

NSW LAW REFORM COMMISSION

## REPORT 122

### Workplace deaths

July 2009

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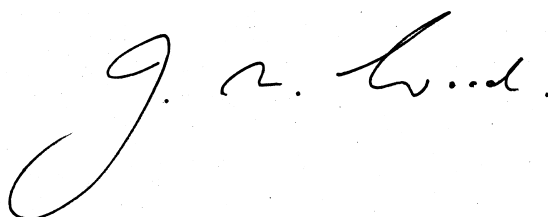
## Letter to the Attorney General

To the Hon John Hatzistergos  
Attorney General for New South Wales

Dear Attorney

### **Workplace deaths**

We make this Report pursuant to clause 22 of Schedule 3 of the *Occupational Health and Safety Act 2000* (NSW).

A handwritten signature in black ink, appearing to read 'J. R. Wood', is centered on the page. The signature is written in a cursive style with a large initial 'J' and a period after 'Wood'.

The Hon James Wood AO QC

**Chairperson**

**July 2009**



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## TERMS OF REFERENCE

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Schedule 3 of the *Occupational Health and Safety Act 2000* (NSW) provides in clause 22:

- (1) The Law Reform Commission is to inquire into, and report on, the effectiveness of the provisions inserted into the *Occupational Health and Safety Act 2000* and the *Criminal Appeal Act 1912* by the *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* (the relevant provisions).
- (2) The Law Reform Commission in carrying out that inquiry, and making that report, is to have particular regard to:
  - (a) whether the relevant provisions are achieving their aims and objectives, and
  - (b) whether the relevant provisions are appropriate to achieve those aims and objectives, and
  - (c) the incidence and circumstances of workplace deaths in New South Wales since the enactment of the relevant provisions and whether the relevant provisions have contributed to a reduction in workplace deaths in New South Wales, and
  - (d) any deficiencies with the relevant provisions that have become apparent since their enactment, and
  - (e) provisions relating to workplace deaths in other Australian jurisdictions and their operation and effectiveness.
- (3) The Law Reform Commission in carrying out that inquiry, and making that report, is to:
  - (a) consult with unions, employees, employers and other interested stakeholders, and
  - (b) conduct public hearings.
- (4) The inquiry and report is to be undertaken under and in accordance with the *Law Reform Commission Act 1967*.
- (5) The inquiry is to commence before the expiration of the period of 3 years after the commencement of the relevant provisions.
- (6) The Attorney General is required to table or cause to be tabled in Parliament the report, and a detailed written response of the Government, within 3 months after the report is made by the Law Reform Commission.

## Division members

His Honour Judge Kenneth Taylor AM RFD

Professor Michael Tilbury (Commissioner-in-charge)

The Hon James Wood AO QC

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## EXECUTIVE SUMMARY

In 2005 the NSW Parliament amended the State's occupational health and safety ("OHS") legislation to create a new "workplace deaths" offence. A corporation, or the director or manager of a corporation, is guilty of this offence where (1) their conduct causes the death of another person (the "victim") at work; (2) when engaging in that conduct, they owe a duty under OHS legislation with respect to the health and safety of the victim; and, (3) they are reckless as to the danger of death or serious injury to the victim arising from the conduct in question.

When creating the workplace deaths offence, Parliament required the NSW Law Reform Commission to begin a review of its operation within three years of its enactment. This report responds to that requirement. However, it does so in very different circumstances to those that existed in 2005. In particular, a national review of OHS laws has recently recommended a model national OHS law to the Commonwealth government, and NSW has committed itself to national reform in this area of law. The model law does not contain a proposal for a specific workplace deaths offence. It does, however, provide for the graduated enforcement of duties under OHS law, exposing corporations or their officers to the severest penalties where their non-compliance with the duty in question involves high culpability (such as recklessness) and where there is a serious risk of harm (such as death). This approach effectively removes the need for a separate workplace deaths offence in OHS law.

By providing for the graduated enforcement of duties under OHS law, the advocated approach accords with the general basis for the imposition of criminal responsibility in OHS legislation, namely, that non-compliance with duties with respect to health and safety generate absolute liability offences (rather than offences based on recklessness or other fault), and that the conduct of the corporation or its officers must contribute to the risk in question (rather than cause the victim's death). This approach is considered the most effective in achieving deterrence and promoting safety in the workplace.

At this time, it makes no sense to examine the effectiveness of the workplace deaths offence enacted in 2005 in the way envisaged by Parliament, that is through full consultation with unions, employees, employers or other stakeholders and by conducting public hearings. The national review has recently consulted relevant stakeholders, although its

focus was not specifically on a workplace deaths offence. There is, however, a lack of empirical evidence to make such a focus worthwhile. In particular, there have been no prosecutions under the new offence and no survey of industry, or workers compensation insurers, on which to base any practical conclusion as to whether the current law works, or has any deterrent effect.

In the event that a national OHS law is not enacted, the Commission considers that it should receive a new reference to review the current workplace deaths offence, taking into account the difficulties with the existing offence that are identified in this report, including that of attributing criminal responsibility to corporations.

Whether the national OHS law is enacted or not, any further review of workplace deaths should also consider if, and in what circumstances, corporations and their officers should incur responsibility for workplace deaths under the general criminal law of manslaughter, generally referred to in this context as “industrial manslaughter”. Such responsibility could be alternative or additional to any criminal responsibility in respect of the same offence under OHS laws.

# 1 Introduction

- This review
- Responding to the terms of reference
- Our approach
- A note on terminology

## THIS REVIEW

1.1 In June 2005 the *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* (NSW) inserted Part 2A into the *Occupational Health and Safety Act 2000* (NSW). Within Part 2A, s 32A created an offence of reckless conduct causing death at a workplace. The *Criminal Appeal Act 1912* (NSW) was amended to allow appeals from convictions under s 32A to the Court of Criminal Appeal.

1.2 In the savings and transitional provisions of the *Occupational Health and Safety Act 2000* (NSW), Parliament required the New South Wales Law Reform Commission to inquire into, and report on, the effectiveness of these provisions.<sup>1</sup>

1.3 In conducting its inquiry, the Commission is to have particular regard to the following matters:<sup>2</sup>

- (a) whether the relevant provisions are achieving their aims and objectives;
- (b) whether the relevant provisions are appropriate to achieve those aims and objectives;
- (c) the incidence and circumstances of workplace deaths in New South Wales since the enactment of the relevant provisions and whether the relevant provisions have contributed to a reduction in workplace deaths in New South Wales;
- (d) any deficiencies with the relevant provisions that have become apparent since their enactment; and
- (e) provisions relating to workplace deaths in other Australian jurisdictions and their operation and effectiveness.

## RESPONDING TO THE TERMS OF REFERENCE

1.4 As required by our terms of reference, we commenced this review early in June 2008, that is, within three years of the commencement of

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1. *Occupational Health and Safety Act 2000* (NSW) sch 3 pt 5, cl 22(1).  
2. *Occupational Health and Safety Act 2000* (NSW) sch 3 pt 5, cl 22(2).

Part 2A.<sup>3</sup> At that time, it was our intention to publish a Consultation Paper that would identify the issues arising and that would provide a basis for consultation with relevant stakeholders. As envisaged by Parliament, we proposed to consult with unions, employees, employers and other stakeholders, and to conduct such public hearings as were necessary to enable us to resolve the issues raised in the review.<sup>4</sup> It soon became apparent, however, that it was likely to be pointless to respond to the reference in this way. The validity of this conclusion had to await, and was confirmed by, the release in February 2009 of the final report of the National Review into Model Occupational Health and Safety (OHS) Laws.<sup>5</sup>

1.5 There are two reasons that make it impossible to respond to this reference in the way that Parliament envisaged in 2005:

- There is a lack of empirical evidence concerning the operation of Part 2A; and
- The landscape of occupational health and safety (“OHS”) laws, of which Part 2A forms a part, is now in the process of significant change, making the terms of reference potentially redundant.

### Lack of relevant empirical information

1.6 At this time, it is impossible to respond to those items in the terms of reference that require us to determine whether the 2005 amendments are achieving their objectives (even assuming that those objectives can be clearly identified);<sup>6</sup> whether the amendments have contributed to a reduction in workplace deaths; and what deficiencies have become apparent in the legislation since the amendments. The reason is that the empirical evidence necessary to support such inquiries is simply unavailable.

1.7 Statistics do show a slight reduction in the number of workplace deaths in the period immediately after the enactment of the 2005

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3. The relevant amendments commenced operation on the date of Assent to the *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* (NSW), which was 15 June 2005.

4. *Occupational Health and Safety Act 2000* (NSW) sch 3 pt 5, cl 22(3).

5. See para 1.10.

6. See para 4.3-4.5.

amendments. During 2006 and 2007, WorkCover reported 69 workplace fatalities in comparison with 75 during the period 2005 to 2006.<sup>7</sup> Any association between these figures and the 2005 amendments is, however, purely speculative. In particular, it is difficult to assess the impact of s 32A of the *Occupational Health and Safety Act 2000* (NSW) because there have to date been no prosecutions under it.

1.8 There have, of course, been a number of fatal workplace incidents since 15 June 2005 when the amendments came into force. For example, between that date and 31 March 2008, the number of such incidents notified to, and investigated by, WorkCover was 111.<sup>8</sup> To date, only a few prosecutions arising out of these incidents have been reported.<sup>9</sup> The prosecutions have not relied on s 32A but on contraventions of the more general duties of an employer relating to health, safety and welfare at work under the *Occupational Health and Safety Act*,<sup>10</sup> the widest of which is the duty of an employer to ensure the health, safety and welfare at work of employees.<sup>11</sup> The reported prosecutions all involved contraventions of the legislation that were in the mid to upper range in terms of their objective seriousness and that resulted in fines varying from \$85,000 to \$214,000.

1.9 The facts of these cases may not have persuaded prosecutors that there was a basis for a finding that the defendant was “reckless as to the danger of death or serious injury” as required by s 32A(2)(c) of the workplace deaths offence. Recklessness does not, however, have to be proved where the defendant is prosecuted for contravention of the general duties in OHS law. The general duties in OHS law create absolute

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7. WorkCover NSW, *Statistical Bulletin 2006/07: New South Wales Workers Compensation*, Publication No 5543.

8. Letter to the Commission dated 6 May 2008 from Mr Jon Backwell, Chief Executive Officer, WorkCover.

9. Including *WorkCover Authority of New South Wales (Inspector Michael Salmon) v Provimi Australia Pty Ltd* [2008] NSWIRComm 182; *WorkCover Authority of New South Wales (Inspector Davidson) v St Mary’s Tyre Service (NSW) Pty Ltd* [2008] NSWIRComm 226; *WorkCover Authority of New South Wales (Inspector Robert Mayell) v Bilfinger Berger Services-Roads Pty Ltd* [2009] NSWIRComm 10.

10. *Occupational Health and Safety Act 2000* (NSW) pt 2 div 1.

11. *Occupational Health and Safety Act 2000* (NSW) s 8(1).

liability offences,<sup>12</sup> which can easily be applied in the case of corporations<sup>13</sup> and which are informed by an existing body of case law. The offences are capable of encompassing conduct at the high end of a scale of objective seriousness,<sup>14</sup> which is aggravated where the risk in question is reasonably foreseeable,<sup>15</sup> or, indeed, foreseen.<sup>16</sup> Moreover, the prosecution of a death case under the more general duties in the legislation has the advantage that it can effectively encompass, and result in, the attribution of liability to directors and managers of the corporation.<sup>17</sup>

## Developments in OHS laws since 2005

1.10 On 4 April 2008, the Deputy Prime Minister and Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, announced a national review into model Occupational Health and Safety (OHS) Laws (the “National Review”). The Australian government appointed an advisory panel to conduct the review and to recommend to the Workplace Relations Ministers’ Council the optimal structure and content of model OHS legislation. The panel was specifically asked to inquire into, and make recommendations on:<sup>18</sup>

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12. See the discussion in *WorkCover Authority of New South Wales (Inspector Patton) v Western Freight Management Pty Ltd* [2008] NSWIRComm 217, [4]-[26] (Boland J President), and authorities there cited.
  13. See para 2.4.
  14. See, eg, *WorkCover Authority of New South Wales (Inspector Maurice Vierow) v Barclay Mowlem Construction Ltd* [2008] NSWIRComm 1 (multiple system failures resulting in fine of \$300,000).
  15. See especially *Capral Aluminium Ltd v WorkCover Authority of New South Wales* (2000) 99 IR 29, [82].
  16. See especially *WorkCover Authority of New South Wales (Inspector Barbosa) v McDonald’s Australia Ltd* (2003) 125 IR 270, [109].
  17. *Occupational Health and Safety Act 2000* (NSW) s 26. For a recent example, see *WorkCover Authority of New South Wales (Inspector Richard Mulder) v Giroto Precast Pty Ltd and Giuseppe Giroto* [2008] NSWIRComm 94.
  18. See R Stewart-Crompton, S Mayman and B Sherriff, *National Review into Model Occupational Health and Safety Laws: First Report to the Workplace Relations Ministers’ Council* (October 2008), iii; R Stewart-Crompton, S Mayman and B Sherriff, *National Review into Model Occupational Health and Safety Laws: Second Report to the Workplace Relations Ministers’ Council* (January 2009) (“National Review”), iii.

- duties of care, including the identification of duty holders and the scope and limits of duties;
- the nature and structure of offences, including defences;
- scope and coverage, including definitions;
- workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees;
- enforcement and compliance, including the role and powers of OHS inspectors, and the application of enforcement tools including codes of practice;
- regulation-making powers and administrative processes, including mechanisms for improving cross-jurisdictional co-operation and dispute resolution;
- permits and licensing arrangements for those engaged in high-risk work and the use of certain plant and hazardous substances;
- the role of OHS regulatory agencies in providing education, advice and assistance to dutyholders;
- other matters the review panel identifies as being important to health and safety that should be addressed in a model OHS Act.

The panel's first report was submitted on 31 October 2008 and the second report was released on 13 February 2009.

1.11 The National Review's comprehensive investigation of OHS laws resulted in the formulation of recommendations designed to form the basis of a model OHS law that would apply nationally. NSW is committed to the harmonisation of OHS laws across Australia on the basis of the recommendations of the National Review.<sup>19</sup> It follows that the future of Part 2A must depend on the place that a workplace deaths offence has in the model national law. If national model OHS laws are enacted, there would be no room for NSW to retain Part 2A if it forms no part of the national scheme.

1.12 The approach of the National Review to workplace deaths is found in its overall approach to non-compliance with duties of care in OHS legislation.<sup>20</sup> While recommending that offences for breaches of duties

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19. See "National safety laws will 'cost' NSW", *Sydney Morning Herald*, 19 May 2009, 5.

20. See National Review, pt 3.



under OHS legislation should continue to be absolute liability offences (qualified by reasonable practicability, due diligence or reasonable care),<sup>21</sup> the Review nevertheless favoured an approach of *graduated enforcement* of the duties under the legislation, penalties being related to non-compliance with the duty, the culpability of the offender and the level of risk (not merely the actual consequences of the breach).<sup>22</sup> The Review proposed three categories of offences,<sup>23</sup> of which Category 1 is relevant to workplace deaths. It would provide that “in a case of very high culpability (involving recklessness or gross negligence) in relation to non-compliance with a duty of care where there was a serious harm (fatality or serious injury) to any person or a risk of such harm, the highest of the penalties under the Act should apply, including imprisonment for up to five years”.<sup>24</sup> This recommendation met the concern of the Review that the creation of a specific workplace deaths offence would focus on the consequences of non-compliance with a duty of care rather than on the culpability of the offender, which would run the risk that “egregious, systemic failures to eliminate or control hazards and risks might not be adequately addressed”.<sup>25</sup> The Commission shares this concern.

1.13 If the approach of the National Review is adopted, there would not appear to be any need for a separate workplace deaths offence in OHS legislation, such as the offence in s 32A. The existence of recklessness and the fact of a fatality would result in non-compliance with the duty being a Category 1 offence. The maximum fine for such an offence would be \$3 million in the case of a corporation and \$600,000 in the case of an “officer” of the corporation. An “officer” of the corporation would also be liable for imprisonment of up to five years. Except for the maximum term of imprisonment, these penalties are significantly higher than those currently provided in Part 2A.

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21. National Review, Recommendation 52.

22. National Review, Recommendation 51.

23. National Review, Recommendation 57.

24. National Review, Recommendations 56, 59. Compare *Work Safety Act 2008* (ACT) s 34 (making the offence of failing to comply with a safety duty and recklessly causing serious harm punishable with a penalty of imprisonment up to 7 years, the longest custodial sentence in any Australian jurisdiction’s OHS legislation).

25. National Review, [11.31].

1.14 Moreover, the liability of an “officer” of the corporation would be wider in the model law than it is in the current Part 2A, where liability will only attach to directors and managers who personally engaged in reckless conduct that substantially contributed to the death in question.<sup>26</sup> The National Review has recommended that the model Act should “place a positive duty on an officer to exercise due diligence to ensure compliance by the entity of which they are an officer with the duties of care of that entity under the model Act”.<sup>27</sup> “Officer” would refer to any person who acts for, or influences or makes decisions for the management of the entity;<sup>28</sup> and the “standard of ‘due diligence’ is well known by those who would be sufficiently directing or influencing the decisions of the company as to be defined as ‘officers’”.<sup>29</sup>

## OUR APPROACH

1.15 In view of the factors identified in this chapter, we have approached this review on the following bases:

- Part 2A of the current law will be replaced by the scheme for the enforcement of OHS obligations recommended by the National Review when NSW adopts the model OHS legislation. This legislation will not provide for a separate workplace deaths offence.
- If for some reason national model legislation does not eventuate, a comprehensive review of Part 2A will need to await the availability of empirical evidence that deals with the operation of Part 2A in the context of OHS law. This evidence is not currently available. Independently of that evidence, Chapter 4 of this paper analyses the difficulties to which the current Part 2A gives rise. Chapters 2 and 3 of the paper lay the basis for that analysis by outlining the context and background of Part 2A.
- This leaves open the question whether or not NSW should facilitate the prosecution of workplace death offences in the general criminal law, either as manslaughter or as a new and specific offence of “industrial manslaughter”. Chapter 5 draws attention to the issues

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26. See para 4.23-4.30.

27. National Review, Recommendation 40.

28. National Review, Recommendation 41.

29. National Review, [8.29].

that this raises, while recognising that the resolution of those issues is beyond our terms of reference.

- To respond as fully as we can to our terms of reference, we provide an Appendix that surveys the law in other jurisdictions.

1.16 We record our appreciation to WorkCover NSW for the assistance it has given us in this review.

## A NOTE ON TERMINOLOGY

1.17 The terms “industrial manslaughter” and “corporate manslaughter” are frequently used in literature surrounding workplace deaths offences. Section 32A does not use either term. The offence is named in the *Occupational Health and Safety Act 2000* (NSW) as “reckless conduct causing death at workplace by person with OHS duties”.

1.18 “Industrial manslaughter” usually refers to manslaughter or deaths that occur in a workplace setting. We confine its use in this paper to the prosecution of workplace deaths under the general criminal law, rather than under OHS legislation. Some consider “corporate manslaughter” to be limited to workplace deaths caused by corporations,<sup>30</sup> while others define corporate manslaughter as broadly encompassing deaths caused by corporations in workplaces and any other context.<sup>31</sup> The former understanding of corporate manslaughter is used in this Paper, which is concerned solely with workplace deaths. The prominence of corporations’ involvement as employers in the workplace means that issues of corporate liability are central to any workplace deaths offence. Thus, corporate criminal liability for deaths must be considered in the context of examining the effectiveness of s 32A.

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30. J Clough, “Will the Punishment Fit the Crime? Corporate Manslaughter and the Problem of Sanctions” (2005) 8 *Flinders Journal of Law Reform* 113, 114.

31. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004), [12.3]-[12.4].



## **2 Workplace death offences in OHS law and general criminal law**

- Occupational health and safety offences
- Manslaughter

2.1 Prior to the 2005 amendments, deaths that occurred in the workplace could be prosecuted either under the *Occupational Health and Safety Act 2000* (NSW) or under the criminal law of manslaughter. This remains true after the 2005 amendments, which simply provide an additional basis on which a person with occupational health and safety (“OHS”) duties can, by reckless conduct causing death at a workplace, contravene those duties.

2.2 Finding an individual responsible for a workplace death is distinct from finding an entity, such as a corporation, responsible for a workplace death. Individuals may be found guilty of manslaughter or to have breached an occupational health and safety duty according to the common law tests for manslaughter and according to the statutory provisions respectively. Corporate liability for a workplace death, particularly under the general criminal law, is more difficult to establish.

## OCCUPATIONAL HEALTH AND SAFETY OFFENCES

2.3 Part 2 of the *Occupational Health and Safety Act 2000* (NSW) imposes duties relating to health, safety and welfare at work, including an absolute duty upon employers to eliminate or reduce workplace risks, including inherent risks, and those risks caused by external, uncontrollable, or unpredictable factors. Part 2 Division 1 expands on these “general duties” as they apply to employers and others. A breach of these general duties is an absolute liability offence, that is, one in which proof of the objective ingredients of the offence establishes guilt and the defendant is unable to invoke a defence of honest and reasonable mistake,<sup>1</sup> although the defendant may rely on a defence specified in the legislation.<sup>2</sup>

2.4 Either a corporation or an individual can be prosecuted under the provisions mentioned in the last paragraph. Because the duties are absolute, there is no need to find the individual or corporation possessed a particular mental state. Moreover, in the particular instance where a corporation contravenes the provisions of the Act, s 26 provides that individual directors or managers are also deemed to have contravened

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1. The Industrial Court has accepted this for many years in respect of offences under the present legislation and its predecessors: see *Cahill v State of New South Wales (Department of Community Services) (No 3)* [2008] NSWIRComm 123, [149]-[291] (Boland J, President).
  2. *Occupational Health and Safety Act 2000* (NSW) s 28. And see para 2.4.

the provision unless they are able to prove they were not in a position to influence the corporation's contravening conduct, or if they were in a relevant influential position, used all due diligence to prevent the corporation's contravention.

2.5 The offences are such that their objective gravity depends upon risk rather than actual consequences. The Act is both remedial and preventative. Offences occur where the duty to prevent "risk" is breached. Thus, where death or injury eventuates, there is no requirement to establish causation between the injury and the act but rather the risk and the act.<sup>3</sup> Causation is established, in a common sense way, between a person's failure to take care and the relevant workplace risk.<sup>4</sup>

## MANSLAUGHTER

2.6 A person who has caused death at a workplace may incur liability under the criminal law, in particular, the general law relating to manslaughter.

2.7 Manslaughter is defined in the *Crimes Act 1900* (NSW) to mean every punishable homicide other than murder.<sup>5</sup> Voluntary manslaughter occurs when the requisite mental state for murder is present but a partial defence such as provocation operates to downgrade the charge of murder to manslaughter. Involuntary manslaughter occurs when the requisite mental element to commit murder is not present.

2.8 There are two types of involuntary manslaughter at common law. The first is manslaughter by an unlawful and dangerous act carrying with it an appreciable serious risk of injury.<sup>6</sup> The second is manslaughter by criminal negligence where the act or omission of the accused involves

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3. *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 149. See also R McCallum, P Hall, A Hatcher and A Searle, *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & Other Matters: Report to WorkCover Authority of NSW* (2004) [25], citing *WorkCover Authority of New South Wales (Inspector Twynam-Perkins) v Maine Lighting Pty Ltd* (1995) 100 IR 248, 257; *WorkCover Authority of NSW (Inspector Ankucic) v McDonalds (Aust) Pty Ltd* (2000) 95 IR 383, 439-440; *WorkCover Authority of NSW (Inspector Amanda Templeton) v Pirelli Cables Australia Limited* [2002] NSWIRComm 371 [6]-[9].

4. *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 432.

5. *Crimes Act 1900* (NSW) s 18(1)(b).

6. *Wilson v The Queen* (1992) 174 CLR 313.

such falling short of the standard of care which a reasonable person would have exercised and where there was such a high risk of death or serious bodily injury that criminal punishment is merited.<sup>7</sup>

2.9 It has been suggested that manslaughter by criminal negligence is the most appropriate category for dealing with workplace deaths.<sup>8</sup> Its utility is, however, limited where liability is sought to be imposed on persons whose conduct does not substantially contribute to the death in question,<sup>9</sup> as may be the case where, for example, directors have omitted to correct workplace practices that are dangerous and breach OHS laws. The imposition of secondary liability on such persons would require their intentional assistance in, or encouragement of, the conduct that goes to make up the offence.<sup>10</sup> In such cases, it is only if liability can be imposed on the corporation in question that manslaughter is an effective vehicle for the imposition of criminal liability.<sup>11</sup>

2.10 The penalty for manslaughter is 25 years imprisonment.<sup>12</sup>

### The liability of corporations

2.11 A corporation is an entity that can only function through the actions of the individuals within the corporation. In order to find a corporation liable for a workplace death under the general law of manslaughter, the mental state and actions of natural persons within the corporation must be attributed to the corporate defendant. The most prominent methods of attribution in common law jurisdictions such as Canada, the United Kingdom and Australia are the identification doctrine, the aggregation approach, and the corporate fault model.

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7. *Nydam v The Queen* [1977] VR 430 and *R v Lavender* (2005) 222 CLR 67.

8. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004), [12.8] (evidence of Nicholas Cowdery QC, Director of Public Prosecutions).

9. This is the test of causation in this context: see *Royall v The Queen* (1991) 172 CLR 378. See also para 4.26.

10. *Giorgianni v The Queen* (1985) 156 CLR 473, especially 505 (Wilson, Deane and Dawson JJ).

11. See para 2.11-2.16.

12. *Crimes Act 1900* (NSW) s 24.



### *The identification doctrine*

2.12 The identification doctrine, or “controlling mind” approach, is the basis of corporate liability in New South Wales.<sup>13</sup> This approach was developed in the English case of *Tesco Supermarkets Ltd v Natrass*.<sup>14</sup> In order to find a corporation liable for a workplace death, the offending conduct (including negligence) must be attributable to a person in authority who is the “controlling mind”, “directing the mind and will”, of the corporation.

2.13 Safety decisions are not usually made by those in positions of authority high enough to be categorised as “controlling” the corporation. The Legislative Council Inquiry into Serious Injury and Death in the Workplace heard evidence to this effect:

Safety-related decisions are, by definition, made at the workplace level. They are not generally made in board rooms. The board might implement a general safety policy, and might reach particular views about appropriate levels of training, supervision and so on, but the day to day decisions which result in either safe workplaces or unsafe workplaces generally are made at lower, hands on levels, often not even at the plant level but ... by shop floor supervisors, foremen and so on. That is the level at which decisions are made.<sup>15</sup>

2.14 In any event, the doctrine oversimplifies the diverse structures of contemporary corporations, which do not have a clear hierarchical chain of command. Larger corporations, unlike medium-sized firms, possess fewer “controlling minds”; directors and higher-level managers are a smaller proportion of the total staff and more removed from daily operations. The identification doctrine is harder to apply to larger corporations.<sup>16</sup>

### *Aggregation approach*

2.15 It is possible that the conduct of several employees together constitutes gross negligence, even though their individual actions and mental state would be insufficient to make out an offence. The aggregation approach views the cumulative actions of these individuals

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13. *Hamilton v Whitehead* (1988) 166 CLR 121, 127 (affirming *Tesco Supermarkets Ltd v Natrass* [1972] AC 153).

14. *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

15. Parliament of New South Wales, General Purpose Standing Committee No. 1, *Serious Injury and Death in the Workplace* (2004), [12.21] (evidence of Peter Rozen).

16. NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [2.9]-[2.11].

as establishing corporate liability. This approach has been rejected by English and Australian jurisdictions in both criminal and civil cases.<sup>17</sup>

### *Corporate fault model*

2.16 The corporate fault model, adopted as a basis of liability in the *Criminal Code* (Cth), assumes that a corporation is a discrete entity capable of being liable for a workplace death through its organisational culture and practices.<sup>18</sup> The corporation's liability for any workplace death is not derivative of any individual person's liability. As evidence to the Legislative Council Inquiry into Serious Injury and Death in the Workplace suggested:

Corporations have policies, rules of behaviour, and ways of doing their activities that are sometimes written and sometimes unwritten and to make any sense of the enquiry "was the corporation grossly negligent" the inquiry needs to go beyond just looking at a particular individual and needs to examine a broader range of practices, policies and procedures within the corporation itself, to see whether they were grossly negligent."<sup>19</sup>

### The use of the criminal law

2.17 The case law on the prosecution of companies for manslaughter arising from workplace fatalities in Australia is sparse. In Victoria, a company has been found guilty of manslaughter by criminal negligence, and fined \$120,000, for inadequately maintaining facilities and failing to train employees.<sup>20</sup> The company in question was a small one with only two shareholders, so the search for a directing mind and will under the identification doctrine was not a prominent issue.<sup>21</sup> The defendant

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17. NSWLRC, Report 102, [2.18]. See also *R v A C Hatrick Chemicals Pty Ltd* (Unreported, Supreme Court of Victoria, Hampel J, 29 November 1995); *R v Australasian Films Ltd* (1921) 29 CLR 195.

18. *Criminal Code* (Cth) s 12.3(2)(c),(d).

19. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace*, [12.23] (evidence of Peter Rozen). For an extended discussion of organisational failures behind a particular major accident, see A Hopkins, *Lessons from Longford: The Esso Gas Plant Explosion* (CCH Australia Ltd, 2000).

20. *R v Denbo Pty Ltd* (Unreported, Supreme Court of Victoria, Teague J, 14 June 1994).

21. D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4th ed, 2006) 495.

company had also pleaded guilty to the charge of manslaughter by criminal negligence.<sup>22</sup>

2.18 In NSW in 2008, the operator of a small business and one of his employees pleaded guilty to, and were convicted of, manslaughter by criminal negligence following the death of a person who assisted in the running of the business.<sup>23</sup> The defendants had a close relationship with the victim or her family. The offences were at the lowest end of the scale for penalties for manslaughter: the owner of the business was sentenced to two years imprisonment, suspended on terms; while the charge against the employee was dismissed without recording a conviction. The offences occurred before s 32A of the *Occupational Health and Safety Act 2000* (NSW) was enacted. In sentencing the employee, Judge English remarked that, had the offences arisen after the enactment of s 32A, the offender would have been charged under that section, which attracted lesser penalties than that applicable to manslaughter.<sup>24</sup> In our view, there is nothing in the legislation or in the general law to support the view that workplace death offences *must* be tried under s 32A rather than under the *Crimes Act*.

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22. See S Chesterman, "The Corporate Veil, Crime and Punishment: The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch" (1994) 19 *Melbourne University Law Review* 1064.

23. *R v Smith* (Unreported, District Court of New South Wales, Criminal Jurisdiction, Newcastle, Judge English, 2008/5549, 6 November 2008); *R v Thirkell* (Unreported, District Court of New South Wales, Criminal Jurisdiction, Newcastle, Judge English, 2008/5550, 6 November 2008).

24. *R v Thirkell*, (Unreported, District Court of New South Wales, Criminal Jurisdiction, Newcastle, Judge English, 2008/5550, 6 November 2008) 6-7.



# 3

## The development of a workplace deaths offence

- NSW Legislative Council Standing Committee
- The McCallum report
- The 2004 bill
- Community consultation
- The new law is enacted

3.1 This Chapter provides a brief overview of the background to the enactment of Part 2A of the *Occupational Health and Safety Act 2000* (NSW).

## NSW LEGISLATIVE COUNCIL STANDING COMMITTEE

3.2 On 19 November 2003, the New South Wales Legislative Council referred the issue of serious injury and death in the workplace to the General Purpose Standing Committee No 1 (the “Standing Committee”) for inquiry.<sup>1</sup> The referral was made following concerns about the rate of workplace injury and death in New South Wales, particularly in the building and construction industry. The principal issue before the Standing Committee during the inquiry was that of criminal responsibility for workplace deaths.<sup>2</sup>

3.3 Many submissions expressed concern that prosecutions under the *Occupational Health and Safety Act 2000* (NSW) were ineffective in deterring workplace deaths,<sup>3</sup> particularly due to the low penalties being issued for contraventions of the Act.

3.4 The Standing Committee concluded that current manslaughter laws in NSW only captured small businesses, leaving large corporations immune. Corporate prosecutions were made difficult by corporate

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1. The immediate catalyst was possibly the workplace death of a 16 year-old labourer in Western Sydney. This incident provoked renewed interest in legislating for an offence of industrial manslaughter. The New South Wales Government responded by asserting that it was committed to enacting new provisions covering industrial manslaughter, but only as part of the *Occupational Health and Safety Act 2000* (NSW). The Communications, Electrical and Plumbing Union reportedly joined other unions demanding that the New South Wales Government speed the introduction of special industrial manslaughter legislation. See: “Prosecution Clash Over Teen's Work Death”, *Sydney Morning Herald*, 15 October 2003; B Norington, “Union Calls for Tougher Laws After Teen's Death”, *Sydney Morning Herald*, 16 October 2003; B Norington, “Anger Over Joel's Last Day at Work” *Sydney Morning Herald*, 17 October 2008. WorkCover successfully prosecuted the employer company and its director, and the director of the roofing company engaged to undertake the work.
  2. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004), xiii.
  3. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004), [12.1].

liability and the operation of the identification doctrine.<sup>4</sup> Unsuccessful prosecutions of individuals were attributed to the high level of negligence and the standard of proof (beyond reasonable doubt), required for establishing manslaughter by criminal negligence.

3.5 The Standing Committee recommended that, “as a matter of urgency, discrete and specific offences of ‘corporate manslaughter’ and ‘gross negligence by a corporation causing serious injury’ be enacted in the *Crimes Act 1900* (NSW)”.<sup>5</sup>

## THE McCALLUM REPORT

3.6 On 29 January 2004, WorkCover New South Wales sought advice from a panel of experts consisting of Professor Ron McCallum, Mr Peter Hall QC, Mr Adam Hatcher and Mr Adam Searle (“McCallum Report”).<sup>6</sup> The panel concluded that measures proactively to identify and eliminate risks are crucial. Despite Parliament increasing maximum penalties multiple times, the evidence showed “actual penalties as a proportion of maximum penalties have tended to decrease”<sup>7</sup> and “in the overwhelming majority of cases, the penalty imposed has been in the area of 10-20% of the maximum”. The panel recommended that this failure of general deterrence in sentencing warranted the creation of a separate offence with higher penalties for occupational health and safety violations resulting in deaths.<sup>8</sup> The regulatory burden of this additional offence would lead to greater vigilance in minimising workplace risks in general.<sup>9</sup>

## THE 2004 BILL

3.7 In October 2004, the New South Wales Minister for Industrial Relations, the Hon John Della Bosca, released the Occupational Health

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4. Parliament of New South Wales, General Purpose Standing Committee No 1 *Serious Injury and Death in the Workplace* (2004), [12.25]-[12.28].
  5. Parliament of New South Wales, General Purpose Standing Committee No 1, *Inquiry into Serious Injury and Death in the Workplace* (2004), [12.79] (Recommendation 26).
  6. R McCallum, P Hall, A Hatcher and A Searle, *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & Other Matters: Report to WorkCover Authority of NSW* (2004) (“McCallum Report”).
  7. McCallum Report, [14].
  8. McCallum Report, [20].
  9. McCallum Report, [27].

and Safety Legislation Amendment (Workplace Fatalities) Bill 2004 (NSW) (“2004 Bill”) for consultation. Modelled on the WorkCover Report, the Bill created a new offence, a breach of the Act causing death of a person. Existing monetary penalties were increased for workplace deaths and the Bill listed aggravating factors to assist courts in sentencing and assigning penalties. There was a possibility that the penalty of imprisonment be made available to courts.<sup>10</sup>

3.8 The draft 2004 Bill was criticised on a number of grounds including that it allowed unions to initiate prosecutions; the burden of proof was reversed with no presumption of innocence; and rights of appeal within the criminal justice system were restricted.<sup>11</sup>

3.9 The 2004 Bill was subsequently withdrawn.

## COMMUNITY CONSULTATION

3.10 In an extensive six-month consultation process following the 2004 Bill, business groups argued the reforms would reduce the economic growth of local business and foreign investment. Some also perceived that absolute liability general duties with limited defences unfairly punished employers whose culpability might be minimal.<sup>12</sup>

3.11 However, the union movement,<sup>13</sup> along with many major stakeholder organisations including Australian Business Limited, the

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10. K Haines, T John and M Park, *Workplace Death and Serious Injury: A Snapshot of Legislative Developments in Australia and Overseas*, Research Brief No 7 2004–05 (Parliament of Australia, Parliamentary Library, 2004).

11. See NSW Minerals Council, “Combined Employer Group Submission Concerning the Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004” (12 November 2004). See also R Evans, Australian Institute of Company Directors, “AICD Concerned NSW Workplace Fatalities Bill 2004 Will Become Law” (Press Release, 29 April 2005).

12. See New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 5 May 2005, 15652 (Hon John Della Bosca, Special Minister of State, Minister for Commerce, Minister for Industrial Relations, Minister for Ageing, Minister for Disability Services, Assistant Treasurer, and Vice-President of the Executive Council).

13. K Haines and T John, *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005*, Bills Digest No 131 2004–05 (Parliament of Australia, Parliamentary Library, 2005).



Australian Industry Group, and the NSW State Chamber of Commerce, supported the introduction of a new workplace deaths offence.<sup>14</sup>

## THE NEW LAW IS ENACTED

3.12 The Government released a revised Bill in May 2005, the Occupational Health and Safety (Workplace Deaths) Bill 2005 (NSW), which became law in June 2005. During the Second Reading Speech of the Bill in the New South Wales Legislative Council, the Minister for Industrial Relations, the Hon John Della Bosca, stated:

The revised bill is aimed at the very small minority of rogues whose indifference to health and safety in the workplace results in death. The bill represents the most effective means of targeting those who are most culpable and deserving of greater degrees of punishment.<sup>15</sup>

3.13 Along with the element of recklessness,<sup>16</sup> the revised Bill also added the “reasonable excuse” defence to the general defences available to any offence under the Act.<sup>17</sup> Unions were not permitted to initiate prosecutions.<sup>18</sup>

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14. WorkCover NSW, *Report on the Review of the Occupational Health and Safety Act 2000* (May 2006).

15. New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 8 June 2005, 16539 (Hon John Della Bosca, Special Minister of State, Minister for Commerce, Minister for Industrial Relations, Minister for Ageing, Minister for Disability Services, Assistant Treasurer, and Vice-President of the Executive Council).

16. See para 4.10-4.18.

17. See para 4.31.

18. New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 May 2005, 16340 (Hon Kerry Hickey, Minister for Mineral Resources).



## 4 Part 2A of the OHS Act

- The aims and objectives of part 2A
- The offence
- Recklessness
- Application to corporations
- Application to directors and managers
- Causation
- Defences
- Defences
- Penalties
- A summary offence
- Restrictions on the initiation of proceedings
- Victim impact statements
- Appeals

4.1 The *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* (NSW) amended two statutes. First, a new Part 2A was inserted into the *Occupational Health and Safety Act 2000* (NSW). This contained s 32A, an offence of “reckless conduct causing death at a workplace by person with OHS duties”, and s 32B, which details prosecutions for the s 32A offence. Secondly, the *Criminal Appeal Act 1912* (NSW) was amended to provide for appeals in connection with convictions under s 32A to the Court of Criminal Appeal.

4.2 In the absence of empirical data concerning the operation of the workplace deaths provisions in s 32A,<sup>1</sup> this chapter analyses the appropriateness of the provisions of Part 2A having regard to their internal consistency and clarity in the definition of the offence elements; the test used for establishing corporate criminal liability; the extent to which the offence encompasses all employers (corporate or otherwise), and to individuals such as directors and managers; external consistency between the offence and other offences of similar gravity in the law, particularly as measured by proportionality between culpability and penalty and consistency of procedural safeguards; and, the extent to which a regime is created that facilitates deterrence of workplace breaches, education about workplace safety, and cooperation between stakeholders in promoting workplace safety.

## THE AIMS AND OBJECTIVES OF PART 2A

4.3 We have already drawn attention to some of the difficulties in responding to the terms of reference drawn up by Parliament in 2005.<sup>2</sup> There is another. Our terms of reference require us to determine the extent to which the 2005 amendments are appropriate to achieve their aims and objectives.<sup>3</sup> Yet it is by no means clear what those aims and objectives are.

4.4 The general aims and objectives of the *Occupational Health and Safety Act 2000* (NSW) are listed in s 3 and largely centre on securing and promoting the health, safety and welfare of people at work<sup>4</sup> through ensuring risks at work are identified, assessed and eliminated or

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1. See para 1.6.

2. See para 1.4-1.5.

3. See para 1.3 (item (a)).

4. *Occupational Health and Safety Act 2000* (NSW) s 3(a).

controlled,<sup>5</sup> and through developing community awareness of workplace safety issues.<sup>6</sup>

4.5 The specific intended aims of the amendments were examined in Chapter 3, which demonstrates that the 2005 amendments had a difficult political history. The general concerns prompting the amendments were that there was insufficient responsibility placed on employers and corporations in the case of fatal incidents; a failure to prosecute breaches; and insufficient penalties being imposed resulting in poor general deterrence. This had led to various recommendations, including a proposal for an absolute liability workplace deaths offence. This formed the basis for a Bill in 2004. However, by the time of the Second Reading Speech for the 2005 Bill, the offence had a recklessness element, its purpose having been narrowed to punish merely “a very small minority”, “rogues” in the workplace who are “most culpable” for deaths, without placing undue burden on “the vast majority of employers”.<sup>7</sup> The extent to which the 2005 are intended to provide a general response to workplace deaths in cases where recklessness can be proved is, therefore, debatable.

4.6 If Part 2A is to be retained in OHS legislation, its aims and objectives should, in our view, be clearly articulated.

## THE OFFENCE

4.7 Section 32A (2) of Part 2A of the *Occupational Health and Safety Act 2000* (NSW) provides:

A person:

- (a) whose conduct causes the death of another person at any place of work, and
- (b) who owes a duty under Part 2 with respect to the health or safety of that person when engaging in that conduct, and
- (c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct,

is guilty of an offence.

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5. *Occupational Health and Safety Act 2000* (NSW) s 3(e).

6. *Occupational Health and Safety Act 2000* (NSW) s 3(f).

7. See para 3.12.

A reference to “a person” in s 32A encompasses an individual, a corporation and a body corporate or politic.<sup>8</sup>

4.8 A person can only be prosecuted under s 32A if they first owe a duty to the victim<sup>9</sup> under Part 2 of the *Occupational Health and Safety Act 2000* (NSW).<sup>10</sup> There are a wide range of parties who must ensure health, safety and welfare at work. These parties include employers;<sup>11</sup> self-employed persons;<sup>12</sup> controllers of work premises, plant or substances;<sup>13</sup> and designers, manufacturers and suppliers of plant and substances for use at work.<sup>14</sup> Employees themselves also have duties, including the duty to take reasonable care that their actions do not harm the health and safety of other employees, and the duty to co-operate with their employers’ health and safety compliance efforts.<sup>15</sup>

4.9 The conduct causing death can be an act or omission.<sup>16</sup> The conduct causes death where it “substantially contributes” to the death.<sup>17</sup> There has been no case law to define the meaning of the term “substantially contributes”. The location of a person’s death is irrelevant provided the death results from an injury sustained at a place of work.<sup>18</sup> However, the conduct causing death need not occur at a place of work. The Second Reading Speech states:

The death of a person under the new offence is taken to have been caused at a place of work even if the person is injured at work but dies elsewhere, such as a hospital. It also does not matter where the culpable conduct that led to the death at work took place. An employer can therefore be held accountable for conduct or decisions

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8. *Interpretation Act 1987* (NSW) s 21.

9. Generally an employee (*Occupational Health and Safety Act 2000* (NSW) s 8(1)), but including other people who are “exposed to risks to their health of safety arising from the conduct of the employer’s undertaking while they are at the employer’s place of work” (*Occupational Health and Safety Act 2000* (NSW) s 8(2)).

10. See para 2.3.

11. *Occupational Health and Safety Act 2000* (NSW) s 8.

12. *Occupational Health and Safety Act 2000* (NSW) s 9.

13. *Occupational Health and Safety Act 2000* (NSW) s 10.

14. *Occupational Health and Safety Act 2000* (NSW) s 11.

15. *Occupational Health and Safety Act 2000* (NSW) s 20.

16. *Occupational Health and Safety Act 2000* (NSW) s 32A(1).

17. *Occupational Health and Safety Act 2000* (NSW) s 32A(4)(a).

18. *Occupational Health and Safety Act 2000* (NSW) s 32A(4)(b).

taking place at corporate headquarters although the fatal injury to the worker took place at the worksite.<sup>19</sup>

## RECKLESSNESS

### The meaning of recklessness

4.10 A person is only guilty of the offence created by s 32A if the person was reckless as to the danger of death or serious injury to the victim.<sup>20</sup> The term “reckless” is not defined in the Act.<sup>21</sup>

4.11 Very generally, “recklessness” involves foresight of, or advertence to, the consequences of an act as either probable or possible and a willingness to take the risk of the occurrence of those consequences. Its application in criminal law can be controversial in a number of respects, at least two of which are relevant, and remain unresolved in their application, to the s 32A offence. The first is whether the awareness of the consequences must be that of the accused or of a reasonable person. The second is whether the awareness of the degree of risk is that of a probability or only a possibility, probability indicating a higher likelihood than possibility.<sup>22</sup>

4.12 As to the first, the Second Reading Speech to the Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005 in the New South Wales Legislative Council, states the following:

‘Recklessness’ has been defined as ‘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 of, the consequences’.<sup>23</sup>

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19. Parliament of New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 May 2005, 16340 (Hon Kerry Hickey, Minister for Mineral Resources).

20. *Occupational Health and Safety Act 2000* (NSW) s 32A(2)(c).

21. *Crimes Act 1900* (NSW) s 4A distinguishes “recklessness”, “intention” and “knowledge”, providing that where recklessness is an element of an offence under the Crimes Act, that element can also be proved by proof of intention or knowledge.

22. *Bouhey v The Queen* (1986) 161 CLR 10; *R v Solomon* [1980] 1 NSWLR 321; *R v Crabbe* (1985) 156 CLR 464, 469.

23. Parliament of New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 8 June 2005, 16539 (Hon John Della Bosca, Special Minister of State,

4.13 This passage, which is an aid to the interpretation of the legislation,<sup>24</sup> suggests that the accused must actually foresee the consequences in question. Recklessness sometimes has this connotation in other offences. Murder for example, requires one of three mental elements: intent to kill, intent to inflict grievous bodily harm, or reckless indifference to human life.<sup>25</sup> These are all subjective tests.<sup>26</sup> In particular, reckless indifference to human life is shown where the accused was aware that his or her conduct would probably result in death.<sup>27</sup>

4.14 On the other hand, the fault elements for manslaughter by criminal negligence or manslaughter by unlawful and dangerous act are based on objective tests. The Court of Criminal Appeal has recently said that “[m]anslaughter by criminal negligence is committed where an accused causes the death of a person by an act or omission which so far falls short of the standard of care required by a reasonable person, that it goes beyond a matter of civil wrong and amounts to a crime”.<sup>28</sup> And, manslaughter by unlawful and dangerous act requires that the person breach the criminal law in circumstances where a reasonable person would have realised that they were exposing someone to an “appreciable risk of serious injury”.<sup>29</sup>

4.15 As to the second factor, the Second Reading Speech requires foresight of “some probable or *possible harmful consequence*”. If the offence is analogous to manslaughter by criminal negligence, it would require proof that a reasonable person would have foreseen a *high risk of serious injury*.<sup>30</sup>

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Minister for Commerce, Minister for Industrial Relations, Minister for Ageing, Minister for Disability Services, Assistant Treasurer, and Vice-President of the Executive Council).

24. *Interpretation Act 1987* (NSW) s 34(2)(f).

25. *Crimes Act 1900* (NSW) s 18(1)(a)

26. *Parker v The Queen* (1963) 111 CLR 610, 632; *Pemble v The Queen* (1971) 124 CLR 107.

27. *R v Crabbe* (1985) 156 CLR 464, 469-70; *R v Solomon* [1980] 1 NSWLR 321.

28. *R v Cittandi* [2008] NSWCCA 256, [4], citing *Nydam v R* [1977] VR 430. See also *R v Lavender* (2005) 222 CLR 67, [60].

29. *Wilson v The Queen* (1992) 174 CLR 313, 340.

30. See, eg, *R v Lavender* (2005) 222 CLR 67.



## Is recklessness too high a threshold?

4.16 Section 32A departs from the general pattern of offences in occupational health and safety legislation by imposing liability for workplace deaths only where recklessness is established. This has the obvious effect of making it more difficult to establish liability in such cases. Thus, the expert panel gathered by WorkCover took issue with the need to prove recklessness and negligence in the ACT industrial manslaughter offence.<sup>31</sup> These were considered “excessively onerous” and too high a threshold to establish:

The requirements for a conviction are, compared to the current offences under the 2000 Act, excessively onerous such that we suspect that few, if any, convictions would be obtained under such provisions. This would in turn mean that they would be unlikely to have any real deterrent effect. We are not in favour of the creation of a statutory provision which is unlikely to be utilised to any significant degree and is really only tokenistic in nature.<sup>32</sup>

4.17 In contrast, employers’ groups described an absolute liability workplace death offence as an unnecessarily onerous punishment on all employers. The offence would have reversed the onus of proof so that accused parties would be deemed guilty.<sup>33</sup> These groups claimed that this would create a “no-fault culture” among employees, who would have no legislative impetus to look after their own safety. Recklessness or gross negligence was required to narrow the focus of the offence to target only those employers who were “rogues” or “cowboys” and deserved greater punishment. Employers were also concerned that the occupational health and safety body WorkCover placed too little focus on regulation through collaboration and education, relying excessively on prosecutions. Creating an absolute liability offence that relied merely on an outcome, death, rather than culpability would have exacerbated this perceived trend.<sup>34</sup>

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31. See Appendix para A.11-A.17.

32. R McCallum, P Hall, A Hatcher, and A Searle, *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & Other Matters*, Report to WorkCover Authority of NSW (2004), [48].

33. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004), [12.78] (evidence of Garry Brack).

34. M Goodsell, “Submission to Hon John Della Bosca MLC re: Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004” (2 February 2005) Australian Industry Group [«http://www.aigroup.com.au/](http://www.aigroup.com.au/)

## The Commission's view

4.18 In our view, if recklessness is to be retained as an element of a workplace deaths offence, its meaning should be clarified. However, there is a real question whether recklessness should be retained as an element of the offence. A basal inquiry needs to focus on what fault requirement would best serve the articulated objectives of a workplace deaths offence. In this respect, careful consideration should be given to the approach of the National Review, which has already been discussed.<sup>35</sup> In particular, consideration should be given to whether the offence should be one of absolute liability, but with an enforcement regime that takes account of the culpability of the offender in determining the seriousness of the offence and hence the penalty that ought, in the circumstances, to be imposed.

## APPLICATION TO CORPORATIONS

4.19 A corporation can only act through its employees. To establish the criminal liability of a corporation, the identification doctrine requires that a mental element be shown in senior employees who are the corporation's directing mind and will.<sup>36</sup> This is then attributed to the corporation to establish corporate liability. However, the board of directors and senior managers, the "directing mind and will" of corporations,<sup>37</sup> rarely make operational decisions about workplace health and safety. Large corporations often have diffused command structures,<sup>38</sup> so there is no clear stratum of employees with power over workplace safety.

4.20 The workplace deaths offence in s 32A of the *Occupational Health and Safety Act 2000* (NSW) does not make corporate liability easy to establish. The offence contains a mental element of recklessness but does not specify how a corporation can possess a mental state. The

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portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE\_CONTENT/Policy%2520and%2520Representation/Submissions/OHS/2005/ltr\_minister\_2\_2\_05\_final.pdf».

35. See para 1.12.

36. *Tesco Supermarkets Ltd v Natrass* [1972] AC 153. See para 2.12.

37. *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; *R v A C Hatrick Chemicals Pty Ltd* (Unreported, Supreme Court of Victoria, Hampel J, 29 November 1995); *Hamilton v Whitehead* (1988)166 CLR 121.

38. See para 2.13-2.16.

identification doctrine is the only method of determining corporate criminal liability. In contrast, an offence of absolute liability does not require proof of a mental element so the deficiencies of the identification doctrine, used to attribute liability to corporations, are bypassed.<sup>39</sup>

4.21 Commentators have argued that if an offence with a fault element is retained, there must be attendant provisions dealing with corporate criminal liability.<sup>40</sup> The National Review into Model Occupational Health and Safety Laws has now recommended that model occupational health and safety legislation should provide for “the imputation to a corporation of the conduct and state of mind of officers, employees and agents of the corporation acting within the scope of their actual or apparent authority”. A defence available to the corporation would be that it had taken all reasonable and practicable measures to prevent the occurrence of the offence.<sup>41</sup>

4.22 Clearly, if recklessness is to be retained as an element of the offence, consideration should be given to whether Part 2A should contain provisions explaining when liability for a workplace deaths offence will attach to a corporation, and, if so, what those provisions should be. As we explain in Chapter 5, we see merit in the approach to corporate criminal liability in the Commonwealth *Criminal Code*.<sup>42</sup> At the same time, we acknowledge that the incorporation of the Code’s provisions would seem out of place in OHS legislation.

## APPLICATION TO DIRECTORS AND MANAGERS

4.23 Where a corporation owes a duty under Part 2 of the *Occupational Health and Safety Act 2000* (NSW), any director or other person concerned in the management of the corporation is also deemed to owe the duty for the purposes of s 32A(2).<sup>43</sup> This overcomes the difficulty in manslaughter by criminal negligence prosecutions of proving that the individual

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39. See para 2.3.

40. R McCallum, P Hall, A Hatcher and A Searle, *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & Other Matters*, Report to WorkCover Authority of NSW (2004), [49].

41. R Stewart-Crompton, S Mayman and B Sherriff, *National Review into Model Occupational Health and Safety Laws: Second Report to the Workplace Relations Ministers’ Council* (January 2009), Recommendation 232 (“National Review”).

42. See para 5.7.

43. *Occupational Health and Safety Act 2000* (NSW) s 32A(5).

manager or director owed a personal, rather than corporate, duty of care to the victim.<sup>44</sup>

4.24 The expression “person concerned in the management of the corporation” has been subject to interpretation in other sections of OHS legislation.<sup>45</sup> In *Powercoal v Industrial Relations Commission of NSW*,<sup>46</sup> Chief Justice Spigelman was of the view that the term should not have a narrow or technical meaning and should not be read down to apply only to central management.<sup>47</sup> However, it would appear that some form of managerial or decision-making role is required. In *Newcastle Wallsend Coal Company Pty Limited v Inspector McMartin*,<sup>48</sup> which applied the *Powercoal* formulation, a distinction was drawn between the role and functions of the General and Statutory Mine Manager on the one hand, and a mine surveyor on the other. The former was considered a “person concerned in management” as he attended meetings where safety policy was formulated, implemented this policy, and authorised personnel appointments.<sup>49</sup> The latter was not considered a manager as he was a casual employee whose actions were subject to others, and who had no involvement in board meetings or company policy. Although the mine surveyor’s work was critical to the safety of the mining work, this did not elevate the employee into a managerial position.<sup>50</sup>

4.25 Although directors and managers may possess a deemed duty to ensure the safety of a worker under s 32A(5), they will only be individually liable for a workplace death if they personally engaged in reckless conduct, which substantially contributed to the death.<sup>51</sup> We point out below that the requirement that the conduct of the director or manager must cause the death in question, is likely to place significant

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44. N Foster, “Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing From Company Workplace Safety Breach” (2006) 9 *Flinders Journal of Law Reform* 79, 109.

45. See *Occupational Health and Safety Act 2000* (NSW) s 26., previously *Occupational Health and Safety Act 2000* (NSW) s 50.

46. *Powercoal v Industrial Relations Commission of NSW* (2005) 145 IR 327 (“*Powercoal*”).

47. *Powercoal* (2005) 145 IR 327, [116].

48. *Newcastle Wallsend Coal Company Pty Limited v Inspector McMartin* (2006) 159 IR 121 (“*Newcastle Wallsend*”).

49. *Newcastle Wallsend* (2006) 159 IR 121, [482]-[486].

50. *Newcastle Wallsend* (2006) 159 IR 121, [514]-[516].

51. *Occupational Health and Safety Act 2000* (NSW) s 32A(6).

limits on the liability of directors or managers.<sup>52</sup> The justification for such limitation is no doubt found in the potentially severe penalties likely to follow on a conviction for a workplace death. However, we see merit in the general provision in current OHS law that where a corporation has contravened a provision of the Act or regulations, a corporation's manager or director is deemed to have contravened the same provision unless they can satisfy a court that they were not in a position to influence the corporation in relation to the contravention or, if they were in such a position, used all due diligence to prevent the contravention.<sup>53</sup> This general provision is, in our view, much more consistent with the approach of the National Review, with which we agree, of imposing a positive duty on officers of the corporation to exercise due diligence to ensure compliance with the duties of care that the corporation has under OHS legislation.<sup>54</sup>

## CAUSATION

4.26 Section 32A(2)(a) requires that the defendant's conduct "causes the death of another person at any place of work". The person's conduct causes death if it substantially contributes to the death.<sup>55</sup> This is similar to the causation formulation under the common law of murder and manslaughter.<sup>56</sup> All other offences in the *Occupational Health and Safety Act 2000* (NSW) require causation to be proved between the conduct and the creation of a risk.<sup>57</sup>

4.27 Because directors and managers of large corporations are often separated from the day-to-day operations of a business, it will usually be difficult to attribute causation for a workplace death to a policy maker or a person in a position of control whose omissions or negligent practices (such as a failure to change a corporate culture of lax safety measures) are hidden within the corporation's complex organisational roles and

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52. See para 4.26-4.30.

53. *Occupational Health and Safety Act 2000* (NSW) s 26, whose application is specifically excluded in respect of the s 32A offence: see s 32A(6).

54. See para 1.14.

55. *Occupational Health and Safety Act 2000* (NSW) s 32A(4)(a).

56. *Royall v The Queen* (1991) 172 CLR 378; *R v Hallett* [1969] SASR 141; *R v Smith* [1959] 2 QB 35.

57. See para 2.5.

structures.<sup>58</sup> It is more likely that the most directly reckless person was not a senior officer. One commentator provides the example of the UK Southall train crash, where the primary cause of the crash and fatalities were a driver's negligence but senior managers had failed to ensure properly functioning automatic warning and protections systems were installed in the train.<sup>59</sup>

4.28 Moreover, there is a tendency in workplace safety regulation to focus on accidents and "events" rather than investigating background circumstances. A study of occupational health and safety prosecutions in Victoria found that prosecutions were event focused, 87% of the matters were in response to actual accidents rather than the general creation of risks, and the defence focused on details in order to portray events as atypical rather than contextualising accidents within histories of systematic culpability.<sup>60</sup> This serves further to limit the causal link to individual workers at the scene of an accident rather than directors or managers.

4.29 Part 2A thus provides no firm incentive for corporate officers to take a proactive approach to ensuring both their own and their corporation's compliance with occupational health and safety duties. Because there are no legislative prescriptions or guidelines for managerial practices accompanying s 32A, there is no impetus for managers to create an "integrated system approach in managing hazards or risks".<sup>61</sup> Rather, managers in corporate headquarters have incentives to distance themselves from the dangers facing workers.

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58. N Foster, "Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing From Company Workplace Safety Breach" (2006) 9 *Flinders Journal of Law Reform* 79, 90-91. See also the description of management failures in the Esso Longford Gas explosion: K Wheelwright, "Corporate Liability For Workplace Deaths And Injuries – Reflecting On Victoria's Laws In The Light Of The Esso Longford Explosion" (2002) 7 *Deakin Law Review* 321.

59. J Gobert, "The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen Years in the Making But Was It Worth the Wait?" (2008) 71 *Modern Law Review* 413, 418.

60. A Hall and R Johnston, "Exploring the Re-criminalising of OHS Breaches in the Context of Industrial Death" (2005) 8 *Flinders Journal of Law Reform* 57, 70-71.

61. R McCallum, P Hall, A Hatcher, and A Searle, *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & Other Matters*, Report to WorkCover Authority of NSW (2004), [165].

4.30 The National Review into model occupational health and safety laws has recommended that a proactive duty should be placed on officers, requiring them to exercise due diligence in their position of responsibility.<sup>62</sup> Where a company commits an offence, controlling officers are liable if they fail to do all that is reasonably necessary. In this instance, the officer is liable both for their own conduct and also the actions and policy of the corporation. We agree with this approach.

## DEFENCES

4.31 Under s 32A(3), it is a specific defence if the defendant proves there was a reasonable excuse for the conduct that caused the death. The general defences set out in s 28 of the *Occupational Health and Safety Act 2000* (NSW), which apply to any charge under the Act, are also available to those defending a workplace deaths charge. A person may prove that it was not reasonably practicable for the person to comply with the provision,<sup>63</sup> or the offence occurred due to causes over which the person had no control and it would have been impracticable for the person to prevent the cause happening.<sup>64</sup> While the “reasonable excuse” defence does appear in other OHS legislation,<sup>65</sup> it is questionable whether, in the context of s 32A, it ought to operate as an additional defence to those identified in s 28 of the Act.

## PENALTIES

4.32 Since the offence in Part 2A requires proof of a greater degree of culpability than other offences under OHS legislation, it is accompanied by a “significantly higher” penalty regime.<sup>66</sup> Section 32A(2) provides that the maximum penalty for a corporation guilty of a workplace death offence is 15,000 penalty units (currently \$1,650,000).<sup>67</sup> The maximum

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62. National Review, [8.31], Recommendation 40.

63. *Occupational Health and Safety Act 2000* (NSW) s 28(a).

64. *Occupational Health and Safety Act 2000* (NSW) s 28(b).

65. See *Occupational Health and Safety Act 1991* (Cth) sch 2 cl 18(2). And see Appendix, para A.6.

66. Parliament of New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 May 2005, 16340 (Hon Kerry Hickey, Minister for Mineral Resources).

67. The *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17 currently provides that the value of a penalty unit is \$110.

penalty for an individual is a five-year term of imprisonment or 1,500 penalty units (currently \$165,000). These penalties are at least double those prescribed for offences involving contraventions of the general duties under Part 2 Div 1 of the *Occupational Health and Safety Act 2000* (NSW). At the same time, the penalties under s 32A are considerably lower for individuals than under the criminal offence of manslaughter. Section 24 of the *Crimes Act 1900* (NSW) establishes a maximum penalty of 25 years imprisonment for the crime of manslaughter.

4.33 If the workplace deaths provision in Part 2A were to be redrawn as an absolute liability offence, the question would arise as to whether or not imprisonment was an appropriate response to the sentencing of an offender guilty of the offence. Currently, s 12(c) of the *Occupational Health and Safety Act 2000* (NSW) provides for imprisonment (up to a maximum of 2 years) only where an individual is guilty of an offence under Part 2 Division 1 of the legislation and is a previous offender. Submissions from State governments, the Australian Council of Trade Unions, and the Australian Industry Group to the National Review all support custodial sentences for the most serious occupational health and safety breaches, such as those involving reckless conduct.<sup>68</sup> Others have questioned the fairness and justice of a regulatory system that imposes custodial sentences in an absolute liability context.<sup>69</sup> The Australian Industry Group stated that employers could be deprived of rights they would have possessed under conventional criminal law prosecutions. There was a lack of confidence in the impartiality of WorkCover investigations and prosecutions, and in the soundness of relegating occupational health and safety matters to be heard by a specialist tribunal.<sup>70</sup>

4.34 The National Review itself favoured the imposition of sentences of imprisonment (to a maximum of 5 years) for breaches of duties of care under OHS legislation where there is a high level of culpability in the

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68. National Review, [12.2]-[12.5].

69. Parliament of New South Wales, General Purpose Standing Committee No. 1, *Serious Injury and Death in the Workplace* (2004), [12.73] (The Law Society of NSW).

70. M Goodsell, "Submission to Hon John Della Bosca MLC re: Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004" (2 February 2005) Australian Industry Group <[http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE\\_CONTENT/Policy%2520and%2520Representation/Submissions/OHS/2005/ltr\\_minister\\_2\\_2\\_05\\_final.pdf](http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Policy%2520and%2520Representation/Submissions/OHS/2005/ltr_minister_2_2_05_final.pdf)>.



offender.<sup>71</sup> We support the approach of the National Review in linking penalties imposed for non-compliance with duties under OHS legislation to the culpability of the offender and the level of risk. Where appropriate, such penalty should include imprisonment.

## A SUMMARY OFFENCE

4.35 Proceedings for an offence under Part 2A may only be dealt with summarily before the Industrial Relations Commission in Court Session, now known as the Industrial Court.<sup>72</sup> There are some benefits to this approach. Summary proceedings are usually faster and more efficient, and matters are heard before those experienced and expert in occupational health and safety.<sup>73</sup>

4.36 On the other hand, the National Review into OHS Laws has recommended that prosecutions for the most serious breaches of duties of care under OHS laws should be brought on indictment, with provision for indictable offences to be tried summarily where the Court decided that it is appropriate and the defendant agrees.<sup>74</sup> The deterrent value of workplace death offences would arguably be strengthened by making them indictable, “demonstrating that they are on a par with the most serious breaches of the general criminal law”.<sup>75</sup> While this would exclude the jurisdiction of the Industrial Court with its special expertise in occupational health and safety matters, it potentially carries the advantage of exposing proceedings to juries who would, for example, be able to inject community values into the determination of what is “reasonable excuse” for a person’s conduct under s 32A(3). Moreover, as

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71. National Review, [12.26], Recommendation 59.

72. *Occupational Health and Safety Act 2000* (NSW) s 32B(1); *Industrial Relations Act 1996* (NSW) s 151A.

73. See National Review, [11.3]-[11.6]; R McCallum, P Hall, A Hatcher, and A Searle, *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & Other Matters*, Report to WorkCover Authority of NSW (2004), [47], [127].

74. National Review, Recommendations 53, 54.

75. National Review, [11.4]. See also Recommendation 53.

the Law Society of NSW has pointed out, the Industrial Relations Commission has rarely exercised powers of imprisonment.<sup>76</sup>

4.37 It should be noted that making proceedings indictable would not preclude WorkCover, with its specialised expertise in workplace criminal law, from prosecuting occupational health and safety offences.

## RESTRICTIONS ON THE INITIATION OF PROCEEDINGS

4.38 Proceedings under s 32A may only be instituted with the written consent of a Minister of the Crown or by an inspector.<sup>77</sup> “Inspector” means a WorkCover Inspector or, in the case of mines, a Mines Inspector in the Department of Primary Industries.<sup>78</sup> However, any person who would otherwise be entitled to institute proceedings may make a written application to WorkCover for a statement of the reasons why proceedings have not been instituted.<sup>79</sup> This provision applies to unions who are authorised to prosecute other offences against the *Occupational Health and Safety Act 2000* (NSW) under s 106(1)(d).

4.39 In our view, if a workplace deaths offence were to be retained in OHS legislation in New South Wales, a person who is not satisfied with the reasons given by WorkCover for a failure to institute proceedings should at least be able to have those reasons reviewed by the DPP.<sup>80</sup>

## VICTIM IMPACT STATEMENTS

4.40 Part 3 Division 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) contains provisions on victim impact statements. These are voluntary<sup>81</sup> written statements<sup>82</sup> from either the victim, or in case of a

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76. See Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004) [12.73] (The Law Society of NSW).

77. *Occupational Health and Safety Act 2000* (NSW) s 32B(2). Section 4 of the *Occupational Health and Safety Act 2000* (NSW) defines “inspector as “an inspector appointed under Division 1 of Part 5”.

78. *Occupational Health and Safety Act 2000* (NSW) ss 47, 47A.

79. *Occupational Health and Safety Act 2000* (NSW) s 32B(3).

80. Compare R Stewart-Crompton, S Mayman and B Sherriff, *National Review into Model Occupational Health and Safety Laws: Second Report to the Workplace Relations Ministers’ Council* (January 2009), Recommendation 224.

81. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29.

fatality, family members of the victim, that are received and considered by certain courts<sup>83</sup> after the conviction of an offender, but before sentencing. The statements describe how the crime for which the offender has been convicted has impacted upon the victims with regard to physical or psychological health, coping skills, relationships, and financial situation. Its purpose is to involve the victim in the criminal justice system and if the convicted person disagrees with the contents of the statement, the victim or victim's representative may be cross-examined by the defence.

4.41 Section 27(2A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) currently limits the use of victim impact statements in the Industrial Relations Commission to Division 1 of Part 2 of the *Occupational Health and Safety Act 2000* (NSW) where there is a death or actual physical harm caused. Victim impact statements are not currently permitted for s 32A prosecutions.

4.42 Even where victim impact statements are receivable by courts in death cases, a court must not consider a victim impact statement, given by a family victim in a case where the victim has died, in connection with the determination of the punishment for the offence unless it considers it is appropriate to do so.<sup>84</sup> Trial judges who, at sentencing, "bear in mind" the victim impact statements made by friends and family of the deceased and who have regard to the particular effects of the death of the deceased upon the members of his family, at least run the risk of taking irrelevant material into account in sentencing.<sup>85</sup>

4.43 WorkCover's review of the *Occupational Health and Safety Act 2000* (NSW) in May 2006<sup>86</sup> and a further review by Justice Paul Stein in April 2007<sup>87</sup> proposed that Victim Impact Statements be available in matters involving a breach of s 32A of the *Occupational Health and Safety Act 2000* (NSW). Both reviews considered it an omission that this had not been

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82. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30.

83. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27.

84. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(4)(b).

85. See *Bollen v The Queen* (1998) 99 A Crim R 510, though the status of the decision may be in question: see *R v Tzanis* [2005] NSWCCA 274, [14]-[16].

86. WorkCover NSW, *Report on the Review of the Occupational Health and Safety Act 2000* (May 2006).

87. P Stein, *Inquiry Report* (WorkCover NSW, April 2007).

previously included.<sup>88</sup> Notwithstanding the limitations on the use of victim impact statements in death cases, we agree with these earlier reviews.

## APPEALS

4.44 The *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* (NSW) inserted s 5AG of the *Criminal Appeal Act 1912* (NSW) providing for appeals to the Court of Criminal Appeal. The appeals are available where a person has been convicted of an offence under s 32A of the *Occupational Health and Safety Act 2000* (NSW) and sentenced to any term of imprisonment by the Industrial Court of NSW. The person may appeal their conviction or their sentence.<sup>89</sup> However, they may only do so if they have first exercised any right they have to appeal to the Full Bench of the Industrial Court of NSW under the *Industrial Relations Act 1996* (NSW).<sup>90</sup>

4.45 Section 197A of the *Industrial Relations Act 1996* (NSW), which provides for an appeal against acquittal in proceedings for an offence against occupational health and safety legislation, does not apply to an offence under Part 2A of the *Occupational Health and Safety Act 2000* (NSW).<sup>91</sup> In our view, this provision should be retained. We agree with the National Review that there should not be an appeal against acquittal in proceedings for any offence against OHS legislation.<sup>92</sup>

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88. WorkCover NSW, *Report on the Review of the Occupational Health and Safety Act 2000* (May 2006) 61; P Stein, *Inquiry Report*, [13.44].

89. *Criminal Appeal Act 1912* (NSW) s 5AG(1).

90. *Criminal Appeal Act 1912* (NSW) s 5AG(2).

91. *Occupational Health and Safety Act 2000* (NSW) s 32B(4).

92. National Review, Recommendation 64.

# 5

## Prosecution under criminal law

- Should workplace deaths be prosecuted under general criminal law?
- What sentencing options should be available?

5.1 This chapter addresses two questions:

- the role that the general criminal law ought to have in the regulation of workplace deaths; and
- the sentencing options that ought to be available to a court in response to a workplace deaths offence.

## SHOULD WORKPLACE DEATHS BE PROSECUTED UNDER GENERAL CRIMINAL LAW?

5.2 Where a person is guilty of an offence under OHS legislation the person may also be guilty of an offence under the general criminal law. Thus, a person who is guilty of an offence under s 32A of the *Occupational Health and Safety Act 2000* (NSW) may also be guilty of manslaughter under the general criminal law.<sup>1</sup> In such a case, the person may be prosecuted either under the OHS legislation or under the criminal law.<sup>2</sup> There have been few prosecutions for manslaughter in circumstances of workplace deaths in Australia.<sup>3</sup> Convictions, however, are not uncommon overseas. Before the commencement of the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) in April 2008, twenty-four incidents involving workplace deaths in England and Wales had resulted in the successful prosecution for manslaughter of seven companies, seventeen directors, and nine business owners who were sole traders or partners.<sup>4</sup>

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1. See para 2.1.

2. See para 2.18, where we note our disagreement with the suggestion to the contrary of Judge English in *R v Thurkell* (Unreported, District Court of New South Wales, Criminal Jurisdiction, Newcastle, Judge English, 2008/5550, 6 November 2008), 6-7.

3. See para 2.17-2.18.

4. R Stewart-Crompton, B Sherriff and S Mayman, *National Review into Model Occupational Health and Safety Laws: First Report to the Workplace Relations Ministers' Council* (October 2008) [11.16] ("National Review") citing the Centre for Corporate Accountability, *Statistics on Convictions in England and Wales*, «<http://www.corporateaccountability.org/manslaughter/cases/convictions.htm>». See also N Foster, "Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing From Company Workplace Safety Breach" (2006) 9 *Flinders Journal of Law Reform* 79, 87-8.

## The differing views

5.3 Opinions differ on whether workplace death offences should be dealt with under the general criminal law rather than under OHS legislation, and “there is no academic or social consensus that greater use of the criminal law ... in the regulation of OHS is either necessary and/or worthwhile”.<sup>5</sup> On the one hand, while stakeholders generally view the criminal status of OHS offences as crucial for ensuring that workplace safety is taken seriously,<sup>6</sup> there is a common perception that placing corporate homicide within OHS legislation marginalises it by equating it to the mere infringement of regulatory legislation, such as the failure to fence dangerous machinery.<sup>7</sup> On the other hand, even if the criminal law is recognised as a useful tool in the scheme of regulation to punish the most culpable offenders,<sup>8</sup> if a workplace death is singled out for “special treatment” as a manslaughter prosecution, this risks undermining the criminality of regulatory OHS offences under OHS legislation.<sup>9</sup>

5.4 Workplace death offences are not, however, easily equated with other offences under OHS legislation. The Maxwell Report, which reviewed Victorian OHS laws, rejected locating a workplace deaths offence within OHS legislation because it was inconsistent with the nature of other OHS offences:

It follows from the nature of [OHS] offences that no question of manslaughter can arise under [OHS legislation]. Manslaughter is a concept known only to the criminal law, as are the offences of negligently or recklessly causing serious injury. ... [T]here can be a

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5. A Hall and R Johnston, “Exploring the Re-criminalising of OHS Breaches in the Context of Industrial Death” (2005) 8 *Flinders Journal of Law Reform* 57, 59. See also the mixed opinions in submissions to Parliament of New South Wales, General Purpose Standing Committee No 1, *Inquiry into Serious Injury and Death in the Workplace* (2004), [12.1]-[12.79].
  6. National Review, [10.5]-[10.7].
  7. D Brown, D Farrier, S Egger, L McNamara and A Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4th ed, 2006) 494 citing G Slapper, “Corporate Manslaughter: An Examination of the Determinants of Prosecutorial Policy” (1993) 2 *Social and Legal Studies* 423, 432.
  8. NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) Ch 2, and literature there cited.
  9. A Hall and R Johnston, “Exploring the Re-criminalising of OHS Breaches in the Context of Industrial Death”, 73-74. See also J Clough, “Will the Punishment Fit the Crime? Corporate Manslaughter and the Problem of Sanctions” (2005) 8 *Flinders Journal of Law Reform* 113, 116.

punishable breach of an OHS duty whether or not that breach had any direct consequence in the form of injury or death. No question of causation arises. Instead, the fact that somebody is injured or dies is relevant only –

(a) as evidence of the existence of the risk to health and safety which the dutyholder (*ex hypothesi*) failed to take adequate measures to prevent; and

(b) in providing some indication (perhaps) of the “severity of the hazard or risk” and, therefore, as a pointer to what the dutyholder ought reasonably to have done.<sup>10</sup>

5.5 Thus, the offence under s 32A of the *Occupational Health and Safety Act 2000* (NSW) is obviously not a typical OHS offence, especially as it requires proof of fault and the establishment of a causative link between the conduct relating to the OHS duty and the death in question.<sup>11</sup> In short, such an offence arguably looks as if it belongs in the general criminal law.

### Establishing corporate criminal liability

5.6 The effective prosecution of corporations for manslaughter under the criminal law assumes that corporate criminal liability can successfully be attributed to corporations. The common law identification doctrine is inadequate for this purpose. However, there are other models of corporate criminal liability.

5.7 Part 2.5 (Corporate Criminal Liability) of the *Criminal Code* (Cth) is the most prominent example.<sup>12</sup> The provisions of this Part operate to extend the basis of corporate liability beyond the identification doctrine<sup>13</sup> to include aggregation,<sup>14</sup> corporate fault and vicarious liability.<sup>15</sup> The provisions as a whole have been heavily cited by commentators in other jurisdictions as providing a “more holistic approach to corporate criminal

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10. C Maxwell, *Victorian Occupational Health and Safety Act Review* (Department of Treasury and Finance, 2004) (“Maxwell Report”), 355-6.

11. See para 4.10-4.18, 4.26-4.30.

12. An extensive discussion of corporate liability and the *Criminal Code* (Cth) provisions can be found in NSWLRC, Report 102, Ch 2. See also para 2.11-2.16.

13. *Criminal Code* (Cth) ss 12.3(2)(a) and (b).

14. *Criminal Code* (Cth) s 12.4(2).

15. *Criminal Code* (Cth) s 12.2.



liability".<sup>16</sup> The Commission has previously recommended that consideration should be given to the adoption of Part 2.5 into the criminal law of NSW. Part 2.5 would be particularly relevant to workplace deaths in so far as it allows proof of guilt to be founded on a corporate culture that directs, encourages or tolerates non-compliance with law.<sup>17</sup> This is a useful way of encouraging corporations to be proactive in determining their practices and attitudes towards ensuring workplace safety.

5.8 Vicarious liability is another possible means of establishing the criminal liability of corporations. Vicarious liability has not generally been applied in criminal law in Australia,<sup>18</sup> and its use in the United States has been criticised for unfairly importing a civil law mechanism into the criminal law with the result that:

holding a corporation liable for the unlawful acts of a subordinate employee in violation of company policy in effect imposes vicarious liability twice removed upon the corporate entity and stretches the concept of *mens rea* beyond an acceptable limit.<sup>19</sup>

5.9 Moreover, vicarious liability has not made prosecuting offences of specific intent any easier in the United States, although the courts have developed doctrines such as collective knowledge and wilful blindness to apply in corporate prosecutions.<sup>20</sup>

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16. J Gobert, "The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen Years in the Making But Was It Worth the Wait?" (2008) 71 *Modern Law Review* 413, 421.

17. *Criminal Code* (Cth) s 12.3(2)(c).

18. See R Grantham, "Attributing Responsibility to Corporate Entities: A Doctrinal Approach" (2001) 19 *Company and Securities Law Journal* 168, 171; N Foster, "Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing From Company Workplace Safety Breach", 93. Even if vicarious liability concepts should be introduced in more broad criminal legislation, their applicability to occupational health and safety schemes is uncertain. Foster, at 93, cites an English case *R v Nelson Group Services (Maintenance) Ltd* [1998] 4 All ER 331, which refused "to apply vicarious liability analysis to legislation which itself distinguishes between the liability of employers and employees".

19. S Vu, "Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent" (2004) 104 *Columbia Law Review* 459, 466 quoting S R Miller, "Corporate Criminal Liability: A Principle Extended to Its Limits," (1979) 38 *Federal Bar Journal* 49, 67. See also Appendix, para A.45-A.48.

20. See further S Vu, "Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent".

5.10 The Commonwealth *Criminal Code* utilises vicarious liability only to attribute the physical elements of an offence to a corporation.<sup>21</sup> As we have already noted, the National Review proposes to use vicarious liability as the general basis of attributing liability to corporations in the context of offences in OHS laws.<sup>22</sup>

### An industrial manslaughter offence

5.11 An alternative to prosecuting corporations for manslaughter in the case of workplace deaths is to develop a new offence of industrial manslaughter for incorporation in the *Crimes Act 1900* (NSW). In 2004, the General Purpose Standing Committee of the NSW Legislative Council recommended “that as a matter of urgency, discrete and specific offences of ‘corporate manslaughter’ and ‘gross negligence by a corporation causing serious injury’ be enacted in the *Crimes Act 1900* (NSW)”.<sup>23</sup> A few years earlier, however, a South Australian government review of occupational health and safety had concluded that there was no need for an industrial manslaughter provision because it was already adequately covered by the criminal law.<sup>24</sup> The Attorney General’s Department believed that creating another manslaughter offence in occupational health and safety legislation in addition to the *Criminal Law Consolidation Act* (SA) would result in inconsistency and duplication of the law.

5.12 An industrial manslaughter provision would have to give careful consideration to the basis of liability for workplace deaths, in particular how the element of fault is to be drawn (for example, is a defendant to be liable only where it has acted intentionally, recklessly or in a grossly negligent way). Unless liability were to be imposed on an absolute basis, the law would obviously have to address the issues of corporate criminal

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21. *Criminal Code* (Cth) s 12.2: “If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate”.

22. See para 4.21.

23. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004), [12.79] (Recommendation 26).

24. SafeWork SA, *Review of Workers Compensation and Occupational Health, Safety and Welfare Systems in South Australia* (2002), 111-12.

liability to which we have just referred.<sup>25</sup> These issues are beyond our current terms of reference.

## WHAT SENTENCING OPTIONS SHOULD BE AVAILABLE?

5.13 The debate about what sentencing options should be available in workplace death cases focuses on the sentencing of corporations. This is because, unlike an officer of the corporation, a corporation cannot be imprisoned. Generally, monetary penalties or fines are imposed on corporations by way of punishment.

5.14 Prioritising the sentencing principle of deterrence over retribution and denunciation enables better protection of health and safety at work.<sup>26</sup> The *Occupational Health and Safety (Workplace Deaths) Bill 2005* (NSW), which enacted the s 32A workplace deaths offence, was partly a response to the perceived lack of deterrence in the low level of penalties imposed on those responsible for industrial deaths.<sup>27</sup> Sentencing requires that “in principle it should not be cheaper to offend than to prevent the commission of an offence”.<sup>28</sup> But increasing maximum penalties does not result in a proportional increase in average penalties.<sup>29</sup> There are several reasons for this failure: the maximum penalty is limited to the very few most serious offences; corporations cannot be fined commensurate to their wealth under general sentencing principles; and monetary fines are associated with phenomena of “overspill”, where the corporation itself does not directly bear the punitive burden but discharges the fine through laying off employees, by reducing dividends to shareholders or by other measures.<sup>30</sup>

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25. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004), [12.79].

26. See further NSWLRC, Report 102, Ch 2.

27. See Chapter 3, and para 4.5.

28. National Review, [12.9] (quoting the UK Sentencing Panel, “Consultation Paper on Sentencing for Corporate Manslaughter” (2007), 17 (available at <http://www.sentencing-guidelines.gov.uk/docs>).

29. R McCallum, P Hall, A Hatcher and A Searle, *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & Other Matters*, Report to WorkCover Authority of NSW (2004), [14].

30. J Clough, “Will the Punishment Fit the Crime? Corporate Manslaughter and the Problem of Sanctions”, 121.

5.15 Numerous government reports,<sup>31</sup> the experience of comparative jurisdictions and legal theorists suggest the solution lies in making available a broader range of sentencing options in addition to fines. These should also be accompanied by sentencing guidelines. This is reflected in the *Occupational Health and Safety Act 2000* (NSW) which, in pt 7 div 2, empowers a court to make orders for restoration;<sup>32</sup> orders relating to the costs and expenses of investigation;<sup>33</sup> publicity orders;<sup>34</sup> and orders to undertake OHS projects.<sup>35</sup> Additionally, the legislation makes provision for guideline judgments.<sup>36</sup> The *Crimes Act 1900* (ACT)<sup>37</sup> provides examples of remedial orders and other measures in the more general criminal law context.<sup>38</sup>

5.16 In our Report 102, *Sentencing: Corporate Offenders*,<sup>39</sup> we recommended that, in sentencing a corporation, a court, instead of imposing a fine, should generally be able to make one or more orders that it considers will best achieve the objectives of sentencing.<sup>40</sup> These orders are:

- Orders for incapacitation – that is, orders aimed at preventing a corporation from carrying out certain commercial, trading or investment activities or taking advantage of certain rights (“disqualification”); and also orders aimed at winding up a corporation either directly or indirectly (“dissolution”).
- Correction orders – this category includes a range of orders, often referred to as “probation orders”, as well as another range of generally stricter orders that are referred to as “punitive

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31. See Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004), [12.98]-[12.99] Recommendations 28 and 29; National Review, [12.10], Recommendation 61.

32. *Occupational Health and Safety Act 2000* (NSW) s 113.

33. *Occupational Health and Safety Act 2000* (NSW) s 114.

34. *Occupational Health and Safety Act 2000* (NSW) s 115.

35. *Occupational Health and Safety Act 2000* (NSW) s 116.

36. *Occupational Health and Safety Act 2000* (NSW) pt 7 div 4.

37. *Crimes Act 1900* (ACT) s 49E(2). Compare *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 10, and the discussion in para A.35.

38. See further J Clough, “Will the Punishment Fit the Crime? Corporate Manslaughter and the Problem of Sanctions”, 120-130.

39. NSWLRC Report 102.

40. NSWLRC Report 102, Recommendation 4.

injunctions". Corporate probation orders aim to alter corporate behaviour, for example, by achieving some internal discipline in the corporation or reforming the organisation by means of external monitoring. Punitive injunctions involve a more severe form of intervention in the operation of the corporation. Such orders might involve specific internal controls, or require that particular activities cease or be undertaken.

- Community service orders – these orders may direct a corporation to undertake or contribute to work or projects that benefit the community or a part of the community in some way.
- Publicity orders – these are orders designed to inform specific people, groups of people or the community, of details relating to the offender, the offence and the penalty imposed for the offence.

5.17 In our view, if an industrial manslaughter defence is enacted in the *Crimes Act 1900* (NSW), consideration should also be given to including, in the *Crimes (Sentencing Procedure) Act 1999* (NSW) a range of sentencing options to be used in the case of corporate offenders. The detailed provisions relating to those options should accord with the recommendations made in our Report 102, *Sentencing: Corporate Offenders*.<sup>41</sup>

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41. NSWLRC Report 102, especially Chs 8-11, 13-14.



# Appendix: The law in other jurisdictions

- Australian jurisdictions
- Other jurisdictions

A.1 This appendix provides a brief overview of the occupational health and safety (“OHS”) provisions in all Australian jurisdictions and in New Zealand, with specific emphasis on provisions similar or relevant to the NSW workplace deaths provision. The ACT and NSW are the only jurisdictions with a specific workplace death offence. The appendix also considers corporate homicide provisions in the United Kingdom and Canada. The United States operates on different corporate liability principles from Australia and is presented as a point of comparison.

## AUSTRALIAN JURISDICTIONS

### Overview of general occupational health and safety provisions

A.2 In all Australian jurisdictions other than Queensland and NSW, the employer has a duty to take all reasonable and/or practical steps to provide a safe working environment, or to protect the health and safety at work of employees.<sup>1</sup> In NSW and Queensland, there is an absolute duty upon an employer to ensure the health, safety and welfare of employees.<sup>2</sup> The duty of care in NSW is qualified by reasonable practicability. In Queensland, the duty of care is qualified by the standard of reasonable precautions. Taking action that satisfies the “reasonableness” standard is sufficient defence to a breach of the duty.

A.3 The violation of these duties incurs criminal sanctions. The Commonwealth scheme contains both criminal and civil sanctions,<sup>3</sup> possibly because the extent to which the Crown is immune from criminal prosecution under the Act makes civil liability necessary.<sup>4</sup> The *Occupational Health and Safety Act 2000* (NSW) provides that the Act binds

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1. *Occupational Health and Safety Act 1991* (Cth) s 16; *Occupational Health, Safety and Welfare Act 1986* (SA) s 19; *Workplace Health and Safety Act 2004* (Vic) s 20; *Occupational Safety and Health Act* (WA) s 19.
  2. *Occupational Health and Safety Act 2000* (NSW) s 8; *Workplace Health and Safety Act 1995* (Qld) s 28
  3. *Occupational Health and Safety Act 1991* (Cth) sch 2 cl 18-19.
  4. Consider *Occupational Health and Safety Act 1991* (Cth) s 11, and sch 2 cl 18-19. And see R Stewart-Crompton, B Sherriff and S Mayman, *National Review into Model OHS Laws: First Report to the Workplace Relations Ministers’ Council* (October 2008) [10.2] (referring to Department of Education, Employment and Workplace Relations, *Submission No 57*, 7).



the Crown<sup>5</sup> and criminal proceedings may be brought against the Crown and agents of the Crown.<sup>6</sup>

A.4 The attribution of liability between corporations and officers of the corporation differs within Australian jurisdictions. In South Australia, the “responsible officer” must take reasonable steps to ensure that the body corporate complies with the obligations under the Act.<sup>7</sup> A “responsible officer” includes a director, executive or chief executive officer of the company. Where the Act is contravened, both the responsible officer and the corporation may be penalised.<sup>8</sup> In the other States and the Northern Territory, individuals involved in management are, in principle, liable to prosecution for breaches of safety obligations by the corporation. In contrast, in the Commonwealth and the ACT, directors and managers do not necessarily have the obligations of corporations.

## Workplace death equivalent provisions

### *Commonwealth*

A.5 Part 2, Division 1 of the *Occupational Health and Safety Act 1991* (Cth) places general duties of care upon employers,<sup>9</sup> employees,<sup>10</sup> manufacturers,<sup>11</sup> suppliers,<sup>12</sup> and persons erecting or installing plants in workplaces<sup>13</sup> to maintain workplace safety. Employers have a duty towards both employees<sup>14</sup> and certain third parties<sup>15</sup> to take all reasonably practicable steps to ensure persons near a workplace under the employer’s control are not exposed to risks created by the employer.

A.6 Clause 18 of Schedule 2 of the *Occupational Health and Safety Act 1991* (Cth) is titled “offences resulting in death or serious bodily harm”. The offence is committed if a person breaches an occupational health and

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5. *Occupational Health and Safety Act 2000* (NSW) s 118.

6. *Occupational Health and Safety Act 2000* (NSW) s 119.

7. *Occupational Health, Safety and Welfare Act* (SA) s 61

8. *Occupational Health, Safety and Welfare Act* (SA) ss 61(5), 58(1), 19(1).

9. *Occupational Health and Safety Act 1991* (Cth) ss 16-17.

10. *Occupational Health and Safety Act 1991* (Cth) s 21.

11. *Occupational Health and Safety Act 1991* (Cth) s 18.

12. *Occupational Health and Safety Act 1991* (Cth) s 19.

13. *Occupational Health and Safety Act 1991* (Cth) s 20.

14. *Occupational Health and Safety Act 1991* (Cth) s 16.

15. *Occupational Health and Safety Act 1991* (Cth) s 17.

safety duty,<sup>16</sup> the breach causes death or serious bodily harm,<sup>17</sup> and the person was negligent<sup>18</sup> or reckless in their conduct.<sup>19</sup> Providing a reasonable excuse for the conduct is a defence to the charge.<sup>20</sup>

A.7 The maximum penalty for the offence is \$495,000 for a Commonwealth authority and \$99,000 for a natural person.<sup>21</sup>

A.8 Part 2.5 of the *Criminal Code* (Cth) specifically addresses corporate criminal liability and overcomes the limitations of the identification doctrine, making the prosecution of corporate offenders involved in workplace deaths and other offences easier. The physical element of an offence can automatically be attributed to the corporation if its employee or agent was acting within the scope of employment.<sup>22</sup> For offences that require a fault element, the corporation must have “expressly, tacitly or impliedly authorised or permitted commission of the offence,”<sup>23</sup> which can occur through the actions of the corporation’s board of directors, high managerial agents, or through the corporation’s culture.<sup>24</sup>

A.9 The majority of workplace deaths will be cases of manslaughter by criminal negligence, falling under s 12.4. Under s 12.4(1), the test for negligence is found under s 5,<sup>25</sup> which is similar to the common law test.<sup>26</sup> In addition, s 12.4(2) provides that fault in corporate negligence can be

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16. *Occupational Health and Safety Act 1991* (Cth) sch 2 cl 18(1)(a).

17. *Occupational Health and Safety Act 1991* (Cth) sch 2 cl 18(1)(b).

18. *Occupational Health and Safety Act 1991* (Cth) sch 2 cl 18(1)(c)(i).

19. *Occupational Health and Safety Act 1991* (Cth) sch 2 cl 18(1)(c)(ii).

20. *Occupational Health and Safety Act 1991* (Cth) sch 2 cl 18(2).

21. *Occupational Health and Safety Act 1991* (Cth) sch 2 cl 21.

22. *Criminal Code* (Cth) s 12.2.

23. *Criminal Code* (Cth) s 12.3(1).

24. *Criminal Code* (Cth) s 12.3(2).

25. *Criminal Code* (Cth) s 5.5 (“A person is negligent with respect to a physical element of an offence if his or her conduct involves: (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence”).

26. See *Nydam v The Queen* [1977] VR 430; *R v Lavender* (2005) 222 CLR 67 (the act/omission of the accused involves such a great falling short of the standard of care which a reasonable person would have exercised and where there was such a high risk of death or serious bodily injury that criminal punishment is merited).

found by aggregating the conduct of the body corporate as a whole – the aggregation approach.<sup>27</sup>

A.10 Exercise of due diligence is a defence.<sup>28</sup> For offences of strict liability, a reasonable mistake of fact is also a defence.<sup>29</sup>

#### *Australian Capital Territory*

A.11 The *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) was passed in November 2003 and commenced operation on 1 March 2004. It amended the *Crimes Act 1900* (ACT) and is currently the only Australian jurisdiction to have enacted a specific offence termed “industrial manslaughter” which removes the need to identify a “controlling mind” of the corporation.<sup>30</sup> Under the ACT provision, employers and senior officers can be guilty of industrial manslaughter where negligence or recklessness is proved. The explanatory memorandum to the Bill states that the purpose of the Bill is to:

Provide improved protection of the health and safety of workers by establishing new offences of industrial manslaughter. The offences will apply where an employer or senior officer of an employer causes the death of a worker through recklessness or negligence.<sup>31</sup>

A.12 The amending legislation inserted two new manslaughter provisions into the *Crimes Act 1900* (ACT). Section 49C of the Act provides that an employer commits the offence of industrial manslaughter if a worker dies or is injured in the course of employment, where the employer’s conduct causes the death of the worker and the employer was either reckless or negligent as to their own conduct. Section 49D is identical except that it applies to senior officers. The Act includes “omission to act” in the definition of conduct for the purposes of s 49C and s 49D.

A.13 Under the ACT provision, an employer is defined as a person who engages the worker as a worker of the person or who is an agent of that person who engages a worker as his or her own worker.<sup>32</sup> The type of

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27. See para 2.15.

28. *Criminal Code* (Cth) ss 12.3(3), 12.5(1)(b).

29. *Criminal Code* (Cth) s 12.5(1)(a).

30. *Crimes Act 1900* (ACT) pt 2A.

31. Explanatory Memorandum, *Crimes (Industrial Manslaughter) Amendment Bill 2002* (ACT) 2.

32. *Crimes Act 1900* (ACT) s 49A.

senior officer who may be made liable is one “who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the entity”. This falls short of a requirement that the person be the “controlling mind” of the corporation for the corporation to be liable. The provision applies to the death of a worker, whether they are employed directly or under contracts for services, as an independent contractor, outworker or volunteer.<sup>33</sup> The provisions do not, however, extend to members of the public who are injured or killed due to industrial or corporate failings.

A.14 Under s 49C and s 49D, the maximum penalty attaching to a violation is 2,000 penalty units. This currently represents \$1,000,000 for corporations and \$200,000 for an individual.<sup>34</sup>

A.15 The criminal responsibility provisions in Part 2.5 of the *Criminal Code* (Cth) are replicated in the *Criminal Code 2002* (ACT) and the *Crimes Act 1900* (ACT). Therefore, as is the case in the Commonwealth legislation, s 50 of the *Criminal Code 2002* (ACT) provides that a physical element of an offence consisting of conduct is taken to be committed by a corporation if it is committed by an employee, agent or officer of the corporation acting within the scope of his or her employment or authority.

A.16 The fault element may be established by objective measures, or by looking to the organisational fault of the corporation, that is, “if the fault element exists on the part of a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of the offence”.<sup>35</sup> This includes proving a corporate culture existed within the corporation “that directed, encouraged, tolerated or led to non-compliance” with the Act under s 51(2)(c) or proving that the corporation failed to maintain a compliance-conducive culture under s 51(2)(d).

A.17 There have been no prosecutions under the ACT legislation to date.

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33. Parliament of New South Wales, General Purpose Standing Committee No 1, *Serious Injury and Death in the Workplace* (2004) [12.62] (evidence of Penny Shakespeare, Director, Office of Industrial Relations, ACT Chief Minister’s Department).

34. *Legislation Act 2001* (ACT) s 133(1)(b).

35. *Criminal Code 2002* (ACT) s 501.2.

### *Victoria*

A.18 The *Occupational Health and Safety Act 2004* (Vic) covers the workplace safety duties of corporations and their officers. There is no specific workplace deaths offence.

A.19 The Crimes (Workplace Deaths and Serious Injuries) Bill 2001 intended to create criminal offences of a corporation negligently killing or seriously injuring an employee in the course of the employee's work. The Bill was defeated in the Legislative Council following pressure from bodies such as the Australian Industry Group, Independent Contractors of Australia,<sup>36</sup> and the Victorian Employers Chamber of Commerce.<sup>37</sup>

A.20. This Bill was initiated in response to the Esso Longford gas explosion of 25 September 1998, where the deaths of two workers in the explosion of a natural gas processing plant was blamed on the employer's poor management, training and risk assessment procedures, which constituted multiple breaches of occupational health and safety legislation.<sup>38</sup>

A.21 The Bill outlined a particular negligence test for corporations. The test involved assessing a corporation's conduct against the actions expected of a "reasonable corporation". Under that test, if the corporation's conduct falls significantly below the standard expected of a "reasonable corporation", the corporation is liable to face criminal punishment. This was a direct adaptation of the objective common law reasonable person test for manslaughter by criminal negligence and involved treating the corporation as an entity in itself, rather than

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36. Independent Contractors of Australia, "The Victorian Crimes (Workplace Deaths and Serious Injuries) Bill 2001 Commonly Called the 'Corporate Manslaughter Legislation': A Discussion Paper" (11 March 2002) <<http://www.contractworld.com.au/reloaded/ica-manslaughter.php>>.

37. R Sarre and J Richards, "Responding to Culpable Corporate Behaviour – Current Developments in the Industrial Manslaughter Debate" (2005) 8 *Flinders Journal of Law Reform* 93, 103.

38. L Gooch, "Coroner blames Esso for Longford disaster", *The Age* (Melbourne), 15 November 2002 <<http://www.theage.com.au/articles/2002/11/15/1037080898920.html>>; K Wheelwright, "Corporate Liability For Workplace Deaths And Injuries – Reflecting On Victoria's Laws In The Light Of The Esso Longford Explosion" (2002) 7 *Deakin Law Review* 321, 324-6.

deconstructing it into the actions of individual employees.<sup>39</sup> Corporate negligence could be evidenced by various factors, largely modelled on s 12.4 of the *Criminal Code* (Cth).<sup>40</sup> The provisions also allowed aggregation of conduct and attribution of individual employee's actions through vicarious liability. The Bill mirrored ACT provisions governing liability of senior managers in corporations.

A.22 A variety of monetary and alternative penalties were permissible, including orders to publicise the crime, and orders to undertake community projects. There were also provisions borrowed from the *Trade Practices Act 1974* (Cth) for ensuring compliance.

### *Queensland*

A.23 Queensland does not have an offence targeted directly at corporate manslaughter. However, s 24 of the *Workplace Health and Safety Act 1995* (Qld) implements a graded penalty scheme for health and safety contraventions. This scheme takes into account the consequences of the violation<sup>41</sup> so that a breach causing bodily harm carries a penalty of 750 penalty units (currently \$56,250)<sup>42</sup> or one year of imprisonment, while a violation causing death or grievous bodily harm incurs up to 1000 penalty units (currently \$75,000) or two years imprisonment. Violations causing multiple deaths carry a maximum penalty of 2000 penalty units (currently \$150,000), or three years imprisonment.<sup>43</sup>

### *South Australia*

A.24 There is no corporate or industrial manslaughter offence in South Australia. However, s 59 of the *Occupational Health, Safety and Welfare Act 1986* (SA) provides that it is an offence (without lawful excuse), to endanger persons in the workplace by conduct that creates a risk of death or serious harm to another person in the workplace where the person knows or is recklessly indifferent to whether his or her conduct would create that risk. An individual, body corporate or an administrative unit in the state public service may commit the offence.

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39. K Wheelwright, "Corporate Liability For Workplace Deaths And Injuries – Reflecting On Victoria's Laws In The Light Of The Esso Longford Explosion" (2002) 7 *Deakin Law Review* 323, 342-3.

40. Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic) s 14B(6).

41. *Workplace Health and Safety Act 1995* (Qld) s 24.

42. *Penalties and Sentences Act 1992* (Qld) s 5 states the relevant penalty unit is currently \$75.

43. *Workplace Health and Safety Act 1995* (Qld) s 23-4.

A.25 Under s 59A, the conduct and state of mind of officers, employees or agents of a body corporate or an administrative unit acting within the scope of their actual, usual or ostensible authority are attributed to the body corporate or administrative unit. The maximum penalty for an individual is double the Division 1 fine or imprisonment for five years, and, for a corporation or administrative unit, double the Division 1 fine.<sup>44</sup> Thus, breaches of s 59 attract a maximum penalty of \$1,200,000 for corporations and \$400,000 or 5 years imprisonment for natural persons. Under s 59A(2), it is a defence to criminal prosecution that the alleged violation did not occur as a result of a failure to take all reasonable and practicable measures to prevent the same or similar violation.

#### *Western Australia*

A.26 Western Australia has no offence specifically targeting workplace deaths. However, the employer's general duty to provide and maintain a working environment in which employees are not exposed to hazards gives rise to penalties on contravention that differ depending on whether the contravention involves "gross negligence" and/or it results in death or serious harm.<sup>45</sup> Section 18A(2) of the *Occupational Safety and Health Act 1984* (WA) provides that a contravention occurs in circumstances of gross negligence if the offender knew that the contravention would be likely to cause death or serious harm to a person to whom the duty is owed and acted or failed to act in disregard of that likelihood, and the contravention does in fact cause death or serious harm to such a person.

#### *Tasmania*

A.27 Tasmania currently has no industrial manslaughter offence. However, there is a general obligation on an employer to ensure "so far as is reasonably practicable" that, while at work, employees are safe from injury and risks to health,<sup>46</sup> the breach of which carries a maximum penalty for a corporation of \$150,000 and for a natural person of \$50,000.

A.28 The Tasmanian Law Reform Institute has conducted a review of workplace and other deaths caused by corporations. The Institute made a

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44. A Division 1 fine is set by s 4(5) at \$600,000 for a body corporate or administrative unit, and \$200,000 for other persons.

45. *Occupational Safety and Health Act 1984* (WA) ss 19(1), 19A, 18A.

46. *Workplace Health and Safety Act 1995* (Tas) s 9.

number of recommendations<sup>47</sup> including that the Tasmanian Criminal Code should be amended to include special principles of criminal liability for organisations. These were to be based upon the corporate criminal liability provisions found in the Commonwealth Criminal Code.<sup>48</sup> The Institute also recommended a range of sentencing options including community service orders and probation orders, under which the offending organisation could be required to establish new policies. The recommendations have not been implemented.

## OTHER JURISDICTIONS

### New Zealand

A.29 Legislation in New Zealand imposes a general duty on employers to take all practicable steps to ensure the safety of employees.<sup>49</sup> Persons (including the Crown or a corporation)<sup>50</sup> commit an offence under the legislation where their action or inaction is contrary to the provisions of the legislation and the person knows that the action or failure to act is reasonably likely to cause “serious harm” (defined to include “death”).<sup>51</sup> On conviction, a person is liable to a maximum fine of \$500,000, imprisonment for two years or both.<sup>52</sup> Because the legislation imposes duties on corporations in respect of safety at work, the actions or inactions of persons “in effective charge of the worksite” are attributable to the corporation for the purposes of establishing criminal liability.<sup>53</sup> And where the corporation has failed to comply with the provisions of the legislation, criminal responsibility is also attributed to the corporation’s

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47. Tasmania Law Reform Institute, *Criminal Liability of Organizations*, Final Report No 9 (April 2007) 1-7.

48. See para 2.16.

49. *Health and Safety in Employment Act 1992* (NZ), s 6 (which also lists particular ways in which the general duty manifests itself).

50. See *Health and Safety in Employment Act 1992* (NZ), s 4; *Interpretation Act 1999* (NZ) s 29 (“person”).

51. *Health and Safety in Employment Act 1992* (NZ), s 49(1) and (2), and s 4.

52. *Health and Safety in Employment Act 1992* (NZ), s 49(3).

53. *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA). See, more generally, M Wilkinson, “Corporate Criminal Liability – The Move Towards Recognising Genuine Corporate Fault” (2003) 9 *Canterbury Law Review* 142; R Rose, “Corporate Criminal Liability: A Paradox of Hope” (2006) 14 *Waikato Law Review* 52.



“officers, directors, or agents who directed, authorised, assented to, acquiesced in, or participated in” that failure.<sup>54</sup>

## United Kingdom

A.30 The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) came into operation on 6 April 2008. It applies to “organisations”, a term that includes corporations, departments and other similar bodies, police forces and partnerships, and trade unions and employers’ associations that are employers.<sup>55</sup>

A.31 The organisation must owe the victim a relevant duty of care. These encompass the duties owed by the employer under the law of negligence to those occupying its premises, employees or persons working or performing services for the organisation, and any other people who are commercially connected to the organisation.<sup>56</sup>

A.32 The general presumption that the Crown is immune from criminal prosecution is abrogated. As stated in the Explanatory Note to the legislation:

The effect is, broadly, to include within the offence the sort of activities typically pursued by companies and other corporate bodies, whether performed by commercial organisations or by Crown or other public bodies.<sup>57</sup>

A.33 However, the offence does not apply to the government where it is engaged in “wider policy-making activities...such as setting regulatory standards and issuing guidance to public bodies on the exercise of their functions.”<sup>58</sup> Matters involving the prerogative of the Crown are not within the scope of the Act but “remain subject to other forms of public accountability.”<sup>59</sup>

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54. *Health and Safety in Employment Act 1992* (NZ), s 56.

55. *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 1(2).

56. *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 2.

57. Explanatory Notes, *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) ch 19, [23].

58. Explanatory Notes, *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) ch 19, [23].

59. Explanatory Notes, *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) ch 19, [23].

A.34 An organisation is guilty of an offence if the organisation causes the death of the victim, and the way in which its activities are organised or managed by senior management is a substantial cause of a person's death, and is a "gross breach" of the relevant duty of care owed to the deceased.<sup>60</sup> For the purposes of the provision, "senior management" means the persons who play significant roles in the "actual managing or organising" of the whole or a substantial part of those activities, or the decision-making regarding how such activities are to be managed. A breach of a duty of care by an organisation is a "gross" breach if it falls far below what can reasonably be expected of the organisation in the circumstances.<sup>61</sup> This standard of reasonableness has not yet been clarified by case law. An organisation that is found guilty of the offence of "corporate manslaughter" (termed "corporate homicide" in Scotland) is liable on conviction on indictment to a fine.<sup>62</sup> There is no stated maximum penalty in the legislation.

A.35 The court also has the power to make remedial orders. The court may require the organisation to remedy the breach, any consequence of the breach which the court deems to have been the cause of the death, or any deficiency regarding health and safety matters in the organisation's policies, systems or practices of which the relevant breach appears to be indicative. It is an offence to breach a remedial order by not taking the particular steps within the specified period.<sup>63</sup> The court also has the power to make a publicity order requiring the convicted organisation to publicise the conviction.<sup>64</sup>

#### *Criticism of the Act*

A.36 A number of criticisms have been made of the Act.<sup>65</sup> The first is that it fails adequately to address issues of corporate liability, especially short-sighted risk management deficiencies that result in workplace deaths. Secondly, requiring that persons in the organisation substantially contribute to the offence continues to contain identification doctrine

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60. *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) ss 1(1), 1(3).

61. *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 1(4)(b).

62. *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 1(6).

63. *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 9(5).

64. *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 10.

65. J Gobert, "The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen Years in the Making But Was It Worth the Wait?" (2008) 71 *Modern Law Review* 413.

difficulties. Thirdly, there are no provisions to find individual managers and executives criminally liable. Fourthly, the offence can only be prosecuted with the consent of the DPP and commentators have argued that this introduces unacceptable political interference.

## Canada

### *Occupational health and safety legislation*

A.37 Each jurisdiction in Canada has its own occupational health and safety legislation, all largely based upon the Robens model of co-operation, and internal responsibility and regulation.<sup>66</sup> The federal instrument is the Canada Labour Code Part II and applies to employees of the federal government and Crown agencies and corporations, and employees of companies that operate across provincial borders. Workplace inspectors investigate accidents and press charges, independent of any police involvement.

A.38 There are no particular provisions for workplace deaths. Section 148(1) of the Canada Labour Code Part II is a general offence of contravening a provision of the Part, which carries on indictment a maximum penalty of a \$1,000,000 fine and/or 2 years imprisonment,<sup>67</sup> or on summary conviction, a fine of not more than \$100,000.<sup>68</sup>

A.39 If a person's contravention results in death, or serious illness or injury, the maximum penalty is a \$1,000,000 fine and/or 2 years imprisonment on indictment.<sup>69</sup> The maximum penalty on summary conviction is a fine of \$1,000,000.<sup>70</sup> The same penalties apply if a person "wilfully contravenes" a provision, knowing that their contravention is likely to cause death, or serious injury or illness.<sup>71</sup>

A.40 Exercise of due care and diligence is a defence.<sup>72</sup>

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66. The "Robens model" refers to the approach to workplace health and safety developed in the English Committee on Safety and Health at Work, *Safety and Health at Work: Report of the Committee (1970-72)*.

67. *Canada Labour Code*, pt 2, s 148(1)(a).

68. *Canada Labour Code*, pt 2, s 148(1)(b).

69. *Canada Labour Code*, pt 2, s 148(2)(a).

70. *Canada Labour Code*, pt 2, s 148(2)(b).

71. *Canada Labour Code*, pt 2, s 148(3).

72. *Canada Labour Code*, pt 2, s 148(4).

*Criminal corporate liability for workplace deaths and negligence*

A.41 Entirely separate to occupational health and safety legislation, the Criminal Code contains legal duties regarding workplace safety. Section 217.1 of the Criminal Code, which came into force in 2003, provides that “every one who undertakes, or has authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.” Glasbeek observes that the section is notable in extending the duty of care owed to people outside the workforce. Moreover, the duty is no longer owed solely by managerial level employees.<sup>73</sup>

A.42 The Criminal Code also contains provisions expanding corporate liability beyond the common law identification doctrine.<sup>74</sup> Section 22.1 addresses offences of negligence, including workplace deaths, by organisations. “Organisations” is a term encompassing any group from corporations to trade unions, co-operatives and volunteer organisations.<sup>75</sup> An organisation is criminally liable if one of its representatives acts within the scope of their authority and is a party to the offence, or if the conduct of multiple representatives of the organisation, when taken together, constitutes behaviour consistent with being a party to the offence. The latter describes the aggregation principle: the actus reus and mens rea of an offence do not have to be derived from the same individual.

A.43 Section 22.1(b) states that organisational liability exists if the senior officer responsible for the organisation’s activities pertaining to the offence departs from the standard of care reasonably expected. Section 22.2 provides for attribution of liability to organisations for offences involving a fault element.<sup>76</sup> The Canadian provisions overcome many of

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73. H Glasbeek, “More Criminalisation in Canada: More of the Same?” (2005) 8 *Flinders Journal of Law Reform* 39, 43.

74. D Goetz, Law and Government Division, “Legislative Summaries LS-457E, Bill C-45: An act to amend the Criminal Code (Criminal liability of organisations)” (3 July 2003) Parliament of Canada <[http://www.parl.gc.ca/common/bills\\_ls.asp?lang=E&ls=c45&source=library\\_prb&Parl=37&Ses=2](http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c45&source=library_prb&Parl=37&Ses=2)>.

75. H Glasbeek, “More Criminalisation in Canada: More of the Same?” (2005) 8 *Flinders Journal of Law Reform* 39, 43.

76. Criminal Code s 22.2: In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior

the difficulties in prosecuting a company, as there is no longer a need to find its directing mind.

A.44 Enforcement and applicability of the Criminal Code is different from occupational health and safety legislation. The police and crown attorneys enforce the provisions, which apply to all organisations and individuals. The provisions have been used only against two individuals, where charges were later dropped.<sup>77</sup>

## The United States

A.45 An interesting point of comparison is the United States. The majority of jurisdictions in the United States, including federal, utilise the civil law concept of “respondeat superior” or “vicarious liability” from the tort of negligence to attribute the actions and mental state of an individual or multiple employees, officers, servants or agents to the corporation.<sup>78</sup> This formulation has also been adopted by statute in several states.<sup>79</sup> The test is quite broad and requires that an employee has acted with the requisite mens rea of an offence, and that these actions were within the scope of their employment. The latter is ascertained by considering whether the activity was for the company’s benefit. The mental state may also be found through a process of aggregating the knowledge of a group of agents if their individual mental state is insufficient to make out an offence.<sup>80</sup>

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officers (a) acting within the scope of their authority, is a party to the offence; (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

77. “Bill C-45 Overview” (1 December 2008) Canadian Centre for Occupational Health and Safety <<http://www.ccohs.ca/oshanswers/legisl/billc45.html>>.
78. *New York Central & Hudson River Railroad v United States*, 212 US 481 (1909); *United States v A & P Trucking Co*, 358 US 121, 126 (1958); *Egan v United States Union Electric Co of Missouri* 137 F 2d 369, 379 (8th Cir, 1943).
79. See C Green, “Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law” (2008) 87 *Nebraska Law Review* 197, 199, 204.
80. See S Vu, “Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent” (2004) 104 *Columbia Law Review* 459, 473-475.

A.46 Criticism of this approach, which has not been accepted in Australia, is that the illegal activities of a “rogue” employee are far too easily used to find a company criminally liable, without requiring any indication of culpability on the company’s part.<sup>81</sup> The expansion of criminal law through a tortious concept of vicarious liability has also been described as merging criminal and civil law and erasing the moral authority of the criminal law.<sup>82</sup> Some commentators have noted the inconsistency of vicarious liability’s applicability in various areas of law. For example, while the Supreme Court has limited the use of vicarious liability for punitive damages in the civil law,<sup>83</sup> the doctrine continues to be used to hold corporations responsible for the actions of their employees in criminal proceedings.<sup>84</sup>

A.47 The Federal Criminal Code in particular is broad and affords prosecutors and the Government discretionary power that results in corporations having very little power in court proceedings. Within the particular context of corporate fraud in the post-Enron environment, corporations such as KPMG have been placed in positions where they are compelled to waive many procedural rights including attorney-client privilege.<sup>85</sup> Federal sentences for corporate criminal offences are also very high. Average prison terms for individuals involved in corporate crime nearly doubled between 1980 and 1995.<sup>86</sup>

A.48 There has been a move away from this liberal approach to finding corporate guilt. The American Law Institute in s 2.07 of the Model Penal Code adopts an approach akin to the identification doctrine, requiring action from a managerial agent. Sentencing and prosecutorial guidelines from the Department of Justice temper the broad reach of corporate

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81. For further discussion, see R Sarre and J Richards, “Responding to Culpable Corporate Behaviour – Current Developments in the Industrial Manslaughter Debate” (2005) 8 *Flinders Journal of Law Reform* 93, 108; Department of Justice, “Canada Corporate Criminal Liability Discussion Paper” (2002) <<http://www.justice.gc.ca/eng/dept-min/pub/jhr-jdp/dp-dt/iss-ques.html>>.

82. S Beale, “Is Corporate Criminal Liability Unique?” (2007) 44 *American Criminal Law Review* 1503, 1511.

83. *Kolstad v American Dental Association*, 527 US 526 (1999).

84. A Weissmann and D Newman, “Rethinking Criminal Corporate Liability” (2007) 82 *Indiana Law Journal* 411, 413.

85. S Beale, “Is Corporate Criminal Liability Unique?” (2007) 44 *American Criminal Law Review* 1503, 1524.

86. S Beale, 1519.

criminal liability by providing that corporate fault issues are considered when determining penalties. Considerations include whether the corporation was actually at fault for their agent's actions, and whether there was a corporate culture or history conducive to offending conduct.<sup>87</sup>

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87. S Beale, 1516-1517.





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