Submission in Response to Discussion Paper 87
Corporate Responsibility

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I am a Lecturer in Law at Central Queensland University. I work primarily in the field of corporate responsibility; in 2015 my article 'Finding fault in organisations – reconceptualising the role of senior managers in corporate manslaughter' was published in Legal Studies. I have written more broadly on theories of responsibility and completed a PhD on corporate responsibility, so I am familiar with both the challenges and importance of responsibility in the corporate context.

Discussion Paper 87 is far-reaching and thorough in its coverage of the elements of effective and fair corporate regulation. However, the current proposals suffer from some of the same problems that have impacted previous attempts to hold corporations responsible. A central challenge is connecting individual conduct to corporations, while also recognising the distinct contribution that justifies corporate rather than group liability.

At the core of what is an ambitious response to the many obstacles faced in developing corporate responsibility doctrine, Proposal 8 is a lynchpin of the ALRC's proposals, as it offers not just a, but the method of attributing liability to corporations. However, in its current form, Proposal 8 does not make the connection between the corporation and the conduct of its associates. This is an essential element of attributing liability for that conduct to the corporation. What Proposal 8 can do is attribute liability to corporations for a failure to prevent conduct, but the importance of and difficulties associated with corporate liability mean this insufficient. I will therefore suggest a way of broadening the reach of Proposal 8 to encompass a failure of management by the corporation.

A. Proposal 8 does not facilitate the attribution of conduct necessary for corporate responsibility

At 1.16, Discussion Paper 87 stresses its focus on the responsibility of a corporation 'for conduct done by the corporation'. Maintaining this focus is key to upholding perceptions of legitimacy and usefulness in this area. Corporate responsibility must operate as an improvement over simply holding individuals responsible; it must not weaken the familiar expressive and practical force associated with holding an individual responsible for something they have done. If corporate liability is seen as a proxy for individual liability, then there is a risk it is perceived as a way for individuals to avoid liability in the corporate context.[1] The parameters of corporate responsibility must therefore be carefully defined to provide a distinct basis for holding corporations responsible.

Proposal 8 provides a model of attributing liability to corporations that substantially weakens the 'corporateness' of corporate liability. It does so by beginning from a very broad starting point: attributing to the corporation the conduct and state of mind of persons 'acting on behalf of the corporation', or to use the language of the proposed redrafting of s 12.2, 'associates'. The conduct of those associates is deemed the conduct of the corporation, unless that

[1] Manuel Velasquez, 'Debunking Corporate Moral Responsibility' (2003) 13 Business Ethics Quarterly 531, 543, 535.

corporation proves due diligence to prevent that conduct. The starting point is that conduct by associates is corporate but for due diligence.

The ALRC's approach creates a category of conduct that is treated as corporate, without providing sufficient grounds for treating it as such. Proposal 8, and consequently corporate liability under the ALRC's proposals, risk being perceived as lacking doctrinal basis. Additionally, the absence of firm grounds for recognising the fault or contribution of the corporation has practical consequences. Association cannot provide the necessary detail as to the relationship between the corporation and the bad outcome caused by its associate. The standards of responsible conduct to which a corporation could be held are therefore vague, as we lack sufficient information to determine the corporation's responsibility. This makes it very easy for due diligence to defeat corporate liability – much too easy for the proposed reforms to provide an effective response and deterrent to corporate misconduct. If Proposal 8 were implemented, the resulting corporate liability would likely be perceived as unprincipled and ineffective.

i. Association does not provide a doctrinal basis for attribution

A necessary and fundamental element of corporate responsibility is establishing a way of treating individual conduct as corporate. Corporations being unable to do anything for themselves, the bad outcomes that we wish to ascribe to corporations – deaths or injuries at work, oil spills, financial crimes – are necessarily comprised of the actions of one or many individuals. There must be some way of treating the corporation as having contributed to or caused the conduct of the individuals who work within it.[2] This is why we need attribution. It is a means of treating what is done by individuals as corporate: as though it were done by the corporation. This is important. To achieve maximum expressive force and practical effectiveness, we want to make sure that the corporation is held responsible for that bad outcome, and not some adjacent act or omission. We want to be able to say that the corporation is responsible for the outcome, not just that it was responsible for the person that engaged in the conduct: the latter starts to look a lot like vicarious liability, and cannot carry the same punitive force.

Proposal 8 attributes conduct to the corporation on the basis of association. The use of the term associates has distinct advantages – its broadness is able to capture individual contributions in a way that 'director' or 'senior manager' do not. However, the association between a corporation and an individual does not provide a way of determining whether that individual's conduct should be attributed to the corporation. My use of University branding in a lecture slide or an email is much more connected to the organisation I work for than my writing of this submission, but I am no less associated with Central Queensland University in this submission than I am when sending an email. If I use my office as a base for selling counterfeit textbooks, I have not ceased to be an associate of the University, but my conduct is not corporate – it is solely my own, in my own interest. The University certainly would carry some responsibility in relation to my illegal conduct, but that would be a failure of oversight over my conduct. Other than ensuring that I do not use my office and position to commit crimes, the organisation would have no role in my conduct. The root of its fault would be in its responsibility for me, rather than any of my conduct being attributed to the University. The resulting liability would therefore be vicarious; none of my conduct would be deemed to have been engaged in by the organisation.

[2] Manuel Velasquez, 'Why Corporations Are Not Morally Responsible for Anything They Do' (1983) 2 Business & Professional Ethics Journal 1, 6.

At 6.20, the ALRC refers to the 'substance of the relationship between the individual and the corporation'. Association, though, is a term without the necessary substance. As a result, Proposal 8 is unable to do the work necessary to attribute conduct to corporations. Association tells us only the relationship between the corporation and its associates. It does not tell us what role the corporation played in an associates' conduct.

There is a reason association is more commonly used in the context of vicarious liability; it can show very well the connection between persons. What it does not have is means of showing how one person (corporate or otherwise) contributed to conduct such that we can attribute the conduct to that second person as well as the first. The significance of a connection between persons should not be understated – it can give rise to obligations, and these obligations are the foundation of vicarious liability. But that connection between persons does not make one persons' actions attributable to another. A parent who stands by idly while their child throws rocks at animals might be a negligent parent, but they didn't throw any rocks.

Attribution on the basis of association does not do the conceptual work needed to hold corporations liable for conduct. It does not demonstrate how the corporation contributed to or caused that conduct, so provides no basis for treating the conduct as the corporation's. Proposal 8's adoption of this model of attribution results in a categorisation of conduct that lacks doctrinal basis and is problematically broad. The conduct of associates, but for due diligence, would be treated under these proposals as the conduct of the corporation. This represents a large step beyond vicarious liability, as it treats individual acts by associates as not just a matter of corporate oversight but as equivalent to corporate action. The ALRC's proposals offer no basis for this reclassification of conduct.

ii. **Association as a basis for attribution would be ineffective in practice**

The ALRC's proposals also present practical obstacles to effective corporate liability. The lack of substance to the term 'associate' undermines the potential effectiveness of any corporate responsibility model developed in line with Discussion Paper 87. Proposal 8 allows for the avoidance of liability if the corporation proves due diligence in relation to the conduct that would otherwise be attributed to it. If that attribution is on the basis of the substantively lightweight concept of association, then the scope of due diligence is very vague. In the context of this vagueness, it will be easy for due diligence defences to succeed and corporate liability to be rendered ineffective.

Attribution, under the ALRC's proposed model of corporate liability, is a consequence of association. As such, it is not a consequence of the contribution that the corporation made to the associate's conduct, or what role the corporation had in that conduct. It is merely a consequence of the association between persons. But what due diligence does association require? This is a difficult question, given that vicarious liability is not much help in this context. Due diligence to satisfy the responsibility one person has over the conduct of another person is one thing. Due diligence to negate the presumption that another person's conduct is one's own is entirely distinct. In the latter case, the much higher burden of attribution is being imposed on the same basis of association. It is very difficult to argue that the standards to discharge the duties at play should be the same, given the different prima facie claims that attribution and vicarious liability are making.

Due diligence as a counteracting force to vicarious liability is straightforward. The association between persons gives rise to an oversight obligation; depending on the circumstances liability will be discharged if that oversight meets the requisite standard. One person's responsibility for another person, which is based on the association between those persons, is discharged by the manner in which that first person oversaw their associate: whether they fulfilled their responsibility over that person. When vicarious liability is replaced with attribution, the standard of due diligence becomes problematic. No longer is the corporation responsible for another person; it is now responsible for the conduct of another person as though the corporation itself engaged in that conduct.

Due diligence, in the context of attribution because of association, places a burden on the corporation to prove that it acted responsibly in connection with the conduct of an associate, for example by trying to prevent that conduct. Association, though, does not tell us how the corporation contributed to that conduct. Without reference to how the corporation caused the conduct, how can we define how it should have prevented it? Association does not provide the information needed to determine at what point the conduct of an associate ceases to be the corporation's. When used to attribute conduct, association makes no positive claims as to the responsibility of the corporation in relation to that conduct, and what standards the corporation should be held to as a result. Consequently, due diligence in Proposal 8 is very loosely proscribed.

By way of example, consider BHP Billiton's involvement the Mariana dam disaster. BHP was twice removed from the disaster: the corporation that owned and used the dam, Samarco, was jointly held by a subsidiary of BHP and Vale.[3] If, as Proposal 8 does, we leave vicarious liability to one side, what due diligence is needed to rebut attribution on the basis of the association between a parent company and its overseas subsidiary's joint venture's employees? The association between BHP and the individuals responsible for the dam is impeded by legal and financial arrangements, management structures, and geographical distance. Such a distant association by itself indicates only minimal involvement by BHP in the disaster, so the corresponding due diligence to defeat that attribution must be equally minimal. An associate so far removed, at least in terms of their association, cannot be expected to do much, especially given the high burden of attribution.

Association does not provide a platform for prosecutors to make a positive case of what due diligence should look like. There are many possible ways to demonstrate due diligence, both formal and informal, and it will be too easy to raise the possibility that enough was done on the balance of probabilities. To create a case to answer, corporate responsibility needs to set a standard by which the responsibility of the corporation for the conduct of its associates can be determined. Association does not provide that standard. All that is claimed is that a corporation was associated with another person, so easy avenues are created for corporations to show that their association does not warrant criminal liability. The likely result of Proposal 8's implementation is that it would be ineffective, with due diligence providing an easy get-out for defendant corporations.

iii. A failure of due diligence is not equivalent to attribution

Ascribing a failure of due diligence to a corporation is not equivalent to treating individual conduct as though it were the corporation's and blaming the corporation accordingly. Instead, it identifies something distinct that the corporation did or failed to do in responding to or preventing that conduct. Like the parent of the rock-throwing child, the corporation liable for a failure to exercise due diligence is not responsible for the individual's conduct, but the individual. The corporation has thrown no rocks, and a claim that it has failed its due diligence provides no basis for saying that it has. The wrong done by the corporation is not in fact the

[3] Samarco Mineração S.A., 'Financial Statements at December 31, 2018 and 2017 and Independent Auditors Report' (2019), 3.

wrong of the individual, but a familiar one: a failure to prevent. Proposal 8, while it claims to be a model of attribution, is not actually attributing the conduct of the individual to the corporation. Proposal 8, because it does not connect the corporation to individual conduct, collapses into a failure to prevent model of corporate liability.

As Discussion Paper 87 recognises at 6.74, with a lack of attribution comes a reduction of culpability. Proposal 8, though it uses the language of attribution, does not contain a mechanism through which to blame a corporation as though it engaged in its associates' conduct. There is nothing morally blameworthy about association: if a colleague of mine is selling counterfeit textbooks, then the association between us as co-workers does not make me morally blameworthy or legally liable. If I managed that employee then our association might make me blameworthy, but that would be for a failure of management – of due diligence. Our association would not make me part of his scheme, and would not make me liable as though I were selling the textbooks. A failure of due diligence does not transform the conduct of the managed into the conduct of the manager. Due diligence remains important though, because without attribution, the blameworthiness of failing to exercise due diligence is key to my culpability. However, in Proposal 8, due diligence is a weak and indeterminate standard. If implemented, Proposal 8 would establish corporate liability that would be vicarious at best and easily avoided.

B. The proposals could be improved by recognising the ways in which corporate structures affect the conduct of associates

In order to create a more robust model of corporate responsibility, I recommend looking at what corporations are doing, as well as what they fail to do. Corporations do not only have influence in preventing, or failing to prevent, conduct by their associates. They also impose policies and procedures that direct and influence others, which can be deemed to cause conduct. By focusing on these policies, it becomes possible to identify what the corporation did, rather than what it failed to stop. The corporate contribution to outcomes becomes identifiable, as does a route to corporate liability.

Corporations cannot do anything without people. The corporation remains central, though, because those individuals engage in that conduct in the context of their association with the corporation. The association between corporations and individuals is not, importantly, like the association between two individuals. Corporations, as well as being persons, are places of work. This means their associates operate in the corporate context, in the framework of the corporation with which they are associated. That framework will be comprised of formal rules, informal ways of doing things, and everything in between. A corporation operates through an association with individuals, and provides those individuals with policies, practices, and procedures that establish a structure for their work.

i. Unlike corporate culture, corporate structures can be identified as having contributed to conduct

Corporate policies, practices and procedures are often grouped together to produce a description of 'corporate culture'. Part 2.5's recognition of corporate culture as a basis for corporate responsibility represented an innovative step, but that approach is undermined by the inactivity of culture. Tying corporate responsibility to corporate culture relies on our intuition that corporate policies, practices and procedures will influence conduct within a corporation, but does not demonstrate how they do. In other words, corporate culture does not connect the conduct of associates with the corporation; it does not identify the corporate contribution to bad outcomes. As Discussion Paper 87 recognises at 1.31, this is not only a doctrinal issue but a practical one, with evidence to support conviction difficult to identify.

Liability based on corporate culture relies upon our intuition that if, to take the example quoted at 5.62, a death at work arises from a breach of safety standards at a workplace where those standards have not been embedded, then corporate failures have somehow caused the death. What corporate culture does not do, and why it fails as a basis for criminal liability, is explain why the actions of an individual or individuals were caused by that faulty culture. They look like they probably were, but we have not been shown how the culture of the corporation directed, influenced or altered the actions of individuals.

Claims about culture describe aspects of a corporation, but they do not describe what those aspects do. A culture, for example of short-termism in relation to financial decision-making, is something a corporation has. But that a corporation has something does not mean that it does something, or causes its associates to do something. There is no way to say that the financially irresponsible decisions of an employee were caused by corporate culture, because a description of culture does not tell us how that culture is expressed: it does not tell us what the corporation is doing. The result is that actions of associates are at most consistent with culture. The conduct of associates may correlate with the corporate culture, but that by itself does not imply that the culture caused the conduct.

A culture of short-termism, or health and safety neglect, does not provide a reason for breaches of legal standards. A corporations policies, practices and procedures, on the other hand, do. They do not just set a culture; they also create a context for work. Corporations have incentive schemes, evaluation processes, reporting systems, and these all fit together into a structure within which individuals operate.[4] Corporations may impose approaches to monitoring performance or raising issues: short-term profits may form the basis for remuneration, or the process for reporting health and safety breaches may be at the end of the employee induction.

The structural elements of a corporation provide far more assistance in explaining how the corporation caused the conduct of one of its associates. A breach of financial conduct rules can be said to be caused by a remuneration structure far more easily than it can be said to be caused by a culture of short-termism. A death or injury at work is much more straightforwardly a consequence of defective safety practices than a culture of neglect.

Corporate structure puts the associates of a corporation into a managed environment. Aside from the management of individuals by other individuals, the corporation is itself operating as a manager, bounding and directing what individuals do. The components of this environment go beyond culture in that they proscribe, rather than simply describe, how things are done. Policies, practices and procedures together influence the perceptions and conduct of individuals.[5] Through this process, corporations become active contributors to the conduct of individuals and the corporate outcomes that ensue. This provides a basis for attribution to justify corporate responsibility: one that reflects the connection between individual conduct and corporate outcomes.

The conduct and state of mind of persons, insofar as they are managed by the corporation, is attributable to the corporation. This standard, which reflects the role of the corporation in causing its associates to act in particular ways, enables the delineation of the more and less

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[4] James A Brickley, Clifford W Smith Jr and Jerold L Zimmerman, 'Corporate Governance, Ethics, and Organizational Architecture' (2003) 15 Journal of Applied Corporate Finance 34, 34.

[5] Gareth Morgan, *Images of Organization* (Sage Publications 2006), 211.

corporate things that individuals do. The ideas that I am putting forward in this submission, given my role as an academic working for a University with the academic freedom that this entails, are not particularly corporate. But the manner in which I write them – my workspace, the breaks I take – is in a significant sense driven by the policies, practices and procedures of the University. If I did not engage in academic research but instead operated a crane, and received insufficient support on focus, breaks, or safety, then if I were to drop something on a worksite then that would be corporate conduct: something caused not just by my own inattention, but also the context in which I worked.

The connection between a corporation and its associates does not stop at association. Corporate culpability is not just a matter of due diligence, because corporations can contribute to, as well as fail to prevent, bad outcomes. The issues faced by Proposal 8 in its current form can be averted – corporate responsibility can be found in new contexts, avoiding the problems caused by using association as the basis for attribution. Recognition of structural influences on the conduct of associates opens up new avenues for pursuing corporate responsibility, and does so in a defined and principled way.

ii. The experience of the UK in reforming corporate manslaughter liability demonstrates the need to integrate corporate structures into corporate liability

In previous work I have discussed at length how corporate liability for structure could operate, in an effort to rehabilitate the ineffective Corporate Manslaughter legislation in the UK.[6] The root of the UK legislation's failure was that, while it started from a model of organisational fault, this approach lost out over time to a focus on the conduct of senior managers. Liability was conditioned on a failure by the corporation, subject to the involvement of senior management.[7]

The Act's requirement for senior management involvement was taken to mean, most significantly by police and prosecutors, as requiring direct hands-on involvement by senior managers.[8] I argued in that context that such an interpretation was far too narrow. The things that senior managers set in motion are far more extensive, and indeed more significant, than the things they have complete dominion and control over. Senior managers are the architects of corporate structures, implementing as well as enforcing the policies, practices and procedures that subsequently take on an existence and role of their own within corporations. This makes senior management a useful tool in identifying corporations' roles in bad outcomes: while they rarely have a direct hand in such outcomes, their involvement can provide the indicators for corporate structures that contribute to these outcomes and can provide a basis for attribution.

The lessons from corporate manslaughter in the UK are applicable across all corporate misconduct. Corporations impose processes, practices and procedures that cause and contribute to corporate conduct. The development and interaction of these processes is such that corporate structure will extend beyond senior management, but their involvement can be found at its roots. The involvement of senior management is a marker of corporate structures, and a useful tool for identifying corporate responsibility.

[6] Luke Price, 'Finding Fault in Organisations – reconceptualising the role of senior managers in corporate manslaughter' (2015) 35(3) Legal Studies 385.
[7] Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s 1(3).
[8] 'Police toiling with corporate manslaughter, say lawyers' (2009) [27] 4 The Safety & Health Practitioner.

iii. Recognising corporate responsibility for structure would improve both the doctrinal basis and practical effectiveness of Proposal 8

Once the structural contribution of corporations to the conduct of their associates is recognised, the liability of corporations for bad outcomes can be more straightforwardly discerned. Some of the difficulties often associated with corporate liability are also diminished. Discussion Paper 87 acknowledges that investigations and trials into corporate misconduct are often delayed and lengthy. It is unlikely that any proposed reform will fix this situation. Corporations are complex organisations; the consequences of their misconduct are often diffuse and may take time to be fully realised. When both the discrete contributions to these outcomes and the outcomes themselves require such careful scrutiny, time and resource expenditures are unavoidable. The significance of corporate misconduct and its consequences justifies persistence, but the issue remains of preserving the legitimacy of investigations over time. As the Discussion Paper 87 observes at 1.41:

> 'If it is the corporate entity itself that is charged, there is a significant likelihood that the entity is in fact a different beast by this stage of the proceedings, with a new board, new management, and likely also new employees. Any action against the corporation at that time fails to sheet home liability to those individuals actively involved in the wrongdoing.'

If corporate liability is directed at the distinct structural contribution of the corporation, rather than for the conduct of associates but for due diligence, this concern fades away. Even if changes to management and staffing are made, the corporation, through its structure, has still contributed to the bad outcome in a significant way. Because it has done something to cause the bad outcome, the corporation is like the individual who reforms their character, but does not cease to be a person who in the past committed criminal acts. It does not matter that corporate liability imposed at a later date will not target the individuals who contributed to that bad outcome, because they are liable for their own distinct contribution, and corporate responsibility has its own independent basis. Recognising the contribution of both corporations and their associates to corporate outcomes, rather than merely the association of the two, legitimises corporate liability and maintains that legitimacy as police and prosecutors undertake the difficult task of unpacking corporate misconduct.