TACC Comments

in response to the

Tasmanian Law Reform Institute
report on the
Criminal Liability of Organizations

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Introduction

The Victorian Automobile Chamber of Commerce together with the Tasmanian Automobile Chamber of Commerce is an employer organisation with more than 5000 members operating in the retail motor industry across Victoria and Tasmania. In Tasmania the TACC represents the interests of 330 member businesses.

The retail motor industry comprises mostly of small businesses with less than ten employees. VACC/TACC membership is divided into fourteen divisions that cover a diverse range of sectors within the retail motor industry including towing services, automobile repairs and panel beating, specialist repairers, motor cycles, commercial vehicles, tyres, parts recycling, car dealerships, service stations, component manufacturing, and farm machinery dealers.

The retail motor industry is a significant part of the small business community in Australia, accounting for at least 5.9% of the small business sector, and provider of at least 8.7% of employment. The existence of non-employing businesses is also evident in the retail motor industry, however, the number is small.

Essentially, the employing businesses are those that join the relevant Motor Trade Association in the State or Territory, such as TACC.

Those businesses that consist of sole owners or partnerships and do not employ labour in this industry tend not to find any benefit to membership of an employer organisation. In addition a small portion of those businesses do not qualify for membership, either because their business is not principally concerned with the retail motor industry, their business standards do not meet TACC Codes of Practice, or current members oppose the membership, on the grounds that the applying business does not fit the criteria for membership.

TACC, together with VACC, the peak representative body of employers engaged in the retail motor industry provides the following submission on behalf of its members to the Tasmanian Law Reform Institute report on the Criminal Liability of Organisations.

The issues raised by the Tasmanian Law Reform Institute are not dissimilar to the issues recently reviewed in Victoria. VACC has recently been extensively involved in offering comment on the issues of corporate liability, officer liability and prosecution alternatives having been extensively involved initially in the review of the Victorian Crimes (Industrial Manslaughter) Bill 2001, the Maxwell Report into Victoria's OHS Act 1985, and in the consultation leading to the formation of Victoria's new *Occupational Health and Safety Act 2004*. VACC/TACC has a considered position on reform to health and safety law.

TACC is particularly concerned that the tone of the Law Reform Institute report infers that all workplace deaths are wrongful and that it is only corporations to should have liability, and that Tasmania should follow the lead of other jurisdictions and in particular the ACT, in introducing Industrial Manslaughter style legislation into its criminal code.

TACC does not oppose tougher sentences being applied to the small number of people whose complete disregard for basic occupational health and safety cause the death of a person at any place of work. TACC does not support the contentions within the discussion paper that reforms like those introduced in the ACT are indicative of the type of reform which is being given widespread consideration in jurisdictions across Australia. The Issues paper was released in June 2005 and by this stage legislative reform had been completed in Victoria and was nearing completion in New South Wales, yet the progress and outcomes of the reform in these States, including the defeat of Industrial Manslaughter Bills in both States, appears to have not been considered.

TACC considers that OHS Legislation should create civil duties, rather than criminal offences. Penalties should be monetary, judicially determined and based on the seriousness of offences and the circumstances of breach, not on the nature of the injury. Enforcement requires a mix between education and persuasion on the one hand and, in serious or repeated cases, prosecution and penalties on the other. A system of enforceable undertakings should be an alternative approach to prosecution. There is no justification for creating a new offence of industrial manslaughter given the existing criminal law of manslaughter and related offences.

There should be no absolute or strict liabilities, deemed guilt, reverse onus of proof in any civil or criminal proceedings, nor any other basis on which employers, directors, management personnel or employees are treated less favourably than the defendants in prosecutions under any other equivalent law or legislation. Persons charged with OHS offences should be accorded natural justice and, in criminal cases the standards presumptions and protections of the general criminal law.

Question 1

Should the definition of homicide in the Code be amended so that an organization can be criminally responsible for homicide?

TACC disputes that there is any tangible evidence in the conclusions contained within the discussions contained in Part 2 of the paper to support the conclusion that organizations should be liable for traditional crimes. VACC also disputes that there is recognition by "many" common law jurisdictions that it is and should be possible to find corporations and other organizations guilty of manslaughter.

There is absolutely no focus in the paper on proactive prevention. There is absolutely no discussion on the role and performance of WorkCover Tasmania as the Regulator of OHS in Tasmania. There is absolutely no discussion on the need for education for corporations. The focus of the paper appears to be on retribution.

TACC considers that the definition of homicide in the Code should not be amended so that an organization can be criminally responsible for homicide.

Question 2

Should the method of attributing criminal liability to organizations (the identification doctrine) be reformed?

The report sites a number of examples of prosecutions in Tasmania and across other jurisdictions. It highlights prominent cases such as the Esso Longford disaster (amongst others) and then tries to draw a link to suggest that there must surely have been negligence in some part in at least some of these cases.

This ‘hit and miss’ approach of putting up cases which *might* have warranted criminal prosecution of individuals fails to provide any convincing factual evidence to support the notion that the method of attributing criminal liability to organizations (the identification doctrine) should be reformed.

TACC considers that the method of attributing criminal liability to organizations (the identification doctrine) should not be reformed, but that there should be reform which would potentially apply criminal liability evenly to all duty holders.

Question 3

(a) Should any reforms apply to all ‘organizations’?
(b) Should the term ‘organization’ be defined broadly, in line with recent Canadian reforms?
(c) Would it be appropriate/necessary to implement any of the recommendations of the VLRC in relation to liability of the Crown?
(d) Do you favour an exception like that in the UK draft bill relating to things done ‘in the exercise of an exclusively public function’?

It is TACC’s view that any reforms relating to the liability of organisations should apply to all organisations, including the Crown. TACC supports the implementation of the recommendations of the VLRC in relation to the liability of the Crown into the Workplace Health and Safety Act 1995 (Tas.).

Question 4

(a) Should a specific 'senior officer' type offence be introduced to the Code? If so,

(b) What should the elements of such an offence be?

(c) How should the term 'senior officer' be defined and should the definition extend to volunteers?

TACC supports the view of the Institute that a specific senior officer offence should not be introduced to the Criminal Code. TACC agrees that if specific offences are to be created for senior officers, it seems more appropriate for them to be contained in other specialised legislation, such as the WHSA.

TACC supports the inclusion of an offence for a Senior Officer where the company is charged with an offence and the offence is attributable to the failure to take 'reasonable care', similar to that which has been inserted into the Victorian OHS Act 2004.

TACC does not consider that the definition of Senior Officers should be extended to persons that act in a voluntary capacity.

Question 5

(a) Would you support the introduction of two new strict liability offences in the WHSA: breach of duty causing death, and breach of duty causing grievous bodily harm?

(b) Should such offences be indictable?

(c) If not, what should the maximum penalty for the offences be?

(d) Or, do you prefer the Queensland approach of introducing different maximum penalties depending on the result of the breach?

TACC opposes the introduction of the strict liability offences of breach causing death and breach of duty causing grievous bodily harm.

TACC is not opposed to the introduction of an offence which would be applied to the small number of people whose complete disregard for basic occupational health and safety cause the death of a person at any place of work.

Question 6

(a) Should maximum penalties under the WHSA be increased?

(b) If so, what should the maximum be?

(c) Should any offences under the WHSA be indictable or punishable by imprisonment?

TACC is mindful of the recent reforms in other jurisdictions, including Victoria, and considers that the maximum penalties under the WHSA probably should be increased to bring them into line with the other jurisdictions.

TACC considers offences under the WHSA which should be indictable or punishable by imprisonment should include an offence for interfering with an Inspector and an offence for reckless endangerment similar to that which has been included in the Victorian OHS Act.

Section 32 Occupational Health and Safety Act 2004

Duty not to recklessly endanger persons at workplaces

A person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence and liable to—
(a) in the case of a natural person, a term of imprisonment not exceeding 5 years, or a fine not exceeding penalty units, or both; and
(b) in the case of a body corporate, a fine not exceeding penalty units.

Question 7
(a) Should section 53 of the WHSA be reformed? If so,
(b) Should the reverse onus of proof be removed?
(c) Should reform be based on section 144 of the Victorian *Occupational Health and Safety Act 2004*?
(d) To whom should the offence apply?

Section 53 of the WHSA is clearly too broad in that it applies to 'each' director of an organisation.

TACC supports the inclusion of Senior Officer provisions similar to those contained in Section 144 of the Victorian *Occupational Health and Safety Act 2004* into the WHSA.

Whilst the definitions of Senior Officer in the Victorian OHS Act are the same as those contained in Section 9 of the Corporations Act 2001 with the passing of the OHS Act WorkSafe Victoria have already communicated that they will focus on the persons that have the greatest ability to make or influence decisions on behalf of a business (i.e. the Directors or Executive Officers).

Question 8

(a) Which of the three broad types of reform do you prefer:

1. a specific 'industrial manslaughter' offence to the Code;

2. reforms to the WHSA; or

3. specialised principles of criminal responsibility for organizations?

(b) If you prefer the first or third types of reform, would you also support one or more of the following reforms to the WHSA?

- manslaughter and grievous bodily harm provisions

- breach of duty causing death or grievous bodily harm provisions

- higher maximum penalties

- senior officer liability

TACC 'prefers' reforms to the WHSA. TACC is not opposed to the introduction of higher maximum penalties or senior officer liability provisions into the WHSA.

Question 9

(a) Do you think that a fine is likely be an effective and/or appropriate punishment in most cases of organizations wrongfully causing death or injury?

(b) When imposing a fine on an organization, should courts be required to impose a fine in proportion to the organization's size, revenue and assets?

(c) If so, how should information about these matters be established by courts?

Fines have already proven to be an effective punishment in cases of organisations failing in their duties under the WHSA.

A person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury should be subjected to fines at the higher end of the scale and in cases involving the highest level of culpability should potentially be subject to gaol sentences.

When imposing a fine on an organisation the courts should not be required to impose fines in proportion to the organisation's size, revenue and assets. There clearly needs to be maximum penalties contained within the Act and the amounts of penalties imposed by the Courts should be amounts that the courts deem appropriate in the circumstances in the same manner as it is for all standards of criminal law.

Question 10

Should disqualification orders be an additional sentencing option?

TACC considers that Disqualification orders should not be an additional sentencing option as the impacts of such orders could reach significantly beyond just the directors (particularly on employees and shareholders).

Question 11

Should dissolution of a corporation be an additional sentencing option?

TACC considers that dissolution of a corporation should not be an additional sentencing option. Apart from the potential conflict with Commonwealth Corporations law noted in the paper, the ability to apply the law that a major corporate entity (e.g. Esso or McDonalds) might be able to be dissolved appears extremely unlikely and unworkable.

Question 12

Should community service orders be a sentencing option for organizations?

TACC considers that Community Service Orders should not be a sentencing option for organisations as such orders do not remedy the breach or improve health and safety outcomes in the workplace where the breach occurred.

Question 13

(a) Should the imposition of a probation order be an additional sentencing option for organizations? If so,

(b) Should legislation list organizational specific conditions?

(c) Should a section based on section 732.1(3.2) of the Canadian Code be included?

TACC considers that orders (e.g. enforceable undertakings) should be able to be issued by the courts without the need for supervision. Furthermore, TACC considers that the option to accept enforceable undertakings should be an option which is made available to WorkCover Tasmania, rather than the courts, as an alternative to prosecution.

TACC believes that a section based on section 732.1(3.2) of the Canadian Code should not be included in the Criminal Code in Tasmania.

Question 14

Should sentencing courts be able to impose adverse publicity orders on organizations?

TACC considers that the courts should not be able to impose adverse publicity orders. TACC is concerned that the effect of an adverse publicity order could well exceed the intended impact of a fine or even the maximum penalty which would otherwise be imposed, or conversely have little or no effect.

TACC also considers that prosecution should not be specifically aimed at shaming. There is often sufficient shaming on an employer in the publicity which accompanies an incident in the first instance and then subsequently if there is a successful prosecution.

Question 15

Should equity fines be an additional sentencing option?

TACC considers that equity fines should not be an additional sentencing option. It is wrong to suggest that “mum and dad” shareholders should take such an active interest in the actual management of the companies in which they invest that they ought to be also penalised.

Question 16

(a) Should the imposition of a punitive injunction be an additional sentencing option?
(b) If so, on what model should it be based?

In the discussion paper it is suggested that a disadvantage of enforceable undertakings is their emphasis on ‘correcting’ wrongdoing rather than seeking to punish. TACC considers that the option of enforceable undertakings should be available to WorkCover Tasmania as an alternative to prosecution, available in cases involving lower degrees of culpability but still requiring some action to correct the wrongdoing.

Question 17

Should the *Sentencing Act* require the sentencing judge to make a compensation order where an organization is found guilty of a crime in the Code?

TACC considers that the Sentencing Act should not require the sentencing judge to make a compensation order. There are already adequate means for persons affected by the committing of an offence to be compensated through the Workers Compensation and Rehabilitation Act 1988.

Question 18

(a) Do you think that the range of sentencing options currently available when sentencing an organization for an offence against the Workplace Health and Safety Act should be expanded?
(b) If so, what additional sentencing options do you think should be available?

TACC considers that the range of sentencing options currently available when sentencing an organisation for an offence against the WHSA should be expanded to include the option for the use of enforceable undertakings and orders to undertake improvement projects.

These sentencing options should be available in cases involving lower degrees of culpability but still requiring correction of the wrongdoing and should be aimed at improving health and safety in the workplace at which the offence has been committed.

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