

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005

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EFFECT OF THE PROPOSED LEGISLATION

The effect of the *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005* (the Bill) will be to exempt Commonwealth agencies, authorities, government business enterprises and their employees—where these are not already excluded by virtue of s 27 of the *Australian Capital Territory (Self Government) Act 1988* (Cth)—from the application of ACT industrial manslaughter laws, and any similar laws that may be passed in future by any state or territory. This will extend the two-tiered workplace safety system that exists in ACT. Currently, any Commonwealth entity with protection of the Crown is exempted from industrial manslaughter legislation.

The Bill will extend this exemption to include Commonwealth Government businesses that directly compete with private enterprise. This means that workers who do the same work as counterparts in private industry or the ACT public sector, but are employed by Commonwealth Government controlled entities such as Telstra, will be afforded a lower level of protection. In short, the Bill will achieve the very opposite of its title.

POLICY RATIONALE – WHY INDUSTRIAL MANSLAUGHTER LEGISLATION IS NECESSARY FOR ALL EMPLOYEES

In 2002, the ACT Government began the serious task of evaluating its existing occupational health and safety laws, and investigating ways to deal with the issue of gross negligence and recklessness leading to workplace death. This included responding to the significant public restlessness at the inadequate level of penalties attached to corporations and individual employers, where they have provided insufficiently for worker safety and a death has resulted. This was identified as a particular problem with corporate employers, where the corporate veil served to sometimes obscure and hide the responsibility of employers to directly provide for safe and healthy workplaces. The ACT also identified similar problems associated with senior officers in the public sector, which our industrial manslaughter laws were directly designed to address.

These issues are at the core of emerging issues of responsibility and regulation in relation to workplace safety. The ACT Government responded to these issues through the enactment of its industrial manslaughter laws, and is through reform of its OHS laws.

Work-related fatalities in the ACT

The ACT Government does not suggest that all work-related fatalities are the result of criminally negligent or reckless conduct; however, the ACT Government does believe that in cases where workplace deaths are the result of such conduct, there must be an effective capacity to prosecute both companies and natural persons, and there must be appropriate penalties in place.

Enforcement strategy

The creation of the industrial manslaughter offences is a component of the ACT Government's overall strategy for improving workplace safety and injury prevention. It is the ACT Government's view that a credible enforcement strategy requires both extensive support for and promotion of voluntary compliance and a range of increasingly strong deterrent measures for serious offences.

The offences that have been inserted into the Crimes Act provide a necessary deterrent for the most serious of workplace accidents—those that result in the death of a worker. The new laws

have proved to be an important catalyst in promoting awareness and understanding of employer duties to provide safe workplaces and in ensuring employers take these duties seriously.

The offences are also framed to capture changes in the labour market that have seen contractual relationships undermine the duties of care for health and safety that employers assume in relation to their direct employees. Current research indicates that this has created significant risks in Australian workplaces due to causes including:

economic and reward systems which encourage cost cutting and lack of attention to perceived ‘frills’ such as OHS; [and] more complicated and less obvious chains of responsibility and decision-making, leading to no clear allocation of OHS responsibilities ...¹

There is a potential that this enforcement regime will be further undermined in relation to Commonwealth Government controlled business entities if the proposed Bill is enacted.

Prosecuting Corporations

The difficulty of prosecuting corporate employers has been identified in many jurisdictions. By definition a corporation is a legal person and may be prosecuted for a criminal offence to the same extent as a natural person. A corporation does not have a physical existence, however. It can only commit an offence through its directors or employees.

In order to attribute the required state of mind and conduct to a corporation, the common law has fashioned principles of liability. Before a corporation can be criminally responsible, an individual director or employee must be identified as the ‘directing mind and will’ of the corporation and have, in effect, committed the offence. This will generally require proof of fault by a top-level manager or director and has been difficult to establish in the case of large corporations, where offences are generally only visible at the middle management level.

The ACT Government’s legislative initiative to address this concern is consistent with calls in recent years from around Australia and overseas for legislation enabling successful prosecution of employers for manslaughter in cases of negligent or reckless behaviour leading to a workplace death, and for the imposition of appropriately strong penalties.

Appropriate Penalties

The ACT’s industrial manslaughter legislation provides for substantial penalties where an offence is committed. It provides for maximum terms of imprisonment of 20 years and high financial penalties. It also allows the court to order corporations to take actions including publicising the offence, notifying specified persons, such as shareholders of the offence, or carrying out a specified project for the public interest, similar to community service.

The legislation establishes a penalty regime appropriate to the criminal offence of manslaughter. Penalties need to be large enough to act as effective deterrents. For corporations, financial penalties may not be sufficient. Available sanctions also need to hold out the threat of reputational harm and public stigma. This is because companies value their good name.

¹ Shaw, Andrea and Blewett, Verna, “What’s Happening in the Big Bad World? A Review of Health and Safety Issues in Other Industries and Countries”, NSW Mining Industry OHS Conference, 2001.

Other Jurisdictions

Recent international and Australian developments are summarised at **Attachment A**. In the United Kingdom, the British Government has recently released a draft bill for public comment that would see the establishment of corporate manslaughter laws in that country. Laws similar to those in the ACT were passed in Canada in late-2003 following the failure to obtain prosecutions for the deaths of 26 miners in the 1992 Westray disaster. In both the UK and Canada, there has been a clear objective of remedying “a particular defect in the present law that can lead to companies escaping liability for manslaughter because no senior single individual can be shown to be personally liable”.²

Victoria was the first Australian jurisdiction to introduce industrial manslaughter legislation in 2001. This legislation was passed by the Victorian Legislative Assembly, but was subsequently blocked in that State’s Legislative Council at a time when the Coalition held the balance of power. To date the Victorian Government has not re-introduced this legislation. However, the new Victorian *Occupational Health and Safety Act 2004* increased maximum penalties for both individuals and corporations, and allows for companies to be ordered to undergo significant workplace safety improvement programs if convicted.

Similarly, Queensland and Western Australia have reviewed their occupational health and safety legislation and have increased penalties for deaths in the workplace. New South Wales has been consulting on a draft Bill that would increase penalties for offences resulting in a workplace death.

In 2004, the Commonwealth enacted legislation to establish a criminal penalty regime in its occupation health, and safety legislation. The *Occupational Health and Safety (Commonwealth Employment) Amendment (Employment Involvement and Compliance) Act 2004* created criminal offences where individuals, bodies corporate and politic, and employers (i.e. the Commonwealth or a Commonwealth authority) negligently or recklessly breach specified duties in the Act resulting in death or serious injury. Similar to the ACT’s Crimes (Industrial Manslaughter) Amendment Act, the Commonwealth offences are subject to Chapter 2 of the Criminal Code (Cth) that sets out the general principles of corporate criminal responsibility.

Duty Offences versus Manslaughter

In his recent review of the Victorian OHS Act,³ Chris Maxwell QC noted that no question of manslaughter can arise under the Occupational Health and Safety Act. This observation flows, quite correctly, from Mr Maxwell’s observance that manslaughter is a concept of criminal law, while offences in work safety law are fundamentally about breaches of duties whether or not the breach had a direct consequence in the form of injury or death.

For parallel reasons, the ACT’s industrial manslaughter laws were established through the Crimes Act. At the same time, and consistent with the recommendations of Mr Maxwell, the ACT has amended the ACT’s *Occupational Health and Safety Act 1989* to establish appropriately constructed offences for breaches of safety duties with suitably high penalties.⁴ In the view of the ACT, these are complementary—not contradictory—reforms.

² UK Minister of State, Home Office (Baroness Scotland of Asthal), Lords Hansard 23 March 2005.

³ Victoria. *Occupational Health and Safety Act Review*, March 2004. (The “Maxwell Report”)

⁴ Occupational Health and Safety Amendment Act 2004. See also the *Dangerous Substances Act 2004* (ACT) which has similar duty offences.

The ACT takes fundamental issue with the objection of the Commonwealth to the creation of specific offences and the view that "creating industrial manslaughter offences under the general criminal law is inconsistent with the overall objective of the occupational health and safety legislation framework to prevent workplace deaths and injuries, rather than just punishment after the event."⁵

Regulatory Impact

It is important to recognise that the ACT's industrial manslaughter offences do not impose additional legal obligations or liabilities on employers. Employers have well established duties of care to protect the safety of their workers at common law, under occupational health and safety legislation, and, prospectively, in the model criminal code in relation to fatal and non-fatal offences.

An employer who causes the death of a worker through reckless or negligent conduct could already be charged with manslaughter under the existing provisions of the ACT Crimes Act. As discussed above, however, existing penalties were not appropriate to allow prosecution of corporate employers. The offence addresses an inequity in the law where employers who are natural persons can be held responsible for causing the death of a worker, while corporate employers cannot.

Despite the fact that the Act does not impose additional legal obligations, the ACT Government believes that the legislation has had the beneficial effect of crystallising awareness among employers of their duties and the consequences of serious breaches. Such an outcome is supported by the British Secretary of State for the Home Department in the recently released Corporate Manslaughter paper advising:

The draft bill is therefore primarily designed to secure in a wider range of cases a conviction for a specific, serious criminal offence that properly reflects the gravity and consequences of the conduct involved. The extra deterrent effect of a possible corporate manslaughter conviction for organisations who consistently fail to meet proper standards of health and safety will also provide a further driver for ensuring safe working practices. The UK has a very strong health and safety record but there remain unacceptably high levels of work related deaths each year. The Health and Safety Executive (HSE) considered that the majority of these are preventable.⁶

The offence of industrial manslaughter creates an incentive for companies to adopt more effective accident prevention systems and may improve the comprehension of company directors of their responsibilities and duties for safe management.⁷

The Costs of Workplace Accidents

There can be no question that the costs and consequences of workplace death, injury and illness are unacceptably high. The World Health Organisation (WHO) and the International Labour Organisation (ILO) have estimated that the costs to GDP of injury at work is between 3 and 5 per cent.⁸

⁵ Commonwealth. Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004, Explanatory Memorandum.

⁶ Clarke, Charles, *Corporate Manslaughter: The Government's Draft Bill for Reform*, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, March 2005.

⁷ Beck, Matthias, "An Economic Analysis of the Proposed Reform of the Law On Involuntary Manslaughter, *Journal of the Institution of Occupational Safety and Health*, Vol 3, No 1, 1999.

⁸ WHO and ILO, *National and International Strategies to Improve the Work Environment and Worker's Safety and Health: A Report on a WHO Planning Group*, Prague, 7-9 December [2001?], cited in New Zealand – Department of Labour 2002: p.21.

A study in New Zealand has demonstrated the enormous social consequences and economic costs that follow from a serious work-related accident or illness. Many of these costs cannot be calculated (for instance, the impact on the family of a killed or injured worker). The study noted that costs to the employer are also difficult to quantify. Employers' costs include lost production, negative impacts on staff morale, negative publicity, and the costs of replacing workers or equipment; and in some cases, legal costs.⁹ The ACT Government believes industrial manslaughter legislation can reduce the risk of workplace deaths occurring.

Increased Penalties for Price Fixing Cartels

The ACT Government is concerned that the Commonwealth Government is inconsistent with its legislative reform concerning accountability for individuals within corporations. On 2 February 2005, the Treasurer Peter Costello announced new legislation to provide for gaol terms of up to five years as well as fines in excess of \$200,000 for individuals engaged in illegal price fixing or cartels. It is inconsistent of the Commonwealth Government to impose stricter penalties on individuals in corporations for crimes that cause economic damage, while seeking to mitigate responsibility for involvement in activities causing the death of workers.

CONCLUSION

The ACT Government believes there is a strong case for the consistent application of legislation as far as possible to workplaces located in the ACT, particularly when these workplaces are engaged in the same activity as private enterprises. It is inequitable for different standards to apply to different workplaces that are directly competing with each other. The Commonwealth has a moral responsibility to not undermine the effective prosecution of any employer in cases where a worker has been killed due to the employer's criminally negligent or reckless conduct. The ACT Government also considers that the legislation as enacted will over time have the benefit of raising awareness of employer responsibilities to provide a safe workplace.

The ACT Government opposes the Commonwealth's intervention in this policy area and urges the Committee to recommend that the Bill be abandoned.

⁹ New Zealand – Department of Labour, *Aftermath: the Social and Economic Consequences of Workplace Injury and Illness*, 2002: p.19.

**WORKPLACE DEATH OFFENCES:
SUMMARY OF NATIONAL & INTERNATIONAL DEVELOPMENTS SINCE
NOVEMBER 2004**

UNITED KINGDOM

In 1996, the UK Law Reform Commission presented a report¹⁰ to the Parliament examining reforms to the offence of manslaughter. The Commission recommended abolishing the offence of involuntary manslaughter, and replacing it with two new offences, 'reckless killing' and 'killing by gross carelessness'. It was also recommended that a new offence of 'corporate killing' be created. The proposed elements of the offence of 'corporate killing' correspond to those of 'killing by gross carelessness'.

In March 2005, the UK Government released a draft corporate manslaughter bill for public consultation. The Bill would not extend the liability of directors or managers beyond current liabilities for an individual's negligent conduct (as is the case in the ACT). The proposed offences would apply in a case where someone is killed because a company's senior management "grossly fails to take reasonable care for the safety of employees or others".

CANADA

On 12 June 2003, the Canadian Government introduced the "Westray Bill" to amend that country's Criminal Code in relation to the criminal liability of organisations. The Bill's political context included the 1992 Westray mine disaster in which 26 miners died and the subsequent inquiry that considered limitations on the law of corporate criminal responsibility in relation prosecuting a corporation for such an event. Canada enacted the Bill in November 2003.

The Act includes provisions similar to the criminal responsibility provisions in the ACT's Criminal Code 2002 on which the Crimes (Industrial Manslaughter) Amendment Bill relies. It also includes a new clause in relation to workplace safety that clarify the existence of a legal duty to take all reasonable steps to prevent bodily harm to any person arising from work.

The Act further provides for the creation of an offence for a corporation that fails to provide safe working conditions for its employees, including criminal liability for directors and officers who knew or should have known of the unsafe conditions and did not report them to the appropriate authorities.

VICTORIA

The Victoria Government imposed new offences and penalties in the *Occupational Health and Safety Bill 2004*. The new Act, which replaces the previous *Occupational Health and Safety Act 1986*, states that if an offence committed by a body corporate is attributable to an officer of the body corporate failing to take reasonable care, the officer is also guilty of the offence. Similarly, conduct by individuals can also imputed to bodies corporate, as any conduct engaged in or on behalf of a body corporate by an employee, agent or officer acting within the actual or apparent scope of his or her

¹ United Kingdom Law Reform Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Report No. 237), March 1996.

employment, or within his or her “actual or apparent authority”, is conduct also engaged in by the body corporate.

Fines imposed on bodies corporate under the new Act are increased to \$900,000 from a maximum of \$250,000 in the repealed Act. The Act also allows companies to be ordered to undergo significant workplace safety improvement programs.

WESTERN AUSTRALIA

The Western Australian Government adopted many of the Laing Report’s recommendations in the *Occupational Safety and Health Legislation Amendment and Repeal Act 2004* which amended the existing *Occupational Safety and Health Act 1984*. The amendments increase the maximum penalties for breaches of the Act for both individuals and corporations, and make provision for the imprisonment of individuals in cases of ‘gross negligence’. Gross negligence occurs where an offender:

- knew that their contravention would be likely to cause death or serious harm, but acted or failed to act in disregard of that likelihood; and
- the contravention did in fact cause death or serious harm.

COMMONWEALTH

The Commonwealth has enacted legislation that, among other measures, creates a dual civil and criminal penalty regime in its occupation health and safety legislation. The Occupational Health and Safety (Commonwealth Employment) Amendment (Employment Involvement and Compliance) Act 2004 creates criminal offences where individuals, bodies corporate and politic, and employers (i.e. the Commonwealth or a Commonwealth authority) negligently or recklessly breach specified duties in the Act resulting in death or serious injury. The offences are subject to Chapter 2 of the Criminal Code (Cth) that sets out the general principles of criminal responsibility.

NEW SOUTH WALES

In May 2004, a NSW parliamentary committee tabled a report of its inquiry into serious injury and death in the workplace.¹¹ The Committee recommended the enactment of discrete and specific offences of “corporate manslaughter” and “gross negligence by a corporation causing serious injury” in the *Crimes Act 1900* (NSW). This recommendation was not supported by the NSW Government.

Following receipt of a report to NSW WorkCover in June 2004,¹² the NSW Government released a draft bill for consultation proposing amendments to the *Occupational Health and Safety Act 2000*. The amendments would increase penalties for workplace deaths, including terms of imprisonment—two years for first offenders and five years for subsequent offenders. In April 2005, the NSW Government announced they would not be introducing the Bill into parliament in its current form.

QUEENSLAND

A review of Queensland’s *Workplace Health and Safety Act 1995* recommended numerous amendments to the Act including increased penalties for those found guilty of breaches and the introduction of new offences within the Act. The current maximum penalties, in effect since 1 June 2003, range from 500 penalty units or six months imprisonment, to 2,000 penalty units or three years imprisonment if the breach of the Act causes multiple deaths.

¹¹NSW Legislative Council – General Purpose Standing Committee No.1, *Serious Injury and Death in the Workplace*. (Report 24)

¹²McCallum, *et al.* *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & Other Matters: Report to WorkCover Authority of NSW*, June 2004.