

2002

THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

**Crimes (Industrial Manslaughter)
Amendment Bill 2002**

Explanatory Memorandum

Circulated by authority of
Simon Corbell MLA
Minister for Industrial Relations

Overview

This Bill amends the *Crimes Act 1900* to provide improved protection of the health and safety of workers by establishing new offences of industrial manslaughter. The offences will apply where an employer or senior officer of an employer causes the death of a worker through recklessness or negligence.

The Bill provides for substantial penalties where an offence is committed. The Bill also provides for new financial penalties which can be applied to either natural persons or corporations and allows the court to order corporations to take actions including publicising the offence, notifying specified persons of the offence, or carrying out a specified project for the public interest.

Financial Implications

Nil.

Clause 1 Name of Act

This is a formal provision specifying the short title of the Act.

Clause 2 Commencement

This is a formal provision specifying when the Act commences operation.

Clause 3 Act amended

This is a formal provision specifying the name of the Act that is amended.

Clause 4 Section 7A, note 1

This provision amends a note in the Crimes Act to explain that chapter 2 of the Criminal Code applies to the employer and senior officer offences of industrial manslaughter. The chapter sets out the general principles of criminal responsibility (including corporate criminal responsibility, burdens of proof and general defences), and defines terms used for offences to which the Code applies (e.g. conduct, intention and recklessness).

Clause 5 New part 2A Industrial Manslaughter

Clause 5 inserts a new part into the Act. The part provides for the offences of industrial manslaughter.

49A Definitions for pt 2A

Section 49A defines certain words and expressions used in part 2A, in particular:

“Agent” means a person engaged (as an independent contractor or otherwise) to provide services to another person (the first person) in relation to matters over which the first person has control or would have had control but for any agreement between them. Agent also means a person engaged (as an independent contractor or otherwise) by another agent, or by an agent of the agent, to provide services in relation to the first person regarding matters over

which the other agent has control or would have had control but for any agreement between the agents. The term agent is used in the definition of employer in section 49A.

“Employee” means a person engaged under a contract of service.

“Employer” means a person who employs or engages a worker directly or through an agent. An employer can be an incorporated entity, a government entity or an unincorporated entity.

An entity is a “government entity” in relation to a function of the entity where the function is subject to the control of a government (including a senior officer of the government as defined in this part) or is otherwise an agent of a government in exercising the function.

“Independent contractor” means a person engaged under a contract for services.

“Officer” means an officer of a corporation as defined in section 9 of the *Corporations Act 2001*(Cth). This term is used in the definition of “senior officer” in section 49A.

“Outworker” means a worker engaged by a principal under a contract for services to treat or manufacture articles or materials or to perform other services in the outworker’s own home or on other premises not under the control or management of the principal.

In relation to an employer that is a government or a government entity, “senior officer” means a Minister, a chief executive officer, or an executive who makes, or takes part in making, decisions affecting all or a substantial part of the functions of the government or government entity’s functions. In relation to an employer that is a corporation, “senior officer” means an officer of the corporation. In relation to an employer that is an entity which is neither a government entity or a corporation, such as an unincorporated association, “senior officer” means an executive who makes, or takes part in making, decisions affecting all or a substantial part, of the functions of the entity, or a person who would be an officer if the entity were a corporation.

“Volunteer” means a person who performs work for another person or organisation and receives no payment (other than out-of-pocket expenses). This includes work performed for another person’s trade or business, or for a religious, educational, charitable, benevolent or other public interest organisation.

“Worker” means an employee, independent contractor, outworker, apprentice, trainee or volunteer.

49B Omissions of employers and senior officers

Section 49B provides that conduct, for the purposes of the new industrial manslaughter offences, includes an omission to act by the employer or a senior officer of the employer if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker.

Section 49B further provides that the danger must arise from an act of the employer or senior officer, from anything in the employer's or senior officer's possession or control, or from any undertaking of the employer or senior officer.

Subsection 49B(3) provides that if, apart from an agreement between a person and someone else, something would have been in the person's control, this agreement must be disregarded and the thing must be taken to be in the person's control. This section prevents the making of agreements to set aside a duty to avoid or prevent danger to the life, safety or health of a worker.

Section 49B is consistent with Chapter 5 of the Model Criminal Code.

49C Industrial manslaughter-employer offence

Section 49C creates an offence where the conduct of an employer causes the death of a worker.

The terms "employer" and "worker" are defined broadly in section 49A. There may be cases where more than one person is capable of being the employer of a dead worker for the purposes of this section. For instance, where contracting arrangements are used in a workplace, it is intended that in addition to the direct employer of the worker, principal contractors and other sub-contractors further up the chain of responsibility could be found responsible for the death of the worker.

The offence will only apply if the worker was killed (or suffered injuries that later led to the worker's death) in the course of his or her employment. In the case of workers who are not employees, such as independent contractors or outworkers, the death or injuries that led to death must occur in the course of the person's engagement as an independent contractor or outworker.

An employer will only commit the offence if the employer's conduct caused (substantially contributed to) the worker's death and the employer's conduct was either reckless or negligent.

In cases where the employer's conduct is reckless, the new offence will apply if the employer was reckless as to causing serious harm to the worker. If the employer was reckless as to causing death to the worker, other offences such as murder under the Crimes Act will apply.

In cases where the employer's conduct is negligent as to causing the death of the worker, the new offence will apply.

In cases where the employer intentionally causes the death of a worker, other offences such as murder under the Crimes Act will apply.

The elements of the employer offence are modeled on the fatal offences provisions set out in Chapter 5 of the Model Criminal Code.

The maximum penalty for the offence is 2 500 penalty units or imprisonment for 25 years or both.

49D Industrial manslaughter-senior officer offence

Section 49D creates an offence where the conduct of a senior officer of an employer causes the death of a worker.

The offence will only apply if the worker was killed (or suffered injuries that later led to the worker's death) in the course of his or her employment. In the case of workers who are not employees, such as independent contractors or outworkers, the death or injuries that led to death must occur in the course of the person's engagement as an independent contractor or outworker.

A senior officer will only commit the offence if the senior officer's conduct caused (substantially contributed to) the worker's death and the senior officer's conduct was either reckless or negligent.

In cases where the senior officer's conduct is reckless, the new offence will apply if the senior officer was reckless as to causing serious harm to the worker. If the senior officer was reckless as to causing death to the worker, other offences such as murder under the Crimes Act will apply.

In cases where the senior officer's conduct is negligent as to causing the death of the worker, the new offence will apply.

In cases where the senior officer intentionally causes the death of a worker, other offences such as murder under the Crimes Act will apply.

The elements of the senior officer offence are modeled on the fatal offences provisions set out in Chapter 5 of the Model Criminal Code.

The maximum penalty for the offence is 2 500 penalty units or imprisonment for 25 years or both.

49E Court may order corporation to take certain actions

Section 49E provides that where a court finds a corporation guilty of an offence against section 49C (employer offence), that in addition to or instead of any other penalty imposed, the court may order a corporation to take specified actions. These are

- to publicise the offence, any deaths or other consequences relating to the conduct from which the offence arose, and the sentence imposed;
- to notify a specified person or persons, such as shareholders;
- to perform specified acts or establish and/or carry out a specified project for the public benefit. In the case of the latter, the project can be unrelated to the offence.

Subsection 49E(3) provides that the court may specify a period within which the order must be completed and may also impose any other requirements that it considers necessary or expedient for enforcement of the order or to make the order effective.

Subsection 49E(4) provides that the total cost to the corporation of compliance with orders under section 49E cannot be more than \$5 million including any fine imposed for the offence.

Subsections 49E(5) and 49E(6) provide that in making an order under section 49E, the court must take into account, as far as practicable, the financial circumstances of the corporation and the burden that the order will impose. The court is not prevented, however, from making an order if it has been unable to ascertain the financial circumstances of the corporation.

Subsections 49E(7) and 49E(8) provide that if a corporation fails, without reasonable excuse, to comply with an order under subsection (2)(a) or (b), the court may on application of the commissioner for OH&S, order the commissioner to carry out the order and to publicise the failure of the corporation to do so. The commissioner must comply with such an order.

Subsection 49E(9) provides that an order to the commissioner under subsection 49E(7) does not prevent contempt of court proceedings against a corporation that has failed to comply with an order under this section.

Subsection 49E(10) provides that reasonable costs incurred by the commissioner of complying with an order under subsection 49E(7) will be a debt owed to the Territory by the corporation.

Clause 6 Dictionary

The dictionary is amended to insert signpost definitions to the terms defined in the new part 2A.