

To: Economic Policy Scrutiny Committee EPSC@nt.gov.au
From: George Roussos george@roussoslegaladvisory.com
Re: *Work Health and Safety (National Uniform Legislation) Amendment Bill 2019*
Date: 8 Oct 19

1. The following matters are raised for consideration.

2. **Penalty.**

(a) My understanding of the UK *Corporate Manslaughter and Corporate Homicide Act 2007*¹ is that there is an unlimited fine to allow for the Court to take into account the size of the corporation. Quoting from the Wikipedia entry:

“On conviction a corporation may be ordered to remedy any breach, or to publicise its failures, or be given an unlimited fine. The Sentencing Guidelines Council issued a steps based definitive guideline, effective from 1 February 2016, for sentencing the offence of corporate manslaughter. The recommendations of the guideline are based on the size and turnover of the organisations with a starting fine of £300,000 and a no limit maximum. If an individual is also found liable for the offence of manslaughter, it can be prosecuted under the Health and Safety at Work Act 1974 ruled by the same sentencing guideline.”

(b) The UK Sentencing Council website² relating to corporate manslaughter provides, among other things:

- An unlimited fine.
- Steps for determining the seriousness of the offence.
- “The offender is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status... For companies: annual accounts. Particular attention should be paid to turnover; profit before tax; directors’ remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet.”

(c) A fine if \$10m per new s34B is substantial. However, a small business with revenue of \$500,000 is likely to be significantly impacted by a fine of \$300,000, 60% of its turnover. If its profit was \$100,000, a fine of that order (\$300,000) may cause a winding up. Australia’s largest companies annual revenue is in the order of \$30 billion - \$70 billion. If the maximum of \$10m was imposed on a business convicted of industrial manslaughter turning over \$70 billion, that would amount to 1/ 7000th of its revenue. If net profit was \$5 billion, a fine of \$10m would be 1/500th that.

(d) In place of a maximum penalty, there may be merit providing the Court discretion to consider the relative size of the business per the UK model.

¹ https://en.wikipedia.org/wiki/Corporate_Manslaughter_and_Corporate_Homicide_Act_2007

² <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/>

3. **Comparison** of relative standard to be proved by the prosecution and relative penalties.

- (a) Referring to the table below, a Category 1 offence (maximum penalty, fine of \$3m) requires proving someone was “reckless”. The new industrial manslaughter offence (fine of \$10m) appears to require something lesser – “negligence”. The UK corporate manslaughter law appears to require something more stringent – “gross breach of a relevant duty of care”.
- (b) Whilst it is noted s160 of Schedule 1 of the NT *Criminal Code Act* makes it a crime if you (i) engage in conduct; and (ii) that conduct causes the death of another person; and (iii) you are reckless *or negligent* as to causing the death of that or any other person by the conduct, query the consistency between s31 and new s34B.
- (c) The Queensland provision also uses the term “negligence”, however, the penalty³ for an individual is 20 years imprisonment (new s34B, imprisonment for life (consistent with s160 *Criminal Code*)).
- (d) No recommendation is made, save the issue is raised for further consideration.

NT Act	Proposed amendment	UK legislation ⁴ (excerpts)
<p>31 Reckless conduct - Category 1</p> <p>(1) A person commits a <i>Category 1 offence</i> if:</p> <p>(a) the person has a health and safety duty; and</p> <p>(b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and</p> <p>(c) the person is <u>reckless</u> as to the risk to an individual of death or serious injury or illness.</p>	<p>34B Industrial manslaughter</p> <p>(1) A person commits the offence of industrial manslaughter if:</p> <p>(a) the person has a health and safety duty; and</p> <p>(b) the person intentionally engages in conduct; and</p> <p>(c) the conduct breaches the health and safety duty and causes the death of an individual to whom the health and safety duty is owed; and</p> <p>(d) the person is <u>reckless or negligent</u> about the conduct breaching the health and safety duty and causing the death of that individual.</p>	<p>(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—</p> <p>(a) causes a person's death, and</p> <p>(b) amounts to a <u>gross breach of a relevant duty of care</u> owed by the organisation to the deceased. (4) For the purposes of this Act—</p> <p>(a) ...;</p> <p>(b) a breach of a duty of care by an organisation is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;</p>

³ <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2011-018#sec.34C>

⁴ <http://www.legislation.gov.uk/ukpga/2007/19/contents> ; <http://www.legislation.gov.uk/ukpga/2007/19/section/1>

Maximum penalty:

(a) in the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking) – \$300 000 or imprisonment for 5 years or both; or

(b) in the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking – \$600 000 or imprisonment for 5 years or both; or

(c) in the case of an offence committed by a body corporate – \$3 000 000.

(1A) Section 12B does not apply to the physical elements referred to in subsection (1)(b) and (c).

(2) The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.

Maximum penalty:

(a) for an individual – imprisonment for life; or

(b) for a body corporate – 65 000 penalty units.

(2) Strict liability applies to subsection (1)(a).

(3) A volunteer does not commit industrial manslaughter for a failure to comply with a health and safety duty, unless the duty is under section 28 or 29.

(6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.