



Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005

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Law and Bills Digest Section

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Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005

Date Introduced: 9 March 2005

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: This Act commences on the day on which it receives the Royal Assent

Purpose

The Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005 (2005 Bill) will exempt Commonwealth employers and employees from the current Australian Capital Territory (ACT) industrial manslaughter laws and any other similar legislation introduced by any other Australian State or Territory.

Legislative history of the Bill

The Commonwealth introduced the Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004 (the lapsed 2004 Bill) to counter the ACT's industrial manslaughter laws and to pre-empt similar moves in other jurisdictions.¹ However, due to the prorogation of the 40th Parliament on 29 August 2004, that bill lapsed. The 2005 Bill has been reintroduced into Parliament. The only substantial change was with respect to the retrospective commencement of the immunity to be provided by the amendment. The lapsed 2004 Bill provided for a retrospective operation of the immunity commencing 1 April 2004, leaving a gap of one month in which the immunity would have not been available. The 2005 Bill has been changed to bridge this gap, providing that the provision operates retrospectively from 1 March 2004.

Background

Current ACT legislation

On 1 March 2004, the *Crimes (Industrial Manslaughter) Amendment Act 2003* (the IM Act) came into force in the ACT. The IM Act introduced the specific crime of industrial manslaughter into the *Crimes Act 1900* (ACT) and is applicable to all employers, employees, independent contractors, outworkers, apprentices, and trainees or volunteers working within the ACT. In addition, the Act also includes a senior officers offence, which provides that senior officers can be prosecuted where it is proven that their negligence or recklessness led to the death of an employee under their supervision.

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The Act was just one of a broader range of measures introduced by the ACT Government to improve workplace safety and increase penalties for negligent and reckless acts within the workplace that result in a death. Other measures included:

- the launch of an annual health and safety month in August 2004,²
- the *Dangerous Substances Act 2004* which brings the ACT into line with national standards on the regulation of dangerous goods and hazardous substances,³ and
- the *Occupational Health and Safety Amendment Act 2004* which improves compliance and enforcement measures for health and safety within ACT workplaces.⁴

Moves by other states

Victoria, New South Wales, Queensland, Western Australia and Tasmania have all considered introducing stricter penalties for incidences of workplace death including industrial manslaughter laws, although none of the mentioned states has introduced such laws or penalties yet. For a thorough comparison of Occupational Health and Safety (OHS) legislation in Australia and overseas refer to the Parliamentary Library's [Research Brief No. 7 of 2004-05](#), *Workplace death and serious injury: a snapshot of legislative developments in Australia and overseas*.

The Commonwealth's position

The Coalition Government was not supportive of the ACT's moves to introduce industrial manslaughter laws, with the Federal Workplace Relations Minister, the Hon. Kevin Andrews MP, urging the ACT's Chief Minister Jon Stanhope to instead focus on making improvements to existing OHS laws.⁵ Upon the introduction of the Commonwealth's 2005 Bill, the Minister re-iterated the Government's approach of 'preventing workplace injuries, rather than punishment after the event'.⁶

Other parties' positions

On the 4 August 2004, a Private Senator's Bill entitled Criminal Code Amendment (Workplace Death and Serious Injury) Bill 2004, was introduced into the Senate by Senator Kerry Nettle.⁷ It contained similar provisions to the IM Act which was passed in the ACT, by amending the Commonwealth's *Criminal Code Act 1995* to include the criminal offence of industrial manslaughter. This Bill lapsed due to the proroguing of the 40th Parliament, but has since been restored to the Senate's Notice Paper.⁸

The Federal Parliamentary Labor Party has still not made any public comment on whether it will support the present Bill.⁹ The only public statement in respect of industrial manslaughter laws made by the Australian Labor Party remains a resolution reached at the party's 43rd National Conference (Conference) in 2004, with which the Conference congratulated:

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... the ACT unions and Government for the timely introduction of industrial manslaughter legislation. Recent tragic workplace fatalities have highlighted the need for this legislation. Conference recognises the duty of company owners and managers in enforcing OH&S in their enterprises. Where this duty is neglected there are currently inadequate sanctions. Conference urges all State and Territory governments to rectify this lack of accountability.¹⁰

At the time of writing, the other parties represented at federal level have not made their position public.¹¹

Union and Business divide

Amendments to OHS legislation are a contentious political issue on both a Federal and State level. In addition, there have been mixed reactions from unions and business groups to the introduction of industrial manslaughter laws. A majority of unions across Australia are generally in favour of tougher penalties for workplaces deaths, with many supporting the introduction of specific industrial manslaughter laws, citing the need to protect workers rights and safety whilst at work and to actively try and lower the rates of workplace fatalities. In contrast, many business groups have opposed the introduction of specific criminal laws for workplace deaths, arguing that the introduction of such laws could have a significant detrimental effect not only on the economic growth of local business, but also upon investment by foreign businesses.

The Robens Report and international approaches to OHS

In other Commonwealth nations, there has been a tendency to move away from the Robens model of OHS which is presently subscribed to in Australia. In 2003, Canada modernise its criminal code with respect to ‘corporate criminal liability’ after a mining disaster in 1992 claimed 26 lives and a number of reports recommended that the Canadian Government adopt this approach in order to obtain a comprehensive OHS system.¹² The changes were made to ensure that employees can be held liable for criminally negligent acts and omissions at the workplace.

The United Kingdom is also proposing the introduction of ‘corporate killing’ legislation, with the British Prime Minister Tony Blair noting in September 2004 that proposals on corporate manslaughter legislation would be produced in the current parliamentary session.¹³ More recently, as part of the British Labor government’s 10 year plan of workplace health and safety initiatives,¹⁴ a Health and Safety (Directors’ Duties) Bill [Bill 22] was introduced into the House of Commons in January 2005. This bill pursues the purpose of placing an obligation on directors to take responsibility for their company’s compliance of health and safety laws, and for large corporations to appoint a health and safety information director.¹⁵ Other legislative measures are to follow.

For further information on the 1972 British Robens Report and the differing views and approaches to workplace safety refer to [Research Brief No. 7 2004-05](#).

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Main Provisions

Item 1 of Schedule 1 proposes to introduce **new section 11A** into the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS Act). If enacted, this new section will provide an immunity to those covered by the provision from laws which impose criminal liability in respect of a death that occurs during, or in relation to, the person's employment or provision of services to another person (industrial manslaughter law).

Upon commencement, the new provision will have two areas of application:

- first, it will apply to any State or Territory industrial manslaughter law prescribed under a regulation under the OHS Act [**new subsection 11A(1)**], and
- second, it applies specifically to Part 2A of the *Crimes Act 1900* (ACT), that is the industrial manslaughter law of the ACT [**new subsection 11A(2)**].

New subsection 11A(3) provides that current and future industrial manslaughter laws will have no effect to the extent that they would impose criminal liability upon employers, employing authorities or employees within the meaning of the OHS Act.

It remains peculiar that the scope of the immunity afforded by the provision can be prescribed by regulation. The [Bills Digest](#) prepared with respect to the lapsed 2004 Bill, already noted that whilst the Bill aims at immunising against industrial manslaughter laws:

the [lapsed 2004] 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 [such as manslaughter, murder or culpable driving].¹⁶

The scope of this provision is broad, covering employers, employing authorities or employees. Each of these terms is defined in sections 5 and 9 of the OHS Act.

- 'employers' which include the Commonwealth, Commonwealth agencies established for a public purpose or under Commonwealth legislation (including 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 as long as the Commonwealth holds a substantial interest in the company).¹⁷
- '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, and
- 'employees', which, in general terms, includes employees of all Commonwealth employers.¹⁸

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Under **new subsection 11A(3)**, the operation of this new provision will be retrospective and will be taken to have commenced on 1 March 2004, the day the IM Act commenced in the ACT.¹⁹

Concluding Comments

Several of the issues and main arguments for and against of the proposed amendment have already been outlined and canvassed in the [Bills Digest](#) that has been prepared with respect to the lapsed 2004 Bill.²⁰

The current Bill's purpose to exempt both Commonwealth and Commonwealth-owned corporations, employers and employees will effectively create a two-tiered system of OHS legislation within the ACT. This fragmentation of the workplace health and safety regime, in which different standards apply to different entities in the same market, has been labelled inappropriate by the ACT's Minister for Industrial Relations, Katy Gallagher.²¹ In contrast, the Federal Minister for Employment and Workplace Relations, the Hon. Kevin Andrews MP, stated in the second reading speech that industrial manslaughter laws go against the main purpose of OHS regulations, which is to prevent rather than punish.

Any model for workplace safety adopted by Governments, both Federal and State, needs to consider a number of competing factors in order to find a balance between continued growth of business and the safety of Australia's workforce. Parliament may consider that punishment and prevention are not hostile and mutually exclusive concepts, but may effectively be interlinked to combine prevention and deterrence in order to create a comprehensive and even more successful approach to workplace safety in Australia.

Endnotes

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- 1 For information on the provisions of this Bill refer to J. Varghese, 'Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004', [Bills Digest](#), No. 135, Canberra, 2003-04.
 - 2 K. Gallagher MLA (Minister for Education and Training, Minister for Children, Youth and Family Support, Minister for Women, Minister for Industrial Relations), *Health and Safety Month Launch*, media release, Australian Labor Party (ACT Branch), Canberra, 30 August 2004.
 - 3 K. Gallagher MLA (Minister for Education and Training, Minister for Children, Youth and Family Support, Minister for Women, Minister for Industrial Relations), *Dangerous Substances Bill 2003*, Presentation Statement, Legislative Assembly for the Australian Capital Territory, Canberra, 11 December 2003.
 - 4 K. Gallagher MLA (Minister for Education and Training, Minister for Children, Youth and Family Support, Minister for Women, Minister for Industrial Relations), *New Occupational*

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- Health and Safety Laws Focus on Cooperation and Compliance*, media release, Legislative Assembly for the Australian Capital Territory, Canberra, 23 June 2004.
- 5 E. Macdonald and S. Hanaford, 'Plea to drop ACT Bill on industrial manslaughter', *Canberra Times*, 27 November 2003.
 - 6 The Hon. Kevin Andrews MP (Minister for Employment and Workplace Relations and Minister Assisting the Prime Minister for the Public Service), 'Second reading speech: Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005', House of Representatives, *Debates*, 9 March 2005, p. 7.
 - 7 Senator Kerry Nettle, 'Second reading speech: Criminal Code Amendment (Workplace Death and Serious Injury) Bill 2004', Senate, *Debates*, 4 August 2004, p. 25660.
 - 8 The Private Senator's Bill was restored to the Notice Paper on 30 November 2004. [Senate Bills List](#), Criminal Code Amendment (Workplace Death and Serious Injury) Bill 2004.
 - 9 Compare with the situation in May 2004: J. Varghese, op. cit., p. 10.
 - 10 Australian Labor Party, National Platform and Constitution 2004, [report](#), Canberra, March 2004, p. 51.
 - 11 Compare with the situation in May 2004: J. Varghese, op. cit.
 - 12 Comprehensive coverage of the Westray Mine Disaster can be found on the Westray Coal Mine Disaster website at <http://www.littletechshoppe.com/ns1625/wraymenu.html>, accessed on 15 March 2005. The site includes Hansard debates from the Canadian Parliament, reports about the disaster and links to a number of other sites about the disaster.
 - 13 The Hon. T. Blair, Prime Minister of the United Kingdom, 'The Prime Minister's address to TUC Congress on Monday 13th September', speech, Brighton, 13 September 2004, <http://www.tuc.org.uk/congress/tuc-8618-f0.cfm>, accessed on 15 March 2005.
 - 14 Department of the Environment, Transport and the Regions, *Revitalising Health and Safety Strategy Statement*, paper prepared for the United Kingdom Government, Department of the Environment, Transport and the Regions, London, 2000, <http://www.hse.gov.uk/revitalising/strategy.pdf>, accessed on 15 March 2005.
 - 15 Stephen Hepburn, 'Health and Safety (Directors' Duties) Bill', United Kingdom, House of Commons, *Explanatory Notes*, 12 January 2005, <http://www.publications.parliament.uk/pa/cm200405/cmbills/022/en/05022x--.htm>, accessed on 15 March 2005.
 - 16 Varghese, op. cit., p. 11, including suggestions about how alternative approaches may circumvent this problem.
 - 17 Note that Telstra, after its full privatisation would not come within the current scope of the proposed amendment. The Commonwealth would lose its *substantial interest* in Telstra as soon as it loses the required control of more than or as many votes at a general meeting as any other single person.
 - 18 For the details of the term 'employee' as used in the OHS Act, see section 9. For further examples, see Varghese, op. cit., pp. 11-12.

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- 19 As noted under Legislative History at the beginning of this Bills Digest, the lapsed 2004 Bill provided for a retrospective operation of the immunity commencing 1 April 2004, leaving a gap of one month in which the immunity would have not been available. The 2005 Bill has been changed to bridge this gap, providing that the provision operates retrospectively from 1 March 2004.
- 20 Varghese, *op. cit.*, pp. 12-13.
- 21 B. Doherty, 'Blow to industrial manslaughter law', *Canberra Times*, 10 March 2005.

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