

TASMANIA

CRIMINAL CODE AMENDMENT (CLARIFICATION OF ORGANISATIONAL LIABILITY) BILL 2007

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TASMANIA

CRIMINAL CODE AMENDMENT (CLARIFICATION OF ORGANISATIONAL LIABILITY)

BILL 2007

(Brought in by Nicholas James McKim MHA)

A BILL FOR

An Act to amend the *Criminal Code Act 1924*, and the *Sentencing Act 1997*, to improve workplace safety for Tasmanian workers by clarifying the attribution of criminal liability to organisations.

Be it enacted by His Excellency The Governor of Tasmania by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

Short title

1. This Act may be cited as the *Criminal Code Amendment (Clarification of Organisational Liability) Act 2007*.

Commencement

2. This Act commences on a day to be proclaimed.

PART 2 – *CRIMINAL CODE ACT 1924* AMENDED

Principle Act

3. In this Part, the *Criminal Code Act 1924*[•] is referred to as the Principal Act.

Chapter I amended (Interpretation)

4. Chapter I to the Principal Act is amended as follows:

(a) By inserting the following definition in section 1:

‘**person**’ shall include any body of persons, corporate or unincorporate including the Crown.

Chapter IV amended (Criminal Responsibility)

5. Chapter IV to the Principal Act is amended as follows:

[•] No. 69 of 1924.

(a) By inserting the following sections after section 13:

13A Organisational Liability

(1) This Code applies to organisations in the same way as it applies to individuals. It so applies with such modifications as are set out in this Chapter, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on organisations rather than individuals.

(2) An organisation may be found guilty of any offence, including one punishable by imprisonment.

“Organisation” means:

(a) a public body, body corporate, society, company, firm, partnership, or trade union, or

(b) an association of persons that

- (i) is created for a common purpose,
- (ii) has an operational structure, and
- (iii) holds itself out to the public as an association of persons.

13B Representative acts or omissions

(1) The acts or omissions of all of the representatives of an organisation, acting within the actual or apparent scope of their employment or within their actual or apparent authority must be attributed to the organisation.

(2) In this section a person is acting within the apparent scope of their employment or within the apparent scope of their authority if the organisation has conducted itself in a manner that it is reasonable to treat that person as acting within the apparent scope of their employment or the apparent scope of their authority.

(3) In this Chapter ‘representative’ includes a director, partner, officer, employee, member, agent or a person who does the work of an organisation.

13C Establishing fault

(1) If intention, knowledge or foresight of consequences is a state of mind in relation to an act or omission that must be proved in relation to an offence, that state of mind must be attributed to an organisation that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the organisation's board of directors:

(i) intentionally, knowingly or with foresight engaged in the relevant act or omission; or

(ii) expressly, tacitly or by implication authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the organisation:

(i) intentionally, knowingly or with foresight engaged in the relevant act or omission, or

(ii) expressly, tacitly or by implication authorised or permitted the commission of the offence; or

(c) proving that a culture existed within the organisation that directed, encouraged, tolerated or led to the commission of the offence.

(3) Paragraph (2)(b) does not apply if the organisation proves that it exercised due diligence to prevent the act or omission, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the organisation; and

(b) whether the employee, agent or officer of the organisation who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the organisation would have authorised or permitted the commission of the offence.

(5) If foresight of consequences is not a state of mind in relation to an act or omission, subsection (2) does not enable the state of mind to be proved by proving that the board of directors, or a high managerial agent, of the organisation had foresight of the consequences of engaging in the act or omission or had foresight of the consequences of authorizing or permitting the commission of the offence.

(6) In this section:

“high managerial agent” means a representative of the organisation, or group of such persons (such as the board of directors of a body corporate) with duties of such responsibility that his, her or their conduct may fairly be assumed to represent the organisation's policy.

“organisational culture” means an attitude, policy, rule, course of conduct or practice existing within the organisation generally or in the part of the organisation in which the

relevant activities takes place.

13D Aggregation of Fault

(1) The acts and omissions of an organisation must be viewed as a whole when assessing the negligence of an organisation. This may involve aggregating the acts and omissions of any number of the representatives of the organisation.

(2) The negligence of an organisation may be evidenced by the negligent acts and omissions of its high managerial agents or the failure of the organisation or one or more of its high managerial agents:

(a) to adequately manage, control or supervise the conduct of one or more of its representatives; or

(b) to engage as a representative a person reasonably capable of providing the contracted services; or

(c) to provide adequate systems for conveying relevant information to relevant persons in the organisation; or

(d) to take reasonable action to remedy a dangerous situation of which a high managerial agent has actual knowledge; or

(e) to take reasonable action to remedy a dangerous situation identified in a written notice served on the organisation by or under an Act.

13E Due Diligence

(1) A failure to exercise due diligence may be evidenced by the fact that the act or omission was substantially attributable to one or more of the failures (of the organisation or one of its high managerial agents) set out in section 13D(2)(a)-(e).

13F High Managerial Agent Offence

(1) Any charge laid against an organisation can also be laid against a high managerial agent of that organisation.

Chapter XVII amended (Homicide: Suicide: Concealment of Birth)

6. Chapter XVII to the Principal Act is amended as follows:

(a) By amending section 153(1) so that it reads:

‘Homicide is the killing of a human being by another person’

PART 3 – SENTENCING ACT 1997 AMENDED

Principal Act

7. In this Part, the *Sentencing Act 1997*[•] is referred to as the Principal Act.

Part 1 amended (Preliminary)

8. The Principal Act is amended as follows:

(a) by inserting the following section after section 6:

6A Act to apply to organisations

- (1) This Act applies to organisations in the same way as it applies to individuals. It so applies with such modifications as are set out in this Act, and with such other modifications as are made necessary by the fact that sentence is being imposed on organisations rather than individuals.
- (2) The term ‘organisation’ has the same meaning as it has in the *Criminal Code Act 1924* (Tas).
- (3) The term ‘high managerial agent’ has the same meaning as it has in the *Criminal Code Act 1924* (Tas).
- (4) The term ‘representative’ has the same meaning as it has in the *Criminal Code Act 1924* (Tas).

Part 2 amended (General Sentencing Powers)

9. The Principal Act is amended as follows:

(a) by inserting the following section after section 7:

7A Sentencing orders in relation to organisations

- (1) Instead of or in addition to making an order under section 7, a court that finds an organisation guilty of an offence may do any one or more of the following, in accordance with this Act and subject to any enactment relating specifically to the offence:

(a) record a conviction and, if the offence is punishable by imprisonment, make a disqualification order in respect of the offender.

[•] No. 59 of 1997.

(b) record a conviction and make an adverse publicity order in respect of the offender.

(c) Grant an injunction against the organisation in such terms as the court determines to be appropriate.

(2) A disqualification order made in accordance with subsection (1)(a) may, among other matters:

(a) prevent the organisation from engaging in certain commercial activities;

(b) revoke or suspend a licence held by the organisation;

(c) disqualify the organisation from entering specified contracts;

(d) deny the organisation the use of its profits for a fixed period of time.

(3) An adverse publicity order may require an organisation to:

(a) disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the organisation or to which the organisation has access;

(b) publish, at its own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

(4)

(a) The court may rescind or vary an injunction granted under subsection (1)(c).

(b) The power of the court to grant an injunction under subsection (1)(c) restraining an organisation from engaging in conduct may be exercised:

(i) whether or not it appears to the court that the organisation intends to engage again, or to continue to engage, in conduct of that kind;

- (ii) whether or not the organisation has previously engaged in conduct of that kind; and
 - (iii) whether or not there is an imminent danger of substantial damage to any person if the organisation engages in conduct of that kind.
- (c) The power of the court to grant an injunction under subsection (1)(c) requiring an organisation to do an act or thing may be exercised:
- (i.) whether or not it appears to the court that the organisation intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
 - (ii.) whether or not the organisation has previously refused or failed to do that act or thing; and
 - (iii.) whether or not there is an imminent danger of substantial damage to any person if the organisation refuses or fails to do that act or thing.

Part 4 amended (Community Service Orders)

10. The Principal Act is amended as follows:

(a) by inserting the following section after section 28:

28A Community Service orders in respect of organisations

(a) A community service order in respect of an organisation should specify:

- (a) a particular project or activity which the organisation should complete or contribute towards, and if so to what extent;
- (b) a period for completion of the project or the contribution towards the project or duration of the activity;
- (c) any other requirements the court considers necessary or expedient for enforcement of the order.

- (b) Where a community service order is made in respect of an organisation the court may order that the role of the probation officer or supervisor be undertaken by the court or a person specified by the court.
- (c) Where a community service order is made in respect of an organisation the court may order that the organisation pay any cost of the enforcement and/or the supervision of the order.

(b) by amending section 31(4) so that it reads:

‘This section does not apply to a community service order made under section 47(2)(a) in respect of an organisation’.

Part 5 amended (Probation Orders)

11. The Principal Act is amended as follows:

(a) by inserting the following subsection after section 37(2):

37(2A) A probation order in respect of an organisation may also include any or all of the following special conditions:

- (a) the offender establish policies, standards and procedures to reduce the likelihood of the organisation committing a subsequent offence;
- (b) the offender communicate those policies, standards and procedures to its representatives;
- (c) the offender report to a probation officer on the implementation of those policies, standards and procedures;
- (d) the officer implement/undertake, specified reporting, record keeping or auditing controls;
- (e) the offender establish compliance programs or education or training programs for its employees and/or representatives;
- (f) the offender review its internal operations or activities which led to the offence and report its findings to its probation officer.

(b) by inserting the following section after section 37:

37A Supervision of organisation

(1) Where a probation order is made in respect of an organisation the court may order that the role of the probation officer be undertaken by the court, Workplace

Standards, a specified officer of Workplace Standards, or a person appointed by the court (such as an independent workplace safety consultant, or an accountant, auditor or lawyer).

- (2) Where a probation order is made in respect of an organisation the court may order that the organisation pay the cost of the enforcement of the order.

Part 8 amended (Adjournments, Discharges and Dismissals)

12. The Principal Act is amended as follows:

- (a) by inserting the following section after section 59:

59A Conditions for undertakings by organisations

Where an undertaking is given by an organisational offender under section 7(f), the conditions imposed on that offender under section 59(c) may include any or all of the following conditions:

- (a) the offender establish policies, standards and procedures to reduce the likelihood of the organisation committing a subsequent offence;
- (b) the offender communicate those policies, standards and procedures to its representatives;
- (c) the offender contribute (financially or otherwise) to the establishment of policies, standards and procedures to reduce the likelihood of the organisation committing a subsequent offence;
- (d) the offender implement/undertake specified reporting, record keeping or auditing controls;
- (e) the offender establish compliance programs or education and training programs for its employees and/or representatives;
- (f) the offender review its internal operations or activities which led to the offence.

Part 11 amended (Sentencing Procedure)

13. The Principal Act is amended as follows:

- (a) by inserting the following subsection after section 82(3):

82(3A) Pre-sentence reports for organisations

(1) In cases where the offender is an organisation and the court requests a professional assessment of an organisation's characteristics, the court may appoint a suitable person or persons to prepare a report on the organisation, and the court may give such other directions in relation to the nature and means of obtaining the assessment as the court considers necessary or appropriate.

(2) The court may order that the organisation pay the costs of preparing the report.

(b) by inserting the following subsection after section 83:

83(1A) Pre-sentence reports for organisations

In addition to the matters referred to in subsection (1), in cases where the offender is an organisation, the pre-sentence report may include the criminal records of its Board of Directors or high managerial agent which appear to the court or the author of the report to be relevant to the sentencing of the offender.

(c) by inserting the following subsection after section 90(2):

90(2A) Attendance of high managerial agent

The judge or magistrate presiding at the trial of an offence or receiving a plea of guilty to an offence, or any other judge or magistrate empowered to impose sentence, may require the attendance at the sentencing proceedings of any of the high managerial agents of the organisation, if he or she considers it appropriate in the circumstances.