



VOID SUBMISSION: LEGISLATIVE REVIEW

Review: Work Health and Safety Act 2012 (SA)

Abstract

This document is partly reflective and partly research based – in the hope that it might help explain why in 2018, the families of those killed at work are still dealing with similar problems that were being aired in 2006.

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VOID SUBMISSION

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FORWARD

This submission hopes to shine a light on the many difficulties faced by families directly affected by a workplace death. The document presents a view that is drawn from personal experiences as well as from 12 years of advocacy as founder of VOID. My son was in his first year of his apprenticeship when he was pulled into a horizontal boring machine in June 2004.

I created VOID in May 2006 in order to establish a voice on the topic of workplace death. Today we have approximately 50 active members. Our primary concerns have mostly reflected on investigative processes and procedural justice.

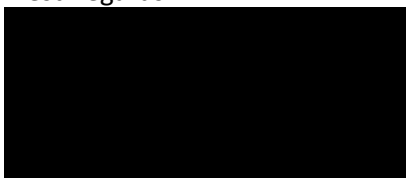
Justice itself has been a contentious and continual source of frustration. The idea that people, during a highly distressing time, are forced to deal with complex legal issues without the support they need to allow them to make informed decisions, remains an issue today.

It is important to note that our members come from diverse backgrounds with equally varied political views. This submission does not endorse any one political theory. Our position is based on how the *Work Health and Safety Act 2012* (SA) [WHSa] is perceived as compared with legal realities and outcomes.

This document focuses mainly on discussions about the serious effects to failed safety when the outcome is a fatality and more specifically, how the system deals with those directly impacted by the fatality.

We apologise in advance as this submission may not adhere to the terms of reference. We hope the reviewer and the board understands the legitimacy of the diversion and respects the content on its merit.

Best Regards



Andrea Madeley
Founder - VOID

INTRODUCTION

This submission is framed around a broad reflection of issues facing families who have lost a loved one in a workplace incident. It is partly reflective and in part research based – in the hope that it might help explain why in 2018, the families of those killed at work are still dealing with similar problems that were being aired in 2006.

For those of us who have experienced this process, it is both confronting and complex. At a time, people are already amid great sorrow, the ‘system’ can not only increase the challenge, it may cause further psychological harm. Even families with a strong support base are vulnerable. They are expected to grasp legally complex, often without the resources to seek advice to ensure their rights are protected.

There would be few families that would deny the most important way forward must be by prevention. As important as that is, we should not ignore those who are already dealing with the system and those who will tomorrow. What we are asking for here is a voice. We need to ensure the politics that dictate this area of law does not forget those who have already been delivered this ‘life sentence’. This submission will call for measures of support for families so that they may come through their tragic ordeal without that ‘added’ trauma.

We also want to begin discussions about how we currently characterise breaches of work health and safety. There is uncertainty surrounding the question as to whether breaches of the law are really a ‘crime’. We question why those who stand accused of causing death are afforded the greatest legal protections while the same system of justice makes no attempt to protect the innocent parties.

There is also a discussion on the current push for industrial manslaughter – something we whole heartedly support but also, urge caution if the issue of ‘enforcement’ is not first addressed. We argue that any law designed to ‘send a message’ risks becoming another token measure – a ‘symbolic gesture’, that will ultimately cheat justice.

The powerlessness of this journey, undertaken by almost 200 families each year, is breathtaking. It is no longer acceptable to sheet off responsibilities to the bureaucrat, hoping the department manages to achieve an acceptable outcome in a timely and considered manner. The current system has been shown to be unreliable in that management, structural and staffing changes deliver inconsistencies.

We are asking to be properly considered – in consultation. In other words, we believe those most personally affected by a workplace death deserve to be a part of the collaboration process. This is really the highest priority of this submission and it underpins every word from there on.

TERMS OF REFERENCE

The information and views set down here broadly reflect the issues that arise as a direct result of the operation of safety legislation for a class of people who are external to the workplace and its controls. They are generally the immediate family members of a worker who has died. They may or may not be the direct next of kin. They may or may not have been financially dependent on the worker's income. Nevertheless, they are all utterly reliant on the laws that regulate safety and they are vulnerable to the harm that these laws inflict in their administration.

It is for those reasons that this submission will need to project broadly and beyond the parameters of the terms.

FOCUS: FAMILY

THE MISSING VOICES

- 1 There are some strong voices around work health and safety and the prevention of workplace fatalities. The subject is normally manipulated by two formidable driving forces with equally strong and competing political interests. This describes the push-pull evolution of safety laws throughout our history. The trade unions, who pushed in favour of more regulation to protect the worker and the business lobbyists, who pulled back in favour of less regulation, in the name of business and economic prosperity.
- 2 They are of course closely aligned to the major divisions in the Australian political system. They make up the left and right side of our democratic system of government; albeit not as clearly defined today as it once was.
- 3 While this submission is not really concerned with these political forces, they are still relevant to this discussion because of their enormous influences in the hotly contested political zone of industrial relations. It is relevant because decisions here capture all – intentionally or not.

THE IMPACT OF A DEATH AT WORK

- 4 Each year in Australia, nearly 200 families will be added to the ranks of those struggling to come to terms with the effects of a workplace death. While there have been groups like VOID pushing the establishment to acknowledge these struggles, it was not until 2012 that we saw a genuine targeted approach toward research. The project was undertaken by Sydney University in order to identify a wide range of circumstances that affect families impacted by a workplace death.

Research and policy on occupational health and safety have understandably focused on workers as the direct victims of workplace hazards. However, serious illness, injury, or death at work also has cascading psychological, social, and economic effects on victims' families and close friends. These effects have been neglected by researchers and policymakers.¹

¹ Lynda R Matthews et al, 'Traumatic Death At Work: Consequences for Surviving Families' (2012) 42(4) *International Journal of Health Services*, 647, 647.

- 5 The research was extensive and covered a wide range of important issues. It identified and was able to separate the effects of a workplace death to that of other types of traumatic loss. It recognised the trauma associated with workplace fatalities. One article assessed the immediate and latent consequences of individual experiences.² Another looked at the institutional response and its human impact.³ There was also a review of the coronial process and how that was able to meet the needs of family members.⁴ Finally, there was a report with recommendations that might improve support for families.⁵
- 6 Groups like VOID rarely deal with grief. People generally look for us because they feel helpless. A workplace death is rarely a peaceful end to a life. They are almost always catastrophic with significant physical trauma – in other words, they are haunting events. Also, for many of our families, there is eventually the realisation that their struggle is getting harder, rather than easing, as time goes on.
- 7 There are many issues that can present problems. Sometimes just obtaining a death certificate to deal with pressing financial issues can present enormous hurdles, due to the involvement of peripheral administrations. The same can be said for superannuation claims. One of the most frustrating challenges is access to information about how their loved one died. We have even had families deal with missing body parts – more than once.
- 8 Families tend to place a great deal of faith in the investigative process, which can, and does often linger for years. These investigations represent the first step in many that begin to impact on their emotional wellbeing. These are not just people that are finding it hard to manage their grief. The above research has provided clear literary support to the effect. We know that people already in a fragile emotional state following a workplace death, are

² Ibid.

³ Lynda R. Matthews et al, 'The Adequacy of Institutional Responses to Death at Work: Experiences of Surviving Families' (2012) 6(01) *International Journal of Disability Management*, 37.

⁴ Lynda R Matthews et al, 'Bereaved Families and the Coronial Response to Traumatic Workplace Fatalities: Organizational Perspectives' (2016) 40(3) *Death Studies*, 191.

⁵ Lynda Matthews et al, 'Death at Work: Improving Support for Families' (Consultation Report University of Sydney- Work and Health Research Team, August 2016).

already vulnerable and at risk of being further subjected to varying amounts of psychological harm – caused by the administrations of procedural justice.⁶

9 We submit that this it is not an acceptable outcome for our families. It is inexcusable for justice itself to subject innocent parties to added distress. We believe it is time we considered ways to structure a better response so that an appropriate and independent support mechanism for families’ can move to help them from day one.

SUPPORT GROUPS

10 Today, we understand better the role non-government organisations play in supporting a community and its people through difficulties. The data provided by the Sydney University research confirms the important role these support groups have played in helping families affected by a workplace death in Australia.⁷

11 Locally and in recent years, SafeWork SA engaged specific staff to work as liaison officers. VOID has always supported such initiatives because these roles are vital in providing a compassionate contact for families with the department. However, we do not and never have considered such roles as being an adequate substitute for independent support. The reason for this is the regulator must operate without bias, whereas support groups exist to provide support to their members, just as the business associations support the employer.

12 The ability to access families in a timely manner has always been problematic. While it is true that today groups like VOID can utilise modern approaches by way of closed networks on social media, our scope to provide help remains limited.

13 Another important point to make is that groups like ours are often formed and managed by people who are themselves, under a considerable pressure.

14 From a personal perspective as the founder of VOID, it was difficult to know where to find help to structure the group without a personal background in NGOs. We believe the longevity of support groups will be depend on a high level of autonomy.

⁶ Matthews et al (2012) above n 3.

⁷ Matthews et al (2016) above n 5, 20.

- 15 As already mentioned, the effectiveness of any support provided will depend on a timely access to families. It is often not until a family member runs into difficulties that they come looking for help. Typically, this will happen after some time of frustrated dealings with either legal representation or one of the organisational processes. With better timed advice, some of these problems could be avoided.

RECOMMENDATIONS

INDEPENDENT STRUCTURE AND FUNDING

- 16 This submission proposes discussions at a national level to better advance NGO support. We envisage a national body with representatives from each active jurisdiction to develop a consistent approach to service delivery. This might require a funding model at both state and national level – most importantly, any funding must have autonomous underpinnings. This national body should also be represented in the tripartite representation that discusses issues relating to the WHSA and compensation matters.
- 17 Autonomy is vital because support groups should be free to act in the best interest of the family without fear of financial retaliation. It is for this reason we propose that those who create the problem should contribute to its solution by way of a substantial levy paid from the imposed fines or infringement notice. This could provide a valuable income stream without burdening the taxpayer.

INDEPENDENT LEGAL ADVICE

- 18 This submission also proposes that families be provided with wholly independent legal assistance at the outset via the support groups. That is to say, they should provide two important support functions; emotional and legal. We propose the family is provided with an advocate during the various stages of procedural justice.
- 19 An advocate should act in the interest of the family to ensure they are provided with the relevant facts surrounding the cause of death and how the case is progressing. The advocate might operate as a conduit between all parties and also to provide help in other services such as compensation, common law rights, death certificates and superannuation claims etc.

PROCEDURAL JUSTICE

JUSTICE

- 20 What is wrong with the way our system of justice operates that makes it so difficult for families who have lost a loved one to feel they have felt justice was done?
- 21 We know today, those who administer safety laws seldom contemplate how those laws will affect those impacted by them,⁸ and more the point, ‘the key question is why the process continues to give them little recognition’.⁹ This lack of ‘recognition’ has resulted in too many coming away feeling that justice failed them and their loved one.
- 22 The legal complexities are a hindrance. People need to grasp the ‘artificial person’ of a company persona and that this fake person has many of the same legal rights of a real person. We are dealing here with a unique kind of ‘person’ that has its own set of rules – almost chameleon-like in its ability to change its shape or de-register and re-emerge under a new persona.
- 23 This is just the start of what the average family needs to get its head around. Remembering, all the while, they are already being challenged by an enormous and heart-breaking disruption in their lives.

JUSTICE DENIED

- 24 We are not here to argue that safety laws are ineffective. The statistical data does tend to indicate that workplace deaths have been declining for many years.¹⁰ What is not clear is what portion of those declining numbers are relevant to regulatory controls and to what level the changing workplace has influenced those numbers – such as manufacturing and related industries.

⁸ Matthews et al (2012) above n 3.

⁹ Lynda R. Matthews et al, 'Investigation and Prosecution Following Workplace Fatalities: Responding To the Needs of Families' (2014) 25(2) *The Economic and Labour Relations Review*, 253, 266.

¹⁰ Creative Commons, 'Comparison of Work Health and Safety and Workers' Compensation Schemes in Australia and New Zealand' (Report No 18, Safe Work Australia, 14 May 2018); Commonwealth Government, 'An Inquiry Into Occupational Health and Safety- Version 2' (Report No 47, Industry Commission, 11 September 1995).

- 25 In any event, this submission is not looking to take a specific position on that question because it would detract from the catastrophic consequences that a family must deal with. The focus for us here is to question the regulatory regime and why it is that people feel so cheated by the response by the cannons of justice.
- 26 We return to political interests here. The regulator is a statutory body under political controls. There is not an Attorney-General in Australia that is independent of all political influence. When there is an injustice, perceived or real, there appears to be no real avenue of redress.
- 27 Perhaps the criminal justice system was always going to be inept at delivering a fair outcome where one party is not a real person. We do acknowledge that the judicial process was developed to deliver just outcomes to those accused of crime, more so than it was to safeguard a victim. Once upon a time, the family of a negligent employer may have had some recourse by way of the civil justice system, however today that area of law has been desecrated. Much of these civil rights were taken away due to the cries of an ailing insurance industry some years ago. Worth noting, in 2017 that same industry boasted profits of \$4 billion dollars in Australia.¹¹
- 28 An example of this is the prohibition to an action in breach of statutory duty under the model WHSA.¹² This is coupled with a compensation scheme that also restrains the right to a common law claim of negligence. As an example, there is no right for an immediate family member to bring an action where a company's negligence has caused psychological harm under South Australia's compensation scheme. Effectively, taking away one of the few civil remedies a non-financially dependent family member may have had.
- 29 We are not downplaying the importance of criminal sanctions because we recognise the limitations of civil justice as a standalone remedy. The most important being the 'private' nature of civil law as compared with the public status of criminal law. This tends to allow the

¹¹ McMullan Conway Communications Pty Ltd, Industry Logs Almost \$4 Billion in Profit (Updated 13 November 2017), InsuranceNEWS.com.au, <<http://www.insurancenews.com.au/local/industry-logs-almost-4-billion-in-profit>>.

¹² *Work Health and Safety Act 2012* (SA), s 267(1).

cached-up litigant to control reputational damage by private settlement and expressed gag orders. Not ideal – but better than no rights at all.

RECOMMENDATION

COMMON LAW RIGHT

30 This submission is in strong support of opening full common law rights to those psychologically injured by a workplace death. This is likely well beyond the scope of this submission, but it remains a vital goal in casting a wider net so that negligent employers are accountable for their acts or omissions. This is especially important where the state opts not to prosecute because it provides a means to bringing accountability to the table.

31 In South Australia, several pieces of legislation would need to be amended to achieve such an objective.

BREACH STATUTORY DUTY (BSD)

32 We propose a review of s 267 of the model WHSA and its limitations on the right of redress. This would be especially important where the state decides not to go ahead with a prosecution although we believe they should operate in unison.

33 A claim in a BSD is a different beast to that of common law negligence. The court in *Pasqualotto v Pasqualotto* [2011] VSC 550 confirms that a BSD action need not make out a case of negligence.¹³ One assumes the strict liability risk based offence with supporting breaches in regulations can be used to support the claim.¹⁴

The question of whether or not a statute has been breached lies at the heart of the BSD workplace action. It also provides one of the primary advantages of the action for plaintiffs, in comparison to the law of negligence. If a statute imposes absolute liability, then the demonstration that the statute has been breached (so long as the other criteria are satisfied) frees the plaintiff from the need to prove exactly how the defendant was careless.

¹³ See also *McDonald v National Grid Electricity Transmission plc* [2015] All ER 257.

¹⁴ Ann Apps and Neil Foster, 'The Neglected Tort: Breach of Statutory Duty and Workplace Injuries Under the Model Work Health and Safety Law' (2015) 28(1) *Australian Journal of Labour Law*, 57.

34

Our view would be that such claims should be restricted to immediate family whose relationship with the deceased worker complies with Australian case law.

INDUSTRIAL MANSLAUGHTER

- 35 We expect there will be no shortage of submissions supporting a mandate for industrial manslaughter.
- 36 This submission hopes to raise some points worthy of consideration inside this debate. At the outset, we whole heartedly agree that the laws that govern safety are not adequate in making negligent employers accountable. Where we differ is in what the best path forward in finding ‘accountability’ might be, without hurting families who may come to rely on the justice system tomorrow.
- 37 The reason that we urge caution here is because Australia has a long history of symbolic laws. These declarations by law makers are designed to send warnings. In the industrial manslaughter context, they almost always aim to send a message to the big end of town. They speak of prison sentences for directors who cut corners. These laws have decorated most safety legislation across the country for decades. In South Australia, we once referred to such measures as aggravated offending,¹⁵ this ‘aggravated offence’ was later amended to ‘reckless endangerment’.¹⁶ Neither provisions was ever charged, despite the many, many workplace deaths that happened whilst they were in operation. There are similar stories across other Australian jurisdictions.
- 38 What we are saying is that if a law’s main claim to fame is to ‘send a message’, then we believe it creates unfair expectations by those who will come to rely on it. More importantly, these laws should be drafted to deliver the most confident path toward enforcement as possible – sparing a future family many years of legal arguments.
- 39 There are other matters that should also be considered; the jurisdictional conflicts with overarching corporations’ legislation; investigation quality and more the point, the political will of parliament to enforce such laws. Also, we need to look at how the ‘objects’ of the WHSA itself will be affected. Perhaps, even beginning with something as simple as defining what kind of offence a breach of the model WHSA really is.

¹⁵ *Occupational Health, Welfare and Safety Act 1986 (SA)* s 59.

¹⁶ *Occupational Health, Safety and Welfare (Penalties) Amendment Act 2007 (SA)*.

DEFINING THE CRIME

40 The model WHSA and its 50-year-old predecessors were modelled to persuade or encourage compliance, rather than enforce it.

Traditionally and currently, approaches to enforcement of OHS legislation in Australia, have been predominantly based on persuasion — seldom resorting to deterrence in an effort to secure compliance.¹⁷

41 For those in the know; safety professionals et al, this is not exactly news. However, for those of us who grappled with the death of a loved one because of compliance failures, this can be difficult to wrap the mind around.

VICTIMS OF CRIME – OR ARE WE?

42 As an involuntary and innocent party, families have no legal standing in the processes and procedures that follow a workplace death. Interaction with bureaucrats may well be a matter of written guidelines but that is still a far cry from being included in the canons of procedural justice.

43 For the most part, the family's role in this process is no more than a public bystander. There is no seat at the table during plea bargaining and precious little input as to how the matter progresses – or if it progresses at all. History has taught us that the judicial systems will bemoan the cries of a victims of crime in favour of maxims designed to safeguard the rights of the accused. That is the stark reality.

44 Certainly, the situation is better today than it was 20 years ago. In South Australia, the office for the Commissioner for Victims' Rights provides many services to the more traditional victims of crime and there have been occasions where the Commissioner has assisted families of a workplace death over the years. Still, if we look on the website under the 'crime in the workplace' link, a family member looking for help, might be wondering why the only relevant advice will point them to get advice from the employer, the union, a safety representative or the workers compensation scheme.¹⁸ It is confusing advice. We do not raise this to shine a negative light on the Commissioner's office. The message here simply

¹⁷ Commonwealth Government (1995) above n 10, 381.

¹⁸ Government of South Australia, Assistance: Victims in the Workplace, Commissioner for Victims Rights, <<http://www.voc.sa.gov.au/victims-workplace>>.

spells out that while we tend to label breaches of safety laws as a ‘crime’, the traditional crime support networks sometimes miss the mark when it comes to our families. Meanwhile, the family is left feeling shut out and powerless.

The whole process is so bad that you are still trying to find the answers. It was an accident that was avoidable but no one will take responsibility. Everyone says they are sorry but they go on with their lives and I live with a life sentence of loss.¹⁹

45 The family of the deceased worker is not privy to the evidence which means they are often in no position to counteract or address fabricated evidence made by an employer about their loved one. Nor can they defend the reputation of their loved one. Their insights are often dismissed as irrelevant because, we assume, their view is tainted with a lack of objectivity.

46 An example here of the 2005 death of fisherman and deckhand Giacomo Salvemini, where his father, himself an experienced fisherman, identified issues in relation to the incident that claimed his son’s life (pertaining to the shark reel itself). Many issues actually only arose during the trial, once evidence was presented in court. That is because Mr Salvemini had no way to deal with the irregularities that sat in the brief because he was not privy to it. The inconsistencies he pointed out were overlooked by the investigation and later disregarded. This father continues to knock on the doors of Parliament House seeking an inquest into his son’s death. This matter highlighted an extraordinary bloody-minded arrogance that a bureaucracy is capable of.

47 Perhaps if the Salvemini’s were represented during the various stages of his son’s matter, there may have been an opportunity to pursue the topic of ‘drugs’ found by the employer with allegations they belonged to his dead son (even though no trace of drugs were found in his son’s system at autopsy) and why there were so many oddities in the reporting of their son’s death. What we know today, is attempting to remedy these issues after a case is closed is a fruitless exercise. In this instance, the artificial entity of the business structure was moved on and we understand the fine imposed by the industrial court remains unpaid.

48 Another example of an obliteration of justice was the death of Allen O’Neil on the Adelaide Desalination Plant project. Allen was labelled a thief after he died siphoning diesel out of an

¹⁹ Matthews et al (2016) above n 5, 11.

onsite generator. Documents obtained by FOI failed to reveal any evidence that Allen was acting outside the scope of his employment. We understand that siphoning diesel from the generators around the plant was commonplace because the project was under such strict time constraints. The employer conducted its own investigation, removing the evidence. The family had no recourse to have the matter independently investigated. It was an incredibly distressing experience for them. His father to this day struggles deeply with how his son was portrayed.

IN NO-MAN'S LAND – CRIME OR NOT?

49 We seem to be dealing with a justice system that is uncertain as to whether its non-compliance creates a victim of a crime, or not. The question as to whether breaches of safety laws are considered a real crime is one that has had a great deal of academic attention over the years.

50 If we look back a little, a good place to start is when law makers have cautioned that to regulate the economic activities of a business, is bad policy.²⁰ The current legal framework that underpins today's safety laws still embraces that mindset.

51 Our model safety laws were developed in the 1970s by the committee lead by Lord Robens, an English industrialist. He created the theory that it is better for industry to self-regulate and be educated and guided with encouragement, rather than being controlled by the state. The Robens theory was embraced by many countries – it was modelled entirely on 'risk'. There is no law inside the WHSA or its predecessors that recognise the 'outcome' of a risk. The offences are *preliminary* to a crime – even preliminary to negligence. They precede harm, whereas the tort of 'negligence' insists that harm is done before a claim for 'negligence' can be made.

52 This applies equally to the Category 1 offence. It is breached where a person 'engages in conduct that *exposes* an individual ... to a *risk* of death or serious injury or illness' and the person is *reckless* as to that risk.²¹ This provision is the closest thing to traditional crime because unlike the lower level offences, it does call for a subjective blameworthiness – a fault

²⁰ Steve Tombs and David Whyte, 'The Myths and Realities of Deterrence in Workplace Safety Regulation' (2013) 53(5) *British Journal of Criminology*, 746.

²¹ WHSA (SA), s 31(1)(b)-(c).

element – *recklessness*. This is also the only offence that introduces a prison sentence and is capable of a criminal indictment, although it will always begin in the summary jurisdiction.

53 As of February 2018, this offence had largely laid idle across Australia, until only recently.²²

54 They arguments on the subject claim that safety offences are not considered ‘real crime’ because they do not require conscious conduct. The best comparison we can offer is a speeding offence. There is no need for a driver to intentionally speed to be liable for a speeding fine. A driver is deemed to have committed the offence because we are incumbent to be aware of the law and ignorance is no excuse. These kinds of offences are termed as *regulatory offences* rather than criminal. The popular view is that breaches under the WHSA are similar to these road traffic offences.²³

55 To further frustrate the argument, the emergence of *enforceable undertakings* has blurred the line even more between crime and regulatory compliance. These undertakings are legal agreements designed to bring about alternatives to a prosecution. They may have their place in the lower level under s 33 but we are very sceptical of their role where a death has resulted. There is more said below on enforceable undertakings.

56 As stated earlier, the question on how a breach of safety law is characterised has created a reasonable volume of academic debate.²⁴ Perhaps the best view right now is that there is no clear grounding and that we really do exist in the no man’s land of law enforcement.

ANCILLARY – INCHOATE – REGULATORY - QUASI CRIME

57 In researching the Robens theory of ‘crime’, there are several terms used to characterise breaches of work health and safety laws.

²² *Orr v Cudal Lime Products Pty Ltd* [2018] NSWDC 27 (26 February 2018).

²³ Peter Rozen, National Work Health and Safety Law (Lexis Nexis AU, 2016); Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, ALRC Report 129 (Final) (2015).

²⁴ Wesley Carson, 'Hostages To History: Some Aspects of the Occupational Health and Safety Debate in Historical Perspective' (1985) *The Industrial Relations of Health and Safety*, 60; Richard Johnstone, 'Safety, Courts and Crime' (2002) 27 *Australian Institute of Criminology*; Richard Johnstone, 'Work Health and Safety and the Criminal Law in Australia' (2013) 11(2) *Policy and Practice in Health and Safety*, Taylor & Francis, 25.

58 As already touched on, *preliminary* crimes are ancillary or inchoate offences. They do fall under the crime banner but there is a clear dividing line between an assault, robbery, manslaughter or murder as compared any ancillary conduct that anticipates them.

59 Perhaps this is why work health and safety offences are sometimes also referred to as quasi-crime.²⁵ They mimic different styles of wrongdoings; like speeding or drink driving offences, they have a primary objective to catch a problem before there is a tragedy. There is nothing wrong with that – strong preventative measures are vital. But there is no question that exposing someone to a risk of death is a very different offence than actually causing a death. If we return to the speeding motorist, if the driver goes on to cause a death or serious injury, there will be another offence to reflect that outcome – involuntary manslaughter or culpable driving are examples.

60 Intention is not a factor here. The High Court made it clear that a consequence is what transitions one offence into a more serious one.

*Just as an unintended death may convert a crime such as an assault into involuntary manslaughter, so death or grievous bodily harm may convert a lesser driving offence into culpable driving, even if the death or grievous bodily harm is unintended.*²⁶

61 More worrying for workers and their families is that almost all prosecutions are undertaken by the regulator *only after* an injury or death. This of itself flows against inchoate principles.²⁷ In other words, while the offences are themselves preliminary by nature, they are only enforced after serious harm or death has resulted.

62 It would not be socially acceptable to convict an armed robbery on an inchoate offence of ‘attempted robbery’ where the offender is caught with the loot running from the property. Yet here, under the model WHSA this mindset is considered adequate. The death is merely a consideration in sentencing.

²⁵ Johnstone (2002) above n 24.

²⁶ *Giorgianni v The Queen* (1985) 156 CLR 473, [12].

²⁷ Johnstone (2002) above n 24.

63 I myself recall being sold on the idea that these laws are somehow better because they tend to be easier for a prosecution to prove. Looking back, I understand these comments merely echoed a whitewashed policy that was and is misleading. Logically, we know there is no such crime in any criminal statute that places the preliminary activities of an offence into the same category as the consequential conclusion.

64 While we are comparing mindsets, remember, the Robens ethos is based on self-regulation. We should then contrast this mentality to how road traffic offenders are dealt with. They are vigorously and consistently captured by police with speed devices, random breath testing enforcement policies.

65 These oddities are important. They matter because we are experiencing serious consequences without criminal convictions. This is why we do need to have a conversation about corporate accountability through manslaughter laws. In our view the question is not should we, the question is, how.

ACCOUNTABILITY IS IMPORTANT

*Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?*²⁸

CONSEQUENCE MATTERS

66 We have a long history of underutilising indictable offences under safety laws. The fact remains, we have moved well beyond an exposed risk once a life is lost - just like the speeding driver has moved beyond a speeding offence once his speeding causes death and he moves into culpable driving or manslaughter law. It makes no sense to think otherwise, other than to placate the political interests of the business lobby whose members no doubt would prefer not to have to deal with such an impost.

CONSUMER vs EMPLOYEE

In Australia, we have managed to address the importance of corporate culpability rather well where consumers have been cheated. With just these recent examples, it is clear the Federal Court is quite prepared make a corporation accountable for breaches against consumer laws.

- Telstra \$10,000,000 (misleading consumers)

²⁸ *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* (2007) 2 All ER 791.

- Ford \$10,000,000 (unconscionable conduct)
- Pentel \$700,000 (misleading claims - flushable wipes)
- Thermomix \$4,600,000
- Flight Centre \$12,500,000 (price fixing scandal)

Now we should compare those few penalties to that of the fines handed down over all jurisdictions in Australia during the 2015-2016 year. That amounted to a total of just over \$12 million Australia wide – this was down from \$22 million in 2011-2012.²⁹

Respectfully, there would be few excuses that might justify a situation where a single penalty under a consumer law in 2018 can stand up against over 232 successful convictions under safety legislation – considering many lives lost across the country.

DETERRENCE THEORY

One of the main objectives to sentencing crime is to punish the offender sufficiently so they might rethink committing the same offence again (specific deterrence) and to send a message to others in the community that crime does not pay (general deterrence).³⁰

In the context of work health and safety, the broadly held view is that corporations generally respond better to measures of general deterrence than individuals do.³¹ Nonetheless, the more compelling and consistent argument talks about the importance of enforcement as the most influential factor in controlling behaviour where the chance of being caught outweighs any financial incentive.³² In other words, the best outcomes are said to come from a certainty of enforcement (provided the penalty is serious enough). So, while deterrence appears to work well in the area of corporate crime, if laws are not enforced, there is no fear of reprisal.

²⁹ Creative Commons, 'Comparative Performance Monitoring Report: Part 2 Work Health and Safety Compliance and Enforcement Activities' (Report No 19, Safe Work Australia, December 2017).

³⁰ Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters (Proessional) Australia Limited, 3rd ed, 2016).

³¹ Kate Warner, 'Theories of Sentencing: Punishment and the Deterrent Value of Sentencing' (Speech delivered at Sentencing - From Theory to Practice Conference, Canberra Full 8-9 February 2014 Speech Delivered).

³² Muhammad Chowdhury, 'Deterrence Theory and Labelling of Industrial Accidents as White Collar Crime in Bangladesh Apparel Industry: An Epistemological Standpoint' (2014) 14(2) *Perspectives of Innovations, Economics and Business*, 69.

*In other words, both the severity and certainty influence injuries but certainty has a substantially stronger effect than severity*³³

INVESTIGATIONS

- 67 Another issue that hinders accountability relates to the line between two distinct and separate investigative bodies; the police and the safety inspector / investigator.
- 68 The police, typically first respondents to a fatal workplace event, will generally conduct initial investigations with first access to vital evidence. This draws our attention to two different focuses by two groups of investigators covering two vastly different laws; the police enter a scene looking for a 'crime' while the regulator enters looking for a 'cause'.³⁴
- 69 There is also a view that laws surrounding corporate liability is a significant shift from normal policing education. Customary police teaching is focused on a physical person whose conduct is generally based on a conscious decision to break a law, rather than an artificial one where the conduct is limited to the unintended consequences of negligent acts or omissions. Even in extreme negligence matters, the legal structure of the corporate body is at odds with normal policing, due to the protective armour of the corporate veil.³⁵
- 70 Another complexity may also flow from the inspectorate's role reversal where they function to build trust in an education and advisory role then conflicts with that of law enforcer.³⁶ These arguments do raise legitimate concerns about the governing philosophy that underpins the legal framework of our model WHSA. The decision to take the path of least resistance is at odds with a serious crime control ethos.
- 71 We believe it makes sense to consider these points if the future for the model WHSA is to move toward a more serious crime regime like industrial manslaughter. As an example, witness statements have been known to take months to collect. In at least one instance we

³³ Commonwealth Government (1995) above n 10, 402.

³⁴ Katherine Lippel and Steven Bittle, 'What can we Learn from National and International Comparisons of Corporate Criminal Liability?' (2016) 11(2) *Policy and Practice in Health and Safety*, 91.

³⁵ Gary Slapper, 'Justice is Mocked if an Important Law is Unenforced' (2013) 77(2) *The Journal of Criminal Law*, 91.

³⁶ Diana Kloss, *Occupational Health Law* (John Wiley & Sons, Incorporated, ProQuest Ebook Central, 2010), <<http://ebookcentral.proquest.com/lib/cqu/detail.action?docID=485678>>.

are aware of, a key witness was not even interviewed because the death he saw was traumatic. We argue this is unfair on those who rely on the rigours of an investigation to expose any wrongdoing. It has been a matter of contention for VOID families for some years where the collection of evidence has historically been a weakness of workplace death investigations determining the quality of the prosecutions.

THE DUTIES

- 72 As far as we can determine, one of the main features of the harmonised WHSA was redefining the primary duty holder from that of the ‘employer’ and ‘employee’ working relationship,³⁷ to a broader definition of those persons with control of the business undertaking (PCBU). The reform also created a new positive duty for ‘officers’ of a company (PCBU) to exercise due diligence to ensure the PCBU meets its primary duties. The full interpretation of what constitutes an ‘officer’ is included in the model WHSA – it expressly directs us to s 9 of the *Corporations Act 2001* (Cth).
- 73 The ‘officers’ standard is *due diligence* and it is not a direct duty to the ‘worker’. This follows common law and corporations law principles in that an officer of a company does not owe a duty of care to the company’s employees. His direct duty is to the company – in this case the PCBU.
- 74 There have been questions raised as to whether an officer has any liability under s 31 (Category 1) offence:

[P]laces a duty on officers to ensure compliance by the business or organisation with its duties; it is not a direct duty to workers to ensure their safety. It is submitted that, to remove any doubt, the Model Act needs a provision that officers are deemed to owe a duty to workers for the purposes of prosecuting the Category 1 offence.³⁸

We respectfully contend that not only an officer not liable to the Category 1 offence, s 27(3) limits the maximum penalties for an officer who fails to exercise due diligence, to the

³⁷ Eric Windholz, 'The Harmonisation of Australia's Occupational Health and Safety Law: Much Ado About Nothing' (2013) 26(2) *Australian Journal of Labour Law*, 185, 16.

³⁸ Karen Wheelwright, 'Company Directors' Liability for Workplace Deaths' (2011) 35(4) *Criminal Law Journal*, Thomson Reuters, 223.

maximum penalty that would apply to an individual under the Category 3 offence under s 33.³⁹ This sits in line with s 180(1) of the *Corporations Act 2001* (Cth) where a breach of due diligence was clearly not intended to fall inside the criminal law.

It appears then the model WHSA has shielded executive officers under s 27 from the risk of a prison sentence and since they are not a PCBU, that leaves the small business and contractor open to individual liability under the offence regime of Category 1 and 2. Hardly the big end of town, where penalties are often said to be targeted.

POLITICS, SYMBOLISM AND DRAFTING ISSUES

75 A less popular discussion on this topic is the symbolic nature of some of the more serious laws that underpin safety.

76 They are symbolic because the very existence of a prison sentence is almost entirely reliant on general deterrence. They rarely exist to deliver real justice. We would even go so far as to argue the workability of some of these provisions is more about political posturing, than finding solutions to corporate accountability.

77 In South Australia and in the lead up to the 2018 March election, the incumbent Labor Party announced its intention to bring about industrial Manslaughter laws.

*Premier Jay Weatherill said it would send a strong message that employers will be held accountable for workers losing their lives. It will also prevent individuals hiding behind corporate structures to avoid being held responsible for their criminal negligence.*⁴⁰

78 The irony here is that after 16 years in power, the same Government rejected 'Industrial Manslaughter' Bills in 2006, 2010, 2012 and again in 2016. It is very hard not to be cynical.

79 The problem is when parliament creates a law to 'send a message' and we later find they are unenforceable because they are frequently drafted in a rush, making them too onerous or complicated to prove.

³⁹ *Explanatory Memorandum – Model Work Health and Safety Bill 2016* (Safe Work Australia).

⁴⁰ Lauren Novak (Political Reporter), 'Labor Government Promises To Introduce Laws To Parliament If Re-elected in March To Hold Bosses Accountable for Workplace Deaths' *The Advertiser* (Adelaide, SA) 21 January 2018.

- 80 These symbolic provisions have laid idle inside OHS laws across Australia for over three decades. Every single deceased worker represented by the families in VOID had the benefit of a law capable of sanctioning a prison sentence. Not once was this law charged.
- 81 On a personal level, I can attest to how devastating it can be to realise a law was never meant to be anything more than a 'message'. Either that or, those who drafted it simply didn't care whether it was workable or not.
- 82 Before forming VOID, I lobbied to have an 'aggravated offence' in the repealed statute dealt with in the mid-2000s because it was deemed unworkable and too burdensome to prove. It was gut wrenching to realise a provision could sit for 20 years and be left to a grieving mother to deal with. It's ultimate replacement came with another name - 'reckless endangerment' and it too sat idle, never to be tried.
- 83 Directors of large companies may be the target of these new tougher laws, but they are rarely the ones caught by them. While the criminal jurisdiction has sent several negligent directors to prison, none, to our knowledge, have been associated with a large enterprise.
- 84 In South Australia recently, there was a matter taken by Police for 'endanger life and manslaughter by gross negligence' of an owner of a trucking company who was aware of the faulty brakes in the truck that caused the death of his employee.⁴¹ A similar conviction succeeded in Queensland recently after a young worker was electrocuted. There have been others, but none seem to represent the 'big end of town'.
- 85 Whatever the intentions of the model WHSA, not only have prosecutions declined overall in recent years, but only the mid-range Category 2 offence has been actively pursued. We wonder what the point was to the Category 1 and 3 offences.
- 86 There has also been a very limited application of s 33 low level offence in South Australia – we could find only one prosecution.⁴² One can only presume that educational aspect of intervention is preferred over the will to penalise low level offending. Or perhaps the

⁴¹ *R v Colbert* [2017] SASFC 29 (12 April 2017).

⁴² *Soulis v Chives North Pty Ltd* [2016] SAIRC 5 (24 March 2016).

drafting has proved the Category 3 offence has limited scope. Either way, there should be more discussion as to what is happening with this provision.

87 Likewise, the high-level Category 1 offence has yet to be successfully prosecuted in South Australia. We could find only one very recent successful prosecution in New South Wales against a mining company. The corporate structure was fined \$1.2M (\$900,000 after plea discount) and a worker, not an officer, was also fined \$64,000 (\$48,000 after plea discount) after woman was electrocuted in one of the mine huts.⁴³ The matter took four years to get to final sentencing. As the company entered a guilty plea, there was no need for the court to delve into what might constitute *recklessness* under this offence. That means that there is no case law to provide future guidance.⁴⁴

88 All of this becomes a little less unexpected once we again consider the historical foundations of these safety laws. Applying a criminal mindset to laws that are regulatory tools of encouragement seems a little like trying to slice fine sashimi with a butter knife.

89 Likewise, the UK spent 20 years grappling with these same issues and even after bringing in their corporate homicide legislation, it took some years before there was genuine activity.

*The main obstacles to prosecution were a lack of resources and political will to prosecute, and a lack of training and legal understanding of how the law of manslaughter applied to corporate defendants.*⁴⁵

90 That tells us that even where a law is constructed cautiously, there is still the problem of enforcement and the political will to prosecute.⁴⁶

INDUSTRIAL MANSLAUGHTER IN THE ACT

91 The Australian Capital Territory (ACT) was until recently the only jurisdiction in Australia with Industrial Manslaughter legislation (IML). Their law was enacted in 2003 and drafted into

⁴³ *Orr v Cudal Lime Products Pty Ltd* [2018] NSWDC 27.

⁴⁴ *Cudal Lime Products NSWDC* [2018] NSWDC 27 (26 February 2018).

⁴⁵ Slapper (2013) above n 35, 93.

⁴⁶ Steven Bittle, 'Cracking Down on Corporate Crime? the Disappearance of Corporate Criminal Liability Legislation in Canada' (2016) 11(2) *Policy and Practice in Health and Safety*, 45.

their criminal legislation with a clear crime charter. This law has yet to be tested after 15 years on the books.

92 Once again, we can see from the Ministers fact sheet that this was a 'symbolic' law - that it was designed to send a message, 'even if the offence is never prosecuted'.⁴⁷

93 Looking at the parliamentary debate at the time, there was already some misperception as to what the Bill was actually proposing:

Currently, the general manslaughter offence in the Crimes Act applies to anyone who negligently or recklessly causes the death of another person. This includes an employer, so that if an employer who is a natural person negligently or recklessly causes the death of one of their workers, they can already be charged. These days, however, most people are employed by companies.

*It is very difficult to prosecute a company for manslaughter, due to antiquated common law principles that are used in Australia to attribute criminal liability to a company. Mr Speaker, the ACT is not alone in facing the problem of effective prosecution of companies responsible for workplace deaths.*⁴⁸

94 The intention there appeared to have been focused on the business structure rather than the natural person. However, this law, when enacted, contained separate applications – operating to include an offence against the 'employer' and a 'senior officer'.⁴⁹

95 The other point to make about the ACT legislation is two separate levels of culpability within the one offence. The adoption of a choice between recklessness or negligence as elements of the offence but the two have quite different levels of culpability.

⁴⁷ Andy Hall, Richard Johnstone and Alexa Ridgeway, 'Reflection On Reforms: Developing Criminal Accountability For Industrial Deaths' (Working Paper No 33, National Research Centre for Occupational Health and Safety, April 2004) 43, quoting Katy Gallagher's Fact sheet - 'Manslaughter Laws Passed,' 27th November 2003.

⁴⁸ ACT, *Parliamentary Debates* Legislative Assembly, 27 November 2003, Mr Stanhope (Chief Minister, Attorney-General, Minister for Environment and Minister for Community Affairs).

⁴⁹ *Crimes Act 1900* (ACT), ss 49C and 49D.

- 96 Using the term ‘recklessness’ in terms of Australia’s criminal case law will generally lead to discussions about murder. There is no ratio to support Australia’s High Court acceptance of ‘reckless manslaughter’ as an offence.⁵⁰ There is, however, no shortage of discussion on reckless murder. From what we can gather, the element of recklessness introduces a level of sufficient *forethought* to establish *mens rea* in a crime. So it seems when the drafters of statutory offences imported recklessness into safety legislation, the intention was to create a high level of moral culpability – seemingly, well beyond negligent conduct.
- 97 The level of blameworthiness in reckless murder was measured by whether the accused considered his actions would *probably* lead to a death or GBH (a real and significant chance) or *possibly* lead to that outcome (merely a remote chance).⁵¹ The High Court confirmed the latter was not murder – and that was where that discussion seems to have stalled.
- 98 Beyond that, it is hard to find *recklessness* conduct mentioned to describe manslaughter. Why the ACT imported it is not clear but there have been attempts by some academics to disseminate negligent conduct with varying degrees of culpability that is worth mentioning here.⁵²
- Recklessness – higher culpability (entirely subjective requires actual foresight)
 - Criminal Negligence – high culpability (entirely objective with high standard failing)
 - Negligence – lower culpability (entirely objective - carelessness - civil liability)
- 99 When ‘recklessness’ became an element of *negligence* in legislation, it looks to have created a clear shift from the traditional common law principles of *manslaughter*. Instead, these offences seemed to create a level of culpability far more onerous than manslaughter.⁵³

⁵⁰ Transcript of Proceedings, *The Queen v Lavender* (High Court of Australia, 183, McHugh J Gleeson CJ, Gummow J, Kirby J, Hayne J, Callinan J, Heydon J, 5 April 2005).

⁵¹ *R v Crabbe* (1985) 156 CLR 464.

⁵² Mirko Bagaric, Ken Arenson and Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 3rd ed, 2014); *Nydam v The Queen* [1977] VR 430 (17 December 1976); *Giorgianni* (1985) 156 CLR 473.

⁵³ Jenny Richards (Centre for Crime Policy and Research Flinders University), Submission to Parliamentary Committee on Occupational Safety Rehabilitation and Compensation, *Inquiry into Work Health and Safety (Industrial Manslaughter) Amendment Bill 2015 (SA)*, April 2016.

*The test simply is whether the accused person knew that his actions would probably cause death or grievous bodily harm.*⁵⁴

100 It is said, there is an element of malice in reckless conduct and due to the subjective nature of the offence, it has been difficult to prove because it relies on an accused confession or impelling evidence, to what they knew or had turned their mind to.⁵⁵

*The recklessness contemplated must have involved some foresight
The proposition is based upon the notion that a man cannot counsel
or procure what he does not intend and he cannot intend an
accidental killing.*⁵⁶

101 On the other hand, the offence of 'criminal negligence' is altogether objective in terms of a negligent failing that falls so short of an acceptable standard, that it warrants criminal punishment. The 'reasonable person' is used to measure that level of culpability.

*Gross negligent manslaughter is therefore a rare criminal offence in that liability is based on an objective culpability (that is, negligence) on behalf of a defendant as opposed to subjective culpability. This difference in the evidential standard is significant as negligence (as discussed above in section one) is the least demanding form of mens rea used in criminal law, in contrast to the requirement to prove the more serious intention or recklessness tests. Negligence allows a conviction based on what the defendant should have known or ought to have done in contrast to the requirement to prosecute for what they in fact knew or did.*⁵⁷

102 Another potential issue may relate to a lack of definition as to the standard of negligence in the ACT legislation in that it calls for 'negligence' rather than a criminal standard. That may not be an issue because a criminal standard might be implied, given it sits inside a criminal

⁵⁴ *R v Crabbe* (1985) 156 CLR 464, [11].

⁵⁵ *The Queen v Lavender* [2005] HCATrans 183 (5 April 2005).

⁵⁶ *Giorgianni v The Queen* (1985) 156 CLR 473.

⁵⁷ Hall, Johnstone and Ridgeway, 'Reflection On Reforms: Developing Criminal Accountability For Industrial Deaths', above n 47, 32.

statute. Still, it is one more question a cashed-up corporate defender might argue to pressure a plea bargain to downgrade a charge. These things seem to be so easy to include in the wording of the law, it does not even bear thinking about.

103 Why does this matter? When it is you and your loved one at the centre of some legal argument based on interpretation of a word that is either there, or not, it matters! These court battles take years. They are brutal on those who have no choice but ensure them.

104 *Note: There is talk of the ACT having just recently charged the offence for the first time. It will be interesting to hear what the court has to say; if it gets that far.*

INDUSTRIAL MANSLAUGHTER IN QUEENSLAND

105 In late 2017 the Queensland parliament passed Australia's second Industrial Manslaughter law. Rather than making this an offence that sits inside their criminal code, it has been incorporated into the model WHSA. This is the model currently been pushed by the union movement around Australia.

106 With just a single house of parliament, Queensland is in a different position than other states when it comes to creating new laws. Where bicameral parliaments exist, the path toward industrial manslaughter will be very different.

107 The Queensland manslaughter offences are very similar to those adopted by the ACT (minus the reference to reckless conduct). The two mirror each other in many ways. The 'senior officer' has now been imported into the Queensland Act and yet the definitions are altogether different. The 'senior officer' under the Queensland WHSA appears to capture any business manager who has a level of decision making power. Under the same legislation, that same person might fall under the definition of a 'worker' under s 28 or an 'officer' under s 27 because those terms remain active inside the Queensland WHSA. Although the 'senior officer' may also be deemed a 'worker' or an 'officer', there does not seem to be a clearly defined duty established. What is clear is that an officer and a worker are expressly excluded from owing a primary duty to the employee.

108 The perplexities here are not trivial because if the same individual falls under separate conflicting meanings under the same law, but with significant variations in accountability, it is hard not to envisage some serious court time needed to sort out how an individual offence will be construed by the court.

109 Another issue that arises here is that the structure of the manslaughter offence has lost congruity with the other offences and this could also hinder workability.

110 Where s 31 calls for a *mens rea* by way of reckless conduct, the manslaughter provision has no fault element. It is a level of negligence that determines that offence – but what is the standard? Even if calling it a ‘crime’ implies a criminal standard, the provision sits inside a regulatory framework that has an offence calling for *mens rea* with a lesser penalty. The manslaughter provision might have maintained a better structure by replacing the Category 1 offence with a clear standard of *criminal* negligence.

111 It appears the Bar Association of Queensland and the Queensland Law Society made attempts to caution the parliament on identifying some irregularities, but it was enacted without alteration.⁵⁸ Hopefully, these drafting issues don’t end up dragging a family down a long road of legal arguments. That is really the concern here.

112 With news that several parties have now been involved in the Eagle Farm incident have had serious charges laid with one indictment against the head contractor under the *criminal code* manslaughter, and others under the WHSA reckless conduct charge, what does appear to be happening is ‘enforcement’. Hopefully other states will pick up on that challenge.

CORPORATE MANSLAUGHTER (UK)

113 While we understand the United Kingdom is no longer considered an authority in terms of Australian law, it did form the basis for our legal system. The UK’s frustration to find corporate culpability has been no different. From 1997 they began in earnest to look for a way forward to deal with the complexities of culpability in the corporate structure. This having been spurred on by several high-profile disasters that claimed many lives through corporate failings. A decade later the legislation was finally enacted.⁵⁹ The same concerns were being aired:

⁵⁸ Queensland, *Parliamentary Debates* First Session of the Fifty-Fifth Parliament, Wednesday 11 October 2017, The Hon Grace Grace (Minister for Employment and Industrial Relations).

⁵⁹ *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).

The question to be asked is whether the Act serves any real public interest or merely pays lip service to the 'war on crime' agenda.⁶⁰

114 The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) (CMCHA) was created to operate as a means to deal with corporate killing, whereas the common law crime of *Gross Negligence Manslaughter* was to operate concurrently to deal with individual culpability. On top of these, the work health and safety laws in the UK are also still capable of operating with both offences.

115 One feature we like in the CMCHA is that private parties (families) maintain the right to bring a private action against a corporation with consent of the DPP.⁶¹ That right to private action also applies to the individual *Gross Negligent Manslaughter* offence - although that right appears absolute (no consent required).

116 The CMCHA does not include a prison sentence. This is often seen as a weakness by those who are calling for industrial manslaughter laws and prison sentences. However, this law was reserved entirely for the prosecution of the artificial entity and we already know that a corporate body cannot be incarcerated. To incarcerate those inside the corporation under the criminal law, there needs to be some individual liability. The English may have thought this one through though because if a corporation's primary objective is to make money, then it makes sense to deliver a sting to affect that objective. This appeared to justify a penalty with no upper limit. That said, we already know how pointless maximum sentences can be if the courts fail to enforce them. In the UK, to address this, they have created sentencing guidelines that provide a structured and staged approach.⁶²

117 As already stated, in the UK, individual culpability falls under the common law offence; *Gross Negligent Manslaughter*. Most jurisdictions in Australia have a similar offence inside their criminal law which may have already successfully imprisoned company directors across the

⁶⁰ Susanna Menis, 'The Fiction of the Criminalisation of Corporate Killing' (2017) 81(6) *The Journal of Criminal Law*, 467, 467.

⁶¹ CMCHA (UK), s 17.

⁶² John Cooper and Mike Atkins, 'New Sentencing Guidelines Raise the Stakes in Health and Safety Prosecutions in England and Wales' (2015) 10(2) *Construction Law International*, 10.

country. However, like in the UK, these are still failing to catch big corporate executives, having been limited to where the 'guiding mind' is easy to connect to the corporate failing.⁶³

118 It has taken some years for the CMCHA to gather traction with several scholars becoming frustrated by the lack of activity.⁶⁴ As of April 2017 there have been more than 25 successful convictions under the CMCHA – the majority of which involved workplace deaths.⁶⁵

119 There is a sense here that the United Kingdom may have a recipe worth considering.

RECOMMENDATIONS

WHICH MODEL?

120 There is no question the corporate veil can be pierced but it is still hard to see the day a director of a large corporation is sent to prison without evidence of individual gross negligence. The fact is, these laws already exist. What is lacking is the will to prosecute them.

121 There is some sound logic in an unlimited fine regime and *sentencing guideline* to bring about more consistent outcomes. Perhaps this is about thinking outside the square. An unlimited fine may have a greater effect on a director than a law that will never be used. The director owes a direct duty to the company. Where a financial penalty begins to impact the mood of the shareholder, this may lead to reprisals inside the corporate structure in a breach of duty. Perhaps there is more merit in using existing law to push the artificial entity to inflict some of its own justice.

122 Again – the corporations sole reason for existing is to make money. The laws are clear – a director does not owe a direct duty to the company's worker, but a director most certainly does owe such a duty to the company itself. In other words, if the fines become significant enough, the shareholders may begin to question that director and whether there has been a breach of duty to the corporation.

⁶³ Steve Tombs, 'The UK's Corporate Killing Law: Un/Fit for Purpose?' (2017) 1(18) *Criminology and Criminal Justice*, SAGE Publications, 1.

⁶⁴ Ibid.; Slapper (2013) above n 35.

⁶⁵ Jean McMahon (Ministry of Justice UK - Criminal and Civil Law Policy Unit), Submission to Parliamentary Committee on Occupational Safety Rehabilitation and Compensation, *Inquiry into Work Health and Safety (Industrial Manslaughter) Amendment Bill 2015 (SA)*, 6 April 2016.

ALRC INQUIRY

- 123 What we do not consider acceptable is to make a devastated family the crash-test dummy for symbolic laws that raise more questions than answers.
- 124 This submission proposes that before any further changes are made to the WHSA regime, the Australian Law Reform Commission should be approached to commission an assessment on the best way forward in producing a law that recognises the corporation's role in causing death through negligent conduct.
- 125 Whether such a law sits inside criminal codes or becomes a separate standalone law, or even amends the harmonised model of the WHSA, we think the best way forward here is with well drafted and carefully contemplated law.

ENFORCEMENT

- 126 The shift away from an inspection / enforcement regime to that of self-regulated education has been shaped on the deterrence principles.⁶⁶ Apparently a corporation is more likely to respond to threats of criminal sanctions than the average criminal,⁶⁷ but as already stated above, the stronger view is that the enforcement of law remains the most influential factor in controlling corporate behaviour. In other words, if the chance of being caught outweighs the financial advantage, the law becomes more effective.⁶⁸
- 127 The *National Compliance and Enforcement Policy* (2011) is the driving document that guides enforcement. It does place an emphasis on a more proactive intervention regime designed to improve education by way of workshops, seminars or presentations. The shift in South Australia has been confounding; from just 340 of these types of interventions in 2011, to 5177 in 2016: an increase of 1422 percent. This compares to an increase of 126 percent nationally.⁶⁹

⁶⁶ Chowdhury (2014) above n 32.

⁶⁷ Katherine Beaty Chiste, 'Retribution, Restoration, and White-Collar Crime' (2008) 31 *Dalhousie Law Journal*, 85; Warner, above n 31.

⁶⁸ Chowdhury (2014) above n 32.

⁶⁹ Creative Commons (2017) above n 29.

128 While the statistics appear to have disappeared from the SafeWork SA website, the fatality count in South Australia *was* trending toward a substantial increase on previous years. Whether this is a glitch or underlying trend, remains to be seen. What might be more critically examined is the low level of enforcement compared with the 12,000+ injury claims in SA each year.⁷⁰ We understand the compensation scheme includes correcting factors in its premiums arrangement, nevertheless this fails to delineate the overall picture in terms of deterrence theories in the WHSA. The reasons why *infringement notices* have been underutilised as an enforcement tool is also unclear and should be subject to question.

ENFORCEABLE UNDERTAKINGS (EU)

129 Section 216 stipulates that a regulator may accept an EU for breaches of either a category 2 or 3 offence – both being offences of strict liability.

130 With a 250 percent increase in EUs nationally, they have clearly become an integral part of the penalty regime as a popular alternative to prosecution.⁷¹ These undertakings are voluntary in assessing the employer's rights (in that the employer cannot be compelled) and completely discretionary in the assessment of the regulator's power (in that the regulator holds complete power as to whether they are an option). Once again, the rights of those most seriously impacted by a breach have been overlooked.

131 We do not believe enforceable undertakings should be used where a worker has died or where a breach has caused catastrophic injuries. At the very least, a family of the deceased or the catastrophically injured party should be a central part of this decision-making process - after having been fully informed of all the facts that outline any transgression in the employer's culpability.

RECOMMENDATIONS

ENFORCEABLE UNDERTAKINGS BY INFORMED CONSENT

132 We would like to see an amendment to s 216 to prohibit enforceable undertakings in the event of a fatality or catastrophic injury without the following measures:

WITH CONSENT

⁷⁰ Finity Consulting Pty Ltd, 'Scheme Actuarial Valuation as at 30 June 2017' (Annual Review Report ReturnToWork SA, August 2017).

⁷¹ Creative Commons (2017) above n 29.

133 The immediate family or injured party or legal guardians has given expressed and written consent

WITH FULL DISCLOSURE

134 That the consent is provided only after consideration of all factual evidence that lead to the incident

AND WITH INDEPENDENT ADVICE

135 The immediate family or injured party or their legal guardian has been provided with independent advice in relation to that evidence and what it means.

INFRINGEMENT NOTICES

136 It is our view that infringement notices should be more prominent in the enforcement of the WHSA where injuries have not occurred in the same way road users are penalised for road traffic violations.

SENTENCING PROBLEMS

DISCOUNTING JUSTICE

137 On those rare occasions where a prosecution under the WHSA moves forward, the conviction will invariably result in a financial sanction against the company.

138 We are not aware of any individual sanctions resulting in imprisonment that is attributed to the model WHSA.

139 The defendant to a breach of the WHSA has access to an arsenal of approaches that minimise the penalty. This varies from jurisdiction to jurisdiction because of the different sentencing laws, which highlights again the inconsistent outcomes in direct conflict with the harmonisation objects and further supports the argument in favour of *sentencing guidelines*.

REMORSE

140 There is of course the symbolic statement of remorse; a popular mitigating factor in determining a penalty that is also clearly embraced by sentencing factors.⁷² A good 'sorry statement' can obtain a quite charitable financial consideration whether it carries substance

⁷² *Sentencing Act 2017 (SA)*, s 11(1)(g).

or not. It has been our experience that these statements of contrition can be based on falsehoods, sometimes leaving a family member bewildered in court.

141 In one recent example, the widow listened to defence counsel spend considerable time during a sentencing hearing describing how their client had gone above and beyond the call of duty – clearly an act of contrition. The court accepted these statements.

*Through its directors the defendant has demonstrated contrition and concern for the employee's family. The defendant's directors and some of its employees following the incident undertook working bees at the employee's home to complete renovations to the employee's house.*⁷³

142 The Crown prosecutor echoed the accolades of this model defendant, having taken no steps to substantiate the claims. The widow was stunned. A few weeks later, VOID coordinated an assessment of these claims with a local current affairs TV program. The program footage exposed a very different truth to that depicted in court.

143 Obviously, we are not privy to all such claims and so it is not possible to say how often these misguided statements are made. It shows a clear disconnect between the parties as they agree on facts. This represents another example why a family needs to have representation throughout the procedural path.

CONTRASTING THE VICTIM IMPACT STATEMENT

144 In very stark contrast to an expression of remorse is the Victim Impact Statement (VIS) and the level of scrutiny this document is subjected to.

145 There have been several occasions where VOID family members have been asked to make changes to their statements where it appeared to introduce points not agreed to by the defence. The point is really to ensure the statement cannot be challenged in court. That is to say, if the prosecution has not raise a point that a family member might raise in the statement, that personal impact is not only subject to approval, it is subject to being suppressed.

⁷³ *Boland v Bissen Pty Ltd* [2016] SAIRC 27 (26 August 2016), [47].

- 146 The weight that a VIS carries in sentencing law is not clear. No doubt some courts give them a great deal of consideration, while others see them as form of restorative justice. In fact, Fryberg J cautioned the lower courts in *R v Singh* [2006] QCA 71 to the risk of prejudicial material stemming from an impact statement. He goes on to say, ‘the purpose of those statements is primarily therapeutic’.⁷⁴
- 147 With respect, while we, as family members, do appreciate a voice in the judicial process, it is ever so disappointing and condescending to suggest that our statements are viewed as a kind of legal pacifier.
- 148 What we can confirm, at least in South Australia, is there is no expressed requirement to take a VIS into account under the *Sentencing Act 2017* (SA). We think sub-s 14(6) gives the court absolute freedom in how it might deal with the victim entitlements under s 14, further hinting that they may have no effect on the sentence. Again, with respect, that does give credence to Fryberg J’s claim to their limit of ‘therapeutic’ value.

THE COOPERATIVE DEFENDANT

- 149 Further discounts to justice during sentencing come from a defendant’s cooperation. In South Australia this is now codified in legislation to include cooperation with law enforcement,⁷⁵ as well as cooperation with procedural requirements.⁷⁶
- 150 That provides two separate opportunities for a company to reduce the severity of the penalty – and all for doing something reasonably expected of a corporate body. Perhaps this is a good example as to why sentencing laws that apply to an individual do not carry that well when stacked up against an artificial person.

GUILTY PLEA DISCOUNTS

- 151 Finally, after these mitigating factors are taken into account, a further and most generous discount is on offer for a guilty plea – up to 40 percent in South Australia.⁷⁷

⁷⁴ Bagaric and Edney, above n 30, 123-24

⁷⁵ *Sentencing Act 2017* (SA), s 37.

⁷⁶ *Ibid* s 38.

⁷⁷ *Ibid* s 39.

152 Apparently, discounting justice has become a necessity. It is the carrot designed to free up court time in an already overburdened court system. The other claim is that a guilty plea will spare a victim the ordeal of a lengthy trial.

153 In relation to WHSA offences where a worker has died, a full trial is often the only means that some families may have in order to access information relating to how and why their loved one died. The guilty plea may serve the court and taxpayer well, but it also allows a great deal of evidence to remain buried. Therefore, we would argue the guilty plea in corporate matters are rather more likely to save the corporation embarrassment and to save the taxpayer money than to benefit a family.

154 The heavy discounting of the penalties on this basis does lend itself to vast jurisdictional differences given the variations of sentencing laws across the country. This does in fact directly conflict with the broader objects of the WHSA under s 3. Therefore, we believe *Sentencing Guidelines* should become a part of the WHSA in order to maintain congruity with the primary objectives.

CLAIMS OF FINANCIAL HARDSHIP

155 The penalty for breaking the law is supposed to reflect societies intolerance toward lawless behaviour and one of the most basic underlying justifications for punishing offenders is to impose a penalty that will create some level of 'hardship or pain'.⁷⁸ When this is no longer the effect, so too is the absolute effect of prevention - because there is nothing to fear.

156 The sentencing law in South Australia (and are generally applicable to most jurisdictions) do not permit a court to impose a financial penalty if a defendant is unable to comply or has a limited, or no capacity, to pay a fine.⁷⁹

157 We do understand that there are good reasons why such principles exist and why criminal sanctions aim to punish the wrong-doer and not innocent parties. In traditional crimes, these innocent parties might reflect the undue harshness on a family if the sole breadwinner is incarcerated. Our sentencing laws do attempt to strike a balance here. These principles clearly also apply to the artificial person (the corporation) in that a crippling fine could impact

⁷⁸ Bagaric and Edney, above n 30, 523

⁷⁹ *Sentencing Act 2017* (SA), s 120(1).

the jobs of remaining employees. Concerns for those employees is valid, however, we do not believe depleting the penalty to a negligible value is an appropriate solution either.

158 Further on this point, a court is not generally required to enlighten itself as to whether any claim to an ‘incapacity to pay’ is a genuine reflection of the financial position of the defendant.⁸⁰ We raise this as a matter of concern because where an offence is wholly limited to a monetary penalty, surely it matters that the court informs itself as to whether claims of financial hardship are authentic, rather than coloured by skilled accounting. This has been one of the considerations brought about by the UK where the *Sentencing Guidelines* call for a level of a forensic accounting as scrutiny to hardship claims. We wholeheartedly support this approach.

DISSOLVING THE BUSINESS

159 Another concern we raise is where a business absolves itself from accountability by taking steps toward deregistration.

160 If rights and responsibilities only endure the course of a natural person’s existence, then the same issues arise where a corporate entity ceases to exist. The only difference being that a corporation does not lose its life, it liquifies by the stroke of a pen. And so, the artificial ‘person’ has the technical capability to alleviate itself from its legal liabilities after a death has occurred. Even while an investigation is underfoot, it is possible for a company to sell off its assets and pay up outstanding liabilities in order to comply with s 601AA(1) of the *Corporations Act 2001* (Cth).

161 Provided the legal proceedings have not been yet been brought, the company is able to apply to have the business deregistered by ASIC. The WHSA does not address this issue.

CONFIDENTIAL PENALTIES

162 The 19th comparative report released by Safe Work Australia identified a noticeable reduction in the overall value of fines collected in South Australia, from the 2011-12 data of \$1,825,000 down to just \$778,000 in 2015-16. An even greater surprise was exposed in the

⁸⁰ Ibid s 120(2).

in the appendix of explanatory notes, advising the reader that some penalties were declared *confidential* by the courts.⁸¹

163 Confidential sentencing flies in the face of deterrence theories where a corporate offender is concerned. Generally, a corporation holds ‘reputation’ in higher regard than a traditional offender. Tombs and White talk about this in terms of the ‘economic man’:

*Conversely, companies and their senior officers have a much higher degree of motivation and ability to consider the long-term consequences of their decisions, including the likelihood of detection and the severity of sanctions to their business and their social position; they are, as a result of their access to resources and the structure of motivation within which they are socialized, likely to be much more ‘future-oriented’.*⁸²

164 We would therefore argue that in order to adequately deter unsafe work practices, a court-imposed sanction should not be denied public access. We would even argue that more should be done to bring the significance of these transgressions into the public domain simply because general deterrence itself relies so heavily on getting the word out.

INDEMNITY POLICIES

165 Both the Chief Justice of the NSW Supreme Court,⁸³ and South Australian Industrial Magistrate Stephen Lieschke,⁸⁴ discussed the need for clearly drafted statutory directive to disallow insurance policies to indemnify a corporation and its directors from court sanctions after work health and safety breaches.

166 The issue became apparent after a death on the contentious Adelaide Desalination Plant in South Australia. Until that time, it was generally thought such insurance policies went against public policy. Unfortunately, this government project exposed so many safety

⁸¹ Creative Commons (2017) above n 29.

⁸² Tombs and Whyte (2013) above n 20, 750.

⁸³ The Hon TF Bathurst (Chief Justice of New South Wales), ‘Insurance Law: A View from the Bench’ (Speech delivered at the Australian Insurance Lawyers Association National Conference, Sydney, 19 September 2013).

⁸⁴ *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22 (27 June 2013).

concerns on the back of unmanageable time constraints, it became the subject of a parliamentary inquiry. However, the most controversial issue remained hidden until a sentencing remark exposed an insurance policy that picked up the tab.

167 In handing down his sentence against both Ferro Con (the by then liquidated company) and its director, Mr Maione, Magistrate Lieschke stated:

In my opinion Mr Maione's actions have also undermined the Court's sentencing powers by negating the principles of both specific and general deterrence. The message his actions send to employers and Responsible Officers is that with insurance cover for criminal penalties for OHS offences there is little need to fear the consequences of very serious offending, even if an offence has fatal consequences.⁸⁵

168 We can therefore take away from this that the ability for a company to protect itself from criminal penalty hinders the court's ability to do its job.

169 It is breathtaking that this issue has not been laid to rest under the current WHSA in the years since its assent.

170 We feel there are several things that can be done to deal with the sentencing issues we have discussed above.

RECOMMENDATIONS

SENTENCING GUIDELINES

171 To extend the WHSA to incorporate a derivative sentencing guideline to provide the courts a structured and uniform approach to sentencing. It is important to understand that these guidelines are not designed to become a directive in sentencing as they are in the USA, rather they guide a stepped process – one that a court is obligated to follow 'unless the court is satisfied that it would be contrary to the interests of justice to do so'.⁸⁶ In that event, the

⁸⁵ Ibid 80.

⁸⁶ Sentencing Council (UK), *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences* Definitive Guidelines (2015).

court will need to make it clear why it has deviated from the guidelines. Those reasonings can become a subject of appeal under the UK regime.

172 An example of such a guideline is already utilised by the courts in the United Kingdom. An example is available at <https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web.pdf>.

The following points are all dealt within the sentencing guidelines (above) but are addressed separately here. We understand that sentencing laws are a matter for the states and territories to determine but we include them on the basis they make up such an important aspect of the final determination in justice.

FORENSIC FINANCIAL SCRUTINY

173 Any financial hardship claims should be limited and subject to forensic scrutiny to ensure the any hardship claims are authenticated.

FINANCIAL HARDSHIP - FINES BY INSTALMENT

174 Our current sentencing laws fail to adequately penalise corporate offenders because the economic considerations so often outweigh the seriousness of the offence – and outcome.

175 The UK courts understood the implications to this almost 20 years ago. Discounting fines and mitigating considerations deplete the value of the sanction. The Court of Appeal recognised the contradictory aims in the sentencing principles; taking into account the serious nature of an offence and then balancing this with a potentially crippling financial penalty. The court considered a preference for maintaining a significant fine that reflected the gravity of the offence balanced with it being payable over long periods of time.⁸⁷ This has since been incorporated in the sentencing guidelines.

CONFIDENTIAL PENALTIES

176 They undermine the importance of deterrence by granting a mitigating benefit. For this reason, we submit they should be disallowed.

INDEMNITY INSURANCE

⁸⁷ Diana Kloss, 'Health and Safety at Work: The Criminal Law' *Occupational Health Law* (John Wiley & Sons Incorporated, 2010), 139, <http://ebookcentral.proquest.com/lib/cqu/detail.action?docID=485678>.

We recommend an amendment to s 272 of the *Work Health and Safety Act 2012* (SA) to incorporate a clarification in order to remove any doubt, that a contract indemnifying, or any policy aimed at indemnifying legal liabilities under the Act is prohibited.

DIRECTORS - DISHONEST CONDUCT

An ‘officer’ who is a director of the PCBU, has acted in a dishonest or misleading manner in relation to an investigation after a death or catastrophic injury, serious consequences should follow.

We propose an amendment to s 268 of the WHSA to mirror or trigger s 206B of the *Corporations Act 2001* (Cth) to reflect a disqualification clause.

Given how difficulties in finding direct liability against a company’s officers, we believe dishonest conduct should disqualify an ‘officer’ from being free to manage another corporation. It is our view that a disqualifying provision should be structured to reflect the seriousness of the dishonest conduct as well as the gravity of the culpability.

FUTURE DIRECTIONS

The short term pain of accepting a truth is better than the long term pain of believing in an illusion

There are enormous complexities in holding an artificial person to the same legal standards as a natural person – but whether we like it or not, these principles are real, and they form a central part of our economic and legal systems. While every endeavour should be made to look for a workaround, it should only come with careful consideration for those who may be caught by its flaws - and the political will to indict.

We do not believe it should be left to grieving loved ones to traipse through the doorways of our politicians to highlight the injustices their laws create.

The victims of crime, if we are indeed that, are entitled to real solutions that expose the truth as to how and why a person dies at work and then, where a crime is exposed, to see an appropriate punishment imposed.

183 The model WHSA and the criminal justice system is determined to maintain a strict focus on a moment in time when something went wrong. It all too often does not consider other systemic failings in safety as relevant to the cause of death. For this reason, most family members will never know what those failings were. If prevention is genuinely the primary reason for creating laws to control dangerous workplace practices, then surely, we should dig out all those factors and their underlying causes, and then determine what role they played in the fatal outcome.

CALLING FOR A FUSION OF JUSTICE

184 For the most part, families will never know the true extent of what happened to their loved one because, most of the evidence uncovered by investigations will never see the light of day in court. That is because our system of justice is adversarial. It pegs two opposing arguments side by side and determines the most convincing. Discovering the truth is not an integral part of Australia's criminal justice system. That is intrinsically unfair and senseless given the deep pockets of some corporations.

185 We would argue that an inquiry is more likely to expose systemic attitudes and failings inside the company structure. We think it might be productive to begin serious discussions toward a more progressive shift toward a fact-finding inquiry - with an aim to getting to the truth of the matter, rather than relying only on lawyers making creative arguments.

186 Not only does this give important answers to a family, it might also clarify and draw attention to the many layers of breakdowns that are not necessarily relevant to that one fatal event and yet, provide important connections to it. If this evidence remains undisclosed (and most of it will), the public domain and wider industries lose the opportunity to learn from it. We think this makes a good case for constructive prevention.

187 Revealing the exact causes of a loved one's death is an essential part of the healing process for those dealing with a workplace death. Just as other areas of law are making changes to justice-delivery, so too should laws that contemplate a workplace death.

188 Examples today exist in family law where children are provided special rights and procedures have been altered to reflect a less hostile environment; domestic violence in some jurisdictions are trialling special courts to better deal with the complexities of those crimes just as there have been special courts created to deal with very specific cultural issues or even drug issues.

189 What we know of the contemporary judicial system in Australia is that it will look to alternatives where justice would be served better to do so.

MORE TRUTH – LESS ADVERSARIALISM

190 These ideas fall roughly in line with recommendations made by the South Australian Coroner, Mark Johns, in his recommendations after the inquest into my own son's death. His view was that perhaps an inquiry to examine the cause of these workplace deaths might better serve justice.⁸⁸

As a matter of law reform, I suggest that the Government consider a major reform of the current system of criminal prosecution for fatal industrial accidents. In my opinion it is just wrong that the prosecution of Diemould took 5 years to arrive at a plea of guilty. There must be a way to improve that. It seems to me that the family of a person killed in a workplace accident may be better served by seeing an open public inquiry convened within 12 to 18 months of the accident, than a criminal prosecution which might never result in the public hearing of any evidence, and which takes more than three times that long to even start.⁸⁹

191 The research conducted by Sydney University looked at the role of the coroner's court as a response to a workplace fatality.⁹⁰ It is true, not all families will find their coronial experience positive. To that, we can probably say a coroner's inquest may not be a panacea either, but we do think the idea of an inquiry is worthy of discussion while also recognising and addressing any weaknesses it may also present.

192 Perhaps a more appropriate path in this area of law is a public inquiry conducted by a specialist industrial court or panel - a sort of fusion between the adversarial and inquisitorial systems. It might even produce the directives that forms a part of the investigation and that might begin as early as 6 months after the event to ensure the integrity of all evidence is

⁸⁸ *Finding of Inquest into the death of Daniel Nicholas Madeley* [2011] Coroner's Court of South Australia, File 14/2010 (1637/2004) (Coroner Mark Frederick Johns).

⁸⁹ *Ibid* 39.

⁹⁰ Matthews et al (2016) above n 4.

preserved. Perhaps, in line with this, we might even open discussions about restorative justice with a genuine objective to doing right by the families of the deceased worker.

193 Where this leaves the criminal justice, does not differ to any inquest that ultimately uncovers crime – it stops, allowing the criminal justice system to take up its role.

194 We would also encourage further research into those jurisdictions overseas that allow the civil and criminal processes to run side by side. This would be a fusion of two vastly different systems of law. It is certainly radical, but we believe the topic is worthy of broader discussion.

195 Whatever path we take, we should be mindful that we are deciding the fate of the families who will have to navigate these changes. So – the answer is a resounding yes, we need a genuine path to corporate accountability – but not more false hope and please, no more symbolic gestures.

FINAL REMARKS

196 Thank you for allowing VOID to be a part of this important inquiry. If you are interested in more information, I am happy to provide more detailed accounts that relate to this submission.

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