Corporate Manslaughter Laws in Australia

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Many thousands of agonising deaths have resulted from the activities of producers of asbestos and asbestos products in Australia – CSR, who mined asbestos from Wittenoom for twenty years, and James Hardie (JHI), who manufactured asbestos products in Australia for over a century, as well as much smaller producers. It has been proved in civil court actions that the directors of the companies *knew* that asbestos causes lung disease and cancer even at very low levels of exposure as long ago as the 1930s in the case of JHI, and conspired to keep this knowledge from the public and their employees. In recognition of this, these companies have been forced to pay not just compensation, but *punitive* levels of compensation to victims who lived long enough to fight their court action through to the end. Both companies continue to earn billions of dollars for their shareholders, and in the case of JHI, have been able to hide behind a corporate veil and are now registered overseas.

I could not understand how it was that the directors of these firms were not behind bars on multiple charges of manslaughter. This was not a matter of carelessness or negligence. Their awareness of what they were doing had been proven in court. This article concerns the law relating to corporate manslaughter in Australia and how it is that wealthy and powerful people can knowingly and needlessly cause the deaths of thousands of people and escape any form of legal punishment.

The Corporate Personality

If the directors of JHI and CSR have committed a crime then they did so in their capacity as the "guiding (or 'directing') minds" of a corporation, employees of which committed the crime in pursuit of their employment. So the first issue to clarify is whether and how it is possible to speak of a *corporation*, as well as individual persons, being a subject of the criminal law.

Only individual persons may be the subjects of criminal law, and then only insofar as they are competent. This is the case in common law originating from the English law. One cannot be guilty of a crime by association. Conspiracy to commit a crime is provided for as a criminal act in itself. To commit a crime implies two elements: *mens rea* (a guilty mind) and *actus reus* (a guilty act). The guilty mind and the guilty act do not necessarily have to be in the same person, and much of the relevant law hinges on proving the connection between the "guiding mind" and the criminal act.

The Case of Sutton's Hospital was decided in England in 1612. The case concerned the right of Mr. Sutton to leave his estate to a charitable corporation, but it established the principle, retained ever since in the common law, that a corporation may be deemed to be a personality apart from the individual persons comprising it, and, since the 1930s, may be subject to the criminal law, exercising rights and committing crimes.

Now it is not tenable to claim that a corporation *is* a person. The concept of "person" is quite clear and it refers to an individual human being and not a corporate individual (such as "Plant manager of Wittenoom mine," or "CEO of JHI") or any association of people (such as "The Hell's Angels"). So it is universally agreed that the corporation as a person is a "legal fiction." The problem is that a corporation as an agent in human society is not at all a fiction but is *very real*. The corporate personality is a "legal fiction" because a corporation is not a person, and cannot have desire or exercise will and therefore cannot be guilty of a crime. The ruling is that for the purposes of extending the civil law and criminal law to cover the actions of corporations, a corporation may be *deemed* to be a person, and may be found guilty of crimes and punished under the law *as if* it were a person. A corporation cannot be sentenced to

imprisonment but may be fined, obliged to do community service or have its licence terminated. So, in specified circumstances, a corporation may be treated as if it were a person.

But it remains the case that a crime can only be committed by a person – "doing things with words" such as executing a document, swearing an oath, telling a lie, or "sins of omission" where the problem of identifying the officer responsible is an internal corporate matter, such as failing to make a machine safe or failing to warn a customer, or physical acts such as dumping asbestos or serving poisonous food. The problem then is to resolve the question as to whether the responsible agent of this crime was the minion who did or omitted to do the deed, some senior manager who authorised the act, or the corporation as a whole, whose policies were known to employees. Clearly, unless *some* guilty act is committed by *someone*, then there is no crime. But who is guilty? The Board of Directors, the mine manager or the corporation?

Australian Law in the Commonwealth Jurisdiction

The Commonwealth *Criminal Code Act (1995)*, which came into force in 1998, is the relevant Commonwealth legislation for this question. The Act covers only criminal acts which are crimes under Commonwealth law (which does not include Health & Safety legislation, for example, or homicide or manslaughter). So until the States legislate equivalents of this Commonwealth Act in their own jurisdictions, it will be the common law and State statutes which determine who is responsible for a death resulting from breaches of OH&S legislation or other corporate actions, other than Terrorism. But this Commonwealth Act introduced into Australian law the important concept of "corporate culture."

Part 2.5 - Corporate criminal responsibility (Division 12) is the relevant section.

12.1 General principles

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.
Note: Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

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

12.3 Fault elements other than negligence

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

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly,

tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a *corporate culture* existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

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

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

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

Note the following:

12.1 applies the principle under which a corporation is treated as if it were a person, but when it says "any offence" the scope of crimes covered is that of the Commonwealth jurisdiction.

12.2 means that if someone commits a crime in the course of their employment, they may be personally responsible, but so may the corporation, as a legal entity. This raises the issue of how it can be determined whether their action was really in pursuit of the policies and internal constitution of the corporation. If the actor was themself a "high managerial agent" as mentioned in 12.3(6), then liability is not vicarious, and the corporation is directly liable, in addition to the individual.

Otherwise, as delineated in 12.3, the *corporate body* which authorised or permitted that act is at fault. This may be because the agent "believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence" or – and this crucial – that "that a *corporate culture* existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

... that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision."

In the case of CSR and JHI it has been proved in court that the asbestos related death and injury incurred by employees, users of the asbestos products and neighbours was indeed due either to direct authorisation and permission of the board of directors, or flowed from the existing corporate culture, a key component of which was denial of the dangers of handling asbestos, a denial persistently and deliberately fostered and maintained by the directors of the corporation.

So this brings us to three observations leading to why the high managers of these companies have escaped criminal prosecution.

(1) The relevant crimes are all crimes under State provisions, not the Commonwealth Crimes Act, so we need to enquire as to the status of these provisions in the various State jurisdictions, so that "any offence" committed in the relevant jurisdiction may fall under the scope of corporate crime.

(2) The relevant actions by the board of directors are criminal only insofar as they implicate the corporate body as blameworthy. Although a *corporate culture* may be the *cause* of an action, it is not deemed to be the *result* of action by any person. To act as the high managerial agent of a corporate body which has a culture of manslaughter is *not a crime*.

(3) Given that the corporations were engaged in the business for which they were registered as companies, and asbestos production was not legislated as a crime, JHI and CSR were engaged in lawful business, not a criminal conspiracy. Authorising or permitting actions as high managers of a corporation is not to be equated with participation in a conspiracy. (See Appendix on Conspiracy law.)

Corporate Law in the State Jurisdictions

Up to the present moment, the Australian States have not mirrored the Commonwealth Criminal Code Act's provision as reproduced above. They continue base to themselves on the 'organic theory' (also known as the 'identification doctrine') in common law, rather than the concept of 'corporate culture' to attribute corporate liability for a crime.

In this approach, the actions of the CEO or Directors of the corporation are regarded as acts *of* the corporate body, rather than simply acts *on behalf of* the corporation. But the managers cannot be deemed responsible for criminal actions authorised or carried out by (for example) middle management. A middle manager who commits a crime, even if they believed they were carrying out company policy, is personally liable for their action, not the CEO or the company. In any large corporation it is almost impossible to prove that the CEO authorised or permitted actions performed by middle managers. Common law does not recognise the concepts of 'vicarious liability', 'corporate culture' or any means of attributing a criminal act to *systemic* problems within the corporate body (though civil wrongs *can* be so attributed).

As a result, despite a considerable number of prosecutions (in the UK and Australia) of large corporations under common law for corporate manslaughter on the basis that corporate policies led to deaths, none have been successful. It is generally agreed that prosecution of the management of large corporations can never succeed on the basis of the common law as it stands. A CEO would have to be caught red handed in a criminal act in the course of his or her duties as CEO for such a prosecution to succeed.

The possibility of a prosecution for manslaughter due to gross *negligence* is excluded because common law does not recognise the doctrine of 'aggregation'. This concept would allow for the fact that the knowledge of a corporation and its actions rely on the complimentary knowledge of people occupying a wide variety of positions and enacted by means of a division of labour as well as line management; no-one in a corporation

knows, or can be expected to know, everything that the corporation does. But the knowledge of the corporation can be computed as the aggregation of the knowledge of all its members. Without recourse to a concept of aggregation, it is usually impossible to prove that a corporation has been negligent.

Even if, by some remote possibility, a corporation were to be found guilty of corporate manslaughter, by a senior manager personally authorising in pursuance of their corporate responsibilities, an action predictably leading to a person's death, the most serious penalty which could be imposed would be a fine to be *paid by the corporation* in lieu of the term of imprisonment that the individual carrying out the action would suffer. Just one of the costs of doing business.

The A.C.T.

The Australian Capital Territory has a complicated mixture of sources and instruments of law, including statutes passed by its own Legislative Assembly, ordnances issued by the Governor-General, common law and law originating from the Commonwealth and NSW. The Crimes (Industrial Manslaughter) Act 2003 enacted by the A.C.T. Legislative Assembly includes a specific statute for 'industrial manslaughter', which would allow manslaughter to be attributed to a corporation through the provisions reproduced above in §2.5 of the Criminal Code Act.

However, there are no large manufacturing or mining corporations active in the ACT and soon after the ACT Government introduced this statute the Commonwealth, which employs about 60% of the ACT workforce, legislated an exception for itself, so there is no conceivable way this provision could be tested. Only a small firm where corporate manslaughter could in any case be captured by the common law could be convicted. Further, the ACT provision only covers employees and does not extend corporate liability to injury or death of customers or other members of the public (such as an ACT resident who used an asbestos product produced by JHI).

Falling between two stools

So the State / Commonwealth dichotomy remains: Commonwealth law having statutory provisions providing for the 'culture' of a large corporation connecting the *actus rea* to the *mens rea*, but not covering manslaughter and homicide, and State law having common law providing for the offences of manslaughter and homicide, but not allowing for vicarious liability. This situation would be rectified as and when the States mirrored the Commonwealth Criminal Code Act in their own jurisdiction, or the Commonwealth legislated to bring homicide under its jurisdiction, as it did for terrorism.

Further, the existing legislation, in both the State and Commonwealth jurisdictions, allow both the individual agent and the corporation to be guilty in respect to the same criminal act, with the individual guilty as an accessory. In both cases the responsibility of the managers of the corporation – whether for authorising the offending act or for failing to take action to foster a compliant corporate culture – is material to the attribution of criminality to the corporation. The "directing mind" of the corporation is the mind of its most senior manager.

But the corporate culture, or the actions which an individual employee reasonably believes would have been authorised or permitted by a senior manager, *do not lead to attribution of a criminal offence to the senior managers*. Corporate culture may *cause* the actions of corporate officers but cannot *result* from the actions or omissions of corporate officers. Even if a corporation such as CSR or JHI were to be found guilty of corporate manslaughter, the only sanction which could be applied would be a fine to be paid by the corporation. No doubt a corporation being found guilty of manslaughter would constitute serious adverse publicity and would normally be expected to reflect

badly on the careers of the responsible managers. But in the case of companies which continue to avoid paying compensation by fair means and foul, this can hardly be deemed a disincentive. For such managers, a corporate manslaughter charge would be worn as a badge of honour.

The idea of a 'corporate culture' of longstanding existence in a corporation and continuing as individual officers, even senior managers, come and go, has reality. Most of the injury caused by corporations is essentially the actions of a corporation and could never be achieved by even a group of individuals. Only a company could destroy a river system or export millions of tons of asbestos. All but the most senior managers of a corporation confront the corporate culture as something quite compelling and which they could at best be expected to have only a marginal impact upon over time. Senior managers too would generally only with great effort be able to turn around a corporate culture which tolerated criminal deception and gross carelessness. Ingenuity and possibly sacrifice would be required. But surely such is the price one pays for the rewards of senior management? If you know that the corporation which you lead is subjecting employees, customers and the general public to lethal danger and is consistently acting so as to keep knowledge of these actions from the public knowledge, then surely *not to act is to be criminally guilty*?

But this is not the case under Australian law. Corporate leaders are deemed to be captives of corporate culture they lead, and are in fact *more innocent* of liability for the death caused by the actions of the corporation than the lowly employee who physically carries out the relevant action. This has to be wrong.

The Corporate Veil

One of the problems for a proper understanding of corporate crime and the means by which corporations and their managers generally elude attempts to penalise them is the 'corporate veil' along with the allied concepts of 'phoenix companies' and wholly owned 'subsidiaries'.

The problem arises from the fact that the law recognises as corporations, in the first place, only the bodies formed by the enactment of sundry documents: registration of companies, swearing of oaths, issuing of licences, contracts and so on. The corporate entities so created constitute relations between the various agents concerned in a matter before a court.

Two problems arise from this.

(1) How does the law understand the delegation and division of authority exercised *within* a corporation, which in addition to documented job descriptions, statutes and policies, operates through a myriad of *informal norms and rules* without knowledge of which the true chain of causality cannot be disclosed. The documented network of responsibility is frequently itself a fiction. And how does the law distinguish between the lawful business of a company and a criminal conspiracy operated within its ranks?

(2) The corporation, insofar as it is a *legal entity* defined by the execution of documents, may be dissolved or replaced by any intricate network of interrelated legal entities *without having any effect* on the actual projects to which the persons involved are committed. It is in this very strong sense that we must recognise the *fictional* character of corporations. Yes. If we take a corporation in the narrowly legalistic or documentary sense, it is a fiction, which need not correspond to any real action by a person. It is quite possible that the *real* corporation which is producing some product and distributing it to the profit of some group of people has no documented existence at all. The legal form is designed to mobilise the protection of the law, not to create criminal liability!

The law is not powerless in this matter. Investigations can bring to light the flow of command – for example, from a parent company to a subsidiary – in one direction, and the flow of money in the other direction – for example, the transfer of profits from a company into the personal bank account of a director. It is in the final analysis only the chain of command, and in the case of a for-profit enterprise, the reverse flow of money, which constitutes the real corporation – the *project*. In the case of corporations other than capitalist enterprises, the flow of effects back from the execution of directions might not be money. These are not ephemeral or merely subjective actions, but perfectly material and objective actions and processes.

In the case of *phoenix companies* the situation is similar. Here a corporation is found guilty of a crime or liable to payment of compensation or some kind of sanction, but ceases to exist, winding itself up either through bankruptcy or otherwise. But a little while later the same persons who escaped liability by terminating the legal entity reappear on the corporate register as a new corporate entity and continue in business as before, denying any liability for the corporation with which they were formerly associated. Here again the fictional nature of a corporation is manifested. In reality it was not the corporation but its senior managers who committed the crime and that crime cannot be absolved by dissolution of the corporate shell by means of which the crime was committed. This is as true of corporate crime as it is of terrorism or armed robbery.

Can the law encompass the concept of a 'project', defined if not by legal documents, then by the *real relations between people*: line management in one direction and profits in the other?

The Regulatory Authorities

The other factor making a criminal conviction against the corporate bosses of the asbestos companies unattainable is that throughout the period during which asbestos products were produced and sold the government had not responded to the evidence of medical science by making the import, export and production of asbestos products illegal and therefore a criminal offence. The government through its legislature and the various public health and occupational health and safety regulatory authorities *colluded* with the private corporations producing the asbestos. In fact, there is evidence that Australian governments, like the Canadian government to this day, actively promoted the asbestos industry.

Under these conditions, when asbestos production was as such a legal activity, prosecution of the asbestos corporations for manslaughter or homicide would have to rely on the evidence that the companies were fully aware of the lethal nature of their activity, under conditions where the government itself acted as if it did not know. If, as seems likely, the government through the person of various of its public health officials, *did* know about the death being brought about by the asbestos industry, then the government itself ought to be in the dock alongside the management of CSR and JHI.

While civil actions for compensation can be initiated and pursued by private individuals, criminal charges can only be initiated and prosecuted by ASIC and the Department of Public Prosecutions. So far governments have not seen fit to put themselves in the dock, since all political parties are implicated over the period during which these crimes were committed.

Conspiracy

All the above presumes that the 'corporation' in question is a company, registered for the carrying out of legal business, etc. If the 'corporate body' is *an agreement to commit a crime*, then the activity is a conspiracy which may be a crime in itself. The

relevant Commonwealth Act is the Crimes Amendment Act (1995) and is appended below. JHI and CSR argue that the injuries occurred in the pursuit of the lawful business of their companies. Until the Commonwealth specifically banned the production and importation of asbestos in 2003, it would be difficult to prove that the companies had been established with criminal intent, even though public safety regulations were consistently and flagrantly violated. But in fact, the asbestos producers have generally known more about asbestos and its health effects than the aggregate knowledge of government – except that they used their knowledge in order to deceive and confuse the general public and regulative authorities.

This sounds like a criminal conspiracy, though it would be difficult to prove in court.

Social problem or Crime?

In effect, corporate culture is regarded in a manner proper to a *social problem* rather than a crime. And indeed, it is widely recognised that corporate cultures that facilitate the destruction of the conditions for human life in countries overseas and foster reckless disregard for human life in those countries, not to mention corporate activity which promotes gambling, alcohol and tobacco consumption, the sale of foods with a deleterious impact on health, oppressive employment and labour policies, etc., etc., is widely recognised as a social problem and quite rightly a majority of those involved in the area look to the law for regulation, encouragement of public corporations to lead by example, the promotion of corporate responsibility through education, persuasion, negotiation and the restraining force of the moral community, rather than criminal prosecution. This is just as valid in respect to corporate culture as is community development work, the Transport Accident Commission, public health measures in relation to AIDS and STDs and other arms of government pursuing public health and community objectives alongside or without recourse to criminal sanctions. That our prisons are filled with people who were caught selling party drugs, while no-one has ever been jailed for selling deadly asbestos, is an irony which makes the 'social problem' approach to corporate manslaughter hard to swallow.

And surely, when we have CEOs of major Australian corporations who continue to this day to avoid compensation and use their financial and legal muscle to evade sanctions, minimise compensation liabilities and continue their lethal activity in parts of the world beyond the reach of Australian law – surely, here we are dealing with appropriate use of the criminal law?

Granted that the criminal law is not the proper instrument for the fostering of corporate responsibility, which is in general more appropriately addressed as a 'social problem' – though a social problem afflicting the most privileged and powerful in our community rather than the poor and marginalised. But when death on such a scale has been caused, responsibility proven in court, and far from expressing contrition, the senior managers responsible act to escape the jurisdiction of the court and avoid payment of the compensation already awarded to victims – then surely this is the place for the criminal law to express the community's moral condemnation of the individuals involved! Not to do so, not to make senior managers responsible for the culture of corporations which lead to persistent criminality, is to *condone* the worst kind of corporate misanthropy.

Social Theory

The problem the law has in dealing with corporate crime arises from a problem of social theory. The law relates to the actions of individual human subjects. But in social life individual human beings are, in themselves, quite incapable of doing almost anything. It is not just registered companies or other legally constituted corporations which make effective human actions possible, but *real* corporations, or *projects*. To exercise their freedom, individuals must participate in communicatively constituted

projects, generally speaking projects already up and running, though also projects which they themselves initiate with which others solidarise, granting recognition to the project by either cooperating with it or collaborating within it. Almost everything that happens in the world is the work of such projects, large and small, which in the course of their long life pass through a variety of legal formations, mutate and give birth to subsidiary projects, split up into rival projects, struggle with and subsume other projects. All of this happens only thanks only to the actions of individual persons. But in any but the most trivial ways, *freedom can only be exercised or abused through participation in a project.* It is hardly surprising that the law has difficulty in identifying the criminal or any other attribute of human activity with the nature of the actions of a certain individual human being – because in general it is not an individual, but *a project which is the really effective agent*.

Hadrian did not actually build Hadrian's Wall, but it can nonetheless be attributed to him. The problem of attribution of criminal responsibility is the same as attribution of creative agency in respect to a movie production or a scientific breakthrough. Attribution of creative agency to an individual –the "guiding mind" of the project – is conventional and obscures the essential and active participation of a host of collaborators from producers and funding agencies to technicians and actors.

Where the project is aimed at public service or profit-making, the creative agency is usually reflected in registered corporations in order to facilitate legal protections for its work and for the settlement of disputes. The legal shell is only a pale and virtual image of the real project, but it is by means of this shell that a project mobilises the support of the community for its objective. The law is effective in protecting projects from unwarranted interference and regulating the activity of people in projects to the extent that the legal images of these relations are realistic. Where these relations are not adequately reflected in legal documents, then to do its job, for which individual human beings not pieces of paper are the subjects of the criminal law, the law must address the *real* projects and not the shadows cast in documents and records. Companies are legal fictions about real projects. People can be engaged in projects by means of many types of relationship, including moral leadership as well as employment or contract. Even if the *actus reus* and the *mens rea* are attached to different individuals, if they are joined in a project, then both participate in the action.

But social relations constituting a project is not the only form of mediation by means of which people exercise their freedom. Immediate physical actions and "doing things with words" is possible by means of the use of the human body, but in general people murder with weapons and lie with pens an can do either with a mobile phone. Criminal acts are almost invariably mediated by the use of artefacts which are not subjects of the criminal law: one cannot sentence a gun or a phial of heroine to imprisonment, only the person who used it. When the law wants to know who is liable for a crime it always allows for the fact that actions are mediated by the use of objects, and makes the 'directing mind' liable, not the instrument.

Further, insofar as the law departs from taking individuals as the exclusive subjects, it deals with *groups* of individuals, not for any reason inherent in law, but simply due to the fact that the surrounding social theory is based on the conception of human society in terms of groups. But this conception cannot grasp social reality. Freedom is exercised and crimes committed only by means of people *collaborating in a common purpose*. A person is not guilty of conspiracy simply because they were in some way to be associated with another person who committed a crime, but on the contrary because their association was the common purpose of their collaboration. That is, for its understanding of what happens in the world the law requires a concept of project, units of collaborative activity directed towards common ends. Projects in general cohere

thanks to shared norms of action and belief and semantic norms. Such norms will indeed usually be codified in documents but such codification is never a faithful reflection of the practical reality.

The individual people who collaborate through their participation in such projects change over time and indeed by the time the end is achieved, no-one of the initiators may any longer be participants. But freedom and individual liability is realised only in and through collaboration in projects, identifiable by their shared norms and common purpose. How else can phoenix companies and front organisations for criminal activity be dealt with in law?

Appendix: Conspiracy

Crimes Amendment Act (1995), amending §86(1) of the Crimes Act 1914

86.(1) A person who conspires with another person to commit an offence against a law of the Commonwealth punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

(2) Despite subsection (1), if the person conspires with another person to commit an offence against section 29D of this Act, the conspiracy is punishable by a fine not exceeding 2,000 penalty units, or imprisonment for a period not exceeding 20 years, or both. Note: Penalty units are defined in section 4AA.

(3) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and
(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(4) A person may be found guilty of conspiracy to commit an offence even if:

(a) committing the offence is impossible; or
(b) the only other party to the agreement is a body corporate; or
(c) each other party to the agreement is at least one of the following:
(i) a person who is not criminally responsible;
(ii) a person for whose benefit or protection the offence exists;

or

(d) subject to paragraph (5)(a), all other parties to the agreement have been acquitted of the conspiracy.

(5) A person cannot be found guilty of conspiracy to commit an offence if:

(a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
(b) he or she is a person for whose benefit or protection the offence exists.

(6) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:

(a) withdrew from the agreement; and
(b) took all reasonable steps to prevent the commission of the offence.

(7) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

(8) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(9) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

(10) In any law of the Commonwealth:

(a) a reference to paragraph 86(1)(a) of this Act is taken to be a reference to subsection (1) of this section; and
(b) a reference to the application of subsection (1) of this section because of or by virtue of paragraph 86(1)(a) of this Act is taken to be a reference to subsection (1) of this section; and
(c) a reference to section 86A of this Act is taken to be a reference to subsection (2) of this section.".

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