

RESPONSE TO TASMANIA LAW REFORM INSTITUTE ISSUES PAPER NO 9 – CRIMINAL LIABILITY OF ORGANISATIONS

This paper provides a valuable discussion of issues relating to the criminal liability of organizations with specific reference to instances where organizations wrongfully cause the death or injury of a person. The key problem identified is that, under Tasmanian law, it is very difficult to convict an organization of serious crimes such as manslaughter or grievous bodily harm. In practice organizations are often, in this respect, effectively beyond the law. This is because:

- Under the law, only corporations can be liable for criminal convictions (thus excluding other legal forms of association); and
- The only means of ascribing such crimes to an organization is via the identification doctrine which requires that an ‘individual who is an embodiment of the company must be found guilty of the offence if the company is to be convicted’.

Rectification of these problems is important in ensuring compliance with OHS legislation and the reforms proposed are supported.

A key proposed reform extends the identification doctrine so that organizations can be found criminally liable without any requirement that a Director or Officer be convicted of an offence. Instead, corporate culture - defined as ‘an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place’ – becomes the feature by which blameworthiness may to be attributed to the organization. Thus, in order to establish corporate liability, the prosecution would not be required to establish the criminal guilt of an officer or director but, simply to:

Lead evidence that the company’s unwritten rules tacitly authorized non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees who know that if they do not break the law to meet production schedules (e.g. by removing safety guards on equipment) they will be dismissed. The company would be guilty of intentionally breaching safety legislation. (42)

Introducing this type of reform into the Criminal Code would overcome problems caused by the limitations of the identification doctrine and enable homicide, manslaughter or grievous bodily harm prosecutions against organisations.

COMMENT 1: From this it appears that a key defence against a criminal charge would be to lead evidence that a company has established a culture of compliance.

However, it is not clear what would be necessary and/or sufficient to establish such a defence. Certainly, the existence of a compliance program would be important in determining whether or not there exists a culture of compliance. However, many compliance programs may be justly described as ‘empty shell’ programs which may look good, but which do little or nothing to ensure regulatory compliance or prevent regulatory breaches. It is important therefore to establish what is necessary and/or sufficient for an effective compliance program – in effect, agreed criteria for establishing what constitutes a culture of compliance. Just such criteria are to be found in Australian Standard 3806 which deals with Compliance Programs. AS 3806 provides ‘principles for the development, implementation and maintenance of

effective compliance programs within both public and private organisations' (AS3806 – Preface). This standard was developed in consultation with, amongst others, representatives of the Association for Compliance Professionals in Australia, Australian Consumer and Competition Commission and the Australian Institute of Criminology. It provides a single existing reference, the use of which would do much to avoid confusion, and clarify the criteria according to which criminal liability could be determined. Convergence on this standard would mean that any organization that has implemented AS3806 would thereby be able to establish that it is not liable to any criminal offence. At the same time, failure to implement AS3806 may expose organizations not only to breaches under various pieces of business regulation but also to liability under the criminal law. It may be helpful to explicitly reference AS3806 for guidance on what would be necessary and sufficient to establish a culture of compliance.

COMMENT 2: It is important to maintain the general principle that those who are responsible for a problem should also be accountable. Research indicates that the major causes of workplace injury and illness are systemic – to be found in poor process and production pressures (see for e.g. Gunningham and Johnson 1999:9). However, sanctions for breaches of the workplace health and safety legislation rarely fall on those responsible for such systemic failures. These failures reflect a non-compliant organizational culture. There would be benefit in exploring ways in which those individuals who are responsible for ensuring effective compliance programs can also be held individually accountable. This is particularly relevant in cases where company directors or officers have proved recalcitrant and have repeatedly failed to address systemic problems or breaches.

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