



Workplace death and serious injury: a snapshot of legislative developments in Australia and overseas

Should criminal laws in Australia be amended to allow for industrial manslaughter offences? This became a pertinent question with the introduction of such an offence into the Criminal Code of the Australian Capital Territory. It is again of issue with the introduction of a Private Member's Bill into federal parliament and recent high profile workplace accidents. This Research Brief discusses legislative developments in various Australian states and territories, and comparative examples from the United Kingdom and Canada.

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Introduction

Every year in Australia, it is estimated that the toll from workplace deaths and accidents exceeds the national road toll, and yet there is greater government and community emphasis placed on the latter.¹ The death rate for workplace accidents includes death by accident and death by disease. However, there are a number of limitations of available data on workplace deaths and accidents which must be borne in mind when considering the figures. The limitations of this data will be explored at page 4 of this Research Brief. Whilst some industrial deaths have had a high media profile, and triggered union lobbying of governments for changes to health and safety laws, a number of other cases occur every year with little or no profile. Just as there is a comprehensive legislative and policy approach aimed at reducing the road toll, it could be argued that so too should there be a comprehensive approach to reducing the workplace death and accident toll. This Research Brief suggests that legislation which works to both *prevent* workplace accidents and fatalities, and impose effective and tough *punishment* for breaches in this area, could be the key.

Workplace fatalities in Australia: some examples

Recent examples of workplace fatalities and serious injuries in Australia include:

- Western Australia: in May 2004, one company lost three workers and had another three seriously injured due to workplace accidents. Two workers were killed in separate accidents after being struck on the head by equipment. Another worker was killed and three more injured after an explosion at an iron briquette plant. A review of the company's safety practices was ordered by the state government²
- New South Wales: on 15 October 2003, 16 year old Joel Exner was killed on an Eastern Creek building site on his third day at work. As a direct result, various unions lobbied the NSW government to act against unsafe workplaces and to introduce industrial manslaughter laws³
- Victoria: on 23 March 2003, 29 year old Darren Moon was killed at a Fairfield factory after coming into contact with the rollers of a paper making machine. In October 2004, the Amcor Company pleaded guilty to two offences in relation to the accident.⁴ On 28 October 2004, the company was fined \$120 000⁵
- Queensland: on 15 October 2001, 36 year old Grahame Lange was crushed and killed after pipes he was unloading at a Queensland work site fell on him. In September 2004 two companies were found guilty of failing to ensure safety at the workplace. They are yet to be sentenced,⁶ and
- Australian Capital Territory: on 31 August 1999, 44 year old Gary Waters was electrocuted whilst reconnecting power to a Canberra suburb. In 2001, 45 year old Kerry Griffin, an employee of the same company as Mr Waters, was killed whilst

connecting power to a building site. As a result of these accidents the company has developed a new organisational workplace safety program.⁷

Different views on workplace safety

One view is that the current approach to work place safety based on the current Occupational Health and Safety (OHS) regime—which has its basis in the British Robens Report from 1972—is still sufficient.⁸ The Robens Report recommended improving the OHS regime by introducing self-inspection schemes for employers, who are required to consult with employees and their representatives on OHS issues.⁹ This approach, labelled ‘advise and persuade’ by Professor Richard Johnstone, has been the predominant approach in Australia since the 1970s.¹⁰

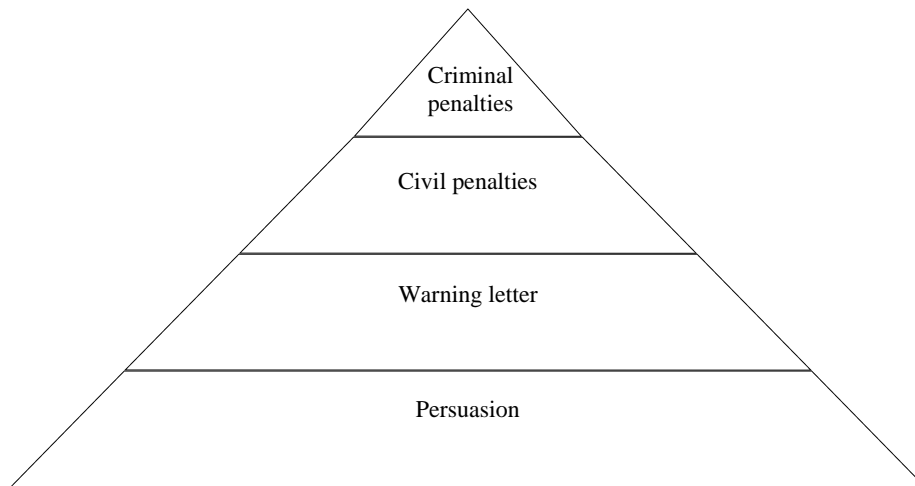
Proponents of this view argue against the implementation of industrial manslaughter laws or toughening of penalties under current OHS laws because these kinds of changes would have the potential to ‘drive investors out’.¹¹ In other words, any benefit that may be derived from such changes would be negated if industries moved off-shore or minimised their involvement in the Australian economy because of the potential economic impact of having to comply with such laws. Others argue that the additional burdens on companies and managers would do nothing to improve workplace health and safety and thus new laws would hinder, rather than help, workplaces.¹²

Another view is that there are still too many workplace deaths and accidents. Proponents of this view argue that punitive action needs to be taken where employers are not ensuring the safety of the workplace, and where their conduct demonstrates culpability, by extending the focus from prevention to punishment of contraventions of workplace safety regulations. According to this argument, the criminalisation of employer misconduct would have the effect of bolstering workplace standards by immediately raising those standards. This view is based on the proposition that a comprehensive regulatory scheme aimed at achieving maximum compliance is best designed as a pyramidal structure: that is, encouraging compliance requires a composite approach which includes both outcome-based standards and tough enforcement measures.¹³ Haines and Gurney argue that:

Pyramidal approaches to enforcement are encouraged where non-adversarial, non-punitive enforcement measures aimed to build on trust between regulators and regulated are used in the first instance. These must inexorably resort to increased levels of punitive and intrusive measures should persuasion and cooperation fail [...].¹⁴

This ‘heavy tip’ of the pyramid, it was suggested, could be created by introducing industrial manslaughter laws into criminal laws.¹⁵ In addition, proponents of this approach note that increasing the deterrent effect of a punitive measure, requires legislative responses that are able to break open the protective shield of a corporation, by imposing individual liability on managers and senior officers.¹⁶ Overall, this argument is driven by the view that the implementation of tough new criminal laws is a move in the right direction for ensuring the continued safety of workers in the workplace, as it would significantly increase the incentives for employers to comply with workplace standards.

Figure 1: An example of the enforcement pyramid¹⁷



Differing approaches to the issue of industrial deaths and accidents have been reflected by the insertion of new offences in the criminal code of the Australian Capital Territory (ACT) and reviews of the various state and territory OHS acts. These recent developments have rekindled debate about what kind of approach is most effective, and renewed interest in the question of whether criminal laws should be amended to include the offence of industrial manslaughter.

The scope of this Research Brief

Governments face major challenges when addressing the issue of workplace health and safety, and there is sharply divided opinion over the appropriate legislative response to industrial deaths and accidents. Any policy has to consider the effects upon industry and investment as well as the effect upon the workforce. This brief will deal specifically with death by industrial accident.

The first part of this Research Brief looks at statistical data available on industrial deaths and accidents. The second part provides a brief overview of the legislative response taken by the Commonwealth, the Australian Capital Territory, New South Wales, Victoria, Queensland and Western Australia. Finally, the third part takes a comparative look at the legislative strategies adopted in the United Kingdom and Canada.

Statistical data

This Brief uses statistical data gathered primarily from the *Compendium of Worker's Compensation Statistics Australia*, produced by the Australian National Occupational Health and Safety Commission (NOHSC), whose mission is 'to lead and co-ordinate national efforts to prevent workplace death, injury and disease in Australia'.¹⁸

The following figures show workers' compensated fatalities (Figure 2) and reported workers' compensation case rates (Figure 3) over the last decade. The figures show a general downwards trend in the number of reported case rates. Whilst any reduction in the number of cases is positive, there is still scope for further reduction in workplace accidents and fatalities.

The NOHSC have estimated that there are more than 2000 fatalities from workplace accidents and diseases per annum.¹⁹ This figure is only an estimate, because the long latency period of some diseases and the difficulty in relating some conditions to periods of work makes it difficult to quantify the precise number of deaths. However, the figure of around 2000 is taken to be an accurate estimate by NOHSC, the Department of Employment and Workplace Relations (DEWR) and the Australian Bureau of Statistics (ABS).²⁰

The NOHSC rates used in this Brief are only for compensatable fatality cases, which includes some disease fatalities. There are discrepancies between estimates of the number of compensatable cases and NOHSC's estimate of the total number of fatalities, as not all cases are eligible for compensation. This is due to the reasons listed above and because in some cases there is no dependent to lodge a compensation claim. Further, there are some workplace fatalities of self employed persons.

It is important to note that there are also discrepancies in the reporting and recording of compensatable workplace fatalities and injuries across Australia's states and territories, thereby making it difficult to compare jurisdictional data.²¹ These discrepancies also make it difficult to accurately assess the correct course of action to take when addressing the issue of workplace accidents.

Accordingly, the following caveats should be borne in mind when considering this data:

NOHSC estimates that state and territory data only covers about 80 per cent of workplace fatalities and injuries

comparisons across jurisdictions should be treated with caution as jurisdictions do not apply a standard definition as to what constitutes a compensable fatality. In addition, data based on workers' compensation claims for fatalities has several important deficiencies. For example, cases are not included where there are no dependants to lodge a claim

there are systemic differences in the treatment of disease cases across jurisdictions and,

there are differences across the states and territories in terms of industry mix and workforce characteristics.²²

Further restrictions on the utility of the available data can be found in the Appendix.

Figure 2: Worker's compensation cases reported, 1992-93 to 2002-03²³

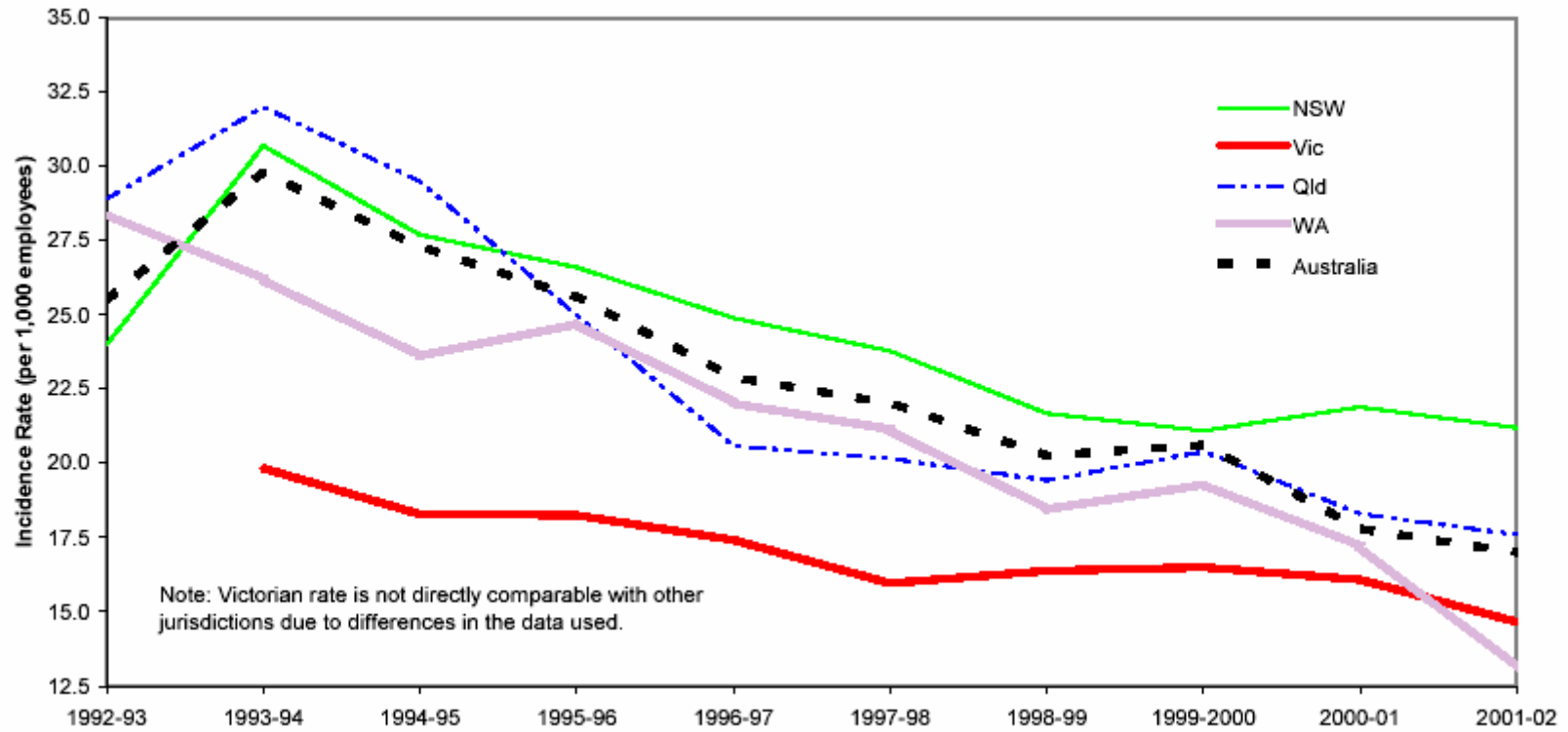
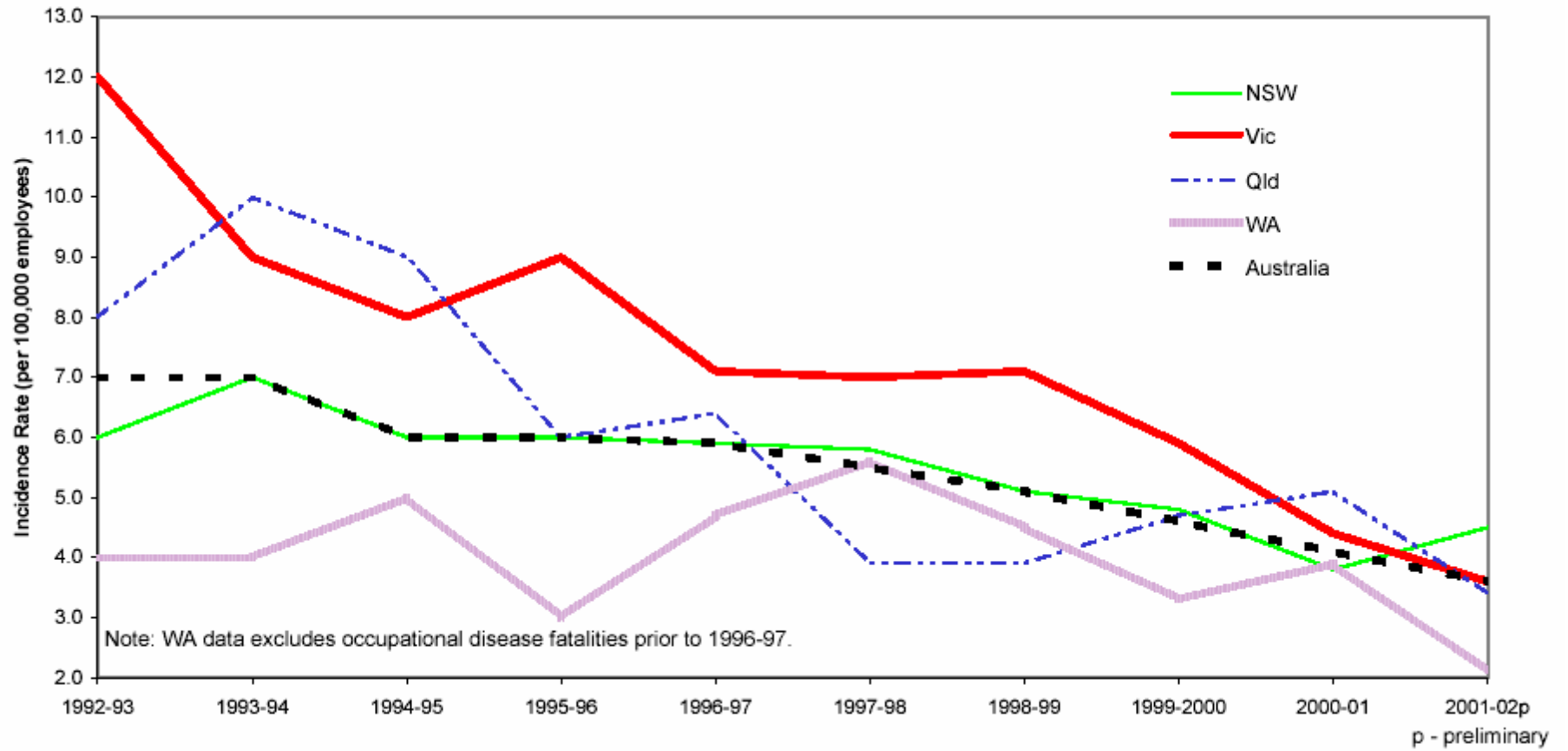


Figure 3: Workers' compensated fatalities, 1992-93 to 2001-02²⁴

Occupational Health and Safety legislation in Australia: a snapshot

Australian Capital Territory legislation

The *Crimes (Industrial Manslaughter) Amendment Act 2003* came into force on 1 March 2004, amending the *Crimes Act 1900*. The Act was implemented to fulfil a 2001 election commitment made by the ACT's Labor Government, and is part of a comprehensive range of measures to improve workplace health and safety standards in the ACT.²⁵ It created a new offence of industrial manslaughter and reinforced the importance of workplace safety by imposing severe penalties including fines and/or imprisonment for breaches of the Act.²⁶ The legislation applies to employers, employees, independent contractors, outworkers, apprentices, and trainees or volunteers. The Act inserts the offence of 'industrial manslaughter—senior officer offence' into the *Crimes Act 1900*. This offence provides that senior officers can be prosecuted where it is proven that their negligence or recklessness led to the death or serious injury of an employee under their supervision. By virtue of being included in the criminal code, the standard is criminal, not civil, negligence or recklessness. The legislation does not include additional OHS requirements or liability for accidents that could not be anticipated.²⁷ Additionally, with its inclusion in the criminal code, the criminal law standard of proof applies, that is, proof of an offence would have to be proved beyond reasonable doubt.

The Act attempts to overcome the difficulties encountered when attempting to hold corporations liable for an incident. The crimes of murder or manslaughter require the prosecution to show that the accused had a certain state of mind; that is, that the accused intended to kill or seriously injure the victim, or was at least reckless or negligent and that death or serious injury could result from the accused's actions. A corporation cannot have a state of mind, and so the criminal law 'identification principle' holds that the required mental state must be attributed to an actual person who can be identified as the 'controlling mind' of the corporation. In large modern companies, where executive structures may be extensive and decision-making diffuse, identifying a 'controlling mind' can be difficult, if not impossible. Acknowledging the change to modern organisational structures, the Act does away with the need to identify an individual who could be deemed to be the 'directing mind and will of a corporation'. It was suggested that this should make it easier to hold the company, as an entity, responsible if found guilty.²⁸

Within Australia, the ACT has been a pioneer in its insertion of the 'industrial manslaughter' offence into the *Crimes Act 1900*. The penalties are severe: for employer and senior officer offences, the court can award penalties of up to 2 500 penalty units (currently the equivalent of \$275 000) and/or order up to 25 years' imprisonment. In addition, the court has the power to make compliance orders against a company where the offence was an employer offence.

However, the ACT's choice of separating industrial manslaughter offences from the coherent OHS regime by introducing them into the *Crimes Act 1900* has also been criticised and labelled by some commentators 'an unhelpful and retrograde

development'.²⁹ The main thrust of this criticism has been the argument that the transfer of industrial manslaughter prosecutions into the 'mainstream criminal law' arena would lead to an over-complication of the prosecution and therewith to a loss of the legislation's deterrent effect.³⁰

Subsequently, the ACT has announced other initiatives to address workplace health and safety issues, including the launch on 30 August 2004 of an annual 'Health and Safety month' where workplaces are encouraged to '[work] together, sharing knowledge and finding solutions to health and safety risks'.³¹ Other states have attempted to introduce similar legislative measures with varying results.

Commonwealth legislation

The *Occupational Health and Safety (Commonwealth Employment) Act 1991* is the legislation which covers the health and safety of Commonwealth employees. Under Schedule 2 of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*, a person may face criminal penalties for breaching one or more of the workplace health and safety obligations created under the Act. In addition, the Act specifies that an employer exposing an employee to a significant risk of death or grievous bodily harm may also be guilty of a criminal offence.

The offences attract various penalties which correlate to the seriousness of the offence. Penalties can range from 30 penalty units (currently the equivalent of \$3 300) or six months imprisonment for lesser offences—such as the failure to produce a document during an investigation—to 4 500 penalty units (currently the equivalent of \$495 000) for the most severe cases, including, for example, the breach of an employer's duty of care. In this latter case, the Act does not provide for imprisonment as an alternative to the financial penalty.

The Act does not contain an offence of industrial manslaughter. At the federal level, the Coalition Government has expressed its opposition to punitive industrial manslaughter provisions.³² In relation to the introduction of the ACT's Crimes (Industrial Manslaughter) Amendment Bill 2003, the Federal Workplace Relations Minister, the Hon. Kevin Andrews MP, urged the ACT Chief Minister to discontinue with plans to introduce industrial manslaughter and to instead focus on making improvements to existing OHS laws.³³ The response of the federal minister to the passage of the Bill was to introduce legislation to have Commonwealth workplaces exempt.³⁴ Entitled the Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004, this legislation not only proposed to exclude Commonwealth authorities and Commonwealth government business enterprises from the ACT legislation, but also from similar legislation introduced by any other state or territory.³⁵ However, due to the prorogation of the 40th Parliament on 29 August 2004, the Bill has lapsed.

The introduction of an industrial manslaughter offence has been placed back on the agenda of the federal parliament. On 4 August 2004, a Private Member's Bill entitled the Criminal

Code Amendment (Workplace Death and Serious Injury) Bill 2004, was introduced into the Senate.³⁶ The purpose of this Bill was to amend the *Criminal Code Act 1995* to create new offences of industrial manslaughter and serious workplace injury. The Bill would establish a legal framework to make negligent employers responsible for the death or the serious injury of workers and has many similar provisions to the ACT legislation. This Bill has also lapsed due to the proroguing of the 40th Parliament.

Legislation in the other states and territories

Victoria

In the wake of the Esso Longford explosion,³⁷ the Victorian state government unsuccessfully attempted to pass legislation to incorporate offences for ‘corporate employers whose employees are killed or seriously injured at work’ into the Victorian criminal code.³⁸ The need for such provisions were highlighted by what were widely perceived to be inadequate penalties, following Esso’s conviction under the Victorian *Occupational Health and Safety Act 1985*. Esso was convicted on 11 counts, including ten breaches of section 21 of the Act which states that:

(1) An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.³⁹

The remaining conviction was under section 22 of the Act which relates to non-employee exposure to health and safety risks. Esso was fined two million dollars, which ‘[g]iven Esso’s resources, ...[was] regarded as an inadequate punishment and deterrent’.⁴⁰

The Esso example suggests that the OHS regime in place at the time may not have offered sufficient incentives for employers to provide and maintain safe workplaces. Indeed, in relation to the prevention of OHS breaches, such incentives may only be achieved where—as a minimum requirement—any financial penalty imposed on a culpable employer is far greater than the costs of complying with OHS standards for a safe workplace. Yet, in addition, it also seems important to complement financial penalties with the threat of imprisonment for breaches of OHS standards, to achieve a comprehensive and complete deterrent strategy.

The Victorian government’s legislative response to this incident, the Victorian Crimes (Workplace Deaths and Injuries) Bill 2001, was an attempt to take a proactive stance in attributing liability for accidents through criminal punishment, and to assist in the prevention of workplace accidents. Based on the findings of the Longford Royal Commission,⁴¹ and an extended period of policy development, the Bracks government proposed to introduce the offence of ‘corporate manslaughter’ into the Victorian criminal code, with criminal liability for senior officers similar to the ACT legislation.⁴² Victoria’s proposed legislation would have imposed severe financial penalties on corporations to ensure that occupational health and safety would be regarded as a priority by employers, and that large corporations with large resources would be significantly affected by any penalties imposed. However, the proposed legislation faced strong opposition from

employer groups, and was ultimately blocked by both the Liberal and National parties which held the majority in the Legislative Council at the time.⁴³

Despite holding the majority in both chambers of the Victorian parliament since 2003, it is unclear whether the Victorian government has any future plans to pursue the issue of industrial manslaughter laws. A recent review of the *Occupational Health and Safety Act 1985*, commissioned by the Victorian Government, produced a report which recommended a variety of changes to the Act, including increasing monetary penalties and alternative sentencing. The report did not address the issue of a specific crime of industrial manslaughter.⁴⁴

In recent developments, as a response to the review of Victoria's *Occupational Health and Safety Act 1985*, the Victorian Minister for Industrial Relations announced in November 2004 plans for new OHS legislation that would increase maximum fines and allow a maximum jail term of five years.⁴⁵ The penalties would apply where negligent employers breached the OHS laws and a death or serious injury resulted. The new legislation has been proposed as an alternative to the introduction of industrial manslaughter laws and is due to come into effect on 1 July 2005.

New South Wales

Despite mounting pressure in the wake of a number of workplace deaths between 2000 and 2003, the notion of an industrial manslaughter offence was rejected in NSW.⁴⁶ The Minister for Industrial Relations in NSW instead opted to make changes to methods of investigations of workplace accidents and established a WorkCover fatalities unit, with the aim of ensuring that any workplace deaths were prosecuted in the appropriate court so that sentencing relevant to the crime would apply.⁴⁷

However, due to amendments in 2001 to the *Occupational Health and Safety Act 2000*, NSW currently has the highest maximum financial penalties for those found guilty of breaching of the Act.⁴⁸ The maximum penalties for a breach of a general duty of care under Part 2, Division 1 of the Act, for example a duty of care owed to an employee, currently range from \$55 000 for first time offenders, to \$825 000 for corporations who are repeat offenders.

Still, the Act does not allow for the imprisonment of offenders. In a recent report, prepared for the WorkCover Authority New South Wales in June 2004, the current legislative regime in NSW has been criticised for this reason.⁴⁹ Advancing two main arguments, the authors highlighted that the current regime cannot provide a sufficient deterrent: the first argument focused on the penalties actually imposed by decision-makers. Referring to statistics provided by NSW's Crown Advocate, the report demonstrated that the increase in level of legislatively-mandated penalties has not been reflected in the penalties actually awarded through the tribunals and courts.⁵⁰ Rather, the authors found that:

Actual penalties have not increased in line with the statutory increases in maximum penalties—or, in other words, actual penalties as a proportion of maximum penalties have tended to decrease over the relevant period.⁵¹

The report authors' second argument was based on the decision-makers' inability to sentence offenders to a term of imprisonment, arguing that the current system—which emphasises prevention by focusing on prosecuting employers for failing to *ensure* a safe workplace—is not a sufficient deterrent to provide and maintain safe workplaces. Rather, they argue, the current regime should be complemented by legislative measures which would enable the punishment of breaches leading, for example, to the death of an employee, through separate offences attracting harsher penalties, including the option of imprisonment.⁵²

Two private member's bills have been included on the Notice of Motion Paper in the NSW Legislative Council, with the most recent appearing on 22 June 2004. Both bills seek to amend the *Crimes Act 1900* to include the offence of either corporate or industrial manslaughter.⁵³ However, they have not yet progressed through the NSW lower house.

On 27 October 2004, the NSW government released a consultation draft for legislation to amend the existing OHS regulatory scheme.⁵⁴ The proposed amendments have two crucial features: first, they would provide for an increase in existing penalties for workplace deaths, including the decision-maker's ability to impose a term of imprisonment. Under this bill, the maximum penalties would be up to \$165 000 or five years imprisonment for individual offenders, and \$1 650 000 for offending corporations. The second aspect is the proposed introduction of additional sentencing guidelines to be applied by the courts. It is envisaged that the courts would be given a list of aggravating factors against which an appropriate penalty has to be set. Yet, despite the NSW government's decision to toughen the OHS regulatory scheme, it again opted against amending the New South Wales' criminal code to introduce an industrial manslaughter offence.

Queensland

Queensland has also considered implementing legislation that would enact industrial manslaughter offences under the criminal code. A Queensland government discussion paper issued in 2000 proposed the adoption of changes to corporate and individual liability under the criminal code, for instances where dangerous conduct leads to a workplace death or serious injury.⁵⁵ The Queensland government planned to seek submissions on the proposed legislation, however, this has not yet occurred and it is not clear whether it will.

Instead, a review of Queensland's *Workplace Health and Safety Act 1995* recommended numerous amendments to the Act which, along the same lines as those proposed in Victoria, included increasing penalties for those found guilty of breaches and the introduction of new offences within the Act.⁵⁶ 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. The decision-makers' discretion to sentence offenders to a term of imprisonment under

Queensland's OHS legislation, rather than by introducing industrial manslaughter offences into the criminal code, has been noted with approval in the 2004 Report for the WorkCover Authority of New South Wales.⁵⁷

Western Australia

Western Australia is another state conducting a review of its occupational safety legislation in order to address perceived inadequacies in the area of workplace deaths and serious injuries. A review of the *Occupational Safety and Health Act 1984* resulted in over 100 recommendations for amendments to the Act. They included improved identification and assessment of hazards and associated risks, and provisions to allow for breaches of the Act 'that lead to death or serious injury to be heard as indictable offences by superior courts'.⁵⁸

As a result of the report, the Western Australian government has introduced the Occupational Safety and Health Legislation Amendment and Repeal Bill 2004. The Bill has adopted many of the report's recommendations: for example, it proposes an increase in penalties for breaches of the Act, and the mention of provisions to allow for imprisonment of individuals in extreme cases.⁵⁹ The penalties proposed by the Bill will range from \$5 000, to a maximum penalty of \$250 000 or two years imprisonment for individuals, or \$500 000 for corporations for the most severe breaches. The Bill is currently at the second reading stage in Western Australia's Legislative Council.

A comparative look: international examples

It is useful to consider the experience of comparable overseas jurisdictions and their recent legislative developments to contrast the various legislative approaches available.

United Kingdom

To quell mounting pressure on the government to fulfil their 1997 and 2001 election promises to introduce legislation on corporate manslaughter, in early 2003 Home Secretary David Blunkett announced that legislation would be drafted in autumn 2003.⁶⁰

The government intended to introduce draft legislation on corporate manslaughter after a 1996 report by the Law Commission of England and Wales⁶¹ recommended that an offence of corporate killing be introduced into the UK's criminal code to respond to perceived shortcomings in the existing criminal laws.⁶² However, like Australia, the United Kingdom would encounter problems in determining the most appropriate method for holding corporations criminally liable, due to the effects of the 'identification principle' (discussed above).⁶³ The UK's proposed 'corporate killing' legislation would also have to negate the need to find a 'controlling mind', thereby making it easier to prosecute companies directly and to hold them accountable for negligence that leads to death.

However, despite government announcements and unions vehemently demanding industrial or corporate manslaughter laws, the latter pointing towards the new laws in the ACT as a model, such legislation has not been drafted to date.⁶⁴ Rather, the government appears to be focused on pre-empting concerns from employers, by stressing that any prospective legislation would target only those organisations and companies that were not taking the health and safety of their employees seriously. The government has also offered to consider industry submissions and comments on the issue. The British Prime Minister Tony Blair noted recently that:

We will publish proposals on corporate manslaughter in the current parliamentary session, and introduce legislation to ensure that corporations are prosecuted for a serious criminal offence where they show such wilful disregard for their employees that it results in death.⁶⁵

Canada

In 1987 the Law Reform Commission of Canada issued a report that examined various models to reform Canadian criminal law to expand the provisions on ‘corporate criminal liability’.⁶⁶ Six years later, the Canadian Minister for Justice released a white paper which again reviewed ‘corporate criminal liability’.⁶⁷ The white paper proposed to expand criminal provisions to overcome the difficulties in prosecuting a company due to the need to identify a ‘directing mind’ of the company, before actual prosecution of the company directly could take place.⁶⁸ However, it was not until the Westray Mine disaster in 1992—in which 26 miners were killed—and the subsequent release of the findings of an inquiry into the disaster in 1997, that prospective legislation to amend the criminal code to ensure workplace safety, was introduced in the Canadian parliament.⁶⁹

Initially, a series of private members’ bills was introduced to amend the criminal code. Although they were not successful—they later lapsed or were withdrawn—they did prompt a study by the House of Commons Standing Committee on Justice and Human Rights, which recommended in its report of June 2002 that the Canadian government introduce legislation to deal with the issue of ‘corporate criminal liability’.⁷⁰

Bill C-45, the Canadian Government’s legislative response to the report, was assented to on 7 November 2003. This Bill amended the criminal code to:

- (a) establish rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives;
- (b) establish a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public;
- (c) set out factors for courts to consider when sentencing an organization; and
- (d) provide optional conditions of probation that a court may impose on an organization.⁷¹

Conclusion

Every year in Australia, a significant number of people die as a result of workplace accidents. This is despite the existing regulatory scheme of OHS laws in operation at Commonwealth, state and territory level. This Brief shows that after disasters such as the Longford explosion, governments are often quick to talk tough and advocate more stringent penalties for offenders and the creation of industrial manslaughter offences. However, this Brief also shows that the majority of legislative responses to date have been to address workplace safety by emphasising prevention and punishment within the context of existing OHS regulatory schemes. The ACT and Canada are the only jurisdictions to date which have gone further and implemented industrial manslaughter provisions into their respective criminal codes.

Yet, the use of punitive measures to complement preventative measures with a view to creating a comprehensive system of maximum deterrence is certainly not unknown to the Australian legal system. Using the pyramidal approach discussed in the introduction, laws regulating traffic safety prescribe preventative measures to keep vehicles safe, punitive measures where breaches of preventative measures occur, and, for the most serious violations of preventative measures, criminal offences with severe criminal penalties. Introducing industrial manslaughter provisions into criminal laws would merely follow this pattern, and allow prosecutors to respond to the most blatant workplace safety violations with the full vigour of a comprehensive legal system.

Whether the ‘heavy tip’ of the pyramid should be created by amending criminal laws to incorporate the offence of industrial manslaughter is still a contentious issue. Only recently, the NSW government decided against taking this approach. However, introducing industrial manslaughter into the criminal laws could serve a number of regulatory purposes, including emphasising the importance of workplace safety within the community and government by elevating industrial manslaughter from a plain OHS offence to a ‘proper’ criminal offence. Further, it has been noted that such strong punitive measures can encourage over-compliance ‘to make sure that [companies] are free from liability’.⁷²

The solution to reducing the toll from workplace deaths and accidents is not easy to come by. Despite the implementation of legislation and education programs, deaths and serious injuries are still occurring in workplaces across Australia at a cost of approximately \$30 billion annually.⁷³ Arguably, the current standards and penalties are not providing enough incentives for employers to further increase the safety of Australian workplaces. As the Victorian Attorney-General has argued:

...when education, advice and compliance activity fail to produce safe workplaces, enforcement is necessary. For enforcement to work, we must ensure that there is a comprehensive range of health and safety offences.⁷⁴

Appendix

Data on workplace fatalities and injuries 1992–2001

General

The data contained in this paper has been collated from various editions of the Australian National Occupational Health and Safety Commission's (NOHSC) *Compendium of Workers' Compensation Statistics Australia*. According to the NOHSC's *Compendium of Workers' Compensation Statistics Australia, 2001-02*, '[t]he statistics presented ... are compiled annually from claims made under the State, Territory and Australian Government workers' compensation Acts which resulted in a fatality, permanent disability or a temporary disability'.⁷⁵ However, the NOHSC estimates that this data only covers about 80 per cent of workplace fatalities and injuries for the following reasons:

- Temporary disability occupational injuries resulting in absences from work of less than one usual working week ... have not been included.
- Occupational injuries and diseases occurring on a journey to or from work have not been included in the data. ...
- While the majority of employees are covered for workers' compensation under general State, Territory and Australian Government workers' compensation legislation some specific groups of workers are covered under separate legislation. ...
- Cases not claimed as workers' compensation or not acknowledged as being work-related are excluded.
- Most occupational injuries to the self-employed are excluded because such workers generally are not covered for workers' compensation. ... Nevertheless, incidence and frequency rates data are more reliable as the denominators used in the calculation of the rates have been adjusted to also exclude self-employed persons⁷⁶

Further, it should be noted that:

[D]ata for 2000-01 and 2001-02 have been supplied according to the National Data Set Second Edition (NDS2). As a result of the change in scope between the First and Second Editions of the National Data Set, there is a break in the time series between 1999-00 and 2000-01. The nature of the break is not the same across jurisdictions, due to the different formats used to supply the data. To increase comparability between jurisdictions and comparability over time, factors have been applied to some historical and current year data. ...

Caution needs to be exercised when comparing jurisdictional data. There are systemic differences in the treatment of disease cases across jurisdictions ... [and] another factor causing variation in the level and rate of occurrences across jurisdictions is the different mixes of industries and workforce characteristics.⁷⁷

Workers' compensated fatalities

The data included in this Brief on compensated fatalities are taken from the 1997-98 and 2001-02 issues of the NOHSC *Compendium of Workers' Compensation Statistics*. The compendia note that:

Data for all cases are shown in the year in which the workers' compensation claim was first lodged. In the case of a fatality there may be many years between a claim being lodged for ill health and when the fatality actually occurs. Hence revisions to the data may be recorded for many years.

...

Data shown for 2001-02 are preliminary ... [and] consequently, these 2001-02 data tend to underestimate the number of cases, as well as the incidence rate for this year in comparison to previous years.

...

Comparisons across jurisdictions should be treated with caution as jurisdictions do not apply a standard definition as to what constitutes a compensable fatality. ... In addition, workers' compensation coverage of fatalities has some deficiencies. For example, cases are not included where there are no dependants to lodge claims.⁷⁸

Workers' compensated cases, injuries and disease

The data included in this Brief on injury and disease includes compensated injury/poisoning and disease cases, including fatalities. They have been taken from each year of the *Compendium*, which includes preliminary data for each year. While this will underestimate the incidence rate it is a means of ensuring comparability of the data over time.

For years prior to 2000-01, data were provided according to the NDS1 scope, which differs from the NDS2 scope in that one working week is defined as 5 working days. The difference between these two scopes is best illustrated by considering an example. If a person was a part-time worker who usually worked 18 hours per week over 3 days, and sustained an injury resulting in being off work for 24 hours (4 working days), the claim would be included in the scope for 2000-01 and 2001-02 (NDS2) as the time off was greater than the time usually worked in one week, i.e. 24 hours (time off) is greater than 18 hours (time usually worked per week). However, it would not be included in previous years under NDS1 scope, as the employee had lost less than 5 working days.⁷⁹

Victorian data

Prior to 2000-01 comparable Victorian data on compensated cases were not provided to the NOHSC. Accordingly, data from the Victorian Workcover Authority has been included for the years 1993-94 to 2001-02. These data are for cases involving more than 10 working days lost and should not be directly compared with other jurisdictions. They have been included to enable a comparison of the trends between the jurisdictions, not to directly compare rates.

Endnotes

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