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No. 135 2003–04

Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 135 2003–04

Occupational Health and Safety (Commonwealth
Employment) Amendment (Promoting Safer Workplaces)
Bill 2004

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Law and Bills Digest Group
12 May 2004

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Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004

Date Introduced: 1 April 2004

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: On the date of Royal Assent

Purpose

The Bill proposes to exclude Commonwealth authorities and Commonwealth government business enterprises from the effect of:

- the *Crimes (Industrial Manslaughter) Amendment Act 2003* (Australian Capital Territory), and
- any future similar legislation enacted by a state or territory.

Background

Introduction

On 27 November 2003, the Legislative Assembly of the ACT passed the *Crimes (Industrial Manslaughter) Amendment Act 2003* (the 'ACT act'). This Act made the ACT the first jurisdiction in Australia to introduce the offence of 'industrial manslaughter'. Other states have considered or are considering similar laws, including Victoria, Queensland, Western Australia and South Australia.¹

The present Bill is the Commonwealth's legislative response to the ACT Act, although it also pre-empts similar moves in other jurisdictions. It proposes to provide immunity to the Commonwealth, its agencies, businesses and employees from any state and territory industrial manslaughter laws. Although the Commonwealth has the constitutional power to do so, the Bill does not override the ACT Act as it applies to the private sector or the ACT Government.

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Industrial manslaughter

Rationale for industrial manslaughter laws

The primary rationale for creating a specific offence of industrial manslaughter is that existing laws are inadequate for the prosecution of recklessly or negligently caused workplace death. In jurisdictions other than the ACT, prosecutions for such incidents are possible under either:

- the general common law crime of manslaughter, or
- existing occupational health and safety laws.

Both of these options have limitations when applied to workplace death. As explained in the presentation speech for the ACT Act:

The objective of the Crimes (Industrial Manslaughter) Bill is to reinforce the important duties employers have to provide safe and healthy workplaces, and to ensure that employers who fail to meet these duties are held accountable if a worker dies.

These duties of care are well established through occupational health and safety legislation and through the common law. There are, however, significant problems in prosecuting employers under existing manslaughter laws, as many people are employed by corporations.²

The chief problem in applying the general crime of manslaughter to industrial circumstances is the difficulty proving that a company has been negligent. Under common law principles, a company can only be found guilty of an offence if the necessary mental element (in the case of manslaughter, gross or criminal negligence) can be attributed to the ‘directing mind and will’ of the corporation, normally the directors or chief executive officer. This is known as the *Tesco* principle after the British case, *Tesco Supermarkets v Natrass*.³

The *Tesco* principle makes prosecutions of large companies for manslaughter difficult as the negligent conduct leading to the death most often occurs at a mid-management level. As one commentator explains —

The *Tesco* principle is unworkable in the context of larger corporations because it fails to reflect the diffused nature of decision-making in large or even medium size organisations. Offences committed on behalf of organisations often occur at the level of medium- or lower-tier management whereas the *Tesco* principle requires proof of fault on the part of a top-tier manager, or a delegate in the sense of a person given full discretion to act independently of instructions in relation to part of the functions of the board. It is easier to prove fault on the part of a top manager of a small company, but if that can be done there is usually little need to prosecute the company as well as the manager.⁴

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In Australia, the *Tesco* principle seems to have been a significant barrier to the prosecution of companies under the general law of manslaughter. The Victorian case *R v Denbo Pty Ltd*⁵ appears to have been the only successful prosecution.

Companies can be, and are, more easily prosecuted and punished under occupational health and safety (OHS) legislation in every Australian jurisdiction. However, only fines, not prison terms, may be imposed for these offences. These fines also tend to be relatively minor. In the ACT, for example, the fine for failure by an employer to ‘take all reasonably practicable steps to protect the health, safety and welfare at work of [their] employees’ attracts a maximum penalty of \$25,000 for an individual employer or \$125,000 for a corporate employer.⁶ Further, the legislation provides no differentiation between failures that result in minor injuries and those that result in death.

Proponents of industrial manslaughter laws argue that a specific crime for this particularly egregious workplace offence could be used to provide more substantial penalties and to imply greater opprobrium. Several commentators have pointed out that OHS offences tend to be seen as merely quasi-criminal, rather than genuinely criminal, including by the inspectorates charged with a policing function.⁷ In the words of a former head of the Department of Labour and Industry in Victoria:

A concept in the minds of many people is that the inspector is there in the workplaces to detect breaches of the law and to prosecute offenders. Some even regard the number of successful prosecutions as a measure of the success of the inspectorate.

Most inspectorates would take the opposite view. They see as a failure any inspector who constantly has to launch prosecutions in order to obtain compliance. They see the legislation they administer as remedial rather than punitive in nature, ie they are there to improve the conditions of work, not to make the employer or employee suffer penalties for breaches of the law.⁸

As the academic Alan Clayton describes OHS law and the use of minor penalties, ‘The semiotics of this position is that occupational health and safety violations are essentially “purchasable commodities” rather than socially intolerable offences.’⁹ In this light, the separate and specific provision of a crime, placed in the criminal rather than OHS legislation and subject to prosecution by the police and Director of Public Prosecutions rather than an OHS inspectorate, can be seen as a means to ensure that workplace death is understood to be an intolerable risk, treated with greater severity than other OHS contraventions.

The ACT legislation

The ACT Act introduced a Part 2A into the ACT’s *Crimes Act 1900*, creating the new crime of industrial manslaughter.

An employer or senior officer of an employer is guilty of the offence if:

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- a worker of the employer dies in the course of their employment¹⁰ or following injuries sustained in the course of their employment
- the employer or senior officer's conduct caused the death, and
- the employer or senior officer was either:
 - reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct, or
 - negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

The following points should be noted about the ACT Act:

- the term *workers* is used rather than the narrower *employees*. Accordingly, the legislation applies to employees, independent contractors, outworkers, apprentices, trainees and volunteers
- the Act provides high penalties: a fine of up to \$200 000 for individuals, \$1 million for corporations, imprisonment for up to 20 years or both a fine and imprisonment. Interestingly, the law also allows the court to impose 'name and shame' style punishments for corporate offenders, such as requirements that they advertise the fact of the crime and the penalty on television or establish and operate a community service
- the test of criminal negligence used is significantly higher than the test used in civil negligence trials
- *senior officers* of an employer may be individually liable for the crime. Senior officers include the following:
 - for government authorities, the relevant Minister, chief executive officer or any other person in an executive position who makes or takes part in making decisions affecting all, or a substantial part, of the functions of the authority
 - for corporations, any officer of the corporation
 - for other entities, a person in an executive position who makes or takes part in making decisions affecting all, or a substantial part, of the functions of the entity, or a person that would be an officer if the entity were a corporation
- vicarious criminal liability is *not* imposed on senior officers for the actions of subordinate employees. Accordingly senior officers will only be individually liable where the negligence or recklessness can be directly attributed to their personal

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conduct. This contrasts to a controversial approach previously proposed by the Victorian government¹¹

- interaction with the ‘corporate criminal responsibility’ provisions of the *Criminal Code 2002* (ACT) (the Criminal Code) broaden the impact of the ACT Act.¹² Among other things, these provisions provide that:
 - where the fault (or mental) element of a crime is negligence and no individual employee, agent or officer of the corporation has the fault element, the corporation’s conduct as a whole may be considered to determine if negligence has occurred, and
 - where the fault element is recklessness, recklessness may be shown by proving that a ‘corporate culture’ existed within the corporation that ‘directed, encouraged, tolerated or led to non-compliance, with the contravened law’ or that the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law.

The application of the corporate criminal responsibility provisions of the Criminal Code is the most significant feature of the industrial manslaughter laws. These provisions, modelled on Division 12 of the *Commonwealth Criminal Code 1995*, dramatically reform the *Tesco* principle by removing, in certain circumstances, the difficult task of finding the company’s ‘directing mind’. The corporate criminal responsibility provisions do not apply to the general crime of manslaughter.

For practical purposes, a similar outcome could have been achieved by making the general crime of manslaughter subject to these provisions. However, it would also have made it easier to prosecute companies in contexts beyond the workplace, for example for deaths that result from environmental, building or food safety failings. By providing a specific industrial manslaughter crime the ACT has been able to limit corporate liability for manslaughter to the industrial context only.

Liability of Commonwealth agencies under the ACT industrial manslaughter law

The present Bill proposes to nullify any effect the ACT Act would have on Commonwealth employers, employing authorities or employees.

The *status quo*, by virtue of s 27 of the *Australian Capital Territory (Self Government) Act 1988* (Cth), is that the ACT Act does not apply to the ‘Crown in right of the Commonwealth’. As a general rule, Government agencies, except government business enterprises (GBEs), would attract this protection.

The extent to which employees of the Commonwealth would be covered by this immunity is not clear. The concept of the ‘Crown in right of the Commonwealth’ may extend to public servants depending on the circumstances, including the purposes for which their

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agency was established, whether or not application of the law in question would cause prejudice to the Crown and the nature of the conduct in question.¹³ Given the complex and qualitative nature of these tests, it is not possible to outline a formula to describe which Commonwealth employees and what conduct by those employees will and will not be subject to ACT law. It should be noted, however, that the jurisprudential trend of recent decades has been to read down the concepts of the crown and its immunities to ensure that public servants are not ‘placed beyond the reach of the ordinary criminal law’.¹⁴

On a different basis, Commonwealth public servants may be immune from the ACT Act as a consequence of s 121 of the *Legislation Act 2001* (ACT). This provides that criminal offences are presumed not to apply to the Commonwealth government nor to its instrumentalities, officers, employees or contractors (as long as they are acting within their functions, roles or contracts). However, s 121 provides only a presumption and this may well be displaced by the ACT Act which clearly envisages application to government.

Accordingly, while the Commonwealth as an entity is clearly immune from the ACT Act and Commonwealth GBEs are clearly not, the position of Commonwealth employees is unclear and — without passage of this Bill — would probably remain so until litigation has tested both the scope of s 27 of the ACT Self Government Act and the effect of s 121 of the *Legislation Act*.

It should be noted that the Bill **does not** propose to override the ACT Act as it affects private sector employers and employees. Given that the ACT is a territory and not a state, this would be within the Commonwealth’s power under section 122 of the Constitution and the Commonwealth Parliament’s position as the paramount legislature for the ACT.

Criticisms of industrial manslaughter laws and rationale for this Bill

The Commonwealth Government’s criticisms of the ACT’s industrial manslaughter laws have been most clearly stated in the second reading speech to this Bill. In this speech, the Minister for Employment and Workplace Relations made the following points:

- the ACT Act is ‘inconsistent with the overall objective of an occupational health and safety legislative framework which is to prevent workplace deaths and injuries’
- it is also ‘contrary to the unified and integrated OHS legislative system established under the internationally recognised Robens model which all Australian jurisdictions have adopted, including the ACT’
- it ‘places employers and employees in an adversarial environment and create a culture of blame’
- it ‘duplicates the existing offences already available under the ACT Crimes Act and ACT OHS legislation’, and

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- it ‘singles out employers for punishment after a death which neglects the involvement of a range of parties such as another employee, manufacturers, and suppliers of plant and equipment. This creates inequities and gaps in attributing responsibility in the unacceptable event of a workplace fatality or serious injury, and wrongly presumes that employers are solely responsible for all workplace injuries and deaths’.¹⁵

A punitive or advisory approach to OHS regulation?

The substantial issue raised by the Bill appears to be about the regulatory approach to OHS that industrial manslaughter embodies. Industrial manslaughter laws represent a punitive approach, in contrast to an advisory or supervisory approach, to regulation. It has been opposed on this basis by the Australian Chamber of Commerce and Industry (ACCI) who have said ‘Employers need advice and guidance not enforcement and punishment.’¹⁶ Similarly, the *Explanatory Memorandum* says—

The Commonwealth considers that creating industrial manslaughter offences under the general criminal law is inconsistent with the overall objective of the occupational health and safety legislation framework to prevent workplace deaths and injuries, rather than just punishment after the event.¹⁷

This statement seems to deny that punishment after the event can help to prevent deaths and injuries by acting as a deterrent for negligent or reckless behaviour. However, as with most criminal law, the current OHS legislative framework does recognise a role for punitive deterrents. Under the prevailing Australian model, punitive criminal sanctions sit at the top of an ‘enforcement pyramid’ that starts with informal advice, cautions and warnings at the base and moves to civil action in the middle.¹⁸

Where industrial manslaughter departs from the traditional OHS regulatory model is that it is placed in the Crimes Act rather than OHS legislation. As a result, its enforcement will be pursued by police and the DPP, unlike other OHS infringements which are enforced by OHS inspectorates. This was discussed above as a rationale for industrial manslaughter laws, in that they underscore that workplace death, where it is caused by negligence or recklessness, is an intolerable outcome and should not be subject to the lower levels of the enforcement pyramid. However, others have suggested that this approach could be counter-productive. For example, ACCI says:

The response by employers to increased penalties of up to \$5,000,000 for the enterprise and fines plus a charge of corporate manslaughter for the CEO, the board and other managers will be predictable. Instead of entering meaningful and constructive negotiations with the authorities to resolve cases of alleged breaches, there will be a change in approach in that individual employers will engage in major legal proceedings to protect the company and its measures from these draconian measures.¹⁹

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This view appears to focus on what happens after a workplace death, suggesting that OHS authorities would make more progress in preventing the next death at that workplace with a co-operative rather than hostile relationship. Industrial manslaughter laws focus on what happens before a workplace death, hoping that fear of a significant penalty would prevent the death in the first place. Where a death has occurred, it assumes that the high profile prosecution of one company would prompt others to ensure it does not happen to them.

The debate might be reduced to a central question about whether tough punishments and deterrents or education and compliance assistance are better means of preventing undesirable behaviour. This is a perennial dilemma that legislators would be familiar with as it animates debates in almost every area of regulation, from corporate governance to drug policy.

It should be noted that industrial manslaughter laws put death into a special category, as an intolerable outcome of an unsafe workplace. It does not necessarily affect the mix of punitive/educative enforcement strategies that might apply to other workplace injuries or OHS contraventions that have not (yet) resulted in injury.

Mere duplication of existing laws?

The Minister's argument that the industrial manslaughter law duplicates existing laws seems inconsistent with his insistence that it is a flawed law that requires the present Bill's intervention. Commonwealth intervention would rarely be warranted to overcome merely superfluous legislation. As discussed above, and as the present Bill recognises, the ACT Act does go beyond the previously existing law.

Singling out employers?

The Minister's argument that industrial manslaughter singles out employers for liability is at odds with the central rationale of the ACT legislation: that under previous law corporate employers were, unlike other actors, almost immune from criminal prosecution for workplace death. In particular, existing general manslaughter laws were and remain adequate for the prosecution of co-employees. Similarly, manufacturers and suppliers could be prosecuted where they were natural persons. In this way, industrial manslaughter fills, rather than creates, gaps and inequities in the attribution of criminal responsibility.

Criminal liability of Commonwealth authorities under state and territory laws

Parliament may want to consider whether it is appropriate that government agencies and GBEs should be immune from criminal liability that would apply to private businesses and citizens in the same circumstances.

To the extent that state and territory laws may bind the Commonwealth, the Commonwealth clearly has the constitutional power, from various heads, to override any

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such law. Conversely, the Commonwealth may decide to relinquish or limit its immunity from state laws. Whether it does so or not is a matter of policy.

In the field of OHS, it is long established that the Commonwealth, its agencies, employees and GBEs should be regulated by a separate national system of laws governing standards, enforcement, compensation and rehabilitation.²⁰ Accordingly, if industrial manslaughter is considered to be a significant re-shaping of OHS regulation, it might be considered consistent with current practice to ensure that Commonwealth agencies and GBEs are not affected by it. On the other hand, one feature of the Commonwealth's OHS regime is that it allows any state or territory law 'that promotes the occupational health and safety of persons' to operate concurrently, to the extent that it is not inconsistent with Commonwealth law in the area.²¹ To the extent that industrial manslaughter laws do 'promote the occupational health and safety of workers', and are capable of operating alongside the Commonwealth OHS regime, the present Bill proposes derogation from that principle.

If industrial manslaughter is seen primarily as a criminal law, different considerations might apply. As a general rule, Commonwealth employees are subject to the criminal laws of the states: for example, a Commonwealth employee who commits a traffic offence while driving in the course of their employment may be prosecuted under state laws. Similarly, a Commonwealth employee who causes the death of a colleague through criminal negligence or the commission of an unlawful and dangerous act might be prosecuted under state or territory law for manslaughter (the general crime). A similar principle would apply to Commonwealth GBEs in respect of any corporate offences. In the absence of Commonwealth legislation specifically providing that state or territory criminal law applies, the picture is less clear with respect to the corporate criminal liability of other Commonwealth agencies.²²

Given that other state and territory criminal law would normally apply to Commonwealth employees and GBEs, at least, is it appropriate for the Commonwealth to override one particular criminal law?

The ACT government has argued against doing so on the basis that 'it will create ... a situation in which some workers will be covered by one law and other workers will be covered by another and it makes a very simple law a lot more complicated.'²³ The ACT Chamber of Commerce has reportedly called on the Commonwealth to override the entire ACT Act, not simply for Commonwealth agencies, arguing that 'in the ACT, where we have a border running through the business community, we would have three sets of government regulation: ACT, Commonwealth and NSW'.²⁴ However, given that the ACT Act does not apply to most Commonwealth agencies anyway, industrial manslaughter laws already apply to some workers in the ACT and not others. The present Bill simply changes where that line is drawn.

At a basic level, the unequal application of the criminal law might be considered unjust. Is it just, for example, for Optus to be subject to industrial manslaughter laws while Telstra is

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not? From the opposite perspective, is it fair that the family of a worker killed by an employer's recklessness can see the employer prosecuted if the victim worked in the private sector but not in the Commonwealth public sector?

Further, immunising the Commonwealth from a particular state or territory criminal law could be thought to undermine the democratic rights of that state or territory's electors, as expressed through their legislatures. This view has been taken by the ACT Government which has promised to 'resist any attempt, any move to override a democratic government.'²⁵

On the other hand, there are many circumstances in which the Commonwealth and other Australian governments do immunise themselves from the application of their own, or other governments', laws. A relevant example is the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS(CE) Act) itself which provides that the Commonwealth cannot be prosecuted for an offence under the Act (although notably, that Act does allow that Commonwealth GBEs can be prosecuted, like their wholly private sector equivalents).²⁶

ALP/Australian Democrat/Greens policy position/commitments

At the time of writing, the Federal Parliamentary Labor Party has not made any public comment on whether it will support the present Bill. However, the 2004 ALP Conference did congratulate the ACT Government on successful passage of the industrial manslaughter law.²⁷ The Stanhope Labor Government of the ACT stands by its law and has opposed the present Bill. Further, the Labor Governments of Western Australia, South Australia, Victoria and Queensland have considered or are considering similar laws in their own jurisdictions.

The Australian Democrats do not appear to have made a public statement regarding their position on the present Bill, nor do they appear to cover the issue of industrial manslaughter in their national workplace relations policy available from their website.²⁸ However, Ms Roslyn Dundas, MLA (ACT) from the Democrats supported ACT Act when it was enacted last year.²⁹ Also, Democrat MLC (NSW), the Hon. Arthur Chesterfield-Evans has introduced a private members bill proposing industrial manslaughter laws for NSW.

Mr Michael Organ, the Member for Cunningham from the Australian Greens, opposed the present Bill on the day it was introduced.³⁰ He has also promised to introduce a private members bill proposing industrial manslaughter as a Commonwealth crime.³¹

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Main Provisions

The main provisions are relatively straightforward. The Bill would amend the OHS (CE) Act to insert **proposed section 11A** with effect that the following would not apply to Commonwealth employers, employing authorities or employees:

- the ACT Act, specifically, and
- any future state or territory law that imposes a criminal liability in respect of a death that occurs during, or in relation to, the person's employment or provision of services **and** is prescribed by regulations.

State and territory laws affected

According to the second reading speech, the criterion that a law be prescribed by regulations has been added because otherwise 'the new section could catch general criminal offences such as manslaughter, murder or culpable driving'. It then states that 'only these particular type of laws [that is, industrial manslaughter] would be prescribed.'³²

The Bill itself does not guarantee that its provisions would not be used to create regulations that immunise Commonwealth agencies and employees from the general criminal offences the Minister mentioned.

Drafting that targeted the unique elements of industrial manslaughter more carefully might have avoided this problem. However, the difficulty of achieving this without creating loopholes that would allow states and territories to achieve the same outcome with differently worded law can be appreciated. An alternative approach might have involved focussing on exactly what aspects of industrial manslaughter laws are opposed. For example, given that the most significant effects of industrial manslaughter laws are the increased penalties and the application to companies, a more targeted approach might have been to set a cap on penalties applicable to the Commonwealth or to reassert that the *Tesco* principle applies to the Commonwealth and its agencies.

Scope of the Bill's proposed immunity

The Bill proposes that immunity from state and territory industrial manslaughter laws be extended to the following:

- 'Commonwealth employers' which include:
 - the Commonwealth (for example, Commonwealth departments)

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- Commonwealth agencies established for a public purpose or under Commonwealth legislation (for example, the Australian Competition and Consumer Commission or Comcare), and
- companies incorporated in Australia in which the Commonwealth has either a controlling or substantial interest (for example, Telstra). (A controlling interest requires the ability to cast more than half the votes at a general meeting, control of more than half the share capital or control of the composition of the board of directors; a substantial interest requires control of more than or as many votes at a general meeting as any other single person.)
- ‘employing authorities’, who are those people or bodies responsible for employees and contractors performing work for a Commonwealth entity, or responsible for workplaces where such work is occurring. For example, the Chief of the Defence Force is the employing authority for the Australian Defence Force, and
- ‘employees’, which, in general terms, includes employees of all Commonwealth employers.³³

The Bill’s proposed immunity will not extend to private enterprises contracted by or supplying to the Commonwealth.

Retrospectivity

With respect to the ACT Act, the Bill would have a retrospective action to the date that it was introduced, that is to 1 April 2004. The ACT Act took effect from 1 March 2004, so this would leave Commonwealth authorities with potential criminal liability only for deaths that occurred in that month.

Concluding Comments

The Bill presents two key policy issues:

- the merits of industrial manslaughter laws
- the merits of immunising Commonwealth agencies and employees from a state or territory law.

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Industrial manslaughter

To summarise, the main effects of industrial manslaughter laws, at least in the ACT form, are:

- allowing prosecution of companies, with potential penalties to include fines and ‘name and shame’ orders
- emphasising enforcement of negligently and recklessly caused workplace death through the criminal justice system rather than through the OHS system, and
- emphasising that workplace death is an intolerable outcome of an unsafe workplace.

The substantial issue of contention is whether punishment of negligence and recklessness or education and assistance is the most effective way to prevent workplace deaths.

Commonwealth immunity from state or territory law

Immunising the Commonwealth, its employees and GBEs from state or territory law raises three concerns:

- it can lead to unjust outcomes, with different judicial consequences for the same conduct
- it undermines a democratically determined policy on what conduct should attract punitive sanctions, and
- it derogates from the principle that state or territory laws that promote occupational health and safety should be allowed to operate concurrent to the Commonwealth OHS system if they are capable of doing so.

On the other hand, it might be argued that:

- the Commonwealth has principal legislative responsibility for the occupational health and safety of its employees and should determine the shape of the OHS regime covering them
- the Commonwealth, as with other Australian governments, has regularly immunised itself from state, territory or its own laws when there have been strong policy grounds to do so, and
- in its own OHS legislation, the Commonwealth has immunised itself and its employees — if not its GBEs — from OHS offences, so it is consistent to ensure that they are similarly immunised from state or territory-based criminal law in the OHS area.

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Endnotes

- 1 See R Sarre and J Richards, ‘Criminal manslaughter in the workplace: what options for legislators?’, *Industrial safety*, January – February 2004, p. 59 at pp. 60–61.
- 2 Mr Simon Corbell, ACT Legislative Assembly, *Debates*, 12 December 2002, pp. 4381–4384.
- 3 [1972] AC 153.
- 4 B. Fisse quoted in R Johnstone, *Occupational Health and Safety Law and Policy, 2nd Edition*, Lawbook Co, Sydney, 2004, p. 467.
- 5 Unreported, Supreme Court of Victoria, 14 June 1994.
- 6 Section 27, *Occupational Health and Safety Act 1989* (ACT).
- 7 See R Johnstone, *op. cit.*, pp. 44–45.
- 8 P F Prior, ‘Enforcement: An Inspectorates View’ quoted in A Clayton, ‘Regulating Occupational Health and Safety: The Need for a New Paradigm’, *Safety Science Monitor*, Vol 7, Issue 1, Article III-1, 2003, p. 8.
- 9 Clayton, *op. cit.*, p. 13.
- 10 Employment here includes ‘providing services’ in the event that the worker is not an ‘employee’ in the legal sense.
- 11 Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic).
- 12 Part 2.5, *Criminal Code 2002* (ACT) and s 7A, Crimes Act (ACT).
- 13 See T Blackshield and G Williams, *Australian Constitutional Law & Theory Commentary and Materials, 2nd Edition*, The Federation Press, Sydney, 1998, pp. 449–452.
- 14 *Bropho v Western Australia* (1990) 171 CLR 1, 21.
- 15 The Hon. Kevin Andrews, Minister for Employment and Workplace Relations, ‘Second reading speech: Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004’, House of Representatives, *Debates*, 1 April 2004, p. 27916.
- 16 ‘Industrial manslaughter and Workplace Safety’ *ACCI Review*, Number 75, May 2001, p. 4.
- 17 The Hon Kevin Andrews, *Explanatory Memorandum: Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004*, Commonwealth of Australia, 2004.
- 18 R Sarre and J Richards, *op. cit.*, p. 59.
- 19 *ACCI Review*, *op. cit.*, 6 (Note that \$5,000,000 refers to proposed Victorian legislation, not the ACT Act).
- 20 Under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* and *Safety, Rehabilitation and Compensation Act 1988* and their predecessors.
- 21 Section 4, OHS(CE) Act.

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- 22 See discussion of whether criminal laws might apply to the Commonwealth as a juristic entity in S Joseph and M Castan, *Federal Constitutional Law: A Contemporary View*, Sydney, Lawbook Co, 2001, p. 213.
- 23 Comments by Ms Katy Gallagher, MLA, Minister for Industrial Relations (ACT) in D McLennan, 'Federal bid to eat away at ACT law', *Canberra Times*, 2 April 2004, p. 6.
- 24 Comments by Mr Chris Peters, CEO of the ACT Chamber of Commerce in M Priest 'Safety Law Concerns', *Australian Financial Review*, 2 April 2004, p. 7.
- 25 Comments by Ms Gallagher in M Priest 'Safety Law Concerns', *Australian Financial Review*, 2 April 2004, p. 7.
- 26 Section 11, OHS(CE) Act.
- 27 *National Platform and Constitution 2004*, Australian Labor Party, Canberra, 2004, p. 51. Available at: <http://www.alp.org.au/policy/platform2004/index.html>.
- 28 Available at: <http://www.democrats.org.au/policies/>.
- 29 Ms Rosyln Dundas, ACT Legislative Assembly, *Debates*, 27 November 2003, p. 4855.
- 30 M Organ, 'Howard insults dead workers', Press Release, Parliament House, Canberra, 1 April 2004.
- 31 M Organ, 'Greens MP to Observe 1 Minute Silence', Press Release, Parliament House, Canberra, 28 April 2004.
- 32 The Hon. Kevin Andrews, Minister for Employment and Workplace Relations, 'Second reading speech: Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004', House of Representatives, *Debates*, 1 April 2004, p. 27916.
- 33 See s 9, OHS(CE) Act for a more detailed definition.

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