



AUSTRALIAN BANKERS' ASSOCIATION INC.

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Dear Sir/Madam,

The Australian Bankers' Association (ABA) welcomes the opportunity to provide comments to the Tasmania Law Reform Institute's Issues Paper *Criminal Liability of Organisations*. The Issues Paper considers the criminal liability of organisations, in particular as it applies to corporations and other entities wrongfully causing the serious injury or death of a person. Following, the Issues Paper considers possible reforms, such as introducing a specific 'industrial manslaughter' offence to the Criminal Code; introducing reforms to the *Workplace Health and Safety Act 1995* (Tas); or introducing specialised principles of criminal responsibility for organisations to the Criminal Code.

1. General observations

Companies can commit the same crimes as natural persons; for example, a company may breach laws in relation to environmental pollution, dangerous industrial practices or workplace safety. Laws, regulations and other measures should ensure that there are effective means of reducing the risk of corporate misconduct.

Indeed, for example, there is clear support across the business sector and the community for health and safety in the workplace; furthermore, there is widespread regard that a culpable failure to provide a safe working environment is a matter of utmost seriousness. Failure to address OH&S issues can lead to massive and unnecessary economic and social costs as well as allow significant benefits to go unrealised.

In Australia, there are a number of statutes that impose criminal and civil sanctions (including non-monetary penalties as additional sanctions) for corporate offenders, particularly in relation to OH&S or equivalent legislation regarding a serious injury or death in a workplace. Instead of limiting sanctions to imposing a fine on the company, an individual within the company may be found liable for a breach of duties to uphold the health and safety of employees and others at a workplace. In addition, specific criminal legislation contains the general crime of manslaughter.

The ABA is of the view that with the introduction of any provisions that relate to a serious injury or death in a workplace:

- Company and director and senior officer responsibilities must be clearly articulated; and
- Adequate protections must be made available within the law for those companies and individuals that have not acted unlawfully or have not wrongfully caused a death or serious injury.

It is important for laws to develop in a nationally consistent manner. Banks generally operate throughout Australia. As a result of the different jurisdictions, for example, the development of OH&S management systems is impeded and business is exposed to significant business costs in terms of compliance and administration. Employees and others are also prejudiced as a result of the lack of national consistency. The ABA believes that Tasmania should be seeking to move towards national uniformity in laws that promote and secure workplace safety and business conduct.

The ABA is concerned with proposals to impose absolute duties on companies, directors and senior officers, particularly in relation to serious offences such as 'industrial manslaughter'. Broad and uncertain law is a significant disincentive to employers conducting investment business. Penalties for breaches of OH&S legislation are often significant, and in some jurisdictions, current defences are very limited.

It is important for the legislation to provide clarity and certainty for companies, directors and senior officers; therefore, the law must be well-defined, practical and well-understood by employers, employees and the wider community.

2. Specific comments

The ABA does not support the introduction of a specific 'industrial manslaughter' offence to the Criminal Code. Similar criminal legislation has already been rejected by the Parliaments of a number of states in Australia. If offences are to be introduced for companies, and more particularly for individuals within companies, this should be done within the framework of other specialised statutes. It is important that there is a nationally consistent approach to criminal laws.

The ABA does not support the introduction of specialised principles of criminal responsibility for organisations, but rather that particular criminal offences should be contained within the framework of other specialised legislation. Companies should be subject to relatively stable legal and regulatory regimes in which vulnerability to criminal liability, whether of an industry-wide type or industry-specific provisions, is predictable and manageable. Notwithstanding, the ABA considers that there is sufficient scope in common law for a company to be found liable for offences traditionally attributed to natural persons. Companies already may face the possibility of a prosecution for manslaughter, particularly where there is gross negligence through indifference to an obvious risk of injury to health or appreciation of the risk coupled with a determination not to mitigate it.

OH&S or equivalent legislation applies to a place of work and generally imposes duties on employers and others to secure and promote the health and safety of employees and others at work, including serious injury and death. Therefore, the ABA considers that specific manslaughter and grievous bodily harm provisions are unnecessary; however, where there is a commitment to introduce specific provisions, such offences should be contained in specialised legislation; for example, the *Workplace Health and Safety Act*

1995. It is important to ensure that any legislative changes, particularly those that may relate to loss of liberty, are awarded adequate protections and procedural fairness.

2.1 Offence

If manslaughter or grievous bodily harm provisions are introduced into the *Workplace Health and Safety Act 1995*, the elements of the offence should ensure a clear causal nexus between the acts and omissions of the company or individual and the risk or hazard that caused a death in a workplace. Other elements of the offence should relate to whether a risk or hazard that caused a death in a workplace could have been reasonably foreseen and that the company or the individual was reckless as to the danger of death or serious injury. Where a company or an individual could not foresee or control the risk or hazard that causes death of a person at a workplace, it should be taken that the company, director or senior officer are not liable for the workplace death or serious injury.

A strict liability offence is problematic. The offence must make it clear that a person does not "cause" a death where the substantial cause is the intervening or unlawful act or acts of a third party. For example, a bank robber in the course of an armed robbery of the bank kills an innocent bystander in the branch. Without clarification of the offence, the bank branch manager, who has done nothing more than their job to the best of their ability, could also be subject to prosecution. Where steps have been taken to mitigate the risk by other duty holders, there is no sound reason why the bank manager should be liable for the acts of a third party.

Furthermore, the offence should not contain a deemed liability provision for directors and senior officers where a company is found guilty of a breach. It is not appropriate for an individual to be presumed guilty of an offence in circumstances where they are not in any real or practical sense culpable. If liability for individuals were to be included in any form within the legislation, it must be limited to circumstances where the individual positively and directly caused or contributed substantially to the risk or hazard.

The ABA considers that there should not be multiple liabilities for a single factual incident. For example, as with the above example, if the "owner" of the premises has relevant control of the workplace, without clarification of the offence, the owner could also be subject to criminal prosecution.

2.2 Defence

The ABA believes that the law should afford a defence where a company or individual took reasonable steps to fulfil its duties with regard to what the company or individual knew, or ought to have known, about the hazard or risk. Furthermore, the ABA considers that a prosecutor must bear the onus of proving that the defendant did not take reasonable steps or that it was not reasonably practicable.

2.3 Penalties

The ABA believes that maximum penalties should depend on the nature of the breach. For example, the ABA does not believe that it is reasonable for an individual to be found guilty, convicted and sent to gaol, particularly for a first offence.

2.4 Proceedings

Due to the serious nature of a possible manslaughter or grievous bodily harm offence, prosecutions should be heard by the Supreme Court of Tasmania and there must be a right of appeal for all defendants.

3. Conclusion

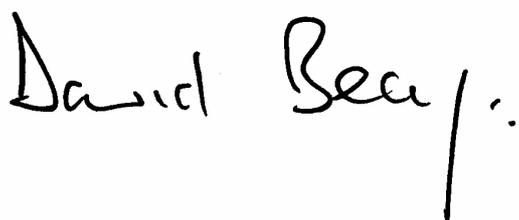
It is important for the legal system to punish companies and individuals that act unlawfully or that wrongfully causes the death or serious injury of a person; however, the law must not impose penalties on companies, directors or senior officers that discharge their duties in good faith.

The ABA believes that to improve workplace safety and promote responsible business practices, a combination of criminal, civil and administrative penalties, self-regulatory measures and guidance from WorkCover Tasmania is required. It is also important for WorkCover Tasmania to assist industry to comply with its obligations through focusing on information exchange, prevention advice, assistance services, standard setting and other advisory mechanisms. This partnership approach will assist in further promoting the commitment to workplace safety across the business sector and the importance of workplace safety across the community.

The ABA is concerned that to encourage companies and individuals to identify and assess foreseeable hazards that may arise from conduct within the workplace and implement measures to eliminate or control any risks of those hazards, that any legislative reform should ensure adequate protections and procedural fairness is provided for under the law.

If you have any queries about any of the issues raised in our submission, please contact Diane Tate, ABA Director on (02) 8298 0410: dtate@bankers.asn.au.

Yours sincerely,

A handwritten signature in black ink that reads "David Bell". The signature is written in a cursive style with a long vertical stroke at the end.

David Bell