

Safety Matters

Special Edition

June 2005

Legislation for “rogue employers”?

Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005 (NSW)

On 10 June 2005, the *Occupational Health and Safety (Workplace Deaths) Bill 2005 (NSW)* (Workplace Deaths Bill) completed its passage through both houses of the New South Wales Parliament. The Hon. John Della Bosca has described the Workplace Deaths Bill as legislation “directed at a very small minority of employers who deliberately behave recklessly and whose behaviour causes the death of a vulnerable worker – not employers who take reasonable precautions and reasonable steps in relation to the safety of their employees.” Among other things, the Workplace Deaths Bill amends the *Occupational Health and Safety Act 2000 (NSW)* (OHS Act) to make it an offence for a person who owes a duty under Part 2 of the OHS Act to engage in reckless conduct that causes death at a workplace. This new offence carries heavy penalties, including imprisonment in the case of individuals who are found to have engaged in reckless conduct which has caused a death at a workplace.

The New South Wales Government launched an inquiry into workplace deaths in 2003 with the appointment of an eminent panel of legal experts (Panel) to advise the Government on issues including whether there should be a new offence relating to workplace death. The Panel released its report in June 2004, recommending that the Government introduce such an offence in New South Wales. In October 2004, the Government released the *Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004 (NSW)* (Workplace Fatalities Bill) for consultation, which implemented many of the recommendations made by the Panel. The Workplace Fatalities Bill was the subject of extensive consultation with employers, unions and industry groups and was widely criticised. The Workplace Deaths Bill represents the culmination of extensive debate over the introduction of a new offence relating to workplace death.

The Workplace Deaths Bill will become an Act and commence

operation on the date of assent by the Governor. At this stage, the date of assent is not known.

Workplace deaths offence and the “reasonable excuse” defence

The Workplace Deaths Bill introduces a new Part 2A into the OHS Act (sections 32A and 32B). A person will be guilty of an offence under section 32A where:

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

The maximum penalty which may be imposed in the case of a corporation is \$1.65 million. The maximum penalty

for an individual is \$165,000, 5 years imprisonment, or both. This penalty regime only applies to the new offence relating to workplace death as contained in the Workplace Deaths Bill.

In addition to the existing general defences contained in section 28 of the OHS Act which will continue to apply, it will be a defence to any proceedings for an offence against section 32A if the person proves that there was “a reasonable excuse for the conduct” that caused the death of another person. In the second reading speech to the Workplace Deaths Bill, it was said that it will be a matter for the court to decide what constitutes “a reasonable excuse” on the particular facts of each case, but that the additional defence allows a court to take into account the inherent dangers and difficulties of particular types of work when considering the application of the new offence.

The provision in the OHS Act whereby directors and managers are “deemed” to commit the same offence as a corporation (section 26) does not apply to the new offence contained in section 32A. However, directors and others persons “concerned in the management of the corporation” can still be prosecuted under the new section 32A if the individual’s conduct caused a death at the workplace.

Who can prosecute? What court can deal with the new offence?

Under section 32B, proceedings for an offence under section 32A can only be instituted:

- by a WorkCover inspector;
- by a mines inspector; or
- with the written consent of a Minister of the Crown.

This represents a significant departure from the Workplace Fatalities Bill, under which it was proposed that a trade union could commence a prosecution without first obtaining written consent from a Minister of the Crown. In effect, trade unions can still commence a prosecution for a workplace death but only if written consent is first obtained from a Minister of the Crown. Trade unions can also make a written application to WorkCover for a statement of the reasons why proceedings for such an offence have not been instituted.

All prosecutions for an offence under the Workplace Deaths Bill will be dealt with by the Industrial Relations Commission of New South Wales in Court Session (IRC). A prosecutor is required to prove a breach "beyond reasonable doubt".

A limited right of appeal

The Workplace Deaths Bill also amends the OHS Act and the *Criminal Appeal Act 1912* (NSW) to provide that an individual convicted and sentenced to

any term of imprisonment for an offence under section 32A may appeal to a Full Bench of the IRC. If an individual is convicted and sentenced to any term of imprisonment, the individual also has a right to appeal the conviction and/or the sentence to the Court of Criminal Appeal (but only after first exercising their right of appeal to a Full Bench of the IRC).

Review of the legislation

The Workplace Deaths Bill was amended on its passage through Parliament to provide for a review of the legislation by the Law Reform Commission within 3 years of the commencement of the Workplace Deaths Bill.

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Lessons for employers

- The workplace deaths offence will apply to all persons who owe duties under Part 2 of the OHS Act.
- It does not appear that the Workplace Deaths Bill will have retrospective operation. A prosecution under the Workplace Deaths Bill should only be commenced in respect of a workplace death which occurs on and from the date the Bill commences operation.
- There is very little guidance as to what constitutes "reckless" conduct. The discussion in the New South Wales 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 to, or disregard for, the consequences."
- "Conduct" extends to include acts or omissions of a person.
- It does not matter where the culpable conduct causing the death of the person takes place. For example, employers will be held accountable for conduct or decisions taking place at corporate headquarters even though the death of a worker occurs at another work location.

Workplace Fatalities Bill v Workplace Deaths Bill

The key differences between the earlier Workplace Fatalities Bill and the Workplace Deaths Bill which introduces a new offence relating to workplace death include:

- the removal of aggravating factors which were to be taken into account when determining appropriate penalty;
- the introduction of an additional defence of "reasonable excuse";
- individuals can be prosecuted but cannot be deemed "guilty" by virtue of the corporation's guilt;
- the removal of the power of a trade union to institute a prosecution, except with the written consent of a Minister of the Crown; and
- the removal of staggered fines for first and subsequent offences.

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