

Corporate Manslaughter

Introduction

The Corporate Manslaughter and Corporate Homicide Act 2007 (the "Act") comes into force in the United Kingdom on 6 April 2008. The Act creates a new statutory offence of "corporate manslaughter" ("corporate homicide" in Scotland) which applies to organisations. The Act replaces the common law offence of gross negligence manslaughter for organisations and seeks to increase the criminal exposure of culpable organisations by removing the requirement to establish the guilt of a directing mind of an organisation.

An organisation is guilty of the common law offence if a person's death results from a gross breach of a duty of care owed by the organisation to the victim, *and* if its "directing mind" (i.e. a director or member of senior management that could be said to embody the organisation in his acts and decisions) is similarly guilty.

Organisations very rarely appoint a director or member of senior management to have responsibility for health and safety issues. Prosecutions have therefore historically faced considerable difficulty in establishing that any particular person could be said to be the "directing mind" of an organisation responsible for a breach of a duty of care. Consequently, very few organisations have ever been convicted of the common law offence. Notably, this requirement prevented successful prosecutions of the organisations responsible for the Hatfield rail crash in 2000 and the Potters Bar rail crash in 2002. The few successful convictions have been of small companies that have a very simple management structure. The Act is intended to make prosecutions more straightforward.

Who does the Act apply to?

The Act applies to:

- companies;

- other corporations (including limited liability partnerships and various public bodies);
- partnerships;
- trade unions;
- employers' associations;
- Crown bodies; and
- police forces.

The Act does *not* apply to individuals. Thus, neither directors nor senior managers can commit corporate manslaughter or be convicted of aiding or abetting the commission of the offence.

Directors and senior managers, however, should not forget their onerous health and safety responsibilities under the Health and Safety at Work etc Act 1974 or their liability for the common law offence of gross negligence manslaughter (which, in respect of individuals only, will remain after the Act comes into force).

The New Offence

Under the Act, an organisation will be guilty of corporate manslaughter if the way in which its activities are managed or organised:

- causes a person's death; and
- amounts to a gross breach of a duty of care to the deceased.

In addition, a substantial part of that breach must be attributable to the way in which the organisation's senior management managed or organised its activities. The offence only applies to acts committed in Great Britain.

Relevant duty of care

The Ministry of Justice's guidance on the Act (the "Guidance") describes a duty of care as "*an obligation that an organisation has to take reasonable steps to protect a person's safety.*"

The Act only applies to breaches of the following "relevant" duties:

- to employees or other persons working for the organisation;
- as an occupier of premises;
- in connection with the supply of goods or services;
- in connection with the carrying out of any other activity on a commercial basis;
- in connection with the carrying out of any construction or maintenance operations;
- in connection with the use or keeping by the organisation of any plant, vehicle or other thing; or
- to persons held in detention or custody.

The explanatory notes to the Act confirm that an employer's duty to provide a safe system of work for its employees is a relevant duty of care.

Gross breach

The Act defines a "gross breach" as "*a breach of . . . duty that falls far below what can reasonably be expected of the organisation in the circumstances*". The Act provides that once the prosecution has established beyond reasonable doubt that the organisation owed a duty of care to the deceased, the jury *must* take into account the following factors to establish whether there has been a gross breach of that duty of care:

- whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach; and, if so —
- how serious that failure was; and
- how much of a risk of death it posed.

In addition, when determining whether a gross breach has occurred, the jury *may* also:

- consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure (described above) or to have produced tolerance of it;
- have regard to any health and safety guidance that relates to the alleged breach; and
- consider any other matters they think relevant.

Substantial part of that breach is attributable to the way the organisation's senior management managed or organised its activities

It is through this concept that the Act moves away from the approach of the common law offence. Rather than focusing on the acts of individuals within the organisation, it looks at the attitude of the organisation to health and safety matters and the way that the organisation is managed or run as a whole.

The Act defines "senior management" as those who play significant roles in:

- the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
- the actual managing or organising of the whole or a substantial part of those activities.

At the very least, this will encompass a company's directors or senior managers and the partners of a partnership or LLP. However, a jury is likely to decide such issues on a case-by-case basis and will look at who, in reality, made the decisions and ran the business.

The Guidance states that factors which might be taken into account in determining whether a substantial part of the breach is attributable to the way the organisation's senior management managed or organised its activities include:

- the systems of work used by employees;

- the level of training of employees and adequacy of equipment;
 - issues of immediate supervision and middle management;
 - the organisation's strategic approach to health and safety; and
 - the organisation's arrangements for risk assessing, monitoring and auditing its processes.
- to provide a safe and healthy place of work — the common law duty of care in tort; and
 - to ensure their health, safety and welfare at work — a statutory duty under the Health and Safety at Work etc Act 1974 and the Management of Health and Safety at Work Regulations 1999.

Listed companies have further obligations under the Combined Code on Corporate Governance.

Penalties

The Act provides that organisations may be punished by an unlimited fine. Guidelines on how the size of the fine will be assessed are expected to be published in autumn this year.

The court's approach to fines is likely to follow its approach in relation to prosecutions under the common law offence, which for serious offences can be very severe. For example, in 2006, Network Rail was fined £3.5 million and Balfour Beatty was fined £7.5 million for their failures in respect of the Hatfield train crash.

The Act also provides for "publicity orders" and "remedial orders", which although not available when the Act comes into force, are expected to be introduced when further guidance is published later this year. The former will require an organisation to publicise the fact of the conviction and certain details of the offence. The latter will require an organisation to address the cause of the death.

As individuals cannot commit corporate manslaughter, the Act does not provide for a penalty of imprisonment.

How does this affect employers?

The key point to remember about the Act is that it does not place additional duties on employers to care for the well-being of their employees. Employers, directors and senior managers continue to owe the following duties to their employees (and to third parties who may be affected by their activities):

- to take reasonable care for their health and safety and to provide a suitable working environment — these are implied terms in every contract of employment;

What the Act arguably does do is increase the possibility of successful prosecution of organisations for the death of a person that results from the gross breach of a duty of care.

Companies should take the following practical steps to minimise the risk of fatalities and consequent prosecution under the Act:

- ensure compliance with health and safety legislation and other industry specific regulations;
- adopt a (or review a current) health and safety policy, which should be published to all staff and followed in practice;
- appoint a director (or a committee) responsible for health and safety within the organisation and ensure that regular training on health and safety is provided;
- ensure that arrangements for the planning, organisation, control, monitoring and review of any preventative and protective measures are made; and
- carry out risk assessments in respect of any employees who may be at risk.

For more information on the Act, or for assistance in preparing for its implementation, please contact a member of Dechert's employment team.

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