



Australian Finance Conference
2001

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31 July 2005

Tasmania Law Reform Institute
Private Bag 89
Hobart
TAS 7001

by email to law.reform@utas.edu.au

Dear Sir/Madam,

Tasmania Law Reform Institute Issues Paper No 9 - Criminal Liability of Organisations

I refer to the Issues Paper No 9 on Criminal Liability of Organisations dated June 2005.

On behalf of members of the Australian Finance Conference and its sister body the Australian Equipment Lessors Association, accompanying is our response to the Issues Paper, as it relates to our members in their capacities of secured lenders and equipment financiers.

Thank you for the opportunity to respond to the Issues Paper.

If you would like to discuss our response, please contact me (ron@afc.asn.au) or AFC Corporate Lawyer, Catherine Shand (catherine@afc.asn.au) or on the phone number set out above.

Yours truly,

Ron Hardaker
Executive Director



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

1. INTRODUCTION

The Australian Finance Conference (AFC) is a national finance industry association. Our members, and those of our sister body the Australian Equipment Lessors Association (AELA), include finance companies, banks, building societies, general and fleet leasing companies and manufacturers. The AFC and AELA represent the interests of their members in their capacities as equipment financiers, including by way of chattel mortgage, hire purchase, vehicle fleet lease arrangement, finance lease and operating lease.

This response to the Paper is provided on behalf of our members in such capacities. It therefore does not address each of the specific questions set out in the Issues Paper nor cover in detail the broader questions raised in the Issues Paper about the duties of organisations to prevent or reduce the likelihood of the death or injury of natural persons in the workplace and elsewhere.

2. EXECUTIVE SUMMARY OF RESPONSE TO THE ISSUES PAPER

This response to Issues Paper No 9 can be summarised as follows:

- AFC and AELA members support the appropriate allocation of responsibility for the safety of employees and members of the public. The law should impose duties on the organisations which are in a position to influence safety outcomes and on the directors, managers, employees and other representatives through whom those organisations operate.
- Penalties for breaches of duty which lead to deaths and serious injury should be imposed on organisations and individuals in proportion to the actual control which they have over risk management and safety outcomes.
- The law should include appropriate exclusions and defences for organisations and individuals who are not in a position to control the circumstances which can lead to death or serious injury. In the case of financiers, this should include a “passive financier” exemption so that duties and penalties are not imposed on an organisation merely because it supplies or is the nominal “owner” of plant or equipment in the course of a finance business.

3. ALLOCATION OF RESPONSIBILITY FOR DEATH AND INJURIES

It is in the interests of the community that the law allocates responsibility for deaths and serious injuries in the workplace and for public disasters to those organisations and individuals who are in a position to control or prevent such events. As noted in Section 2.2 of the Issues Paper, the aims of penalties imposed under the criminal law include:

- public condemnation and denunciation of offenders;
- retribution and punishment, which can take various forms such as imprisonment, fines and community service orders;
- deterrence by the threat of punishment; and
- rehabilitation of offenders so they are less likely to re-offend.

These penalties will only have the desired effect if they are imposed on the organisations or individuals who are in a position to have real control over the events and behaviours which can lead to injuries, deaths or public disasters. Inappropriate allocation of penalties to persons with little influence over such circumstances could potentially lead to those in a position of actual control or influence taking their responsibilities less seriously. For example, a penalty of several million dollars may create a public impression that there has been retribution. However if the penalty is imposed on an equipment financier whose only connection to the incident is that it is the “owner” of equipment which caused an injury, this may not deter future offences by the organisation which operated or maintained the equipment.

We therefore submit that the Institute’s report should include a recommendation that any new or expanded duties or criminal penalties be imposed on the appropriate organisations and individuals within those organisations, namely those in the best position to reduce the likelihood of the occurrence of deaths and personal injuries in the workplace and elsewhere.

In the case of some deaths and injuries, more than one organisation may contribute to the events that lead to an incident occurring. AFC and AELA members are of the view that any new or expanded penalties should allow the sentencing authority to take into account the degree of control which each organisation had over the events which lead to the incident.

4. LIABILITY OF SUPPLIERS OF PLANT AND EQUIPMENT

We note that the focus of the Issues Paper is on workplace deaths, injuries and public disasters caused by organisations (ie corporations and other entities) and whether criminal sanctions should apply in such cases. In most Australian States and Territories, such issues are largely covered under workplace health and safety laws, with some aspects and penalties being addressed under fair trading, corporations and criminal laws at the Federal and State level. These laws include the imposition of duties on the suppliers of plant and equipment used in workplaces or used by people at work. For example, the Tasmanian Workplace Health and Safety Act 1995 places duties on those who supply plant by sale, lease and hire to ensure that the plant is fit for the purpose for which it was designed; and that any risks to health or safety from the use of the plant are, as reasonably practicable, eliminated or minimised before plant is let, or offered for hire.

An organisation which finances the acquisition of plant and other equipment may, for legal, taxation or security reasons related to the type of finance offered, be the “owner” of the financed equipment. In most instances, the financier has little or no control over selection, use or maintenance of the plant or equipment. Some jurisdictions, such as New South Wales, include a “passive financier” exemption which ensures that the duties of suppliers of plant to be used at work do not apply to a person merely because they supply the plant in the course of a finance business. This “passive financier” exemption is unlikely to be interpreted so as to

absolve a financier from responsibility for incidents which occur while the financier is in physical possession of equipment (for example when selling repossessed goods), or where a financier has control of or specific maintenance responsibilities for plant. AFC and AELA members believe that such a “passive financier” exemption assists in ensuring an appropriate allocation of duties to those organisations in the best position to manage and reduce the risks of death and personal injury from the use of plant and equipment.

5. INDUSTRIAL MANSLAUGHTER LAWS

Most Australian jurisdictions have recently strengthened their penalties for workplace deaths. The Australian Capital Territory and New South Wales have introduced specific industrial manslaughter laws. Even without such laws, there is scope for individuals and organisations involved in workplace deaths to be prosecuted under occupational health and safety laws, which in some cases impose higher penalties than under the criminal law.

The New South Wales Occupational Health and Safety Amendment (Workplace Deaths) Act 2005 imposes jail penalties and fines on a person (including an individual, a corporation and a body corporate or politic) who owes a duty under Part 2 of the Occupational Health and Safety Act and whose reckless conduct causes a death in a workplace. This law incorporates the “passive financier” exemption which applies to the general duties under the Occupational Health and Safety Act. The New South Wales law also includes defences that:

- there was a reasonable excuse for the conduct which caused the death;
- it was not reasonably practicable to comply with the provision, and
- commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable to make provision.

AFC and AELA members are of the view that if specific industrial manslaughter laws are introduced in Tasmania, they should include a “passive financier” exemption and appropriate defences to ensure that penalties are applied to the appropriate organisation.
