

# Workplace Safety

## Sweeping up OH&S mess

Gerard Boyce

From a legal standpoint, breaches of workplace occupational health and safety (OH&S) laws are now on par with more conventional crimes against person or property. Indeed, with a majority of workplace accidents now involving the commission of a criminal offence, simply doing business has become akin to a quasi-criminal enterprise.

This disturbing approach to the regulation of OH&S by state and territory Labor Governments is an area of policy that is becoming not only largely incompatible with federalism, but also with the rule of law, individual freedom and the unique character of public government.

Nowhere are the problems better highlighted than in the recent introduction of differing offences for reckless or negligent conduct in the workplace resulting in death or serious injury in Victoria, New South Wales, Western Australia and the Australian Capital Territory. Despite the fact that these offences bear little real resemblance to the offence of criminal manslaughter by an individual, they are commonly referred to as 'industrial manslaughter' offences.

### UNION POLLUTION OF OH&S

Unlike broader labour market regulation, state Labor Governments have historically been able to quarantine OH&S laws from the infections that

flow from leftist class war ideology. But while commendable, this has been more the result of previous union approaches to OH&S, and the nature of the old industrial relations landscape, than a consequence of real leadership within the ALP.

Before the late 1970s, union involvement in OH&S was, at best, sporadic and half-hearted—confined to strikes and arbitral proceedings over safety issues, as well as seeking rents and special allowances such as accident make-up pay and dirt money. It was not until 1979, some four years after wage indexation started to bite, that the Australian Council of Trade Unions actually came up with an OH&S policy. But it was not until a declining membership base in the late 1980s, and questions surrounding ongoing union relevancy after the wages accord, that union leaders first properly recognised the enduring source of power, money and status that could come from unions institutionalising themselves as the collectivist moral voice and representative on all OH&S issues.

The unions monopolistic representation rights and other privileges under IR legislation have given them an undeserved private government status in Australian society. However, though unions may lack the sovereignty and control that defines public government, union privileges in the area of OH&S today are now so significant that their powers are much more expansive than the term 'private government' suggests.

Although not all of these OH&S privileges derive themselves solely from OH&S legislation or hold uniformly across all states and territories, they include: the ability to require that employees be paid for strikes related

to 'genuine' safety concerns; the right to enter business premises without notice to investigate 'suspected' safety breaches; the right to be consulted over workplace safety, even where the union has no members; the right to prosecute employers for breaches of OH&S legislation; the right to obtain a 'bounty' in the form of half of any monetary penalty awarded in a union-led OH&S prosecution; and the right to be reimbursed by business for the legal costs incurred by the union in conducting an OH&S prosecution.

Over the past three years, proper debate about industrial manslaughter legislation across Australia has been polluted by the ability of some unions to leverage their standard class war mantra of 'blame' and 'exploitation' with state and territory Labor Governments. This has not only clouded the real regulatory and legal issues involved in this important area of public policy, but led to inconsistent and deficient legislative outcomes.

### INCONSISTENT AND BAD LAW

Laws in most civilised countries differ according to whether an offence is criminal or civil, due mainly to the seriousness of the moral stigmas and sanctions attached to a finding of criminality. Criminal procedures carry added protections for an accused person, entitling those charged with more serious offences (such as manslaughter) to added protections during the trial procedure and broader rights of appeal.

Manslaughter is a crime; no-one can argue with that. Those individuals in our society who act in a grossly negligent manner, where there is a high risk of death or serious injury, and actually cause death are rightfully pros-

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ecuted according to our established criminal laws. Notwithstanding these well understood and accepted principles, in an effort to deliver moral wins to some of their union constituencies, the aforementioned state and territory Labor Governments have manipulated the criminal offence of ‘manslaughter’—inventing a new statutory offence of ‘industrial manslaughter’ unknown to basic criminal law standards.

Industrial manslaughter laws across Australia are now an inconsistent mess. All are different as to the maximum monetary penalty for individuals and corporations; length of maximum jail term for individuals; the general ‘conduct test’ required for an offence to be committed; the nature of the ‘injury required’ for the statutory offence to become activated from a prosecution perspective; available defences; and basic rights of appeal. Figure 1 perhaps best illustrates these differences.

### NSW—THE STAND OUT

Of all the various pieces of legislation relating to industrial manslaughter, it is New South Wales’ legislation that stands out as the most inconsistent and disagreeable.

In New South Wales, offences are prosecuted before the New South Wales Industrial Relations Commission (sitting as a court), while in all the other States, prosecutions are conducted before a magistrate.

Individuals prosecuted for industrial manslaughter have no right to a trial by jury, as they do in Victoria.

Unions can initiate prosecutions against companies and individuals with the written consent of the relevant New South Wales Minister.

No right of appeal exists beyond the Full Bench of the New South Wales Industrial Relations Commission, in cases where only a monetary penalty is awarded against an individual and/or a corporation.

It appears that, in New South Wales, the rule of law, with its attend-

ant notions of justice, equity and good conscience, has been discarded at the unions’ behest.

### THE NEED FOR NATIONAL CONSISTENCY

While it is clearly apparent from the foregoing that there is a strong case for uniform national laws in the area of industrial manslaughter (and OH&S more generally), it is unlikely that we will be able to rely upon current state and territory Labor Governments to act at all, let alone in the public interest, in this regard. Plainly, given that current arrangements suit the union movement, they also suit ALP poli-

tics. The fact that industrial manslaughter laws across Australia now contain such significant differences, both between jurisdictions and as compared to the standard offence of criminal manslaughter, is a recipe for injustice. Further, it is a degradation of community sentiment at large which says that similar offences should carry similar trial procedures and penalties—a particularly important notion when individual reputations and freedoms are at stake.

Just as the Federal Government is about to take a necessary leadership role in labour market regulation across Australia, in legal terms it can do the same in the area of industrial manslaughter without undue difficulty. Further, as the various state

and territory OH&S legislation—and union privileges derived from them—continues to expand and inconsistently mutate, it appears that Federal Government intervention is inevitable—not only in the national interest, but also in the interest of individual rights.

### CONCLUSION

The current approach to OH&S—conventionally seen as solely a state responsibility—is quickly being eroded by a hotchpotch of legislative outcomes enacted by state and territory Labor Governments.

OH&S has now grown into yet another area of ALP policy that simply highlights how the interdependence between the union movement and the ALP produces outcomes in the union’s, rather than the public, interest.

Industrial manslaughter offences are just one area of OH&S regulation that emphasises how bad things have become and what needs to be done. The start and end point for any industrial manslaughter regime that genuinely seeks to reduce work injuries and deaths is the proper application of the criminal law and a consistent national approach. Manslaughter, be it at work or in the community, is a criminal matter and has no place in OH&S.

Figure 1: Industrial Manslaughter Legislation by State

	NSW	ACT	VIC	WA
Jail Terms	5 years	20 years	5 years	2 years
Fines (Individual)	\$165,000	\$200,000	\$184,000	\$250,000 to \$312,500
Fines (Company)	\$1.65M	\$1M	\$920,000	\$500,000 to \$625,000
General Conduct Test	‘Reckless’	‘Reckless’ or ‘Negligent’	‘Reckless’	‘Gross Negligence’
Inquiry Required	Death	Death	Danger of Serious Injury	Death or Serious Harm
Legal Forum	NSW Industrial Relations Commission	Magistrate	Magistrate	Magistrate

IPA