



Submission

Tasmanian Law Reform Institute

Criminal Liability of Organisations 30 August 2005

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AMMA and Resources Sector Profile

1. AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries. It is the sole national employer association representing the employee relations and human resource management interests including OH&S of Australia's onshore and offshore resources sector and associated industries.
2. AMMA member companies operate in the following industry categories:
 - Exploration for minerals and hydrocarbons
 - Metalliferous mining, refining and smelting
 - Non-metallic mining and processing
 - Hydrocarbons production (liquid and gaseous)
 - Associated services such as:
 - Construction and maintenance
 - Diving
 - Transport
 - Support and Seismic Vessels
 - General Aviation (Helicopters)
 - Catering
 - Bulk Handling of Shipping Cargo
3. AMMA represents all major minerals and hydrocarbons producers as well as significant numbers of construction and maintenance companies in the resources sector. AMMA is in a unique position in that it is able to articulate a view on the workplace relations, OH&S and associated legislative issues of the resources sector.
4. The Australian resources sector has (and continues to make a significant contribution to Australia's wealth and prosperity, underpinning critical supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors.
5. The resources sector has contributed:
 - Minerals and energy exports in the order of \$67.1 billion in 2004-2005.¹ This represents approximately 67 per cent of Australia's total commodity export earnings in 2004-2005.² This equates to 32 per cent of Australia's overall export earnings during this period.³ In 2005-6 export earnings are expected to increase to \$80.9 billion;

¹ ABARE, *Australian Commodities-Forecasts and issues*, Vol. 12 No. 1, March quarter 2005 at 19-21

² ABARE, *Australian Commodities*, Vol. 1 No. 1, March 2005 at 19

³ RBA, *Statement On Monetary Policy*, February 2005 at 43

- exports of mining technology, equipment and services of approximately \$2 billion (2003-4)⁴;
 - new capital expenditure in the mining industry was around \$9.3 billion in 2003-2004⁵ which is approximately 24 per cent of private new capital expenditure in Australia (2003-4)⁶;
 - total government revenue payments of \$4.6 billion (2003-4)⁷; and
 - infrastructure development since 1967 including the construction of 26 towns, 12 ports and additional port bulk handling infrastructure at many existing ports, 25 airfields and over 2,000 km of railway line.⁸
6. The continued growth of minerals and energy exports that has been experienced in Australia over the past decade has been achieved through large capital expenditure programs, both on the expansion/upgrading of existing projects and development of new projects.
 7. As at October 2004, ABARE reported 74 projects either committed or under construction with an expected capital expenditure totalling \$22.6 billion.⁹
 8. These statistics highlight the enormous significance of the resources sector, both in terms of export revenue and domestic capital investment.
 9. AMMA members in Tasmania have witnessed a significant improving OH&S performance and AMMA generally supports any proactive OH&S legislative initiatives but is strongly opposed to a punitive approach as espoused by the Law Reform Institute's report on this issue.
 10. AMMA has taken a consistent national position on the issue of Industrial Manslaughter. That position is that matters should be left solely to criminal law (including all of its statutory and common law principles and defences). AMMA also has taken the position that any prosecutions for the offence of manslaughter should only occur before a criminal court with normal rights of appeal.

⁴ Minerals Council of Australia, *Annual Report 2004*

⁵ ABS, 'Private New Capital Expenditure and Expected Expenditure', Catalogue 5625.0, June 2004 at 12

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ ABARE, *Australian Commodities*, Vol. 12 No. 2, June quarter 2005 at 398

11. Industrial manslaughter legislation across Australia's State and Territory jurisdictions is a mess, if only because the same offence carries different tests for liability and different penalties for convictions, depending upon where the offence is committed. These inconsistencies can only breed injustice. We would submit that any proposal to introduce legislation in Tasmania would only compound these inconsistencies. The following table represents an overview of the legislation applying across the states and territories.

Legislation Passed

Legislation is now in force dealing with the individual offence of industrial manslaughter in the following jurisdictions:

(a) Australian Capital Territory

Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT) which inserted a new Part 2A 'Industrial Manslaughter' Provision into the *Crimes Act 1900 (ACT)*.

(b) Victoria

Occupational Health and Safety Act 2004 (VIC) which contains a 'Duty not to recklessly endanger persons at the workplace' at Section 32.

(c) Western Australia

Occupational Health and Safety Act 1984 (WA) which contains an industrial manslaughter provision at Section 21C entitled 'Breaches of section 21B'.

(d) New South Wales

Occupational Health and Safety Amendment (Workplace Deaths) Act 2005 (NSW) which amends the *Occupational Health and Safety Act 2000 (NSW)* and inserts a new Part 2A 'Workplace Deaths – Offence'.

(e) Commonwealth

Occupational Health and Safety (Commonwealth Employment) Act 1991 which provides for criminal monetary penalties to be imposed upon private businesses which are manufacturers, suppliers or installers of plant, equipment and substances used by Commonwealth employees. This legislation does not contain jail terms penalties.

Legislation Proposed

There has been no written industrial manslaughter legislation proposed as yet in Queensland, Tasmania or the Northern Territory.

In South Australia, the *Occupational, Health Safety and Welfare (Industrial Manslaughter) Amendment Bill 2004* has been introduced as a private members bill into the Parliament of South Australia by the independent Nick Xenophon and had a first reading.

Monetary Penalties

The following maximum monetary penalties apply to the offence of industrial manslaughter in each jurisdiction:

	ACT	NSW	WA	VIC	SA ^[iii]	CWLTH ^[iii]
Individual	\$200k	\$165k	\$250k to \$312,500k	\$184k	\$500k	\$9k
Company	\$1M	\$1.65M	\$500k to \$625k	\$920k	\$500k	\$495k

Jail Terms

The following maximum jail terms apply to the offence of industrial manslaughter in each jurisdiction for relevant 'persons'^[iv]:

	ACT	NSW	WA	VIC	SA ^[v]	CWLTH
1st Offence	20yrs	5yrs	2yrs	5yrs	20yrs	N/A
2nd Offence	20yrs	5yrs	2yrs	5yrs	20yrs	N/A

Jurisdictional Differences

The following differences between jurisdictions as to conduct, fatality required and legal forum may be identified:

Jurisdiction	General Conduct Test	Injury Required	Legal Forum
ACT	'Reckless' or 'Negligent'	Death	Magistrate
VIC	'Reckless'	Danger of Serious Injury	Magistrate
WA	'Gross Negligence'	Death or Serious Harm	Magistrate
NSW	'Reckless'	Death	NSW Industrial Commission
SA	'Reckless Indifference'	Death	Magistrate
Cwlth	'Negligent' or 'Reckless'	Death or Serious Injury or substantial risk of same	Magistrate

12. The introduction of differing 'industrial manslaughter' offences in four Australian states and territories means that individual directors, managers and supervisors can now be prosecuted and sent to jail for a criminal offence in circumstances where they may have little direct control over a tragic event resulting in death at one of their worksites. These new laws have set a dangerous precedent not only for our criminal law standards, but also for the basic concept of consistency between laws.

13. It is without doubt that industrial manslaughter laws introduced in New South Wales, Victoria, Western Australia and the Australian Capital Territory in the last two years mock over 1000 years of established criminal law. These criminal laws date back to English common law and Australian colonial equivalents and form the basis of current criminal statutes that were enacted early to mid last century.
14. Manslaughter is a crime; no one can argue with that. Those individuals in our society who act consciously and voluntarily in a grossly negligent manner, where there is a high risk of death or serious injury, and actually cause death – are rightfully prosecuted according to our established criminal laws. Notwithstanding this well understood and accepted principle, the aforementioned state and territory governments, in an effort to deliver so-called moral wins to their union constituencies, have manipulated the criminal offence of ‘manslaughter’ and dressed it up as a new statutory offence of ‘industrial manslaughter’, but all in different ways.
15. Laws in most civilised countries differ according to whether an offence is criminal or civil, due mainly to the seriousness of the moral stigmas and sanctions attached to a finding of criminality. Criminal offences also normally carry added protections for an accused person, entitling those charged with more serious offences (such as manslaughter) to added protections during the trial procedure and broader rights of appeal. However, unlike in all Australian criminal jurisdictions where the offence of manslaughter is generally treated consistently, the offence of industrial manslaughter will now be prosecuted differently and determined according to varying legal principles and tests from one state to the next. Further, successful prosecutions will carry different monetary penalties and jail terms, depending upon where the prosecution takes place. For example, a first offence workplace death in Western Australia carries a maximum jail term of two years for an individual, in New South Wales it is five years and in the Australian Capital Territory it is twenty years. In Victoria, a death does not even have to occur for a five year jail term to apply for a first offence.
16. In a fundamental rebuke to those who may advocate the virtues of state rights and federalism, industrial manslaughter laws across Australia are now an inconsistent mess. All are different as to quantum of maximum monetary penalty for individuals and corporations; length of maximum jail term for individuals; the general ‘conduct test’ required for an offence to be committed; the nature of the ‘injury required’ for the statutory offence to become activated from a prosecution perspective; available defences; and basic rights of appeal.

17. Of all the inconsistencies between the various pieces of legislation relating to industrial manslaughter, it is New South Wales that stands out as the most inconsistent. In New South Wales, offences are prosecuted before the New South Wales Industrial Relations Commission (sitting as a court), whilst in all the other states prosecutions are conducted before a magistrate. In New South Wales, individuals prosecuted for industrial manslaughter have no right to a trial by jury, as they do in Victoria. In New South Wales, trade unions can initiate prosecutions against companies and individuals with the written consent of the New South Wales Minister. In New South Wales, no right of appeal exists beyond the Full Bench of the New South Wales Industrial Relations Commission where only a monetary penalty is awarded against an individual and/or a corporation.
18. The fact that industrial manslaughter laws across Australia now contain such significant differences, both between jurisdictions and as compared to the standard offence of criminal manslaughter, is a recipe for injustice. Further, it is a degradation of community sentiment at large which says that like offences will carry like trial procedures and penalties - especially where individual reputations, liberties and freedoms are at stake.
19. The inept approach by state and territory governments of using the differing offences of industrial manslaughter with differing penalty outcomes, for their own individual state political purposes, is a travesty that must be resolved. The starting and end point for any changes to manslaughter laws should be a consistent approach within our existing criminal law regimes. The offence of manslaughter be it at work or in the community is a criminal matter and has no place in occupational health and safety legislation.
20. In summary AMMA submits that existing legislation is adequate in addressing the issue of death or injury in the workplace and it is appropriate that situation continue and accordingly we reject the conclusions in report of the Tasmanian Law Reform Institute.

^[ii] Noting of course that this Bill is yet to pass SA Parliament.

^[iii] It is noted that civil penalties under Cwlth legislation for general duty breaches are up to \$242k.

^[iv] The definition of 'person' differs from one jurisdiction to the