

Australian Industry Group

Inquiry into Work Health and Safety  
(Industrial Manslaughter)  
Amendment Bill 2015

**Submission to**  
Parliament of South Australia  
Parliamentary Committee on  
Occupational Safety,  
Rehabilitation & Compensation

**APRIL 2016**

**Ai**  
GROUP

# **INQUIRY INTO WORK HEALTH AND SAFETY (INDUSTRIAL MANSLAUGHTER) AMENDMENT BILL 2015**

## **SUBMISSION TO PARLIAMENT OF SOUTH AUSTRALIA; PARLIAMENTARY COMMITTEE ON OCCUPATIONAL SAFETY, REHABILITATION & COMPENSATION**

### **Introduction**

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Ai Group is a member of Safe Work Australia (SWA) and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety Laws. We are also actively involved in consultative forums with state and territory regulators in relation to the application of safety and workers' compensation legislation.

We have been actively engaged in supporting the effective implementation of the WHS laws, including the Officer Due Diligence provisions and the increased penalties that were introduced under those laws in most states and territories of Australia, including South Australia, and now New Zealand.

We have ongoing contact and engagement with employers on workplace safety issues, including informing them of regulatory changes, discussing proposed regulatory change, discussing industry practices as well as providing consulting and training services. . We promote the importance of providing high standards of health and safety at work, and we hear from them about their success, issues and concerns related to workplace health and safety.

It is in this context that we make our submission in relation to the *Work Health and Safety (Industrial Manslaughter) Amendment Bill 2015 (the Bill)*.

Ai Group is opposed to the Bill.

**Industrial Manslaughter provisions are not justified as a means to improving workplace health and safety.**

We do not believe that the Bill is justified when considering the recent improvements in health and safety that have been experienced across Australia.

Clearly, one fatality is one too many. However, the data published by Safe Work Australia in July 2014 *Work-Related Injury Fatalities Australia 2013* indicates a steady and continuing decline in fatality rates over recent years. In this environment, it is not clear to us what would be achieved by the introduction of Industrial Manslaughter legislation, when the Work Health and Safety legislation already allows for significant penalties including terms of imprisonment.

**Significant Penalties already apply.**

The Work Health and Safety (WHS) Act 2012 already provides significant penalties for breaches of WHS laws. These include:

- up to \$3,000,000 for a body corporate; and
- up to \$600,000 and 5 years imprisonment for an officer, or an individual who is a *person conducting a business or undertaking*
- up to \$300,000 and 5 years imprisonment for an individual (worker or other person)

The penalties outlined above apply to a category 1 offence, described as *reckless conduct* (see definition below).

It is our view that these penalties, and the lesser penalties applicable to category 2 and category 3 offences, provide an adequate penalty regime for breaches of WHS obligations.

**The proposed penalties would create an artificial delineation between officers and senior managers.**

Ai Group does not encourage employers to spend significant resources attempting to exclusively identify who within their organisations might be officers. We advocate that all senior staff should be considering the due diligence provisions in order to improve health and safety outcomes.

The inclusive nature of the current penalties within the WHS laws, applying to all individuals who are found guilty of reckless conduct, ensures that there is little artificial delineation between a senior manager and an officer. Whilst the maximum financial penalties vary, all persons in the workplace could be subject to a 5 year jail term for reckless conduct.

If a new penalty was introduced, which included a potential for an officer to receive a 20 year jail term, just because they were officers, we may see many current officers resign from their positions, particularly those who are board members without direct involvement in the day to day activities of the business. We could also see senior managers making elaborate arrangements to distance themselves from taking on responsibilities for health and safety that might make them look like officers.

The unintended outcome of such a response is likely to be a reduction in standards of workplace health and safety.

### **It is not appropriate to link a penalty to the outcome of an incident.**

It should be noted that the categories of offences, and associated penalties, within the WHS Act were settled at the end of an exhaustive national review and public comment and debate on the previous OHS laws, and have been adopted by most Australian jurisdictions.

A very clear decision was made to link the offences to the level of risk involved, not the outcome. Introducing a penalty that applies when there is a death, but not when there is a very serious breach that results in a serious injury, or even a lucky escape is not consistent with the approach of the WHS Act.

### **It is unclear how the offences would be distinguished**

The definitions associated with reckless conduct under the WHS Act, and the proposed Industrial Manslaughter offence are very similar, as outlined below:

Reckless conduct in the WHS Act	Proposed Industrial Manslaughter offence
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 the person is reckless as to the risk to an individual of death or serious injury or illness	the employer/officer knew, or ought reasonably have known, or was recklessly indifferent as to whether, the act or omission constituting the breach would create a substantial risk of serious harm to a person; and the breach causes the death of a person...

It is unclear how the prosecutor, the courts, or the defendant could clearly distinguish between the two, and justify the different penalty regimes.

## **Inconsistent Penalties**

We also note that whilst the proposed *Industrial Manslaughter* provisions include a 20 year maximum term of imprisonment for an individual, the maximum financial penalty for a body corporate is \$1,000,000; this is less than the \$3,000,000 for a category 1 offence and \$1,500,000 for a category 2 offence.

This penalty regime does not appear to be a fair application of individual and body corporate penalties.

### **It is not appropriate to defend one offence and be found guilty of another.**

At section 268A(8) the Bill allows that “if at trial of a person for an offence against this section the jury is not satisfied that the accused is guilty of the offence charged but is satisfied that the accused is guilty of an offence under Part 2, Division 5, the jury may bring a verdict that the accused is guilty of that offence”.

Leaving aside the particular issue that the offence under s.268A applies to different categories of person within an organisation, a more fundamental difference is the basis of the offence itself. In the case of industrial manslaughter, an essential ingredient of the offence is that the breach “causes the death of a person”. What underpins the offence under Part 2, Division 5 is the exposure to risk without regard to the consequence. This is fundamentally different.

Furthermore, the defences which might be available under Part 2, Division 5, such as due diligence or reasonable practicality are not available or relevant if a charge is brought under s.268A.

**There is already an ability to charge a person with manslaughter, under separate crimes legislation.**

In August 2015, in Adelaide, Peter Colbert (sole-director of his company) was found guilty of manslaughter and received a lengthy jail sentence over a driver's death caused by faulty brakes. This case illustrates that separate legislation, which singles out officers for different attention, is not necessary.

**Further contact-**

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