



Industrial Manslaughter

The long overdue inclusion of an industrial manslaughter offence in the *Work Health and Safety Act 2011* (Cth)

ACTU Submission, 13 June 2023
ACTU D. No 26/2023

Contents

Introduction	1
About the ACTU	1
Summary	2
Recommendations.....	3
Coverage.....	4
Liability.....	4
Fault elements	4
Aggregation.....	5
Penalties.....	6

Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and state and regional trades and labour councils. There are currently 43 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The ACTU and our affiliates fight to ensure that every worker has the right to a safe and healthy working environment and have represented workers on health and safety since our formation. As members of Safe Work Australia, and its predecessor organisations, the ACTU has been involved in all significant matters of WHS law reform.

The ACTU welcomes the opportunity to make submissions in response to the discussion paper published by the Department of Employment and Workplace Relations (discussion paper). The ACTU has carefully considered the discussion paper and consulted its affiliates in relation to the matters raised. In light of the nature of this reform, in particular the ongoing work in relation to the issue of aggregation, the ACTU would be happy to provide further information on request and we look forward to a constructive ongoing engagement on these matters.

Summary

The right to a safe and healthy working environment is a fundamental human right and essential to decent work. Despite this right, every year an average of 200 workers are killed at work with further 5,000 workers dying from diseases caused by their work. Every one of these deaths is a tragedy that could have been prevented.

The ACTU strongly supports the inclusion of a strong ‘outcome-based’ offence to sit alongside, and complement, the existing ‘risk-based’ offences in the WHS Act and believes this reform is long overdue. The inclusion of an industrial manslaughter offence is critical to not only ensuring that both a strong effective deterrent exists within the WHS framework but also that appropriate justice is available for the families, friends and workmates of those who are killed at work.

As noted in the review of the Model WHS Laws the current criminal law is limited in its ability to respond effectively to work-related deaths caused by negligence in the workplace, in particular by larger corporations.¹ Governments across Australia and internationally have cited the challenges with their respective criminal codes and ‘the need to identify an individual director or employees as the directing mind and will of the corporation... ultimately means that manslaughter prosecutions under the Criminal Code are only successful against small businesses and that prosecutions against large corporations are unlikely to succeed’.²

Another limitation of criminal manslaughter offences is the inability to sanction corporations. The inability to imprison a corporation has been a barrier to achieving justice for workers killed at work. The ability for courts to impose significant financial penalties is a critical element to effective industrial manslaughter provisions.

It was nearly 5 years ago that governments received Marie Boland’s review of the Model WHS Laws which called for an industrial manslaughter offence to be included in the Model WHS Laws. Since that time we have seen nearly all harmonised jurisdictions introduce an offence. It is right that the Commonwealth also ensure that such an offence is included in the WHS Act.

¹ The Review of Model WHS Laws 2018, Boland, M (pp127-128)

² Workplace Health and Safety, 2018 Queensland

Recommendations

Recommendation 1

That, consistent with the recommendations of the Boland Review, an offence of Industrial Manslaughter be established under the WHS Model Laws.

Recommendation 2

That the coverage of an offence for industrial manslaughter extend to deaths which arise as a result of exposure to hazards at work but occur outside of that workplace.

Recommendation 3

That liability for the offence of industrial manslaughter apply to PCBUs and their officers.

Recommendation 4

That the fault elements for the offence of industrial manslaughter be met if the relevant conduct causing death is either reckless or negligent.

Recommendation 5

That following the review of aggregation provisions by Safe Work Australia the Commonwealth update the WHS Act.

Recommendation 6

That the penalty available for industrial manslaughter be increased, consistent with the manslaughter penalty in the Commonwealth Criminal Code, to **25 years imprisonment**.

Coverage

The ACTU broadly supports the proposed coverage outlined in the discussion paper.

Unions believe that an industrial manslaughter offence should cover the death of a worker and 'other persons' for whom the Person Conducting the Business or Undertaking (PCBU) owes a primary duty. This should include circumstances where the death does not occur in the workplace but may result from exposure to hazards at work. An example of this would be the recent outbreak of silicosis and the failure of PCBUs to take reasonably practicable steps to eliminate exposure to hazardous crystalline silica.

Recommendation 2:

That the coverage of an offence for industrial manslaughter extend to deaths which arise as a result of exposure to hazards at work but occur outside of that workplace.

Liability

The ACTU supports the proposed liability outlined in the discussion paper.

Consistent with other offences, including industrial manslaughter offences introduced in other jurisdictions, the ACTU believes it is appropriate that the offence would apply only to PCBUs and its officers. The very purpose of an industrial manslaughter offence is to be able to criminalise conduct currently out of reach of existing criminal codes. Moreover, the objective of the offence is to hold officers of a corporate entity responsible where such a person causes, or substantially contributes to, the death of another through an act (or omission) of negligence or recklessness.

Recommendation 3:

That liability for the offence of industrial manslaughter apply to PCBUs and their officers.

Fault elements

The ACTU supports the proposed fault elements outlined in the discussion paper.

The approach proposed in the discussion paper to include the fault elements of either recklessness or negligence is consistent with most of the industrial manslaughter offences introduced in jurisdictions and is consistent with the recently introduced changes to the Category 1 offence.

It has been well documented that the previous Category 1 offence was not operating as intended due to the significant barrier posed by establishing recklessness. This high bar for conviction meant that many deaths went unprosecuted despite clear evidence of negligence.

The inclusion of a fault element of negligence in the industrial manslaughter offence is critical to the offence operating as intended. The ACTU supports the inclusion of negligence consistent with that outlined in the Criminal Code.

Recommendation 4:

That the fault elements for the offence of industrial manslaughter be met if the relevant conduct causing death is either reckless or negligent.

Aggregation

The effective aggregation of conduct is critical to ensuring that an industrial manslaughter offence operates as intended. WHS incidents involve complex work systems and often multiple individual managers (or even PCBUs) with responsibility to ensure these systems are safe. Corporate culture is a significant driver as to how systems are managed and the risks that workers are exposed to.

Furthermore, the challenge of establishing that a corporate entity has a guilty mind is significant. In workplaces with complex management structures or where there are changing work relationships, such as with insecure work, this is especially difficult. Under the current framework, corporations are able to distance themselves from the acts of individuals and avoid consequences.

Aggregation is critical to resolving these challenges and adequately capturing the complexity of corporate conduct. This is critical for all workplaces but will be especially so for large corporations who have been able to avoid responsibility for occupational deaths in the past.

The ACTU notes the work currently underway at Safe Work Australia in relation to including specific aggregation provisions in the Model WHS Act and supports waiting for this work to be completed and to consider its application to the WHS Act.

Recommendation 5:

That following the review of aggregation provisions by Safe Work Australia the Commonwealth update the WHS Act.

Penalties

The ACTU believes that employers who cut corners that cause the death of workers should face serious penalties, including jail time.

As has been noted our current criminal laws have failed to treat causing the death of a worker in the same manner as deaths caused generally. The community has been rightly concerned and Parliaments across the country have moved to introduce industrial manslaughter laws that seek to address this concern and ensure an equality in the approach taken to those that cause the death of a worker.

The ACTU notes that the penalty available for manslaughter under the Commonwealth Criminal Code is 25 years.³ The ACTU believes that a manslaughter offence for the death of a worker in any given jurisdiction should be subject to the same penalty as is available for the manslaughter offence more broadly.

Australia's two most populous states, as well as the Commonwealth, provide for a 25 year term of imprisonment for manslaughter offences. Currently, the only one of these jurisdictions that has legislated an industrial manslaughter offence is Victoria which has set a penalty of 25 years. It is critical that these offences be harmonised to ensure that conduct causing the death of a worker carries the same penalty as manslaughter more generally.

The ACTU believes it is appropriate that the Commonwealth ensure consistency with the Commonwealth Criminal Code and adopt a penalty of **25 years imprisonment** for industrial manslaughter.

Recommendation 6:

That the penalty available for industrial manslaughter be increased, consistent with the manslaughter penalty in the Commonwealth Criminal Code, to **25 years imprisonment**.

³ Commonwealth Criminal Code, 115.2 Manslaughter of an Australian citizen or resident of Australia

address

ACTU
Level 4 / 365 Queen Street
Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au
australianunions.org.au