Submission

to

Occupational Health and Safety Act 1986 Review

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Introduction

AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries. It is the sole national employer association representing the employee relations and human resource management interests of Australia's onshore and offshore resources sector and associated industries.

AMMA member companies operate in the following industry categories:

- Exploration for minerals and hydrocarbons
- Metalliferous mining, refining and smelting
- Non-metallic mining and processing
- Coal mining
- Hydrocarbons production (liquid and gaseous)
- Associated services such as:
    - Construction and maintenance
    - Diving
    - Transport
    - Support and seismic vessels
    - General aviation (helicopters)
    - Catering
    - Bulk handling of shipping cargo

AMMA represents all major minerals and hydrocarbons producers as well as significant numbers of coal, construction and maintenance employers in the resources sector. AMMA is uniquely able to articulate the workplace relations needs of the resources sector.

The Australian resources sector makes a significant contribution to Australia's wealth and prosperity, underpinning critical supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors.

The resources sector will contribute minerals and energy exports in the order of $110 billion in 2006-2007. This represents approximately two thirds of Australia's total commodity export earnings.

The mining industry directly employs 134,500 employees.[1] Many more employees are indirectly employed as a result of activity in the mining sector.

The average annual rate of growth since the mid 1980s as measured by the gross product per hour worked for the mining industry has been 3.3 per cent compared to an all industries average of 1.6 per cent – double the national average.

These statistics highlight the significance of the resources sector.

Summary

The AMMA submission can be summarised as follows:

- The offence of industrial manslaughter should not be introduced into the *Occupational Health, Safety and Welfare Act*. The current criminal law provides legal protections for individuals charged with serious criminal offences. An offence on industrial manslaughter may remove a range of protections for an accused and result in differential treatment between individuals prosecuted under established criminal law and those under Occupational Health, Safety and Welfare legislation.
- The existing pecuniary penalties should not be increased threefold without due consideration as to whether such an increase will result in a reduction of workplace accidents. An increase may have the effect of stunting business investment and may also direct investment away from improving workplace health and safety practices.
- The resource sector has a much improved safety record and continues to looking for ways to improve workplace safety strategies. The penalty regime should be focused on and have as its primary remedy, non-pecuniary penalties which encourage education, training and other preventative approaches.
- Expiable offences are punitive measures and do not assist companies to improve workplace safety practices. Expiable offences should not be introduced without first giving consideration to practical preventative solutions in consultation with the employer.
- The current aggravated offence provision is adequate and reflects the seriousness of the offence and its penalties. This should not be modified in order to make prosecutions easier to obtain without considering modification to the current penalty, which is substantial.

Our comments regarding the penalty regime are as follows.

[1] ABS, Australian Labour Market Statistics, Detailed - Electronic Delivery, (cat. no. 6105.0).

The offence of industrial manslaughter or death at work

The Legislative Council introduced the *Occupational Health and Safety (Industrial Manslaughter) Amendment Bill 2004* into Parliament on 8 December 2004. This was a private members Bill, tabled by the Hon Nick Xenophon. The Bill sought to introduce an offence of industrial manslaughter by an employer, attracting significant monetary penalties and imprisonment of senior officers of a body corporate.

Although receiving a first and second reading; this Bill was not subject to any debate due to the introduction of the *Occupational Health, Safety and Welfare (Safework SA) Amendment Bill 2003*, the scope of which did not include the penalty regime.

Four other states and territories, namely Western Australia, New South Wales, Victoria and the Australian Capital Territory have each introduced an offence of industrial manslaughter in various forms, as part of Occupational Health and Safety legislation. The Hon Nick Xenophon's Bill largely mirrored that of the Australian Capital Territory, however it is unclear as to whether the Bill will be re-tabled or a new Bill introduced by the current government as part of the debate on the offence of industrial manslaughter.

AMMA's view in relation to the offence of industrial manslaughter is made generally rather than in direct response to the *Occupational Health and Safety (Industrial Manslaughter) Amendment Bill*.

AMMA contends that the criminal law has long had the capacity to address the criminal responsibility of corporation officers for the death of another due to recklessness. In South Australia, the *Criminal Law Consolidation Act 1935* (SA) imposes penalties for manslaughter and together with the common law, is accompanied by a range of protections for an accused that underpins our judicial system and ensures respect for the rule of law.

Individuals who act consciously and voluntarily in a grossly negligent manner, where there is a high risk of death or serious injury and actually cause death, are rightfully prosecuted according to our current criminal justice system.

Serious ramifications can result from the introduction of an industrial manslaughter offence, for all employers, directors, managers and employees where a fatality occurs in circumstances where they have little direct control over a tragic event resulting in death.

Employers, managers and other senior staff should not be treated differently to other members of the community and in particular, should not face different standard or tests. The introduction of an industrial manslaughter offence sends the message that workplace death is of a different class to non-industrial related

deaths and thus is treated differently. This will not assist in the reduction of such incidences. '*It imposes no new obligations which are not already in existence under OHS law in terms of setting standards of safety in the workplace…[and will have] very little practical impact on day to day operations of a business*.[2]'

This differential treatment is exacerbated with the introduction of the offence of industrial manslaughter in four separate jurisdictions, each with its own requirements and penalties. In Western Australia, for a first offence of workplace death, the penalty is a maximum of two years imprisonment. In New South Wales the penalty is five years imprisonment and in the Australian Capital Territory it is an astonishing twenty years imprisonment. A death does not need to occur in Victoria to attract a five year jail term. While AMMA does not support an offence of industrial manslaughter and is of the view that the current criminal justice system is adequate, if the reform is introduced, a nationally consistent approach would have created more certainty and fairness, particularly for employers that operate nationwide.

Furthermore, the introduction of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* by the Commonwealth Government excludes the Commonwealth from similar liabilities. AMMA does not support a system in which a large proportion of the employment sector cannot be held criminally liable, but others can be.

There is no justification for an offence of industrial manslaughter where current criminal law can be applied. If such an offence were introduced, employers may focus on protecting themselves and their management from significant sanctions, in lieu of learning from the accident and preventing a re-occurrence.

An industrial manslaughter offence is unlikely to achieve a reduction in the number or severity of fatalities. The focus should primarily be on actual preventative measures rather than punishment in order to assist employers, in a proactive and consultative fashion, to meet their legislative obligations.

The level of fines and structure of penalties under the Act, including the use of non-pecuniary and alternative penalty options

Existing penalty structure

The monetary penalty for a Division 2 offence under the *Occupational Health, Safety and Welfare Act 1986* for corporations is currently set at $100,000. Where a Corporation is convicted of a subsequent offence, this attracts a Division 1 penalty of $200,000.

The Hon Michael Wright MP, Minister for Industrial Relations, has announced that the Government intends to triple fines for safety breaches by corporations.

[2] Michael Tooma quoted in *Industrial Manslaughter: making the case* Illawarra Business Chamber

This means that a Division 1 penalty and Division 2 penalty will increase to $300,000 and $600,000 respectively.

The proposal to increase fines threefold should be done so carefully and should not merely be the result of a desire to increase punitive measures. Consideration should be given as to the actual effect an increase in monetary penalties will have on the current health and safety practices at workplaces.

The imposition of a significant and potentially crippling fine will have broad consequences for the South Australian business climate. Small and medium businesses faced with a penalty of up to $300,000 may not be able to cope financially and may be forced into liquidation, resulting in loss of employment and state revenue. In addition, an increase in penalties and other punitive action like the industrial manslaughter offence may discourage business investment in Australia.

Other Australian jurisdictions have changed or are in the process of reviewing their occupational health and safety legislation and the common thread in each has been the focus on increased monetary penalty provisions. However, in each jurisdiction there has been no reference to documentary evidence that supports the proposition that an increase in monetary penalties will improve occupational health and safety in Australian workplaces.

An ACCI review in May 2001 referred to a survey undertaken by KPMG on behalf of the National Occupational Health and Safety Commission, of 80 CEOs and over 1000 supervisors and small business. This survey revealed that in matters of occupational health and safety, companies are motivated by:

- Moral responsibility – no one wants an unsafe workplace
- Legal requirements – employer's will put in place processes to comply with regulations
- Economic drivers, including reduced workers' compensation premiums, increased productivity and decrease in absenteeism
- Corporate image.

These are values that are still held by companies. With this in mind, employers are likely to respond to increased monetary penalties with an increased drive to fight prosecutions rather than plead guilty. In 2006, the convictions recorded by SafeWork SA[3] were all based on guilty pleas by corporations, with a similar result in 2005.[4] An increase in contested prosecutions will divert attention from implementing improved occupational health and safety strategies.

The courts are empowered to impose fines of up to $100,000 in prosecutions under the *Occupational Health, Safety and Welfare Act*; however the penalties

3 SafeWork SA, www.safework.sa.gov.au site accessed 11 July 2006.
4 Ibid. Two convictions were on a not-guilty plea.

ordered in 2005 and 2006 ranged from approximately $5000 to $55,000. There remains the potential for significant and serious breaches of the *Occupational Health, Safety and Welfare Act* to attract fines of $100,000 in the first instance. An increase tripling this maximum amount may have little practical effect as a preventative measure.

AMMA does not support the introduction of a aggravated penalty structure. This would result in the imposition of a penalty that does not give consideration to the need to prevent future offending conduct but rather, is simply a tool to punish companies based on the gravity of harm caused. This approach does not look to the cause of the harm or address the actual act or conduct of the company, particularly where what is considered to be a minor deviation from the occupational health and safety obligations, results in a tragic event. There is the potential that the penalty may be disproportionate to the behaviour which caused the harm. A penalty designed to assist companies to remedy behaviour that breaches occupational health and safety legislation would be far more proportionate and beneficial to the business and wider community.

The Industrial Relations Court of South Australia currently takes into consideration the resulting harm when applying the penalty provided by the current legislation. The Court should be able to continue to exercise its skill and knowledge in imposing appropriate levels of penalty based on its assessment of the entire circumstances surrounding the offence and based on penalties imposed in other cases. Directions or strict guidelines for the Court by way of a revised staggering structure of penalties relative to a particular harm caused will be unduly restrictive and impose unnecessary fetters on the Court's powers.

Expiable offences

Offences relating to failure to consult with employees, failure to control health and safety risks and failure to ensure the health and safety of employees and others should not be expiable offences but rather, should attract preventative measures such as education and training or other non-monetary penalties.

Expiable offences simply reinforce a punitive style of regulation and traditionally, are used due to the costly and inefficient nature of prosecution. Alternative non-punitive measures would be more successful in educating people on workplace safety issues. By having a greater awareness of the effect of their actions or inaction, companies may be better equipped to minimise workplace incidents.

An improvement or prohibition notice, designed to educate and assist the company to improve workplace safety practices, would serve as a greater preventative method than an expiation notice.

While AMMA does not support the use of expiation notices as a deterrent to promote safe and healthy workplaces, if such offences were introduced clear guidelines must be available to inspectors to ensure they are issued consistently.

In addition, consideration should be given as to the use of the collection of revenue. For example, in keeping with the spirit of prevention of workplace accidents, the revenue collected under the *Occupational Health, Safety and Welfare Act* should be redirected back to businesses by way of education and training programs not into consolidated revenue.

Non Pecuniary penalty regime

There must be a balance between the imposition of monetary penalties for breaches and the continual improvement of safety outcomes. Non-pecuniary options should become a primary remedy for the Courts to prevent any or further breaches of health and safety obligations.

Non-pecuniary options that focus on education and training have a beneficial effect for both the employees and the community through increased safe work practices. By imposing penalties such as community service, compulsory training and education programs and public apologies, this invariably results in the expenditure of money and labour by the company and therefore, effectively operates as a monetary penalty also.

While the current penalty structure provides for a maximum of $200,000 for subsequent breaches of legislation, some circumstances may warrant the replacement of the monetary penalty with a non-pecuniary penalty in order to assist the company to meet its occupational health and safety obligations. Where a situation occurs that a company is faced with an enlarged monetary penalty due to a subsequent breach of the *Occupational Health, Safety and Welfare Act*, this indicates and supports the proposition that there is no correlation between the imposition of monetary penalties and increased health and safety strategies in workplaces.

In regards to the current non-pecuniary penalty involving the publication of offences under the Act, consideration should be given to the resulting damage to the corporate image (and thus the capacity to continue employing persons) and the difficulties that companies may have attracting future employees.

In the length of time it takes to prosecute a matter, the company may already have implemented measures to improve health and safety in its workplace. As part of the publication of offences, companies should be able to indicate and illustrate to the community what they have done since the offence occurred to improve their workplace.

AMMA does not support any increase to the current maximum five year jail term. The focus should be on education, training and other non pecuniary penalties as a primary method of prevention.

Use of current aggravated offence provisions

AMMA does not support any change to the current aggravated offence provision. The current aggravated offence provision is adequate and the requirement of knowledge and recklessness as elements to the offence reflects the seriousness of the offence and also the penalty that is imposed.

If the offence were amended to require that one or the other of the elements be satisfied to meet the criteria, making successful prosecutions easier to obtain, the offending person would be faced with a substantial and onerous monetary or imprisonment penalty. If any reform were made to the current offence such that both elements were not pivotal to proving the offence, the penalties associated with the offence should be reduced.

Conclusion

AMMA supports the review of the current penalty regime under the *Occupational Health, Safety and Welfare Act* to the extent that primacy is given to a policy of prevention rather than punishment. Any review should have at its forefront, the consideration as to whether a change to a particular penalty is going to have the effect of preventing and minimising the number of workplace safety incidents, while satisfying the community resolve that an employer be disciplined for its offences. To that end

- The offence of industrial manslaughter should not be introduced to the *Occupational Health, Safety and Welfare Act*.
- Monetary penalties should not be increased by 300 per cent. Such an increase will not reduce or deter workplace safety offences.
- Non-pecuniary penalties focused on prevention should be a primary remedy or penalty for offences against occupational health and safety as these can increase safe work practices to the benefit of employees and the wider community.
- Expiable offences are a response to a past event and do little to prevent workplace safety incidents and should not be introduced, unless accompanied by increased education and training programs.