



# Industrial manslaughter: Is it time for legislation in all Australian jurisdictions?

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This discussion paper examines industrial manslaughter and discusses whether the time has arrived for all Australian States and Territories to introduce industrial manslaughter legislation. It provides an overview on industrial manslaughter and examines overseas and Australian cases studies and the penalties issued by the courts in these cases.

## OHS Legislation in Australia

In recent decades in Australia there has been an abandonment of prescriptive regulation in favour of what is generally known as self-regulation (Hopkins 2000). The occupational health & safety (OHS) legislation and the supporting regulations in Australia deal with the prevention of workplace accidents by establishing a system based on self-regulation which requires employers to ensure the health, safety and welfare of all their employees and others whilst they are at work as far as is practicable (Mayman undated).

There are many employers that have adopted a proactive and a successful approach to OHS and have made a success of the self-regulatory approach. However the Longford Gas explosion is a good example of self-regulation failure. At the time of the explosion, Esso was largely responsible for running its own safety checks (Hopkins 2000).

OHS legislation in Australia is a separate legal structure. This clearly defines the separation between OHS crime and real crime and creates a perception that workplace death and injuries are less serious than those that are dealt with under general law (Wheelwright undated). Deaths and

injuries at work are not prosecuted by the police but by public servants, which in turn affects the community's perception of the criminality offence.

## Australia's Overall Health and Safety Performance

Australia has a very poor record when it comes to OHS performance. For every 70 workers killed at work in Australia there are 53 workers killed in the USA and 14 workers are killed in the United Kingdom (VTHC undated).

In January 2004 data released by National Occupational Health and Safety Commission (NOHSC) estimated that there are more than 2,000 work related deaths each year in Australia, with the majority being caused by occupational diseases such as cancer (Addison undated).

On average each year 380 workers suffer a work-related injury or disease for which they receive workers' compensation. At least 50 of these cases will be young workers, of which 5 will be permanently incapacitated (Ellis 2004). The cost to the Australian economy exceeds \$30 billion per annum, which is the equivalent of the annual GDP for Tasmania, the Northern Territory and the ACT combined.

Compare this data to information released by the Industry Commission in 1995 which concluded that there were 2,700 work-related deaths and 650,000 injuries annually in Australia. The cost to the economy then was approximately \$20 billion each year (Industry Commission 1995). These statistics suggest that there has been an improvement but the rate of improvement is not fast enough (Ellis 2004).

## Comparing Workplace Safety Performance with Road Safety Performance

In Australia there are more workplace fatalities annually than the national road toll (Burrows 2004). In 1970, 3,900 Australians died on our roads. Culpable driving laws were introduced around Australia to try and tackle this problem, which resulted in a significant decline in the road toll fatalities. The most recent data shows that in twelve months to March 2004 there were 1,634 fatalities on the roads (Marles 2004).

It is difficult to argue that the culpable driving laws were not a critical piece in the overall strategy to reduce the road toll. The laws ensured that the penalty matched the severity of the incident (crime). People were being killed as a result of poor behaviour on the roads, so the courts started to impose penalties including jail sentences and instant loss of licence for serious drinking and speed violations, to send a message to the community that this behaviour was no longer

acceptable (Road Safety Committee 1994, Marles 2004). This resulted in a change in the community attitude to reckless behaviour on the roads (Marles 2004).

### What is Industrial Manslaughter?

Manslaughter is a common law offence. It requires the death of a person but, unlike murder there is no requirement of an intention to kill. In the context of a workplace it arises from criminal negligence on the part of the employer. That is to say that the conduct of the employer was completely negligent or reckless and that their action or failure to act is deemed to be criminal (Wheelwright undated).

### Why is it difficult to prove Industrial Manslaughter?

Currently in Australia all States and Territories have specific OHS legislation, which enables the courts to impose penalties on negligent parties where a worker is killed at work. All jurisdictions also have specific criminal legislation that contains the general crime of manslaughter. The *Crimes Act* in each State allows for individuals to be charged with manslaughter should they contribute to the death of another person (Addison 2004).

Although the crime of industrial manslaughter carries the threat of a prison sentence, it is difficult to prosecute a company for this offence because the common law principles require attributing criminal liability to a company. A company can only be found guilty of an offence if reckless or negligent conduct causes the death of a worker and this can be attributed to a “directing mind and will” of the corporation (Department of Parliamentary Services 2004). This makes it difficult to build a case against larger companies and impossible to send a corporation to jail in Australia because in most cases there are various

## OH&S legislation in Australia creates a perception that workplace death and injuries are less serious than those that are dealt with under general law

levels of management in between the directors (Department of Parliamentary Services 2004).

It is much easier to prove personal liability of individual directors for manslaughter, than to prove corporate liability as demonstrated in the *Tesco Supermarkets Ltd v Natrass* [1972] case. The Supreme Court of Victoria adopted the Tesco principles in *R v A C Chemicals Hatrick Pty Ltd* case that in practice makes it difficult to prosecute companies under the general criminal law (Creighton 1986).

To date there has only been one successful prosecution for corporate manslaughter in Australia, *R v Denbo Pty Ltd* [1994] by the Victorian Supreme Court. The company was fined \$120,000 but the fine was never paid as the company went into liquidation (VTHC undated). History shows that there has been a failure to establish industrial manslaughter charges even in the most serious public disasters in Australia, e.g. the Westgate Bridge Collapse and the Esso Longford explosion (Johnstone undated).

### International Experience

Countries such as the United States of America, the United Kingdom and Canada have introduced tough laws for dealing with serious breaches of the OHS legislation and employers who fail to provide safe workplaces (VTHC undated).

In the United Kingdom there has been some success in prosecuting employers in industrial manslaughter cases. Since 1989 there have been twelve convictions of company directors or business owners for manslaughter and there have been five convictions for corporate manslaughter

in England and Wales and one corporate homicide conviction in Scotland since 1994 (VTHC undated).

### Current Penalties for Breaching OHS Legislation in Australia

In a number of Australian jurisdictions the OHS legislation has serious monetary penalties for corporations and jail sentences for directors and individuals (Addison 2004). The maximum penalty in New South Wales (NSW) is \$825,000 for a corporate offender facing a second or greater offence. A first offence carries a maximum penalty of \$550,000 and an individual with a previous offence faces a maximum fine of \$82,500 and/or two years imprisonment. These penalties are currently under review by the NSW Government (Addison 2004).

Victoria has similar provisions to NSW, with a maximum penalty for a second offence being \$275,000 for corporations, but up to five years imprisonment for an individual (Addison 2004). However the fines in Tasmania are only as high as \$165,000 for corporations and \$55,000 for individuals and there is no provision for jailing any offender.

In Queensland offenders also face the risk of up to two years jail and up to \$88,000 in fines. There are no jail sentences for offenders in South Australia, Western Australia or the Northern Territory (Addison 2004).

### Enforcement of Legislation

Enforcement of OHS legislation in Australia uses the following hierarchy (Johnstone undated b):

- Verbal advice
- Improvement and prohibition notices
- Penalty notices



### Scott Dominguez

In the United States in 1999 an employer Allan Elias the owner of Evergreen Resources was jailed for 17 years for knowingly endangering an employee's life. The employee Scott Dominguez suffered severe brain damage after being ordered to clean out the sludge from the bottom of a storage tank that contained cyanide and phosphoric acid. The employer failed to provide safety training or safety equipment for staff. Allan Elias was also ordered to pay US\$5.9m in compensation to Scott Dominguez, and his family.

Judge B Lynn Winmill said that the sentence would adequately reflect the danger Elias posed to the community and to one individual in particular. The judge hoped it would deter Elias and others from committing such unsafe acts in the future (VTHC undated).

- Formal warning of prosecution
- Prosecution

In 1995 the Industry Commission concluded that the average prosecution rate for all jurisdictions was approximately 0.4% of inspections (Industry Commission 1995b). In 2000-2001, across the 6 States of Australia, there were 686 prosecutions in total that resulted in conviction for OHS offences. Almost 60% of these prosecutions were in NSW and overall the average fine was just under \$12,000 (Mayman undated).

### **The Current Status on Industrial Manslaughter in Australia**

In March 2004 the Australian Capital Territory (ACT) Government passed groundbreaking Industrial Manslaughter legislation. A number of other jurisdictions have threatened to do this over the past few years but have now removed it from their political agenda (Jones 2004). The ACT industrial relations minister Katy Gallagher claims that the legislation recognises the serious nature of workplace fatalities and that it had become clear that the OHS penalties for this offence were an inadequate incentive for some employers to provide a safe workplace (Gallagher 2004).

The new ACT law now allows for the company and the director to be convicted of industrial manslaughter where it is proven the director's policies and decisions actually result in the death of a worker, or the director allows a corporate culture to develop that disregards the health and safety of the workers and results in a death (VTHC undated). However an employer that has taken all reasonable steps to ensure the safety of their employees has nothing to fear from this legislation (WorkCover ACT undated).

The Federal Government has made moves to amend the Occupational Health and Safety (Commonwealth Employment) Act 1991 to prevent the ACT industrial manslaughter legislation applying to any commonwealth entity, including departments and agencies (Gallagher 2004).

The ACT industrial manslaughter legislation is one of only two in the world. The other is the Canadian Bill C-45 Criminal Code (Liability of Organisations) Amendment, which was introduced in 2003. The bill is also known as the Westray Bill, as it is named

after the Westray Coal mine in Nova Scotia where 26 miners were killed in 1992 (Illawara Business undated).

In NSW the State Government came under pressure to ensure that negligent or reckless employers are jailed, in the wake of Legislative Council committee report chaired by Fred Nile, which recommended corporate manslaughter, should be written into the Crimes Act (Boardroom Report 2004).

The second report released in June 2004 by a panel of independent legal experts led by Ron Mc Callum recommended that a new offence specifically related to workplace deaths be introduced into the OHS Act and rejected the introduction of industrial manslaughter into the Crimes Act as recommended by the Legislative Council committee report (Boardroom Report 2004).

The NSW Government has introduced a new offence imposing severe penalties for certain fatal accidents in the workplace. The legislation, the Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005, was given royal assent in June. The Bill introduces a new offence of "reckless conduct causing death at workplace by a person with OHS duties. The new offence imposes a maximum penalty of \$1.65m for corporations and \$165,000 and/or 5 years imprisonment for individuals (CCH 2005).

This approach corresponds with the process adopted in Victoria under section 32 of the Victorian Occupational Health & Safety Act 2004 (Tooma 2005).

Under section 32 of the Victorian Occupational Health & Safety Act 2004 a person found guilty of recklessly endangering persons at a workplace faces a maximum fine of \$188,658 or 5 years imprisonment or both. The maximum fine for a body corporate found guilty of recklessly endangering persons at a workplace is \$943,290 (WorkSafe Victoria 2005).

### **The Courts' Approach to Prosecution**

An injury or death in the workplace is usually the consequences of failing to identify, assess and eliminate any risks that workers may be exposed to during the work process. Generally the courts tend to focus on the actual event, as it

is easier for the prosecution to prove the facts constituting an event, instead of examining the chain of events leading up to the breach of the OHS legislation (Johnstone 2002).

The courts usually interpret the legislation in a very strict fashion and have made it clear that the prosecution of OHS offences is deterrence (Johnstone undated). Under the OHS Laws fines have been the traditional penalty and are applicable to individuals as they are to corporations. However fines may be ineffective in acting as a deterrent as businesses and the public may be led to believe that corporations can always buy their way out of trouble (Lunzug and Waugh 2003). In recent times courts have been imposing penalties towards the upper end of the maximum fine available across all jurisdictions.

In NSW the courts have also used publicity orders on at least six occasions since 2001 as a deterrent to employers and they also seem to have the capacity to improve safety (Workplace OHS 2004).

## **History shows that there has been a failure to establish industrial manslaughter charges even in the most serious public disasters in Australia**

### **Australian Case Studies**

When a young person is killed at work there is outrage amongst the community. The tragic deaths of Dean Mc Goldrick and Joel Exner (Joel fell 15 metres to his death on his third day of work at an Eastern Creek construction site) brought condemnation across all divides in NSW. Joel Exner's tragic death once again ignited the debate for the introduction of industrial manslaughter legislation in NSW (Davies 2004).

The examples of prosecutions detailed in the boxes illustrate that tougher sentences are delivered by the courts in the USA and the U.K than they are in Australia for similar offences. However it is difficult to make valid comparisons as each country and jurisdiction has a different approach, legislation, and reporting methods (Durham et al 2002).



**Dean McGoldrick**

Dean McGoldrick was 17 years old when he fell 12 metres from a roof that he was working on in the Sydney CBD. Dean fell to his death because his employer had not provided a safe system of work, handrails, safety lines or training.

The company was convicted and fined \$20,000 on 25 May 2001. The director was also convicted but no penalty was imposed provided the initial fine was paid. The employer was fined \$20,000 but has only paid \$1,800 of that fine to date. As the company failed to pay the fine in full, the Local Court has directed Mr Poleviak be required to pay the remainder of the fine personally.

**Penalties under the Culpable Driving Laws**

Compare the penalties for breaching OHS Legislation in the above case studies, with the penalty delivered by a Melbourne court for culpable driving.

In Melbourne a woman was jailed for killing a cyclist and seriously injuring another cyclist after falling asleep at the wheel on the way home from an all-night party. She was sentenced to four years and nine months, with a minimum of two years and three months. On appeal in the Victorian court of appeal she had her sentenced reduced to four years jail, with a non-parole period of one year and 10 months.

The court had heard that the woman had been awake for all but a tiny portion of the 24 hours before she dozed off in her car driving home from an all-night dance party and ploughed into three friends out cycling in Bayside, Brighton. Justice Batt said the offence of culpable driving is a species of involuntary manslaughter (Herald Sun 2004).

**Is it time for Industrial Manslaughter Legislation in all jurisdictions?**

A number of commentators and academics have claimed that because OHS offences have been segregated from mainstream criminal law they are regarded as quasi-criminal and that this diminishes the gravity of corporate crime (Fisse 1990).

Michael Tooma, Senior Associate with National Law Firm, Deacons, claims that under criminal law a workplace fatality can result in a charge of manslaughter and that creating a separate specific law for Industrial Manslaughter is unnecessary and could prove to be counter productive. Tooma claims that creating a new offence of Industrial Manslaughter may create a perception that killing someone at work is a lesser crime than killing someone in

the street. Basically a workplace fatality would be treated as an industrial crime, rather than a real crime (Illawarra Business undated). Professor Ron Mc Callum supports Tooma's views and claims that creating the offence of industrial manslaughter in criminal legislation would result in fewer convictions (Davies 2004).

Peter Rozen a barrister and legal expert on OHS law in Victoria, claims that grossly negligent conduct within the workplace should be prosecuted and punished in the same manner as grossly negligent conduct outside the workplace. Mr Rozen claims that under common law in New South Wales and Victoria, effectively legal immunity applies to large and medium sized employers under the current law where gross negligence is required to be proven in manslaughter or serious injury case (Jones 2004).

The Master Builders Association in NSW claims that any workplace death is a tragedy but industrial manslaughter legislation has the potential to introduce a penalty that would punish small business and not address the problem (Priest 2003).

However it could be argued that Industrial manslaughter legislation would not be a threat to businesses (small, medium or large) that are complying with the OHS Legislation but a threat to negligent business (Jones 2004).

Since the introduction of the industrial manslaughter legislation in the ACT there has been a dramatic increase in the number of Chief Executive Officers and senior managers attending seminars on workplace safety. This may not be an indication of the threat of this law but it is difficult to imagine it is a coincidence (Herald Sun 2004).

In October 2004 six months after the introduction industrial manslaughter legislation the ACT Government claims that it is not having an impact on the

viability of businesses in Canberra. Deputy Chief Minister Ted Quinlan said that all industrial manslaughter legislation does is to take away the corporate shield (ABC Online 2004).

All workplace fatalities are unacceptable and preventable, and all avenues must be examined to prevent workplace deaths. This approach should include both education and sanctions (WorkCover ACT 2004).

In cultural terms Industrial Manslaughter Laws make the penalties clearly befit the severity of the incident. The introduction of culpable driving laws has seen a reduction in the number of fatalities on the roads and a change in reckless driving behaviour on Australian roads. Industrial Manslaughter Laws may be a critical piece in the jigsaw puzzle in reducing workplace deaths and has the potential to change community attitudes to fatalities or serious injuries in the workplace caused by criminal reckless negligence (Marles 2004).

**Conclusion**

In theory there is nothing to prevent a normal criminal charge of manslaughter being laid against an individual implicated in a workplace death, provided the necessary points of proof proving the charge beyond reasonable doubt can be established as in the *R v Denbo Pty Ltd* [1994] case. However since the introduction of OHS Legislation in Australia there has only been one successful prosecution for industrial manslaughter in Australia.

The difficulty seems to be that the points of proof associated with the normal offence is not particularly compatible with the manner in which businesses typically operate, particularly Pty Ltd companies. The charge of Culpable Driving is an example of manslaughter applied within a particular environment, i.e. driving a motor vehicle on public roads.

There is no doubt that as long as there are fatalities in the workplace and the courts deliver trivial fines as a penalty (as demonstrated in the Australian cases studies), the campaign for industrial manslaughter legislation will continue to be debated. The community expects justice and the courts to deliver appropriate penalties to fit the crime.

A significant improvement in health and safety standards and a significant reduction in fatalities and serious injuries in the ACT may strengthen the argument for other States and Territories to introduce industrial manslaughter legislation.

However it is imperative that the goal is to continue to improve health and safety standards in all jurisdictions. Prevention must always be a priority in reducing workplace fatalities and injuries and everyone should be committed to ensuring this happens in every workplace.

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