

19905

29 July 2005

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Dear Professor Warner,

CRIMINAL LIABILITY OF ORGANISATIONS – ISSUES PAPER NO 9, JUNE 2005

Please find enclosed a submission from the Tasmanian Minerals Council to the Issues Paper No. 9.

Since the comments impact on legislation to the Workplace Health and Safety Act 1995 we have sent a copy of our submission to Mr Phil Hickey, Workplace Standards for his information.

Attached to this covering letter you will find a two-page summation of some of the main themes in our submission. It was intended as a guide to our Directors. I thought it may be of use to you.

Yours sincerely,

Terry Long
Executive Director

cc P Hickey, Workplace Standards

DIRECTORS' BRIEF – CRIMINAL LIABILITY OF ORGANISATIONS

Comments are sought on Tasmania's Law Reform Institute Issues Paper on *Criminal Liability of Organisations*, and the many aspects surrounding options of introducing:

1. a specific 'industrial manslaughter' offence to the Criminal Code;
2. similar reforms to the *Workplace Health and Safety Act 1995* (WHSA); or,
3. amending the Criminal Code so that physical and mental elements can be proved when dealing with an "organization".

Traditional offences (under the Criminal Code) of murder and manslaughter require an individual's criminal "intent" (*mens rea*) and legal convention makes it hard to attribute such a liability to a corporate body. Courts seek a natural person who is the "directing mind or will", and legal debate suggests that this unfairly disadvantages small businesses due to difficulties in proving that a large body corporate expressly or tacitly authorised or permitted the commission of an offence.

Provisions already exist in the WHSA for each director of a body corporate to have to prove that an offence was committed without the director's (or potentially – if amendments are made - a senior officer's) knowledge and that the director was not reasonably able to have acquired that knowledge, or that the director used all diligence to prevent the contravention or failure to comply by the body corporate. Questions of court jurisdiction (above a Magistrate's court) for hearing murder or manslaughter cases are raised in connection with pursuing such matters under the WHSA; a Magistrates court is not practised in manslaughter hearings and there are legal conventions, such as juries and appeals, that may not apply in Magistrates courts, but are essential for charges of manslaughter. The size of fines and the range of sentencing options would arise with amendments to the WHSA.

Key issues in amending the Criminal Code include:

1. changing the definition of 'homicide' to include organizations (i.e. not limited to 'bodies corporate') and/or incorporate 'grievous bodily harm';
2. the identification of key individuals in the event that a body corporate is wound up;
3. inclusion of the Crown as an organization; and,
4. additional sentencing provisions such as disqualification orders, dissolution of a corporation, community service orders, probation orders, adverse publicity orders, punitive injunctions, equity fines or compensation orders.

It is hard to argue against important but fairly straight-forward amendments to the WHSA, such as amending the words 'body corporate' to 'organisation', 'directors' to 'senior officers', and increasing the size of the maximum penalty. Increasing the maximum penalty must come with larger off-sets for good performance. Similarly, amendments to the *Sentencing Act 1997*, would appear sensible and would demonstrate that the industry is not opposed to the punishment of those who deliberately treat the safety and health of people in a wilful, reckless and criminally negligent manner. However, the WHSA should not be used as the vehicle for retribution because it is easier to achieve a prosecution, requiring a defence on the reverse onus of proof (guilty until proven innocent) compared to "beyond reasonable doubt" under criminal law.

However, serious concerns are raised about the capacity and capability of regulators to administer any new laws or substantial changes in an objective way. Concerns are already widely expressed at a newly emerging punitive style of regulation, and the shrinking resources applied to regulatory process and practice.

The Tasmanian Minerals Council is of the view that fundamental principles relating to any moves to amend legislation include:

1. debate on this issue requires a constant focus on the desired outcomes of encouraging safety and health improvements, and dissuading those who might contemplate the commission of offences;
2. manslaughter charges must be pursued under the Criminal Code (not the WHSA) because an accused should not be treated any more or less favourably depending on the industrial or non-industrial context;
3. any additional specification (i.e. other than changing words to eliminate inappropriate loopholes), will only end up restricting the application of existing provisions;
4. duplication of legislative provisions (eg for manslaughter) must be avoided;
5. legislated provisions must be capable of equitable, efficient and effective application by government officers trained and experienced in this field and who have a structured way of operating in an increasingly complex world with widely varying standards;
6. government processes must be clearly understood by government officers, industry and the public alike – requiring a publicly accessible, transparent and well communicated process and practice document;
7. the *practise* side of the issue needs to be subject of a similar consultation before proceeding beyond the refinement of the Issues Paper.

Tasmania has the great opportunity now to distinguish itself by sound processes, fair outcomes and strong feedback, rather than having the reputation for high penalties. We would not like to see the ‘brag book’ approach (to the number of prosecutions or the size of fines) dominate our communications about the treatment of right and wrong in Tasmania, and detract from the endeavours to date in achieving a safer work environment. Indeed, a legalistic solution is likely to drag the industry back many years and no-one wants that.

SUBMISSION TO:

TASMANIA LAW REFORM INSTITUTE

On the issue of

CRIMINAL LIABILITY OF ORGANISATIONS

ISSUES PAPER No 9 dated June 2005

Submitted - 29 July 2005

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INTRODUCTION

The Tasmanian mining industry appreciates the opportunity to provide the following practical input to the discussion on criminal liability of organisations. We will not provide a legalistic response. The issues paper makes an excellent contribution to the legal aspects of criminal liability or industrial manslaughter, and will draw comment from a legal viewpoint. The paper makes an arguable case for reform of criminal liability but it also infers reform in civil liability and possibly coronial law (although we haven't seen a problem in any of these areas!). The paper also outlines reforms that are being considered under a national model Criminal Code. When all the legal minds sort out manslaughter at a national level we might reconsider it in Tasmania. We are less than convinced at this stage that reform to our Criminal Code or the *Workplace Health and Safety Act 1995* (WHSa) is needed, but quite convinced that enforcement practices and actions need improvement.

As a general rule we find that adding specification to laws only ends up restricting the application of those laws.

We note the Law Society of NSW argument on the issue as quoted on p28 of the Issues Paper, that:

“... the creation of a specific industrial manslaughter offence would ‘offend the long standing principle of the Criminal Law pertaining to equal justice and equal punishment. The fact that a death occurs at work should not mean that the accused is treated in a more or less favourable way than had for example the crime of manslaughter been committed in a non-industrial context’ ...”

We have also reflected on the 1997 OECD report¹ on regulatory reform and include the following extract as a guide to our thoughts and for your consideration when reviewing all comments on the Issues Paper.

“...The volume and complexity of laws, rules, paperwork, and administrative formalities has now reached an all-time high in OECD countries, over-whelming the ability of regulators in implementing the total load, the private sector in complying, and elected officials in monitoring action. Too often, legislators issue laws as symbolic public action, rather than as practical solutions to real problems. Regulatory inflation erodes the effectiveness of all regulations, disproportionately hurts small to medium enterprises, and expands scope for misuse of administrative discretion and corruption. All these problems risk being exacerbated where different layers of government can impose duplicative, conflicting, or excessive regulations.

If governments are to maintain credibility and effectiveness, they must use their regulatory powers no more than the minimum necessary to protect important public interests; apply rules transparently; use market incentives, goal-based regulation, and other policy tools that work within competitive markets to advance social goals; and build capacities for continuing reform and quicker response to change.”

¹ The OECD Report on Regulatory Reform - Synthesis, Organisation for Economic Co-operation and Development Paris, 1997 <http://www.oecd.org/dataoecd/17/25/2391768.pdf>

GENERAL COMMENTS

Reforms of laws or practice?

We are not opposed to amendments (as opposed to ‘reforms’) to the WHSA to change some words. Three options are put forward in the Issues Paper for discussion with excellent background information and the potential exists for a wider discussion on a range of penalties. However, it does not deal at all with regulatory practice, which will not be fixed by additional legislation. At the very least we need an equal discussion on regulatory practice relating to this issue before proceeding beyond the refinement of the Issues Paper. In fact we suggest that the difficulty in progressing this matter is the absence of a clear explanation of how it will be applied. Such a document should have the effect of minimising the emotion surrounding this issue. Waller (c1978) published a text on Coronial Law and Practice and had a marked impact on the *process and outcomes* of inquests and inquiries.

The success with occupational health and safety prosecutions should not suggest that it will be just as easy to prosecute industrial manslaughter cases. Our understanding is that in almost all of the cases prosecuted in New South Wales the defendant pleaded guilty. This could understandably be for commercial reasons rather than any sense of real guilt at being caught intentionally doing the wrong thing – even where improvements were easily seen as appropriate and subsequently made. We cannot imagine anyone pleading guilty to manslaughter of any variety – again suggesting that the competency of investigators has to be high.

The difficulty in amending the Criminal Code should likewise not mean that the *Workplace Health and Safety Act 1995* should be amended just because it is easier to do that instead. Our view is that it is not so much what ‘industrial manslaughter’ is at law, it is how it will be measured and prosecuted. It must be a fundamental point of law that a ‘standard’ must be measurable and those who measure it must be objective and competent, not to mention being fair, firm and consistent. The choice as to whether to pursue a matter under existing provisions or under industrial manslaughter provisions (if they are made) must also be defined by a careful *process*. We would argue that a manslaughter charge could already be pursued (albeit arguably not under the WHSA) if appropriate and such a manual or text as already mentioned could make the difference.

We would also argue that much of the debate seems to focus on the problem of punishing a natural person (even if they represent an organisation’s directing mind and will) versus punishing an (non-human) organisation. Surely that points to inadequacies in interpretations/definitions, the collection of evidence or the range of punishments. At the risk of labouring a point it might also show a weakness in the ‘process’ of enforcement; see also Hall, Johnstone and Ridgway 2004 (summarised in the conclusion pp 90-94 <http://www.ohs.anu.edu.au/publications/pdf/WorkingPaper26pdf.pdf> not that we agree with all the sentiments expressed in that document).

Disregarding for the moment the moves in various jurisdictions to incorporate industrial manslaughter into occupational health and safety (OHS) laws or to include a wider range of alternative penalties or to make amendments to the Criminal Code (national or Tasmanian), we feel very strongly that there are two interwoven issues that must be considered at the same time; the first is the law itself and the second is the regulatory practice. Incorporating industrial manslaughter into OHS legislation without a much better introduction will have far reaching ramifications and unintended consequences when it comes to regulatory practice. Without a discussion on associated regulatory practice most regulators will go overboard in delivering

industrial manslaughter cases for prosecution, believing that is what the government wishes; “*what interests my boss fascinates me*”.

Our general concerns about impeding safety improvements

Our very real concern is that such an outcome (regulatory zeal that is untempered) will have a devastating impact on the development of both more open corporations and a ‘no-blame’ safety and health culture that can really get to the bottom of problems and fix them before someone gets hurt. We believe that this is the (adverse) impact of the recent focus on prosecutions in New South Wales, so we need more than ever before an open, structured and practical way of thinking about criminal liability before proceeding further with this issue. We are not saying it does have some merit, but we are saying that the consequences of an approach that only considers the legal aspects are likely to kill more people than are protected because people will go into defensive mode, hindering communication. We are not saying that terms like ‘body corporate’ in s53 of the WHSA couldn’t be changed to ‘organisation’, for instance. The whole enforcement pyramid needs refinement.

To quote from the Conclusion by K. Phillips in his presentation on Workplace Health and Safety at the Australian Financial Review Conference in March this year:

“Work safety is too important an issue for games to be played with it. Laws cannot make people behave safely. But laws can set the frameworks within which work cultures, systems and behaviours are formed. The laws must imbue people with confidence that obligations and responsibilities are applied equitably, fairly and with common sense. The principles of justice must apply. Transference of liability and transference of obligations cannot be allowed to occur. If the law fails in these areas, people will conspire to avoid their obligations for fear of the unjust laws. This sets the scene for work cultures that are endemically unsafe. People’s well-being and lives will be placed at risk. The Robens’ principles and Convention 155 have laid the international standards for OHS regulation, based on accountability for that which persons actually ‘control’ within the confines of what is ‘reasonably practicable’. Australian regulators are involved in a tug-of-war either to breach these principles or to comply with them. Compliance should lead to safer work environments. Non-compliance risks creating more dangerous work environments.”

Workplace deaths are unacceptable, but the making of laws must be able to separate *emotion* and *process*. We do not believe that organisations should go unpunished if they willingly break the law; a range of penalties should apply starting at a lower level than custodial sentences and going further eg to loss of licence or loss of assets. There are different responses for lapses or (reasonably) unwitting breaches. We do not have nor would we support blanket immunity for directors and management, but we wouldn’t like the discussion to remove or have the effect of reducing everyone’s (other than directors and management) accountability. A charge of manslaughter whether civil or industrial must have a very high standard of proof, given the severity of the charge. As far as we can tell the difficulty is in obtaining such proof rather than any problem at law. We can’t see why an organisation or its representative(s) could not be pursued at the moment for failing in a duty of care, especially given the reverse onus of proof in s53 WHSA and the very common practice of having systematic management, organisational structures, allocation of resources, auditing and reporting requirements.

We are, however, stressing that laws must be wisely introduced and be capable of wise application.

Fundamental principles & beliefs

It must surely be a principle that legislated standards are capable of equitable, efficient and effective regulation. As a corollary, regulators must be competent in the equitable, efficient and effective enforcement of standards. To be able to develop that competence there must be both underpinning knowledge and experience. We suggest that the underpinning knowledge is not there in most regulators and there is little structured development of them in that regard. A discussion paper on the associated regulatory practice might form the basis of that knowledge and development. A further paper on the wider issue of enforcement generally is an absolute necessity. Would a government introduce traffic rules without having trained police? Football needs rules and trained umpires. It is logical that more rules without concomitant training and the requisite skills upgrading to apply those rules are bound to fail.

At a basic level it is a crime in our view for anyone to treat the life or health of anyone will deliberate disregard. When a Coroner gets a sense that a death may have been due to manslaughter or murder he/she suspends their process and refers the matter to the police (who are competent in pursuing such matters) for their further consideration. A Coroner's inquest does not prevent a civil action. It seems logical therefore that the Criminal Code be modified accordingly if there are current problems.

Further, it is against all our beliefs that a person might be found guilty of manslaughter under OHS legislation and not be found guilty under the Criminal Code if there is a lower standard of proof required under OHS legislation – manslaughter is manslaughter and there can't be an easy way to get around proving it! If a prosecutor needs special competency to prove manslaughter that would not be found in OHS regulators, whose role is technical and strategic and as much proactive as reactive, then develop their competencies.

It seems to us from a logical point of view, that all available legal redress is needed to cover all circumstances, so the question is not whether there should be some reform of all laws, civil, criminal and OHS, the question is how the reforms are to be applied so that action is taken properly and not driven by emotion or from the wrong motives. We are concerned to think of the reaction in New South Wales to some of the fatal injury prosecutions that attracted media attention (such as the Gretley and the Northparkes tragedies, in each case involving the deaths of four employees) if industrial manslaughter had been promoted.

Reflecting from a practical perspective on the background for this issue, leads us to comment further on the evolution of mining practice in relation to criminal acts, the recent response to calls for reform, and the desirable next step. We stress that the practise side of the issue needs to be addressed before proceeding further with that of criminal liability, regardless of the outcome of the review of comments. Not wishing to be seen as making light of the Issues Paper, we also question whether the Government accepts that it might have to prove its innocence if one of its field officers dies for example in a vehicle accident; 'making light' is the opposite of our intention.

Evolving Backdrop To The Debate On Industrial Manslaughter

The Complexity Of Work

Work has become more complex, with control felt to be further away, so society has developed a lower tolerance to work-related deaths. The mining industry accepts that circumstances leading up to a tragedy are far from linear so it seeks more than ever to investigate back to root causes; we could provide evidence of serious moves in that area if required. While management decisions often set the scene for later errors, it is not always the case that the corporation (or organisation) must be at fault for all errors. Errors might be of the lapse of concentration, or the unwitting, or of the deliberate kind. Risk management strategies have to contemplate the likelihood and consequence of hazards being a factor in someone being hurt, and the right level of protection afforded; training and procedures are lower order controls so they are not sufficient in themselves to reduce or eliminate higher risks.

Risk Management Capabilities

In response the mining industry has become far more adept at risk management in recent years and is rapidly developing its capabilities in systematic management - though both of these are in need of consolidation. The lower tolerance is reflected in a popular linear 'black & white' approach to enforcement or a virtual 'eye for an eye', and industrial manslaughter provisions seem to many to be the answer. They are popular for their apparent strength, but the appearance might be more illusory and have a long-term adverse impact because it might turn out to be a very blunt weapon used unwisely – not targeted clinically and with precision. A relatively few instances are available to support industrial manslaughter and these are used to good effect to stir emotions. While not wishing to make the pain and suffering of the families of anyone killed at work seem any the lesser, it would be wise to think more closely about what has happened and why, rather than simply resorting to 'an eye for an eye'. Punishment needs to be explained much better than regulators tend to do currently, so that the good performers don't give up trying. We have become much more sophisticated about our systematic management of risk and we must be able to evolve further with our communication in order that we consolidate these gains, let alone being able to evolve further with our 'what if' capabilities.

There is a natural (problematic) tension between the "traditional" criminal law "punish" strategy versus the "persuade" strategy of OHS "regulatory" law. A criminal offence requires *mens rea* "a guilty mind". We believe law and organisational accountability already exists to prosecute those that cause death or injury "with a guilty mind". To pursue alternatives runs the risk of sidelining OHS law which we believe is structured and targeted appropriately for its purpose – "An (The WHSA Tas) Act to provide for the health and safety of persons employed in, engaged in or affected by industry..."

Consolidating Gains

Now is not the time to stop the progress with consolidating risk management and good corporate governance by halting our development with improved (two-way/cross-industry) communication, accountabilities and checking the effectiveness of systems. The Minerals Council of Australia has produced statements on sustainable development called '*Enduring Value*' integrating inter alia safety/health risk management. These statements are on their website (www.minerals.org.au) and hold members to a high level of open corporate accountability. An ill-timed move or less than adequate consideration of the issue at hand will send the industry back

many years. True, not all organisations are ready for open corporate governance, but there are many heading that way and it will be very natural to take the easy, albeit reprehensible path and revert to a denial mode and ‘pathological’ behaviour; we refer to the Hudson model in Figure 1 for maturity to illustrate the journey from pathological to generative behaviour. We further use the diagram, Figure 2, that incorporates the work of other including Reason, Westrum and to characterise the features of organisations attempting to shift from a pathological (vulnerable) to a generative (resilient) state, that has been the goal for high-reliability organisations.

Fig 1

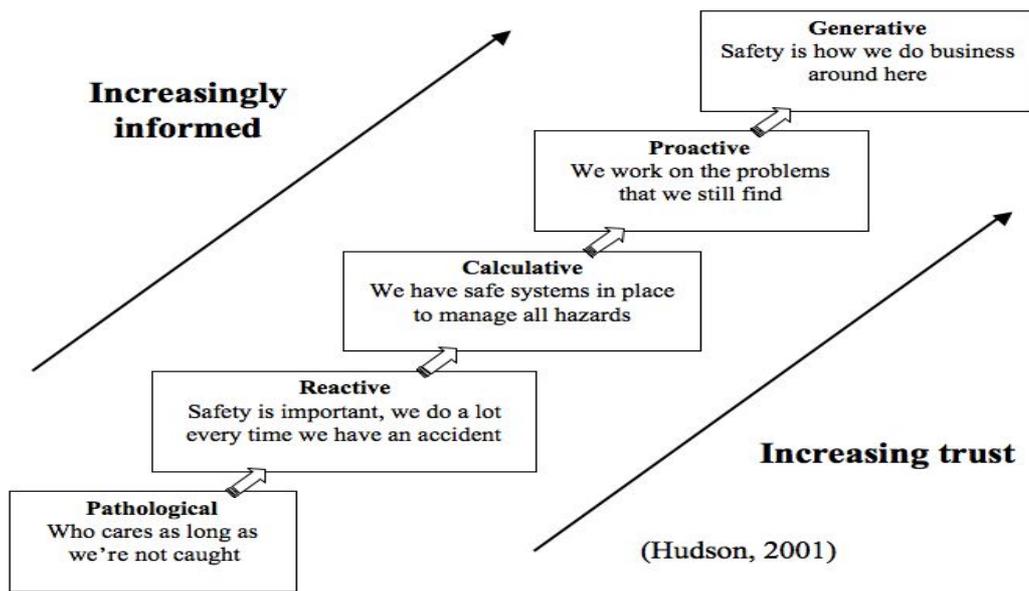
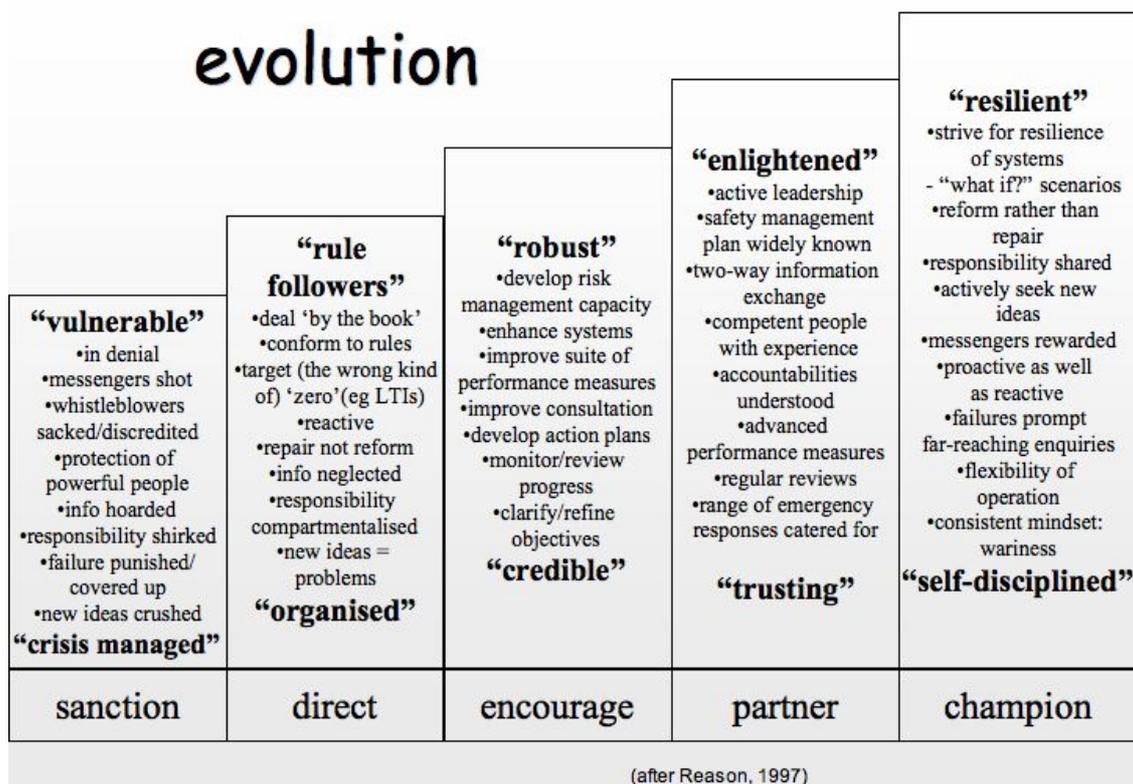


Fig 2



These diagrams have been developed for industry, but they can just as easily be used to illustrate the role of the regulator and how that role changes for mines at different stages of development (maturity). It can provide a structured way of thinking for regulators and help them in their various functions such as enforcement. By way of simple explanation to illustrate this point, a regulator commonly issues sanctions to ‘vulnerable’ organizations, whose senior officers deny the existence of hazards and punish anyone who raises a concern. This area needs further development and might assist in structuring a public document relating to the application of different enforcement responses to criminal acts. For further information on the industry application of these slides see <http://www.energyinst.org.uk/heartsandminds/>

Good Feedback Is A Necessity

In some, probably few, cases the corporation has not shown sufficient commitment to establishing effective safety/health management systems, risk management, on-going improvement plans, allocation of resources and accountabilities, and proper monitoring and review of performance. In some cases certain individuals within the corporation at a management level have made poor decisions, probably in favour of the organisation, that set the latent conditions for subsequent failure. At the workplace level many individuals have the capacity to correct for latent conditions. Indeed, the WHSA places a legal duty of care obligation on both the employer AND employee. For every disaster there are probably many more close calls so it is vital that good communication prevails to make timely improvements. People are far more likely to avert a systemic failure than is a system likely to avert human failure. We must continue to work on human factors to improve safety/health and industrial liability looks likes stopping that in its tracks by suppressing good communication.

Good feedback to stop poor performance, while reinforcing the good behaviour of those striving (hard against the odds) to improve their systems is essential. A blunt weapon in undiscerning hands cannot be allowed to hinder Australian industry in a competitive world. While the Issues Paper provides a strong foundation for the legal side of the debate, the practise side is missing.

Regulatory Practice & Guidance

The regulator has to be able to investigate at depth, discern the level of corporate commitment, consider the causes and effects of the particular circumstances and suggest improvements to institutionalised arrangements both at the particular site as well as across the industry. In her book *The Open Corporation* Christine Parker (2002) suggests that effective regulation requires sound evaluation of three components; the commitment to respond, the acquisition of specialised skills and knowledge, and the institutionalisation of purpose.

It has been suggested in the Working Paper #26 by the National Research Centre for OHS Regulation (previously referenced in this submission on Page 5) that the difference between 'traditional' and 'regulatory' criminal law is perceptual (Page 6); if we better define, apply and communicate the respective approaches to enforcement, the public "outrage" factor (that seems to be driving a lot of the perceived need for change) may well be reduced as condemnation, denunciation and retribution are seen as being applied open, fairly, consistently and with merit.

The UK Health & Safety Executive (HSE) has put worthwhile effort into developing open and structured ways of thinking so that the community can see why the regulator acts the way they do under different circumstances. We argue that this must help the regulator as well as the community, since most regulators come from an industry background and are not developed from scratch. *Reducing Risks Protecting People (R2P2)* - published by the HSE (and available via their website www.hse.gov.uk/risk/theory/r2p2.htm) is a comprehensive guide for both the community and their own staff. A similar document addresses investigation.

The *content* of R2P2 is not surprising or very new - the *publication* of it is. The practice of setting out clear policy and procedure for all to see and comment on is remarkable, and provides the basis for improvements. We stress the need for similar open, informative, educational documentation on criminal liability.

The response to criminal liability

The illusion of control?

It seems that the more complex life or work becomes the more attractive is the illusion that tough action fixes everything. True, tough action may in some cases be appropriate. However, history has shown us that the use of force over time is not sustainable, and becomes oppressive and fails catastrophically. In practice force has unintended consequences unless it is adequately explained and is capable of adjusting to changing circumstances.

We suggest that many of the calls for industrial manslaughter provisions are a reaction to the size of penalties or the type of penalty or even a lack of understanding of the legal process and these should be addressed rather than duplicate provisions that already exist. A common reaction to a fine of say \$100,000 in the case of a fatal injury, is to see the fine as the value placed on a human life,

rather than understand that a civil action will follow, using the prosecution to establish certain facts.

Tactics?

As a tactical device, the introduction of industrial manslaughter may well be less effective than other tactics. It might catch the attention of corporations, but other approaches might be more equitable, efficient and effective. Consider the tactics of Professor Alan Fels for example; refer Braithwaite (2003, see http://www.ohs.anu.edu.au/publications/pdf/Working_paper13.pdf). It might also take any attention off other safety/health improvement tactics since the introduction of the concept of industrial manslaughter will be accompanied by considerable heat and anguish or worse; the distraction might convince the common man that *it doesn't matter how good you are - if something goes wrong pity help you*.

It was no doubt a tactic deployed in New South Wales to conduct more prosecutions to get the attention of directors to safety/health programs, given the peculiar circumstances in that State relating to the mining industry complying with both the umbrella and the associated mine safety legislation and separate inspectorates. We feel that the tactic has been overdone and is already showing a long-term negative impact. Our informal network also suggests that some regulators are personally committed to more prosecutions. This is not surprising since regulators find it easy to function at the pathological and reactive end of the industry spectrum. These responses make us very uneasy about any moves to legislate industrial manslaughter without a further document on the practise of regulating at this step of the enforcement pyramid.

Emotional or informed response?

Industrial manslaughter has really only aroused considerable emotion and fervour over recent years, resulting in a variety of responses. As outlined well in your issues paper, the latest response is in New South Wales with amendments to their *Occupational Health and Safety Act 2000*. The ACT had already taken action. Earlier attempts in Victoria resulted in a comprehensive review. We express perhaps a common view that there appears to be more political influence than legal; whilst acknowledging the fine work in putting together the Issues Paper. In fact we suggest that the difficulty in progressing this matter is the absence of a clear explanation of how it will be applied.

We understand the main reason for choosing occupational health and safety legislation rather than adjusting the Criminal Code is the difficulty in criminal acts of identifying a natural person who is the “directing mind or will” of the organization; the Tesco principle. However, as shown in the adjustments to the Bill in New South Wales, or in view of the ACT legislation, issues of *intention, knowledge* and *recklessness* could just as easily (in our view) be made in the Criminal Code. We fail to see how proving that a corporation’s board of directors intentionally, knowingly or recklessly acted or expressly, tacitly or impliedly directed, approved or permitted an unlawful act is any harder to prove under amendments to the Criminal Code than under OHS legislation. If there is a real difficulty it needs to explained better.

We stress that any corporation that intentionally, knowingly and recklessly causes the death of a person deserves to be punished *appropriately* – where ‘appropriately’ further supports our call for codification of regulatory practice. We believe that punishment should be proportional to the offence and that fines might indeed have to be higher and additional enforcement responses

included in the enforcement pyramid. Recall the ‘naming and shaming’ by Professor Fels in cases he felt were under-punished, and the seizure of assets in other notable cases.

Another reason cited for problems in dealing under the Criminal Code with industrial manslaughter is the fine or penalty available. Again we fail to see how the Criminal Code and criminal regulatory responses cannot be improved just as easily as OHS legislation.

On page 8 of the Issues Paper there appears to be a suggestion that when a Coroner classes a fatal injury as ‘accidental’ they imply that the death is unimportant. Surely that has more to do with the range of findings available to a Coroner and the role that the Coroner has, than with any failings in the whole judicial/enforcement process.

Management accountability in the mining industry

The conduct of one individual, agent or official in an organisation, whether they be a Board executive in management or contractor is not necessarily proof of a corporation’s breach. The question of aggregation of individual acts to satisfy corporate (rather than an individual) liability certainly needs special attention, both at law as well as in investigatory practice. This issue is currently plaguing the New South Wales mining industry at present. The threat, whether real or imagined of a manslaughter conviction for a person in the management of a mine is impacting on people taking up management positions. Those who have been charged on one occasion are particularly fearful of the punishment in the event of a second incident.

The mining industry has prided itself for many years in its accountability with appointments of mine managers and other management position holders. Indeed, the mining industry is characterised at the management levels by people moving fairly regularly from site to site. This has had the beneficial effect of encouraging those people to be more loyal to the industry rather than to the company in order that they protect their good reputation and enhance their career prospects. This has resulted in them being encouraged to do the right thing and not be too persuaded by corporate pressures to perform unconscionable acts.

Unless it’s well codified, criminal liability impacts on all those in management positions, individually and severally. While the threat to individuals may be intended to be low, the absence of an explanation of the regulatory practice causes real concern, and we in the mining industry feel that the tactic is too blunt to be acceptable. The larger the organisation, the higher is the exposure and the likelihood that people in it will be subject to prosecution while the short-cut merchants go undetected.

The desirable next step

Consultation welcomed

We are grateful for the quality of consideration being given to this issue in Tasmania. It is indeed a very rational approach and the Law Reform Institute is applauded by us for it. The Issue Paper will attract considerable comment. We expect a further, perhaps final paper after consideration of all comment. It will be interesting to view the preferred option and consequential changes because the way forward is anything but easy to choose. At that time we would appreciate face-to-face discussion so that our concerns can be explored in greater depth. This written response is not the best way to understand the issue or to discuss alternatives, nor the best way for us to express our strong views about regulatory practices.

Much has been written about regulatory enforcement, predominantly by legally trained researchers and not by regulatory practitioners. Australian authors from a legal perspective include John Braithwaite, Richard Johnstone, Neil Gunningham and Liz Bluff amongst others. There are others who are internationally recognised. Arguably the most practical writer on regulatory practice is Professor Malcolm Sparrow from the Kennedy School of Government at Harvard. Sparrow² makes a very good case for the importance of considering regulatory practice. He makes a strong case for regulators having a structured way of thinking and acting...

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REGULATORS, UNDER UNPRECEDENTED pressure, face a range of demands, often contradictory in nature: be less intrusive—but more effective; be kinder and gentler—but don't let the bastards get away with anything; focus your efforts—but be consistent; process things quicker—and be more careful next time; deal with important issues—but do not stray outside your statutory authority; be more responsive to the regulated community—but do not get captured by industry.

Conflicting demands should surprise no one in government. Such is the nature of governance. That is what makes the role of a public official rich and interesting, rather than morally barren or straightforward. Even more, such is the nature of regulation. If complete consensus were possible on any regulatory issue—that is, if a solution existed that served the interests of every private party—then the issue would probably not warrant regulatory attention. Because regulation and enforcement, by their nature, elevate broad public purposes above the interests of private parties, one should expect regulatory practice to carry with it irreducible conflicts. Regulators inhabit, and are obliged to navigate, a landscape of conflicting and shifting interests.

The task here is to assess the demands now pressing on regulatory systems; in particular, given the focus on *practice*, the problem is to draw out any implications for the conduct of regulators and the organi-

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What is the most effective way of saving lives?

The weight of all this learned material suggests that there are far more effective ways of tackling safety and health enforcement than by introducing criminal liability or industrial manslaughter and at the very least a wider debate about enforcement is required. Indeed the only real arguments for industrial manslaughter provisions appear to emanate from Ministerial Offices and the union movement. No doubt these calls for tougher legislation are the response to popular (perhaps industrial) pressure, which may have more to do with ‘public outrage’ factors not having been adequately addressed in any well enunciated regulatory application and response or to do with changes in the industrial climate in recent years than with the adequacy of the legal system. The Issues Paper makes the point that a corporation may face at worst a fine. Our response to that is that the penalty might be to cancel a licence to operate, such as cancelling a mining lease for failing to meet a condition of a lease. Other broader ranges of sentencing options are

² The Regulatory Craft - Controlling Risks, Solving Problems, and Managing Compliance, **Malcolm K. Sparrow**, Brookings Institution Press 2000, c. 370pp. http://www.brook.edu/press/books/regulatory_craft.htm

canvassed in the Issues Paper; some of these may well appease the ‘outrage’, but also if not more importantly, fit the punishment to the crime for the betterment of the industry as well.

Further discussion

Quite apart from feeling a need for a wider discussion on enforcement, to address for instance restorative justice and other responses, we feel very strongly that the regulatory practice connected with criminal liability or industrial manslaughter has to be clearly laid down before proceeding further with the issue. This is the essence of our submission.

If the pressure is coming from the industrial quarter we should be able to sit down and discuss it rationally and not have a side issue that attacks a symptom and misses the disease.

Specific comment

Question 1 Definition Of Homicide

Q 1. should the definition of homicide in the [Criminal] Code be amended so that an organization can be criminally responsible for homicide?

On the face of it the answer seems to be yes, but only if the application is also addressed. That is, how will this change things and who will administer the changes?

Question 2 organisational liability

Q 2. Should the method of attributing criminal liability to organizations (the identification doctrine) be reformed?

We are not convinced of the need for reform of the method of attributing criminal liability to organisations and have grave concerns about the whole issue arising from the discussion on attribution in the Issues Paper. Further, the Issues Paper states that Section 35(1) of the *Acts Interpretation Act 1931* (Tas) already provides for this.

Corporate structure in the mining industry could conceivably see pursuing people overseas, with obvious difficulties. Nevertheless, the term ‘employer’ is used in OHS law and could help identify the directing mind and will of an organization in civil or criminal laws.

Organizations should clearly be open to fines and punishment, though we’re not saying that the relatively small number of cases of industrial manslaughter is an indication of a problem. We feel very strongly that there is likely to be a small number under any circumstance. We also do not support the contention that cases prosecuted show that the identification doctrine is biased towards small organizations. There should be more checks and balances in a larger organization. Perhaps there should be some reform in areas of *omission* as opposed to *commission* of offences.

The comment in 3.1.6 regarding the Meridian case raises an interesting prospect of organizations being able to establish a *duty of intent* that goes beyond the normal duty of care, presumably by being able to demonstrate that the organization had done a range of good things directed towards the right outcome. A prosecutor on the other hand would be attempting to prove that the organization by certain acts intended to influence others into a wrongful act. The discussion highlights the difficulty in addressing organizations as opposed to individuals, but touches, no doubt, on a sensitive community nerve. It seems to us that this is a subject for the future – since

our current legal system focuses on what someone (including an organization) has actually done, rather than intended to do (or intended to achieve). This would appear to be a significant reform and have far more ramifications than the incorporation of industrial manslaughter.

We are not surprised that that there has never been a prosecution of a traditional crime under the Criminal Code for a workplace injury in Tasmania. Western Australia is far bigger than Tasmania and has something like 40,000 people directly employed in the mining industry. We cannot conceive that that are many people who go to work to deliberately flout the law or be so callous as not to think about the harm they might cause to another, so the exposure is low in Tasmania. The mining industry in particular is a close-kit community and an injury to one person affects us all. Convictions under the *Workplace Health and Safety Act 1995* (Tas) are criminal convictions in any case, so resorting to the Criminal Code should be in the event that someone (including an employer) acts without regard to the harm that might be caused i.e. *mens rea*. Not many people in the mining industry act without regard to the harm that might be caused to someone else. Gathering the evidence necessary to prove that anyone (including an organization) acted carelessly is the issue - not how the organization is identified.

We have grave concerns about the whole issue arising from the inference that the instances quoted in 3.1.8 might have been pursued under the Criminal Code but for definitional or attribution problems. On the information provided the problems seem to centre around less than adequate risk controls, or inadequate proof, not whether anyone thought they might actually do harm to another person or that there was inadequate attribution.

Q 3. Extent of reform

(a) should any reforms apply to all 'organizations'?

Our short answer is yes – for the reasons outlined by the Victorian Attorney-General (“...it makes no difference to a victim whether the corporation was a government or non-government organization...” and ‘organisation’ should be defined broadly). We reiterate (this once) our need for a second discussion document on the *practice* relating to the whole issue for a longer and better answer – the same goes for all of our responses.

(b) should the term ‘organization’ be defined broadly, in line with recent Canadian reforms?

Again, our short answer is yes – for very similar reasons as expressed in 3(a) above.

(c) would it be appropriate/necessary to implement any of the recommendations of the VLRC in relation to the liability of the Crown?

It would certainly be appropriate to consider all the recommendations – and this fits exactly with our need for a *practice* document and regulatory development; the Crown will obviously develop a protocol for the eventuality that it or one of its officers is charged.

(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’?

Yes – but this would have to be reviewed in light of other changes made.

Q 4. Options for Reform

(a) should a specific ‘senior officer’ type offence be introduced to the Code

An answer on this question could only be given after working out the regulatory practice – and again the range of punishments/enforcement needs to be reviewed. If a ‘senior officer’ provision is needed in the event that an organization ceases to exist and has no assets so a prosecutor needs to pursue an individual, surely the same could happen for a senior officer (ie the individual has no assets). Restorative justice and the tactics deployed by Professor Fels illustrate the lateral thinking required to address this issue properly. Without the wise application of the law, prosecutors will catch the relatively innocent parties, while the really deliberately negligent ‘criminals’ escape. Images are conjured up here about the demise of (good) Socrates when it was the Greek society that was degenerating. Plato later wrote that “Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws”.

(b) if so, what should the elements of the offence be

They should be of the reckless, wilful negligent variety – not simply for example, a failure to ensure safe systems that are without risk.

(c) and how should the term ‘senior officer’ be defined, and should the definition extend to volunteers?

We don’t need to comment on the definition, given the research that exists. We are, however, alarmed that the issue might catch a person who assists in an emergency with all the best intentions and who acts in good faith. This causes us to reiterate our view that further prescription on the issue of manslaughter is unnecessary and this question makes us think that it is plainly wrong. We have grave reservations that the law will have serious unintended consequences and as a result be a very bad one - not in the public good or in the interests of the community or business competition.

Q 5. WHSA reforms

(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?

No – the difference between a person or several persons being killed or not is often purely chance. Strict liability already exists, and the punishment should fit the crime. What is needed is a range of alternative penalties.

(b) should such offences be indictable?

If the decision is made to include such offences – and we disagree with such a decision – they must be prosecuted in a Court that is the usual jurisdiction for hearing murder/manslaughter, given the seriousness of the charge, and the skills needed in assessing and interrogating rules of evidence etc.

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

We are not opposed in principle to having larger penalties in the WHSA. For this to occur, at least two things are a pre-requisite; firstly greater off-sets or alternative enforcement actions for making good attempts at averting the breach, and secondly an enforcement practice guide that helps outline what constitutes ‘good attempts’ as well as the (non-political) **process** for considering ‘public good’ factors in deciding whether or not to launch a prosecution, and a public explanation of the action taken so that all parties understand what is acceptable and what is not acceptable behaviour. Consistency with other jurisdictions would also assist.

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

The Queensland approach is abhorrent to us. It should be factors leading up to the incident such as the negligence and conduct of people before the event rather than the result that is at issue. In the case of the Northparkes tragedy, involving the deaths of 4 people, one of whom was the mine manager and another was the senior technical manager, the mine and its staff had the reputation of being among the best safety performers in the Australian mining industry – yet the disaster occurred, clearly without wilful negligence, and the size of the penalty should reflect this. We can easily imagine other (injury-free) cases of accidents waiting to happen where the operator should be removed from the business.

Q 6. Higher maximum penalties

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

We are not opposed in principle to having larger penalties in the WHSA. For this to occur, at least two things are a pre-requisite; firstly greater off-sets or alternative enforcement actions for making good attempts at averting the breach, and secondly an enforcement practice guide that helps outline what constitutes ‘good attempts’ as well as the (non-political) **process** for considering ‘public good’ factors in deciding whether or not to launch a prosecution, and a public explanation of the action taken so that all parties understand what is acceptable and what is not acceptable behaviour.

(b) if so, what should the maximum penalty be?

Penalties should be in line with maximum penalties under OHS legislation in other jurisdictions, and could conceivably be three times as high as they are now; up to \$450,000 for an organization and \$150,000 for a natural person. Tasmania has the great opportunity now to distinguish itself by sound processes, fair outcomes and strong feedback, rather than having the reputation for high penalties. We would not like to see the ‘brag book’ approach (to the number of prosecutions or the size of fines) dominate our communications about the treatment of right and wrong in Tasmania.

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

If custodial sentences are available – and we don’t see a need, either in Tasmania or based on other jurisdictions’ experiences – they should be indictable to Courts used to handing down such sentences. The Criminal Code is the appropriate legislation for matters requiring imprisonment, even if other jurisdictions have had provisions for imprisonment that have existed for decades (and not been used, eg the NSW *Mines Inspection Act 1901*). We also see a necessity for clear guidelines for determining which sorts of matters fall into this category if the provision is included in the WHSA.

Q 7. reforms to s53 WHSA offences by bodies corporate

(a), (b) Should s53³ of the WHSA be reformed? To remove the reverse onus of proof?

³ 53. Offences by bodies corporate

(1) If a body corporate contravenes or fails to comply with any provision of this Act, each director of the body corporate is taken to have contravened or failed to comply with the same provision unless the director satisfies the court that –

It should be reformed to remove the reverse onus proof, in view of the emergence of a new punitive style of regulatory action emerging in other jurisdictions. We would argue that even though this provision has not been used, the reason probably has more to do with the kind of natural justice that has and should prevail (not being guilty until you prove yourself innocent), or to do with making out a statement of facts from available evidence, than it has to do with a problem at law.

(c), (d) should the reform be based on s144 of the Victorian OHS Act 2004? and to whom?

The Victorian model is as useful as any other. The offence might be attributable to an organization and/or its officers.

Q 8. Options for reform – Code &/or WHSA

(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?

Mainly for reasons of not having duplication of provisions for crimes such as manslaughter, we would prefer Option 3, namely ‘specialised principles’ in the Code to clarify ‘manslaughter’ in an industrial context. Other reasons and comments have already been made, notably the requirements for a *practice* guide and regulator development. We would support higher maximum penalties in the WHSA, providing, as already commented there are higher off-sets for good performance generally, better enunciation of the processes and reasoned outcomes to all including the community, and a wider range of enforcement actions and better practice.

Q 9. Sentencing options

(a) do you think that a fine is likely to 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 organisation’s size, revenue and assets?

(a) the body corporate contravened or failed to comply with that provision without the director's knowledge and that the director was not reasonably able to have acquired that knowledge; or

(b) the director used all due diligence to prevent the contravention or failure to comply by the body corporate.

(2) A director may be proceeded against and convicted under a provision in accordance with subsection (1) whether or not the body corporate has been proceeded against or has been convicted under that provision.

(3) Nothing in this section affects any liability imposed on a body corporate for an offence committed by the body corporate against this Act.

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

We have already stated that, in our view the law must be applied equitably, efficiently and effectively. A fine will in many (most?) cases meet those criteria. However, we just as quickly see that alternative arrangements might be more appropriate, for example if a lengthy investigation or court proceeding delays the justice. An ‘enforceable undertaking’⁴ could easily in some cases be more efficient and effective, and certainly more timely; its effectiveness enhanced if the undertaking is more informative. If an organization pleads guilty to a charge, much of the information surrounding the incident is not available to others. We can see an opportunity for regulators to be more creative in adopting the provisions of s55A and some improvement of enforcement practice.

A large organization could spend more on an enforceable undertaking than in a fine. Most large organizations in the mining industry would readily allocate the resources to spread information throughout the industry, in preference to the ‘win-lose’ legal battle. We consider that better good could be seen to be served, both to the community and to the advancement of OHS practice, if other sentencing options were available and applied more appropriately to fit the crime.

We do not support a capacity for Magistrate’s courts to impose unlimited fines.

Tasmania’s Sentencing Act 1997 includes a range of custodial and fines as sentencing options, and also includes the discretion to ...

“(i) impose any other sentence or make an order, or any combination of orders, that the court is authorised to impose or make by this Act or any other enactment.”

Again, the question (especially ‘c’) suggests a need to improve our enforcement practices.

Qs 10, 11, 12, 13, 14, 16 additional sentencing options

Q 10, 11, 12, 13, 14, 16. Should disqualification orders, dissolution of a corporation, community service orders, probation orders, adverse publicity orders and punitive injunctions be additional sentencing options?

In-principle, in relation to the Tasmanian Criminal Code, yes. Amendments in relation to probation orders might adopt the provisions of the Canadian Criminal Code. In the case of probation orders we would expect that Workplace Standards is the most likely ‘regulatory body’

⁴ 55A. Enforcement of undertakings

(1) The Secretary may accept a written undertaking given by a person for the purposes of this section in connection with a matter in respect of which the Secretary has a power or function under this Act.

(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Secretary.

(3) If the Secretary considers that the person who gave the undertaking has contravened any of its terms, the Secretary may apply to the Magistrates Court for an order under subsection (4).

(4) If the Magistrates Court is satisfied that the person has contravened a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the person to comply with that term of the undertaking;

(b) an order directing the person to pay to the Board an amount not exceeding any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the contravention;

(c) an order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the contravention;

(d) any other order that the Court considers appropriate.

to supervise the development or implementation of the policies, standards and procedures specified in the order.

We recall the many adverse publicity actions by Professor Fels, so this might just as appropriately be addressed at the Ministerial level in making any announcement about a court taking into account adverse publicity when considering a plea in mitigation.

The *Trade Practices Act 1974* model seems logical as regards punitive injunctions. However, any changes at law need to avoid duplication or potential duplication; that is even if laws (such as the Code, Trade Practices and Corporations laws) that deal with similar matters are made consistent at a certain point it is highly likely that as these laws change over time that there will eventually be inconsistencies.

Q15 equity fines as additional sentencing option

Q 15. Should equity fines be an additional sentencing option?

We are not convinced that equity fines are appropriate at this stage. We might be more comfortable after we see the impact of all the other changes, as they show impacts over the coming years.

Q 17. Compensation orders

Q 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?

In principle, yes. There are perception problems if a moiety is awarded to the prosecutor.

Q18. Range of sentencing options expanded

Q 18. Do you think that the range of sentencing options currently available when sentencing an organization for an offence against the WHSA should be expanded? If so, what additional sentencing options do you think should be available?

We don't believe there are any restrictions currently. The fact that Tasmanian judges and magistrates may not have been as creative as elsewhere does not necessarily mean that legislative provisions need to be reformed.

As we understand it an enforceable undertaking pursuant to s55A WHSA is a voluntary act that might be performed early following an incident and to avoid a (lengthy) 'win-lose' legal battle, and have a very good effect, not to mention the efficiency. It might avert the payment of a cash fine, even though the undertaking will often involve direct or indirect expenses.

We assume the question to address the situation is that such an act was either not envisaged or was rejected and the defendant pleaded not guilty, but the court could see the merit of such an arrangement. The merit might be to shorten the legal proceeding or to see improvements actually made under the enforcement of an order by the court.

It appears that the South Australian move (s60A non-pecuniary penalties) may be a useful model in this regard. We suggest that a manual might correct any deficiency, rather than add

specification to existing laws. Specification from our perspective only tends to restrict things in the end, rather than open up possibilities.

CONCLUSION

The Issues Paper presents a great opportunity to make informed decisions about an issue that has been circulating for the past 15 or so years; an issue that is emotive. We suggest that difficulties faced to date in making progress have more to do with concerns about regulatory practice, understanding regulatory practice and political point-scoring connected with the matter than with the law itself.

We have grave reservations about making additional laws because the further provisions will only limit the application of existing provisions. We do not oppose changing some words or clarifying some existing provisions in both the Tasmanian Criminal Code and the WHSA.

We have grave concerns about the whole issue arising from the inference that the instances quoted in paragraph 3.1.8 of the Issues Paper might have been pursued under the Criminal Code but for definitional or attribution problems. On the information provided the problems seem to centre around less than adequate risk controls, or inadequate proof, not whether anyone thought they might actually do harm to another person or that there was inadequate attribution.

There must not be a difference at law about whether a person is guilty of manslaughter depending on whether or not the harm occurs at work.

In this day and age, it should be fairly straight-forward to charge an organization under s55A WHSA of a failure to demonstrate its duty of care.

We would welcome further discussion following a synthesis of all comments, but we stress the need to provide much better guidance on the regulatory practice side of this issue before going beyond that discussion.

Tasmania has the great opportunity now to distinguish itself by sound processes, fair outcomes and strong feedback, rather than having the reputation for high penalties. We would not like to see the 'brag book' approach (to the number of prosecutions or the size of fines) dominate our communications about the treatment of right and wrong in Tasmania.