

PHYSICAL AND FAULT ELEMENTS

Element	Summary
	<p style="text-align: center;">s 3.1 Criminal Code (Cth):</p> <ol style="list-style-type: none"> 1) An offence consists of <u>physical elements</u> and <u>fault elements</u> 2) The law that creates the offence may provide that there is <u>no fault element for one or more physical elements</u> 3) The law that creates the offence may provide <u>different fault elements for different physical elements</u>
Mens Rea or Fault Element	<ul style="list-style-type: none"> - s 5.1 of Criminal Code (Cth): <ol style="list-style-type: none"> 1) A fault element for a particular physical element may be <u>intention, knowledge, recklessness or negligence</u>. - 5.2 Intention <ol style="list-style-type: none"> 1) A person has <u>intention</u> with respect to <u>conduct</u> if he or she <u>means to engage in that conduct</u>. 2) A person has intention with respect to a <u>circumstance</u> if he or she believes that it <u>exists or will exist</u>. 3) A person has <u>intention</u> with respect to a <u>result</u> if he or she <u>means to bring it about or is aware that it will occur</u> in the ordinary course of events. - 5.3 Knowledge <ol style="list-style-type: none"> 1) A person has <u>knowledge</u> of a <u>circumstance</u> or a <u>result</u> if he or she is <u>aware that it exists or will exist</u> in the ordinary course of events. - 5.4 Recklessness <ol style="list-style-type: none"> 1) A person is <u>reckless</u> with respect to a <u>circumstance</u> if: <ol style="list-style-type: none"> a. he or she is aware of a substantial risk that the circumstance exists or will exist; and b. having regard to the circumstances known to him or her, it is unjustifiable to take the risk. 2) A person is <u>reckless</u> with respect to a <u>result</u> if: <ol style="list-style-type: none"> a. he or she is aware of a substantial risk that the result will occur; and b. having regard to the circumstances known to him or her, it is unjustifiable to take the risk. - 5.5 Negligence <ul style="list-style-type: none"> • A person is <u>negligent</u> with respect to a physical element of an offence if his or her conduct involves: <ol style="list-style-type: none"> a. such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and b. such a high risk that the physical element exists or will exist; • that the <u>conduct merits criminal punishment</u> for the offence.

Actus Rea or Physical Element	<ul style="list-style-type: none"> - s 4.1 of <i>Criminal Code</i> (Cth) <ol style="list-style-type: none"> 1) A <u>physical element</u> of an offence may be: <ol style="list-style-type: none"> a. Conduct; or b. A result of conduct; or a. A circumstance in which conduct, or a result of conduct, occurs. 2) In this Code: <ul style="list-style-type: none"> • <i>“conduct”</i> means an act, an omission to perform an act or a state of affairs • <i>“engage in conduct”</i> means: <ol style="list-style-type: none"> a. Do an act; or b. Omit to perform an act.
Strict Liability	<ul style="list-style-type: none"> - s 6.1 of <i>Criminal Code</i> (Cth): <ol style="list-style-type: none"> 1) If a law provides that an offence is an offence of strict liability: <ol style="list-style-type: none"> a. there are <u>no fault elements</u> for any of the physical elements of the offence; and b. the defence of <u>mistake of fact</u> is available.

DIRECT AND VICARIOUS CORPORATE CRIMINAL LIABILITY

<p><i>Vicarious Liability:</i> one person responsible for misconduct of another due to nature of relationship (e.g. employer/employee)</p>		
Structure	Features	Legislation/ Authority
Vicarious Corporate Criminal Liability	<ul style="list-style-type: none"> - A corporation can be vicariously liable for crimes committed by officers or employees where: <ul style="list-style-type: none"> • Crime <u>prohibited</u> by statute AND • Statute indicates legislative <u>intention</u> for vicarious liability → Mousell - Usually regulatory offences – fair-trading, consumer protection, environmental offences - S 16(1) Clean Waters Act 1970 (NSW) <ul style="list-style-type: none"> • Offence to “pollute any waters” 	<p><i>Mousell Bros Ltd v London and North-Western Railway</i></p> <p>-----</p> <p><i>Tiger Nominees Pty Ltd v State Pollution Control Commission (1992)</i></p>
Direct Corporate Criminal Liability	<p>Directing Mind and Will</p> <ul style="list-style-type: none"> - <u>General Law</u> <ul style="list-style-type: none"> • Organic theory / doctrine of identification • Involves lifting the <u>corporate veil</u> • “...A corporation is an abstraction. It has no mind of its own any more than a body of its own; its active and directing will must consequently be sought in the person of somebody who ... may be called an <u>agent</u>, but who is really the <u>directing mind and will of the corporation</u>...” • ...Whether their intention is the company's intention depends on the <u>nature of the matter</u> under consideration, the <u>relative position</u> of the officer or agent and the <u>other relevant facts</u> and circumstances of the case.” • “...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 	<p><i>Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd (1915)</i></p> <p><i>H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd</i></p> <p><i>Tesco Supermarkets Ltd v Nattrass (1972)</i></p>

<p>Direct Corporate Criminal Liability</p>	<p><i>mind of the company. If it is a guilty mind then that guilt is the guilt of the company..."</i></p> <ul style="list-style-type: none"> • <i><u>"Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company."</u></i> • <i>Organic theory and the above judgements were accepted by the High Court in 1988.</i> 	<p><i>Tesco Supermarkets Ltd v Nattrass (1972)</i></p> <p><i>Hamilton v Whitehead (1988)</i></p>
<p>Criticisms of Direct Corporate Criminal Liability</p>	<ul style="list-style-type: none"> - Difficulty in determining who is "directing mind and will" - Restricts liability to directors and high level managers - Favours larger corporations - Criminal liability avoided by retaining ultimate discretion within board <p><i>Tesco v Nattrass</i> criticised in <i>Meridian Global Funds Management Asia Limited v Securities Commission</i> (1995)</p> <ul style="list-style-type: none"> - <u>Primary rules of attribution</u> - where the relevant acts were authorized by a resolution of the board of directors or unanimous agreement of shareholders; - <u>General rules of attribution</u> - such as the rules of agency and vicarious liability, which operate in respect of natural persons as well as corporations; and - <u>Special rules of attribution</u> - to be determined by the Courts for the purpose of applying particular rules. In such circumstances, the Court must determine whose act or knowledge was intended by the legislature to be counted as the act or knowledge of the company, taking into account the policy of the relevant law. 	<p><i>The High Court has not yet considered Meridian</i></p>