



Submission by the  
**Housing Industry Association**  
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# **Criminal Liability of Organisations**

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## **Executive Summary**

The issue of the need for a legislative response to deaths caused at work has been the subject of considerable debate in recent years. This debate has been firmly led by the union movement and has resulted in the enactment of legislation in the ACT, NSW, Victoria and WA.

At the same time employer organisations have resisted these laws as being unnecessary and divisive. The union drive is for greater punishment and based on the pretext that punitive measures (combining jail terms with higher fines) will lead to greater safety.

This push for greater punishment for workplace death comes when there has been a consistent and considerable fall in the rate of fatalities and serious injuries across Australia over the last 15 years. The fatality rate across Australia has almost halved in the last 15 years.

HIA has conducted independent research that shows OH&S compliance to be the number one concern for small business in the construction industry. This is consistent with the higher profile and efforts of employer groups to continually raise an awareness of and to educate business about OH&S.

The housing industry is burdened by OH&S laws that focus on increasing the paperwork burden for small business and are enforced by an un-balanced prosecution oriented approach rather than through effective education.

Industrial manslaughter legislation aims to improve OH&S outcomes by attributing blame, rather than recognising that OH&S is a shared responsibility by all involved including business owners, managers and employees.

It is clear from statistics that there is little difference between the fatality and serious injury rates between the States with very high penalty regimes and jail terms for OH&S breaches and those States that have penalties that are not so high.

It is HIA view that there is no justification for the introduction of any offences to further punish and jail persons engaging in business. The focus of any effort to maintain or improve the steady decline in serious workplace injury or death is to educate and promote a culture of safety – not one of prosecution.

HIA:

- opposes the changes to the definition of homicide to provide for the criminal liability of an organisation;
- does not support the reform of the “identification doctrine”;
- opposes the introduction of a “senior officer “ offence into the Code;
- opposes the introduction of manslaughter and strict liability offences into the WHSA;
- supports amending section 53 of the WHSA to remove the reverse onus of proof on company officers and to make liability contingent on the act or omission of the officer being the cause of the offence;
- does not support the increases to fines in the current WHSA;
- does not support the additional range of proposed sentencing options;
- opposes the Commission being given power to order payment of reparations in relation to workplace death.

## **Housing Industry Association**

Housing Industry Association Limited (HIA) represents over 40,000 businesses in all States and Territories, including over 1000 members in Tasmania. HIA is the peak industry association for businesses in the residential, building, renovation and development industry in Tasmania and in Australia.

HIA members include builders and building contractors (residential and commercial), consultants, designers, architects, developers, manufacturers and suppliers.

### **General Comments.**

OH&S laws should be concerned with the creation of civil duties and not criminal liabilities. Monetary penalties should be judicially determined and based on the seriousness of the offence and the nature of the breach. Penalties should not be based on the nature of the injury.

The basis of OH&S laws in Australia has, until recent developments, been based on the notion of the breach of the duty is the offence and not the injury that results. The prosecution is based on the nature of the breach and not the consequence.

HIA has obtained independent industry research that has shown that Occupational Health and Safety is the most significant issue facing contractors in the residential construction industry.

The question of real versus legal responsibility lies at the heart of the problems the residential industry faces with safety regulations.

*“The focus should be on teaching the person on the site how to be responsible for themselves”*

OH&S regulation is becoming increasingly complex and technical. A breach of the OH&S laws can be readily found due to requirements being overly technical and ambiguous. The threat of losing their house because they have forgotten or did not know about some aspect of complex legislation is making it impossible for some builders and contractors to sleep at night.

However enforcement requires a mix of education and persuasion on the one hand and, in the case of serious or repeated cases, prosecution and penalties. This is consistent with the original intent of the Robens model on which all Australian OH&S laws are based.

*We recommend that criminal proceedings should, as a matter of policy, be instituted only for infringement of a type where the imposition of exemplary punishment would be generally expected and supported by the public. We mean by this offence of a flagrant, wilful or reckless nature which either have or could have resulted in serious injury.*  
(Robens, 1972, p.82)

HIA does not believe that any new offences will improve safety outcomes in Tasmania. There have been steady improvements without regard to prosecution or level of fine. The improvements are due to education and an increased awareness of OH&S by industry.

This campaign of awareness has achieved a new focus at a national level through the recent releases of ACCI OH&S blueprint and in our industry through the development of HIA OH&S standards and related education materials.

HIA does not believe that fear and retribution are effective means of achieving safer workplaces. The most successful means of improving OHS standards is to encourage employers to work with employees so as to achieve mutual objectives. Cooperation and consultation are more likely to be successful rather than imposing heavy sanctions.

It is disappointing that the paper did not address the need for such workplace cooperation or that employees themselves can contribute to making workplaces safer.

### **Definition of Homicide**

There is no evidence that there is a need to change the current definition of homicide.

### **Senior Officer Offences**

It is noted that a “senior officer” offence has been included in the Occupational Health and Safety Act in the ACT making the senior officer liable for industrial manslaughter if his/her own conduct “substantially contributed to the death of a worker. There is no provision for vicarious liability in this Act and the senior officer should not be held responsible for the negligence of others.

It is impossible to apply a common definition of a ‘senior officer’ in all organisations. A senior officer may not be aware of the organisation’s conduct which is creating the substantial risk.

The introduction of this offence into other legislation will have the effect of a person not wanting to hold a senior role for fear of prosecution.

Therefore, HIA opposes specific senior officer offences being introduced.

### **Industrial Manslaughter**

OH&S laws are complex and relate to breaches of duties. Breaches of duties can occur due to a technical difference in interpretation or nit picking by inspectors.

The complexity and technicality of HIA duties has continued to increase and change. It is a burden for small business to keep abreast of the changes and to comply with the paperwork requirements being imposed.

HIA does not support the introduction of strict liability offences in to the WHSA in the event of a death on site or a serious accident. The breach of an OH&S duty should be punished according to the breach and not the outcome.

There should be not be absolute or strict liability, deemed guilt reverse onus of proof nor any other basis on which employers, directors and management are treated less favourably than the defendants in prosecutions under any similar criminal law.

All persons charged with an OH&S breach should be accorded natural justice and, in criminal cases, the standard presumptions and protections of the general criminal law afforded.

There is no evidence to suggest that the laws introduced to date have produced a better outcome. HIA suggest that until these laws are tried and tested it is premature for Tasmania to consider adopting similar laws.

It is poor use of the criminal law to achieve objectives in workplace safety by punishing a body corporate and their directors and senior officers. It is HIA's view that workplace safety is best improved by further education and training and an improved emphasis on compliance regimes rather than by prosecution, prevention being better than cure.

### **Strict Liability Offences**

HIA does not support the introduction of strict liability offences in to the WHSA in the event of a death on site or a serious accident.

Our comments made in relation to industrial manslaughter are applicable to this proposal. There should be not be absolute or strict liability, deemed guilt reverse onus of proof nor any other basis on which employers, directors and management are treated less favourably than the defendants in prosecutions under any similar criminal law.

The breach of the duty is the offence and not the injury that results. The prosecution should be based on the nature of the breach and not the consequence.

If such an offence is created for where there is an offence resulting in death or one that involves grievous bodily harm there should be a right to trial by jury. If the penalty involves the possibility of a prison sentence, the maximum penalties would need to be less than those applicable to offences such as manslaughter or grievous bodily harm.

We also note that since the Queensland provisions commenced in 1997 there has been no appreciable change in OH&S outcomes over other States without such laws. HIA also notes that there has been no perceivable improvement in OH&S in Queensland since penalties attached to these provisions substantially increased in 2003. If the objective of the new laws is to improve occupational health and safety HIA cannot see how increasing penalties will translate to any improvement in OHS. HIA does not believe that increases in penalties will automatically translate into safer workplaces.

While the imposition of heavier penalties in the event of a workplace death may act as a "fear factor deterrent" HIA believes it is more appropriate to focus on the need for employers to meet their OH&S obligations, creating a culture of safety and empowering them to do so. An employer must be empowered to take steps to ensure that instructions and policies designed to ensure a safe workplace are implemented and adhered to by employees.

HIA proposes that employers be given the right to instantly dismiss an employee who fails to participate fully in a workplace health and safety programme or abide by an employer's OH&S requirements. This right of dismissal could be supported by amendments to unfair dismissal laws that would permit easier termination of a recalcitrant employee on the grounds of non compliance with OH&S laws or policies.

### **Amendment of Director Responsibility**

HIA submits that Section 53 of the WHSA is harsh on directors due to the reversal of the onus of proof and the lack of requirement of a causal link between the failure of the person who is responsible and the company's contravention.

There should be not be reverse onus of proof nor any other basis on which employers, directors and management are treated less favourably than the defendants in prosecutions under any similar criminal law.

Any law should not seek to blame a person who may be remote from an alleged contravention of the legislation.

HIA supports a reform consistent with section 144 of the *Occupational Health and Safety Act 2004 (Vic)*, in that an officer will only be liable if an offence is attributable to the officer. Furthermore, there are certain factors should be taken into account in determining whether an officer is guilty. These include the knowledge of the officer and the extent to which the officer had the ability to make decisions.

In addition to the above, under OH&S laws an officer should not be liable unless the officer did not take all reasonable steps. This should be a matter for the prosecution and not a defence.

## **Sentencing Options**

### **Fines**

HIA does not support the proposition that increases in fines necessarily improves OH&S outcomes.

HIA does not support the proposition that fines should be levied according to the depth of the defendant's pockets.

HIA considers that requiring large or small businesses to pay inflated fines based on their profits in the hope that this may hurt them financially will not necessarily achieve any improvement in their OH&S standards. It is better for a business to have funds available to invest in improving workplace practices.

### **Incapacitation**

HIA does not support the use of these penalties for OH&S breaches. These are extreme penalties and are not satisfactory because of the spill over effect that they may have on other innocent parties who have had no involvement in the alleged OH&S breach. It is inequitable to make other employees, contractors and even the public suffer the consequences of business ceasing to exist.

Nothing positive can be achieved by taking extreme punitive action of this nature. Putting an organisation out of business or reducing its operations to the extent that it may be forced into liquidation in the future does not achieve anything other than perhaps "making an example" of an organisation to others and this could be a futile exercise.

### **Community Service Orders /Probation Orders**

HIA does not support these types of orders for OH&S breaches.

The question that arises in relation to these options is who will be the person to be subject to this type of “punishment”? It may be relatively easy to single out one person in a small organisation but, the larger the organisation the more difficult it will be.

A NSWLRC report indicated that employees from various levels of the corporation could be involved in the service undertaking so that the corporation can internalise the punishment. Whilst this may raise awareness among personnel in the corporation, and encourage the review of safety practices relevant to each sector, is it fair to make employees undertake the service if they were not directly or even indirectly involved in the offence?

HIA is not aware of the effectiveness of the use of Canadian provisions relating to corporate probation mentioned in the issues paper and the issues paper does no more than mention its existence. HIA is cautious of adopting these types of provisions without evidence that it is effective.

### **Publicity Orders**

HIA does not support the imposition of publicity orders on corporations.

If the offence involves the death of a worker a corporation would already be subject to public exposure and if it was required to voluntarily publicise an offence it could result in the demise of the business.

Reputation is a valuable asset to a corporation- and if its reputation is shamed further, it could lose consumer confidence and the chances of rehabilitation afforded to this sentencing option may be nil for an organisation if it is forced to close as a result.

### **Equity fines**

HIA opposes the use of equity fines for OH&S offences.

The use of equity fines is unreasonably punitive and has a significant and direct spill-over effect on other shareholders and the financiers of the company, particularly where that financier has security over shares.

### **Punitive Injunction**

HIA does not support the use of punitive injunctions.

While HIA supports the requirement to carry out preventative OHS measures it does not support the use of threats of punishment in order to pressure a corporation into action.

Businesses are more likely to respond to positive support when introducing rehabilitative reforms rather than being forced and pressured into taking action.

### **Sentencing under the WHSA**

The imposition of increased penalties and custodial sentences will not necessarily improve workplace safety. Increasing punitive measures has never been highly regarded as a deterrent factor in any aspect of sentencing. It is far too simplistic an approach to believe that increasing sentences as a form of punishment will somehow result in remedying workplace malpractices.

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