objective, we must remove the screens that detach social consequences from their origins in individual acts. Individuals must bear the consequences of their actions, and this may mean the necessity of ending the social, political and, in some areas, even the economic aspects of limited liability (Bower 1974: 210).

The key to this is in refusing to reify the corporation. In asserting the human basis of the corporate form and its current legal structure, Bower (1974: 211) is able to argue for the malleability of institutions and their capacity for transformation across time and space:

Law, the institutions of government and the organisation of production are choices made by men (sic). The problem is to apply new knowledge of man, his social behaviour and the environment to the task of making his institutions more responsive to his needs. Now that we live so close together that individual behaviour has continual social consequence, we must be sure that the standards that express our aspirations for the quality of life in

our society are brought to bear on decision-making in our major organisations (Bower 1974: 211).

This perspective, while advocating the individualism which I have attempted to deconstruct, encapsulates a key point of this thesis: that corporations and corporate activity need to be made relevant and amenable to contemporary society. A part of this involves, as identified by Bower and stressed throughout this thesis, a reconfiguration of their centuries-old legal form.

The legal perspective I have taken in this thesis is essential to understanding the context of corporate dominance. However, this is different to analysing and categorising its effects. For this second, vital research aim, an extra-legal approach to describing corporate wrong-doing is almost essential. The legal description of the corporation, and the resulting difficulties with regulating it, necessitate the abandoning of legal definitions for productive, informative and relevant inquiries into the nature and effects of corporate activity to be made by disciplines within the social sciences. Without this approach, the case studies presented in this thesis could not be considered as instances of wrong-doing symptomatic of the complexity of contemporary corporations.

Beyond Legal Definitions of Wrong-Doing

As the case studies of James Hardie and workplace deaths highlighted, undesirable or harmful corporate conduct is not necessarily described as 'criminal'; this can result from a lack of legislation, but may also be the result of the practical issues associated with applying law to corporations. The legal status and organisation of corporations are such that when it comes to corporate harms, it is difficult to examine them within the bounds of legal codes. Due to these issues, there is a need to look beyond law to reach an adequate understanding of corporate wrong doing.

Ehrlich (1922), Ellickson (1994) and Schwendinger and Schwendinger (1975) stress that a study based on legal doctrine is inherently limited. By using codified

law as a mechanism for delimiting legitimate areas of study, a multitude of harms that impact people's lives are unable to be studied. These harms deserve to be studied not only because of this impact, but also because many are preventable. The activities of powerful groups such as states and corporations are among those that are notably absent from traditionalist paths of inquiry (Schwendinger & Schwendinger 1975).

The formalistic perspective of crime has been challenged by the emergence of critical criminology and the search for the epistemological foundation of the term 'crime' (Brodeur & Ouellet 2004: 1; Schwendinger & Schwendinger 1975). These studies assert that the link between politics and the economic power of corporations must be acknowledged and examined.

Chapter Seven outlined the reluctance of lawmakers to regulate factory owners in the early nineteenth century. The class based relationship between law makers and factory owners was posited by Norrie (2001: 85) as an explanation for this, alongside Tombs and Whyte's (2007: 114) contention that factory owners were considered to be of a 'respectable class' and therefore not deserving of harsh regulation. This led to the development of a body of regulatory law that sought to control factory owners without criminalising them.

Norrie (2001: 85) identified this as establishing the ambiguity of employer criminality; the legal ambiguity of the facts in the case study, just as that surrounding corporate criminal liability for workplace deaths, suggest this has continued. Further, Norrie (2001: 85) argued that underlying this ambiguity was a general sociological ambiguity as to employer criminality. Traditional perspectives on criminality, which use existing law as indicative of legitimate areas of study into deviance, bring this legal ambiguity into the academic realm. Essentially products of a liberal-capital legal system, the traditionalist approach to deviance is also capital-friendly. This focus limits the ability for social science to engage with issues such as those presented by the case study.

James Hardie may not be a criminal in the traditionalist, legal perspective, since it has not been found guilty of any state proscribed crime. However, the company's actions have resulted in a major public health issue in Australia, which, if given attention by the state, could have been controlled over fifty years ago. Studying the company's history, its restructures and the campaign for compensation highlights the subjectivity of law and supports attempts to study activity which can be identified as deviant in an extra-legal sense. Far from being disempowering, identifying these problems allows for a consideration of real legal and political alternatives to the corporation and its regulation.

Concluding Thoughts and Direction for Future Research

The experiences of individuals and communities are now bound to the activities of corporations. Corporate activity brings many advantages in economic realms, however the integration of corporations into almost every area of life has also increased the likelihood of potential harm to occur and has increased the severity of this harm. By giving corporations the qualities of human legal individuals, the legal description of the corporation is central to this potential.

It is essential to examine law as central to establishing and ordering contemporary complexities. Through an examination of theory and its application through corporate liability laws, I explicated the difference between the individual vision of the corporation and its collective reality. This approach highlights the difference between studying law as a source of corporate dominance, and studying the effects of corporate dominance through legal categories.

Due to their dominance, corporations pose a significant threat to the wellbeing of individuals and communities. As long as corporate activity remains beneficial, these threats can be mitigated. However, the economic fortunes of corporations are subject to fluctuation. A downturn in their economic efficacy would necessitate a re-conceptualisation of their role in society. This begins with an

assessment of their legal character. Acknowledging the collective dimension to corporate activity, which I have begun to do in this thesis, would lead to better legal outcomes in realms such as workplace safety and community health, than are currently experienced.

Corporations, as subjects of sociological research, need to move from being the location of phenomena which sociologists are interested in to being the objects of study themselves. Sociology must engage with, and critique, corporations as institutions of great import. The legal analysis presented in this thesis indicates a way in which sociology can speak generally of the foundations of corporate dominance without denying the differences that exist amongst corporations and the benefits that flow from corporate activity. In acknowledging and attempting to engage with the complexity of corporations, research in the field must be similarly complex. An interdisciplinary approach is central to accurately portraying corporate dominance and was attempted in this thesis. This draws upon economic, jurisprudential, sociological, criminological and political accounts of the economy, law and corporations. The scale of such research makes its methods and findings highly contestable, particularly its reliance on literature for establishing corporations as a subject worthy of study. Since corporate activity is an issue over which significantly more academic discussion needs to take place, this contestable nature is its current utility.

Appendix: Extracts of Relevant Legislation

Corporations Act 2001 (Cth) s 9

"director" of a company or other body means:

(a) a person who:

(i) is appointed to the position of a director; or

(ii) is appointed to the position of an alternate director and is acting in that capacity;

regardless of the name that is given to their position; and

(b) unless the contrary intention appears, a person who is not validly appointed as a director if:

(i) they act in the position of a director; or

(ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

Note: Paragraph (b)--Contrary intention--Examples of provisions for which a person referred to in paragraph (b) would not be included in the term "director" are:

- * section 249C (power to call meetings of a company's members)
- * subsection 251A(3) (signing minutes of meetings)
- * section 205B (notice to ASIC of change of address).

"officer" of a corporation means:

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

Note: Section 201B contains rules about who is a director of a corporation.

Corporations Act 2001 (Cth) s 124

Legal capacity and powers of a company

(1) A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate, including the power to:

- (a) issue and cancel shares in the company;
- (b) issue debentures (despite any rule of law or equity to the contrary, this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long);
- (c) grant options over unissued shares in the company;
- (d) distribute any of the company's property among the members, in kind or otherwise;
- (e) give security by charging uncalled capital;
- (f) grant a floating charge over the company's property;
- (g) arrange for the company to be registered or recognised as a body corporate in any place outside this jurisdiction;
- (h) do anything that it is authorised to do by any other law (including a law of a foreign country).

Corporations Act 2001 (Cth) s 180

Care and diligence-civil obligation only

Care and diligence-directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) were a director or officer of a corporation in the corporation's circumstances; and

- (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

- (a) make the judgment in good faith for a proper purpose; and

- (b) do not have a material personal interest in the subject matter of the judgment; and

- (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

- (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)--it does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

"business judgment" means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

Corporations Act 2001 (Cth) s 181

Good faith-civil obligations

Good faith-directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

Corporations Act 2001 (Cth) s 182

Use of position-civil obligations

Use of position-directors, other officers and employees

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

Corporations Act 2001 (Cth) s 183

Use of information-civil obligations

Use of information-directors, other officers and employees

(1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

Note 1: This duty continues after the person stops being an officer or employee of the corporation.

Note 2: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

Corporations Act 2001 (Cth) s 671B

Information about substantial holdings must be given to company, responsible entity and relevant market operator.

Requirement to give information

(1) A person must give the information referred to in subsection (3) to a listed company, or the responsible entity for a listed registered managed investment scheme, if:

- (a) the person begins to have, or ceases to have, a substantial holding in the company or scheme; or
- (b) the person has a substantial holding in the company or scheme and there is a movement of at least 1% in their holding; or
- (c) the person makes a takeover bid for securities of the company or scheme.

The person must also give the information to each relevant market operator.

Crimes (Sentencing Procedure) Act 1999 (NSW) s 16

Fines for bodies corporate for offences punishable by imprisonment only

If the penalty that may be imposed (otherwise than under this section) for an offence committed by a body corporate is a sentence of imprisonment only, a court may instead impose a fine not exceeding:

- (a) 2,000 penalty units, in the case of the Supreme Court, the Court of Criminal Appeal, the Land and Environment Court, the Industrial Relations Commission or the District Court, or
- (b) 100 penalty units, in any other case.

Crimes (Sentencing Procedure) Act 1999 (NSW) s 17

Penalty units

Unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying \$110 by that number of penalty units.

Crimes Act 1900 (ACT) s 49C

Industrial manslaughter-employer offence

An employer commits an offence if—

(a) a worker of the employer—

(i) dies in the course of employment by, or providing services to, or in relation to, the employer; or

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

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

(c) the employer is—

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

(ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

Crimes Act 1900 (NSW) s 18

Murder and manslaughter defined

(1)

(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2)

(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

Criminal Code 2002 (ACT) s 52

Corporation-negligence

(1) This section applies if negligence is a fault element in relation to a physical element of an offence and no individual employee, agent or officer of a corporation has the fault element.

(2) 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).

Criminal Code Act 1995 (Cth) s 12.4

12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

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

(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

Criminal Procedure Act 1986 (NSW) s 10

Indictment of bodies corporate

- (1) Unless a contrary intention appears, a provision of an Act relating to an offence applies to bodies corporate as well as to individuals.
- (2) On arraignment, a body corporate may enter a plea of “guilty” or “not guilty” by means of writing signed by its representative.
- (3) If no such plea is entered the court is to enter a plea of “not guilty”, and the trial is to proceed as though the body corporate had pleaded “not guilty”.
- (4) A representative of a body corporate need not be appointed under the body’s seal.
- (5) A written statement that:
 - (a) purports to be signed by one of the persons having the management of the affairs of the body corporate, and
 - (b) contains a statement to the effect that a named person is the body’s representative,is admissible as evidence that the named person has been so appointed.

Financial Sector (Shareholdings) Act 1998 (Cth) s 10

Meaning of unacceptable shareholding situation

For the purposes of this Act, an *unacceptable shareholding situation* exists in relation to a particular financial sector company and in relation to a particular person if the person holds a stake in the company of more than:

- (a) 15%; or
- (b) if an approval of a higher percentage is in force under Division 3 in relation to the company and in relation to the person—that higher percentage.

Note: A person's *stake* includes the interests of the person's associates—see Schedule 1.

Financial Sector (Shareholdings) Act 1998 (Cth) s 23

Treasurer may declare person to have practical control of a financial sector company

Declaration

(1) If:

(a) the Treasurer is satisfied that:

(i) the directors of a financial sector company are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of a person (either alone or together with associates); or

(ii) a person (either alone or together with associates) is in a position to exercise control over a financial sector company; and

(b) the Treasurer is satisfied that:

(i) the person does not have any stake in the company; or

(ii) if the person has a stake in the company—that stake is not more than 15%; and

(c) the Treasurer is satisfied that it is in the national interest to declare that the person has practical control of the company for the purposes of this Act;

the Treasurer may declare that the person has *practical control* of the company for the purposes of this Act.

Declaration has effect

(2) A declaration under this section has effect accordingly.

Revocation of declaration

(3) The Treasurer must revoke a declaration under this section if the Treasurer ceases to be satisfied of the matters referred to in paragraphs (1)(a), (b) and (c).

Notification of declaration

(4) If a declaration under this section is made or revoked, the Treasurer must arrange for a copy of the declaration or revocation to be given to the financial sector company and the person concerned.

Foreign Acquisitions and Takeovers Act 1975 (Cth) s 9

Substantial and controlling interests in corporations

(1) For the purposes of this Act:

(a) a person shall be taken to hold a substantial interest in a corporation if the person, alone or together with any associate or associates of the person, is in a position to control not less than 15 per centum of the voting power in the corporation or holds interests in not less than 15 per centum of the issued shares in the corporation; and

(b) 2 or more persons shall be taken to hold an aggregate substantial interest in a corporation if they, together with any associate or associates of any of them, are in a position to control not less than 40 per centum of the voting power in the corporation or hold interests in not less than 40 per centum of the issued shares in the corporation.

(2) Where:

(a) a person holds a substantial interest in a corporation; or

(b) 2 or more persons hold an aggregate substantial interest in a corporation;

that person shall be taken to hold a controlling interest in the corporation, or those persons shall be taken to hold an aggregate controlling interest in the corporation, as the case may be, unless the Treasurer is satisfied that, having regard to all the circumstances, that person together with the associate or associates (if any) of that person is not, or those persons together with the associate or associates (if any) of each of them are not, in a position to determine the policy of the corporation.

Interpretation Act 1987 (NSW) s 8(d)

Gender and number

(d) a reference to a person does not exclude a reference to a corporation merely because elsewhere in the Act or instrument there is particular reference to a corporation (in whatever terms expressed)

Occupational Health and Safety Act 2000 (NSW) s 8

Duties of employers

(1) Employees An employer must ensure the health, safety and welfare at work of all the employees of the employer.

That duty extends (without limitation) to the following:

- (a) ensuring that any premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health,
- (b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used,
- (c) ensuring that systems of work and the working environment of the employees are safe and without risks to health,
- (d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work,
- (e) providing adequate facilities for the welfare of the employees at work.

(2) Others at workplace An employer must ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.

Occupational Health and Safety Act 2000 (NSW) s 12

Penalty for offence against this Division

A person who contravenes, whether by act or omission, a provision of this Division is guilty of an offence against that provision and is liable to the following maximum penalty:

- (a) in the case of a corporation (being a previous offender)-7,500 penalty units, or
- (b) in the case of a corporation (not being a previous offender)-5,000 penalty units, or
- (c) in the case of an individual (being a previous offender)-750 penalty units or imprisonment for 2 years, or both, or
- (d) in the case of an individual (not being a previous offender)-500 penalty units.

Note: Section 17 of the *Crimes (Sentencing Procedure) Act 1999* provides, at the enactment of this Act, that the value of a penalty unit is \$110. Accordingly, the above maximum penalties are as follows:

- (a) in the case of a corporation (being a previous offender)-\$825,000, or
- (b) in the case of a corporation (not being a previous offender)-\$550,000, or
- (c) in the case of an individual (being a previous offender)-\$82,500 or imprisonment for 2 years, or both, or
- (d) in the case of an individual (not being a previous offender)-\$55,000.

Occupational Health and Safety Act 2000 (NSW) s 32A

Reckless conduct causing death at workplace by person with OHS duties

(1) In this section:

"conduct" includes acts or omissions.

(2) A person:

(a) whose conduct causes the death of another person at any place of work, and

(b) who owes a duty under Part 2 with respect to the health or safety of that person when engaging in that conduct, and

(c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct,

is guilty of an offence.

Maximum penalty:

(a) in the case of a corporation-15,000 penalty units, or

(b) in the case of an individual-imprisonment for 5 years or 1,500 penalty units, or both.

(3) It is a defence to any proceedings against a person for that offence if the person proves that there was a reasonable excuse for the conduct.

Note: Section 28 provides general defences for any offence against the Act.

(4) For the purposes of this section:

(a) a person's conduct causes death if it substantially contributes to the death, and

(b) the death of a person is taken to have been caused at a place of work if the person is injured at the place of work but dies elsewhere as a result of the injury, and

(c) it does not matter that the conduct that causes death did not occur at the place of work.

(5) If a corporation owes a duty under Part 2 with respect to the health or safety of any person, any director or other person concerned in the management of the corporation is taken also to owe that duty for the purposes of subsection (2).

(6) Section 26 (Offences by corporations-liability of directors and managers) does not apply to an offence against this section. However, this does not prevent a director or other person concerned in the management of a corporation from being prosecuted under this section for an offence committed by the director or other person.

Occupational Health and Safety Act 2000 (NSW) s 32B

Prosecution for offences under this Part

(1) Proceedings for an offence against this Part may only be dealt with summarily before the Industrial Relations Commission in Court Session, despite anything to the contrary in section 105.

(2) Proceedings for an offence against this Part may be instituted only with the written consent of a Minister of the Crown or by an inspector, despite anything to the contrary in section 106.

(3) However, any person who would, but for subsection (2), be entitled to institute proceedings for an offence against this Part may make a written application to WorkCover for a statement of the reasons why proceedings for such an offence have not been instituted in respect of alleged conduct that may constitute such an offence. WorkCover is to provide a statement of those reasons to the applicant as soon as practicable after the application is made, unless the alleged conduct has been referred to the Director of Public Prosecutions for consideration of the institution of proceedings.

(4) Section 197A (Appeals against acquittals in proceedings for offences against occupational health and safety legislation) of the *Industrial Relations Act 1996* does not apply to an offence against this Part.

Occupational Health and Safety Act 2000 (NSW) s 86

Notification of incidents

(1) The occupier of any place of work must give WorkCover notice in accordance with this section of any of the following incidents:

- (a) any serious incident at the place of work (as referred to in section 87),
- (b) any incident occurring at or in relation to the place of work that the regulations declare to be an incident that is required to be notified to WorkCover.

Maximum penalty:

- (a) in the case of a corporation (being a previous offender)-750 penalty units, or
- (b) in the case of a corporation (not being a previous offender)-500 penalty units, or
- (c) in the case of an individual (being a previous offender)-375 penalty units, or
- (d) in the case of an individual (not being a previous offender)-250 penalty units.

(2) Any such notice must be given:

- (a) as soon as practicable (but not later than 7 days) after the occupier becomes aware of the incident, and
- (b) in the manner and form required by the regulations.

(3) Any such notice must, in the case of a serious incident, also be given:

- (a) immediately the occupier becomes aware of the incident, and
- (b) by the quickest available means.

This subsection does not apply if the occupier is aware that another person has given WorkCover notice of the incident.

Occupational Health and Safety Act 2000 (NSW) s 107

Time for instituting proceedings for offences

(1) Proceedings for an offence against this Act or the regulations may be instituted within the period of 2 years after the act or omission alleged to constitute the offence, except as otherwise provided by this section or section 107A.

(2) This subsection applies to an offence against section 11 (Duties of designers, manufacturers and suppliers of plant and substances for use at work) or section 86 (Notification of incidents). Proceedings for any such offence may be instituted:

(a) within 6 months after WorkCover first becomes aware of the act or omission alleged to constitute the offence, or

(b) within 2 years after the act or omission alleged to constitute the offence, whichever provides the longer period to institute proceedings.

(3) If a coronial inquest or inquiry is held and it appears from the coroner's report or proceedings at the inquest or inquiry that an offence has been committed against this Act or the regulations (whether or not the offender is identified), proceedings in respect of that offence may be instituted within 2 years after the date the report was made or the inquest or inquiry was concluded.

(4) This section applies despite anything in any other Act.

Occupational Health and Safety Act 2000 (NSW) s 107A

Time for instituting proceedings-special provision for work incident notification

(1) If an act or omission alleged to constitute an offence against this Act or the regulations gives rise to an incident (a "work incident") to which section 86 (Notification of incidents) applies, proceedings for the offence may be instituted:

- (a) within 2 years after the occurrence of the work incident, or
- (b) within 6 months after WorkCover first becomes aware of the work incident,

whichever provides the longer period to institute proceedings.

(2) It is to be conclusively presumed for the purposes of this section that WorkCover does not become aware of a work incident until whichever of the following happens first:

- (a) notice of the incident is given in compliance with section 86, whether or not that notice is given within the time required under that section,
- (b) WorkCover gives the employer or occupier concerned notice in writing that is expressed to be notice for the purposes of this section and indicates that WorkCover has become aware of the incident.

(3) The Chief Executive Officer of WorkCover may for the purposes of this section give a certificate in writing certifying as to when WorkCover first became aware of a work incident as provided by this section.

(4) Proceedings for an offence against this Act or the regulations cannot be instituted under this section more than 2 years after the occurrence of the work incident unless the Chief Executive Officer of WorkCover has certified in writing that the proceedings are in the public interest.

(5) A certificate given by the Chief Executive Officer of WorkCover under this section is conclusive evidence as to the matters certified and cannot be challenged, reviewed or called into question in any proceedings before any court or tribunal.

(6) For the purposes of the application of this section to a mine, a reference in this section to section 86 is to be read as a reference:

- (a) in the case of a mine to which the *Mine Health and Safety Act 2004* applies-to section 88 of that Act or to such other provision of that Act as may be prescribed by the regulations, or
- (b) in the case of a mine to which the *Coal Mine Health and Safety Act 2002* applies-to section 110 of that Act or to such other provision of that Act as may be prescribed by the regulations.

(7) This section applies despite anything in any other Act.

Trade Practices Act 1974 (Cth) s 45

Contracts, arrangements or understandings that restrict dealings or affect competition

(1) If a provision of a contract made before the commencement of the *Trade Practices Amendment Act 1977* :

- (a) is an exclusionary provision; or
- (b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;

that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation.

(2) A corporation shall not:

- (a) make a contract or arrangement, or arrive at an understanding, if:
 - (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
 - (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
- (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
 - (i) is an exclusionary provision; or
 - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(3) For the purposes of this section and section 45A, **competition**, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

- (a) the other provisions of that contract, arrangement or understanding or

- proposed contract, arrangement or understanding; and
- (b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect.

(5) This section does not apply to or in relation to:

- (a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;
- (b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or
- (c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:
 - (i) conduct that contravenes section 48; or
 - (ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
 - (iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

(6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:

- (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or
- (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
 - (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
 - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(6A) The following conduct:

- (a) the making of a dual listed company arrangement;
- (b) the giving effect to a provision of a dual listed company arrangement; does not contravene this section if the conduct would, or would apart from subsection 88(8B), contravene section 49.

(7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

(8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.

(8A) Subsection (2) does not apply to a corporation engaging in conduct described in that subsection if:

- (a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and
- (b) the notice is in force under section 93AD.

(9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:

- (a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and
- (b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;

but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (2).

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