

Death in the Workplace



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Introduction

On 15 June 2005, the New South Wales Government introduced the *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005 (Workplace Deaths Act)*.

The Act amends the Occupational Health and Safety Act 2000 (NSW) to create a new offence of reckless conduct causing death at a workplace by a person with Occupational Health and Safety duties.

Although many employer groups have welcomed the new laws, the amendments are a watering down of what had been originally proposed by the Government in an earlier draft.

According to the Minister responsible for the amendments the legislation “*is directed at a very small minority of employees who deliberately behave recklessly and whose behavior causes the death of a vulnerable worker- not employers who take reasonable precautions and reasonable steps in relation to the safety of their employees..*”

As a result of the amendments, an employer will not automatically be responsible for any death that occurs in the workplace.

The new offence will only apply where the person who is culpable is reckless as to the risk of serious injury or death.

This means that the person has to be aware of the risk and have knowledge that serious injury or death is a probable result of their actions.

The amendments also impose significant penalties on employers where there is a death in the workplace. The Government believes that these heavy penalties will act as a strong motivation for businesses to review all policies and procedures currently in place to ensure the health and safety of employees.

The passage of the changes

New South Wales has had occupational health and safety laws since 1896 but for most of the 20th century these laws were prescriptive.

The relevant statutes and regulations prescribed the way that machinery was to be guarded, the maximum weights which could be lifted by employees and the maximum pressure of fluids and gasses in pressure vessels and other containers.

The problem with these statutes and regulations was that they only applied to factories, shops, construction sites and mines.

By the late 1970s however less than half of the workforce in NSW was engaged in this type of industrial production.

The Occupational Health and Safety Act 1983

Following a government Inquiry commissioned in 1979 to examine Occupational Health and Safety legislation, the New South Wales Parliament enacted the *Occupational Health and Safety Act 1983* which placed broad performance-based duties upon employers, employees, designers and manufacturers of equipment, and persons in control of non-domestic premises.

These duties required employers and employees to ensure the safety and health at work of employees and of all persons at places of work.

Employer and employee consultation was mandated through the establishment of safety committees.

Inspectors were also given powers to not just warn, but to issue improvement notices requiring employers to rectify unsafe aspects of places of work.

Where an inspector believed that there was risk to life or limb, an inspector could issue a prohibition notice that would prohibit work at the relevant place of work until the danger was rectified.

Under this scheme, prosecutions were seen as a last resort where consultation, warnings and notices had failed to implement a safe workplace.

The Occupational Health and Safety Act 2000

By the mid-1990s, the Occupational Health and Safety Act was in need of an overhaul.

Consequently there was a review of workplace safety in 1996.

The panel of review recommended that the *Occupational Health and Safety Act 1983* be updated with the enactment of a new and more modern statute.

Subsequently in mid-2000 the NSW Parliament enacted the *Occupational Health and Safety Act 2000* which came into force in September 2001.

This new Act continued the broad performance-based duties to ensure so far as was practicable, the safety and health of employees and persons at places of work.

Workplace consultation was strengthened with the addition of safety and health representatives as well as safety committees.

All of the old safety regulations were consolidated into the new *Occupational Health and Safety Regulation 2001*.

The regulations also required employers and persons in control of premises to establish safety management systems to identify hazards and to undertake risk assessments at places of work.

Criminal sanctions however, were still the last resort and were a back-up to employer and employee consultation, inspectoral warnings, improvement notices and prohibition notices.

Different views on workplace safety

There are several views as the most effective model for occupational health and safety.

Deregulation model

On one hand, there are those who argue for deregulation and self regulation and who maintain that safe behaviour can be achieved without tough laws.¹

Those in favor of this approach argue against industrial manslaughter laws or the toughening of penalties under OHS laws because of the negative affect that tough laws would have on investors.

It has also been argued that additional burdens on companies and managers would do nothing to improve workplace health and safety and that new laws would hinder, rather than help work safety,

Criminalisation model

On the other hand, there are those who argue in favor of the criminalisation of employer misconduct and imprisonment in the most serious of cases.

Those in favour of the tough enforcement approach argue that increasing the deterrent effect requires legislative responses that are able to pierce the protective veil of a corporation and impose individual liability on managers and senior officers.

¹ Rick Sarre "Corporate Criminal Liability: Criminal Manslaughter in the Workplace" Law Society Journal March 2003 page 58

Driving this argument is the view that the implementation of tough new criminal laws will assist in ensuring the continued safety of workers in the workplace, as the existence of heavy penalties would increase the incentives for employers to comply with workplace standards.

Middle ground approach

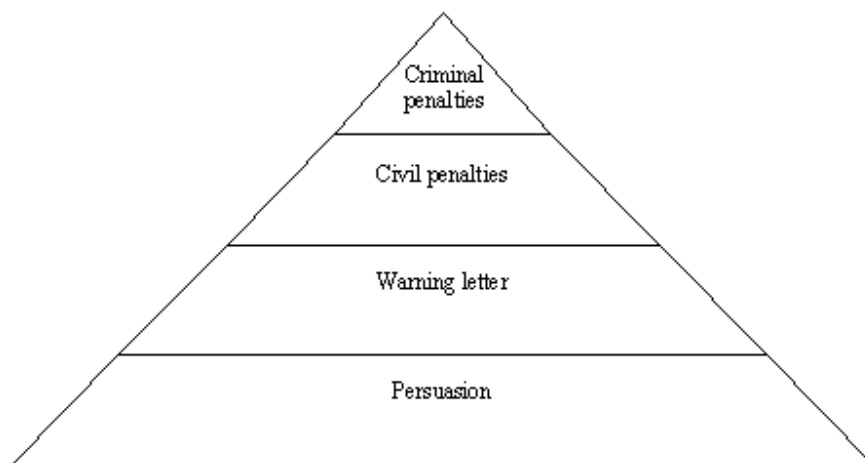
The middle ground position recognizes the value of self regulation and a culture of compliance which at the same time recognizing that punitive sanctions had their place.

This model has been explained by some commentators in the form of a pyramid.

At the base of the pyramid are non-adversarial, non-punitive enforcement measures aimed to build on trust between regulators and the regulated.

As the conduct becomes more serious so do the responses.

The tip of the pyramid model would represent the introduction of industrial manslaughter laws into the criminal laws.²



² For discussion of the model and the difference views of workplace safety, refer to Parliament of Australia Research Brief No.7 2004-2005 “Workplace death & serious injury: a snapshot of legislative developments in Australia and Overseas”.

The Maccullam Report

Before the current amendments the law in New South Wales did not contain any specific provisions dealing with workplace deaths.

Section 8 of the *Occupational Health and Safety Act 2000* (OHS Act) imposed a general obligation on employers to ensure the health, safety and welfare of all employees and other persons at work but there was no additional penalty applicable where a person caused the death of another at work.

In a report prepared for Work Cover dated June 2004, known as the Maccullam Report, recommendations were made for the creation of a new offence and an increase to the penalties in circumstances where a breach of the existing provisions of the Act resulted in a death in the workplace.

The authors of the Report made the recommendations, believed that the then current regime did not provide a sufficient deterrent to employers.

Governments Response

The Government initially accepted the recommendations contained in the Macullam Report and prepared draft legislation which introduced the new offence and which the Government made available for consultation..

The new offence consisted of a breach of the Act which caused the death of a person.

The new offence like most offences under the Act would have been established on a strict liability basis. The critical point being that intent would have been irrelevant except in the assessment of penalties.

Concerns by Employer Groups

These suggested changes however raised a number of concerns by employer groups.

Some of these concerns included the need for some “mental element” such as recklessness to establish the offence. The absence of any element of intent would mean that employers who did take reasonable precautions for the safety of their workers could be easily prosecuted.

As a result of these concerns the government amended the draft legislation.

The Changes

A new offence – workplace deaths

The new amendments create an offence where a breach of the OHS Act causes the death of a person.

The amendments are contained a new section 32A in the OHS Act.

The section has no retrospective effect.

Under section 32A, a person will now be guilty of an offence for death, where:

- the person’s “conduct” causes the death of another person at any place of work
- the person owes a duty under Part 2, of the OHS Act for example a duty as an employer
- the person is reckless as to the danger of death or serious injury to any person to whom that duty is owed

First element - conduct

Firstly, a person must engage in conduct which causes the death of another at a place of work.

That conduct may be by way of some act or omission.

The legislation provides that a person's conduct causes the death of another if it substantially contributes to the death.

An example of a reckless act could be where an employee is required to work at a height without fall protection.³

The provision is applicable to an employer; self-employed person; controller, designer, manufacturer or supplier of premises, plant or substance; employee; or director or manager.⁷ It follows that all of these persons may be liable to incur a penalty for contravening the provision.

The conduct need not have occurred at the place of work and the death is taken to have been caused at the place of work if the person is injured at the place of work but dies elsewhere.

An employer, for example, might be liable for conduct or decisions made at corporate headquarters, although the fatal injury occurred at the workplace.⁴

Second element - duty

The second element is that when engaging in the conduct which causes the death the person must owe a duty under Part 2 of the Act with respect to health or safety of the person.

Those persons who owe a duty under Part 2 are employers, self employed persons, controllers of premises, plant or substances at work and employees.

Third element – mental element

Before the implementation of new offence, there was no requirement on the prosecution to prove the existence of any mental element in order to make out a breach of the OHS Act causing the death of a person.

³ The Hon Kerry Hickey Minister for Mineral Services Second Reading Speech 27 May 2005, Hansard page 16339

⁴ Hon Kerry Hickey ibid

It would have been sufficient to prove that the defendant owed the victim a duty, and that the duty was breached.

According to the new offence, the person must be reckless as to the danger of death or serious injury to any person to whom that duty is owed under the Act (and) that arises from the persons conduct.

Key to the provision is the concept of “recklessness”

There is however, very little guidance in the Act as to what constitutes “reckless conduct” for the purposes of s32A.

The Legislature has not attempted to define the term “reckless”. This raises the question as to whether “recklessness” requires an element of foresight. For example s18(1) of the NSW Crimes Act 1900 provides for an offence described as “reckless murder” in that a homicide committed with “reckless indifference to human life”.

It is the awareness that death was the likely or probable outcome of the offenders acts or omissions that would establish the offence of reckless indifference to human life.

According to the Concise Oxford Dictionary 9th edition University Press (1995) reckless means “disregarding the consequences of danger” of an act or omission.

The discussion in the Legislative Assembly, suggests that “reckless conduct” may include “heedless or careless conduct where the person can foresee some probable or possible harmful consequence but nevertheless decides to continue with those actions with an indifference or disregard for the consequences..”

It is arguable for the purposes of s32A of the OHS Act that the offence will be established in circumstances where the defendant could foresee some “possible” harmful consequence that might arise from their conduct or that death or serious injury was a foreseeable outcome and that this foresight be established on an objective basis.

The likely test in such a case would be whether a reasonable person in the accused’s position would have realized that the conduct was placing or might place another in danger of serious injury.

If that is the approach, the further question will be whether the reasonable person will be armed with the degree of skill, training and experience of the accused.

Offences by Corporations

Irrespective of the consequences however for individuals, there is a real question as to how corporations will be prosecuted under 32A of the OHS because of the mental element that will need to be established.

By reason of a legal fiction, a corporation is an independent legal person . That being the case; at common law, a corporation is potentially liable for manslaughter by criminal negligence.

There is however a notable reluctance to charge corporations with manslaughter because of the requirement of both actus rea and mens rea, Obvious problems arise when what is essentially a personal criminal responsibility is attributed to a fictitious legal person.

Generally at common law the person whose reckless or negligent conduct caused the death of a worker must be proven to be the “directing mind and will” of the company for the company to be held liable.

The common law test is particularly difficult to establish against large companies which often have many levels of management in between the directors (who are the directing mind and will of the company) and the day-to-day managers whose conduct in implementing the directors’ policies has the actual impact on workers

Unless therefore it can be demonstrated that a senior executive officer engages in reckless conduct it may prove to be very difficult to convict a corporation under the legislation.

The amendments do not make a change to the common law position of the culpability of corporations.

The position in the ACT is quite different.

There the ACT *Crimes Act* 1900 has been amended to include the new crime of industrial manslaughter.

Despite the difficulties of attributing criminal liability to corporations, the ACT legislation is the only jurisdiction in Australia that has enacted an industrial manslaughter offence for Corporations.

As a result of those changes in ACT , where the director's policies and decisions are what actually caused the death of a worker, or where the director allows a corporate culture to develop that disregards workers' safety that results in a death, the company and the director could be convicted of "industrial manslaughter".

Defence – “reasonable excuse”

The OHS Act provides that a person has a defence if they can prove that it was not reasonably practicable to comply with the Act, or that they did not have control of the causes of the offence and it was impracticable to make provision against its happening.⁵

In addition to those general defences, section 32A(3) now creates a new defence if a person can prove that there was a “reasonable excuse” for the conduct.

The section does not however explain the meaning of the term “reasonable excuse.”

In the Second Reading Speech of the Minister for Mineral Resources stated that what constitutes a “reasonable excuse” will be a matter for the court to determine, taking into account the facts of the case.

At the same time however the Court will require a “compelling and overriding” reason why reckless conduct causing death at the workplace might be excused.

Some of the examples noted in the Second Reading Speeches as to what may constitute a reasonable excuse include:

⁵ Section 28 of the OHS Act

- in an emergency where some action is taken that causes a death in the workplace⁶
- if an employee is dishonest about their skills and experience, disobeys a lawful instruction, or performs tasks that they were specifically instructed not to perform.⁷
- If an employee disregards a specific instruction such as for example an instruction to wear a safety harness and falls from a roof. Such an example will affect the question of whether the employer caused the death, because in such a case the substantial cause of the death may have been the employees actions⁸

The Minister has stated that when applying the new offence the defence will ensure that courts take into account the “inherent dangers and difficulties of particular types of work”⁹

This does not mean that employers will automatically have a reasonable excuse if the nature of the work is inherently dangerous – for example, where the employer operates in the security or mining industries.

Employers will still be obliged to take all practicable steps to prevent foreseeable risks of injury.

However, it appears that an employer may escape liability if it has taken such steps but its conduct still causes the death of a worker.

Higher penalties

Under the existing OHS Act a person who contravenes s.8 is guilty of an offence and is liable to pay the following maximum penalties:

- Individual: \$55,000 for a first offender; \$82,500 or two years’ imprisonment, or both for a previous offender;
- Corporation: \$550,000 for a first offender; \$825,000 for a previous offender.

⁶ The Hon Kerry Hickey *ibid* page 16339

⁷ Second Reading Speech of the Hon John Della Bosca 8 June 2005 *Hanard*

⁸ *ibid*

⁹ Second Reading Speech to the Legislative Assembly by the Hon Kerry Hickey *op cit*

The maximum penalty under the amendments for an individual is \$165,000 or five years imprisonment, or both, and \$1.65 million in the case of a corporation.

The justification for these increased penalties was that the prosecution will have to prove a greater level of culpability in order to obtain a conviction.

The penalties also takes into account the serious consequences of the reckless behavior of the offender.

Directors' liability

Under the new offences a director or manager may also be prosecuted but only to the extent they were *personally* reckless.

This is different to the approach of section 26 of the OHS Act and which is specifically excluded for the purposes of section 32A of the OHS Act)

Section 26 of the OHS Act; deems directors and managers to be liable when a corporation committed a breach of the OH&S Act, unless they were not in a position to influence the conduct of the corporation; or they have used all due diligence to prevent the contravention.

Unlike section 26(1) of the OHS Act, under section 32A of the OHS Act, neither directors nor persons concerned in the management of the corporation are assumed or deemed to be complicit in any breach by their corporation.

Under section 32A(6), the prosecution will bear the onus of proving each element of the offence against any director or person concerned in the management of the corporation which has been charged with the offence.

To prove that the offence has been committed by directors and persons concerned with the management of the company, the prosecution will need to prove beyond reasonable doubt:

- The persons acts or omissions
- The casual link between those acts or omissions and the fatality
- recklessness

Rights of appeal

Under the OHS Act, a person's right to appeal is limited to the full bench of the Commission.

The amendments provide that an individual who is convicted of the new offence and sentenced to a term of imprisonment can appeal to the Court of Criminal Appeal as of right but only after the person has first exercised its rights of appeal to a full bench of the Commission.

A corporation which is convicted and ordered to pay a fine of up to \$1.65 million will be able to appeal to the Full bench of the Industrial Relations Commission but have no right of appeal to the Criminal Court.

Right to commence proceedings

The amendments also restricts unions' rights to commence proceedings for breach of the new provisions, by imposing a requirement that they must first obtain the consent of the Minister. There is no such qualification on unions in relation to the institution of proceedings for other offences.³⁹

Review of the Act

The *Workplace Deaths Act* makes provision for a review of the legislation by the Law Reform Commission (LRC) within three years of its commencement.

The LRC will determine whether the relevant provisions are achieving their objectives, including whether they have contributed to a reduction in workplace deaths.⁴⁰

Implications

In many ways, the new legislation recognises the industrial reality of the workplace. It accepts that a range of parties are responsible for the health and safety of persons at work, not only employers, and imposes obligations accordingly.

It also recognises that directors and managers are not necessarily to blame when the corporation has breached its obligations, and removes the deeming provision (as it relates to the new workplace deaths offence).

The Act did not win the unanimous support of both sides of Parliament.

Some of the criticisms of the Act include:

- that the Act does not provide for a regime of strict liability which was the recommendation of the writers of the Maccullum Report which in their view was required to have any real deterrent effect.
- That the Act does not add to the existing law which provides that a reckless indifference to life leading to death is a criminal offence¹⁰
- That the only entitlement to appeal a conviction will be where a prison sentence has been imposed, but again that right of appeal will only be permitted once all other appeal rights to the Full Bench of the Industrial Relations Commission have been exhausted.

¹⁰ *ibid*

- That the Act which provides for imprisonment of up to 5 years if an employer is found guilty of occupational health and safety manslaughter, is inconsistent with that of manslaughter under the Crimes Act where the maximum sentence could be 25 years imprisonment¹¹
- That any prosecution of the offence should be in the Supreme Court and not the industrial Relations Commission as the Supreme Court routinely decided cases where imprisonment is a possible sentence¹²
- There is no trial by jury which means that a person can be sentenced for a manslaughter type offence without a jury.

Conclusion

There are a number of uncertainties with the offence. However what is clear, is that the Act will expose both employees and employers to prosecution under the offence if they recklessly cause death.

Although the offence in its current form is the eroded version, it does introduce a much higher level of potential risk for employers, directors, managers and employees.

Ultimately however it will only be “reckless conduct” which will result in a conviction but with that qualification comes a heavy penalty.

The new offence is another reminder of the importance of proper and adequate work safety practices.

¹¹ The Hon Lee Rhiannon Second Reading Speech [8.58pm] 8 June 2005 Hansard p16605

¹² *ibid*