BOOK REVIEW

New South Wales Law Reform Commission, Workplace Deaths, Report No 122 (2009)

I INTRODUCTION

In Australia in 2006–07, there were 295 traumatic work-related fatalities.[1] The issue of how the law should respond to deaths at work is one that has challenged policy makers and academics for many years. Should deaths at work be dealt with under the general criminal law, for example by prosecution for gross negligence manslaughter, or should there be specific offences in state and territory occupational health and safety ('OHS') legislation to supplement the existing offences for breach of the general duty on employers and others to provide a safe and healthy working environment?

The approach taken by the New South Wales legislature in 2005 was to introduce a new pt 2A to the *Occupational Health and Safety Act 2000* (NSW) ('*OHS Act 2000* (NSW)'). The new offence provided for substantial penalties where the conduct of a person who has a health and safety duty (the 'duty holder') 'causes the death of another person at any place of work', in circumstances where the duty holder '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'.[2] After the new provisions had been operating for three years, the NSW Law Reform Commission was required by the OHS Act to examine whether the new provisions were achieving their aims and objectives, including whether they were contributing to the reduction of workplace deaths in NSW. The result of that examination is Report 122, released in July 2009.

Two major factors have impacted upon the capacity of the Commission to fulfil its remit under the Act. The first is that no prosecutions have occurred under the new provisions, making it impossible to assess their practical operation. The second factor is that, around the same time as the Commission commenced its review, the Workplace Relations Ministers' Council commissioned a National Review of Occupational Health and Safety Laws, with a view to harmonising OHS laws and gaining agreement for the passage of identical OHS legislation in all Australian jurisdictions. A model Work Health and Safety Bill has now been drafted, with a view to having all jurisdictions repeal their existing acts and pass the Model Bill

1 Productivity Commission, 'Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety' (Research Report, April 2010) 48.

2 *OHS Act 2000* (NSW) s 32A. 'Conduct' includes omissions. Persons with health and safety duties include employers, self-employed persons, and directors and managers of corporations: see at s 32A(5); New South Wales Law Reform Commission, *Workplace Deaths*, Report No 122 (2009) [4.8] ('*Report 122*').

by 1 January 2012.[3] New South Wales has agreed to adopt the model legislation and repeal the *OHS Act 2000* (NSW).

In the light of these developments, what can the Report 122 add to our understanding of the problem of workplace deaths and the need for specific provisions addressing the problem? The Report will have limited if any capacity to affect NSW OHS laws in the light of the proposed introduction of uniform state laws, but the report's content nevertheless raises some important issues around workplace safety at a time of significant change in the way the area is regulated. These issues include the difficulties in drafting effective offences to address workplace deaths, the problems surrounding penalties and sentencing and the capacity of the general criminal law to respond to the problem.

II BACKGROUND

A *Occupational Health and Safety Offences*

The report's contribution needs to be considered against the background to OHS regulation in Australia, which is principally a matter for the states and territories.[4] Under all state and territory legislation, it is a criminal offence for an employer to fail to provide, so far as is reasonably practicable, a working environment that is safe and without risks to health.[5] The offence contains no fault element and is generally described as a strict or absolute liability offence.[6] This facilitates the prosecution of corporations. Most importantly for this discussion, the offence is inchoate and is not dependent on the death or serious injury of a worker; a safety failure is the nub of the offence. In practice, however, most if not all prosecutions involve a worker's death or a serious injury, not least because a safety failure is likely to be easier to prove beyond reasonable doubt when there is a victim.

1 *Manslaughter Offences*

It is also possible in very limited circumstances to prosecute an individual who causes a workplace death under the criminal law, usually for gross negligence

3 At the time of writing, the Western Australian government has not agreed to adopt the model act: see Troy Buswell, Minister for Commerce, 'Western Australia Maintains its Opposition to Full OHS Harmonisation' (Press Release, 11 December 2009).

4 There is also Commonwealth legislation designed to regulate health and safety of Commonwealth employees.

5 In some Acts, the prosecution must prove reasonable practicability: see, eg, *Occupational Health and Safety Act 2004* (Vic) s 21; in others, reasonable practicability is cast as a defence with the burden of proving that it was not reasonably practicable to ensure a safe workplace resting on the employer on the balance of probabilities: see, eg, *OHS Act 2000* (NSW) s 8(1).

6 The High Court of Australia has observed however that the duty to provide a safe workplace cannot remain absolute if the defence is invoked — an employer need not do everything to guarantee safety, but only what is reasonable practicable: *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531, 555 [19] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).

manslaughter. Very few such charges have been brought in Australia,[7] although in Britain there are numerous examples of successful manslaughter prosecutions in the workplace context. Proving manslaughter against all but the smallest corporations has proven extremely difficult due to the need to show that both the physical and fault elements of the crime are satisfied by an individual who is sufficiently senior in the corporation so as to be its 'directing mind and will'.[8]

2 *The Development of Specific 'Workplace Death' Provisions*

From the mid 1990s, Canada and the United Kingdom and most state and territory governments in Australia considered whether new offences were desirable to facilitate the prosecution of corporations and their officers in cases where negligent corporate operations lead to workplace deaths. An issue in the debate was whether these new offences should be part of the general criminal law or, alternatively, should supplement existing OHS offences.

A number of incidents prompted these reviews, including the Longford gas explosion in Victoria, the Westray mine explosion in Canada, and the P&O ferry sinking and the Southall rail crash in Britain.[9] The legal proceedings that followed these disasters showed the substantial difficulties of getting convictions against the corporations involved or their officers of negligent manslaughter, and the OHS prosecutions resulted in what many regarded as inadequate penalties.

As the Commission's report outlines, different jurisdictions responded in different ways.[10] The Australian Capital Territory was the only jurisdiction to amend the general criminal law by introducing industrial manslaughter laws into its Crimes Act and adopting the expansive principles of corporate liability set out in pt 2.5 of the Commonwealth Criminal Code.[11] All other jurisdictions except Tasmania made changes to their OHS legislation, for example by providing for increased penalties where a safety failure resulted in a worker's death, or, like NSW, introducing a new offence that focused on the culpability of the accused.[12]

7 *Report 122*, above n 2, [2.17].

8 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, discussed in ibid [2.11]–[2.13].

9 See generally James Gobert and Maurice Punch, *Rethinking Corporate Crime* (LexisNexis Butterworths, 2003) 31–4; Andy Hall, Richard Johnstone and Alexa Ridgway, 'Reflection On Reforms: Developing Criminal Accountability for Industrial Deaths' (Working Paper 33, National Research Centre for Occupational Health and Safety Regulation, The Australian National University, April 2004).

10 *Report 122*, above n 2, Appendix: The Law in Other Jurisdictions.

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

12 For a summary of the culpability offences in OHS Acts, see Australian Government, 'National Review into Model Occupational Health and Safety Laws: First Report to the Workplace Relations Ministers' Council' (Report, October 2008) [11.13] Table 7.

III THE NATIONAL REVIEW, THE MODEL BILL AND WORKPLACE DEATHS

The harmonisation process means that there will be a uniform approach to OHS offences from 1 January 2012. The National Review recommended that the Model Act should differentiate between offences by reference to levels of culpability and risk, a recommendation that was accepted by the Workplace Relations Ministers' Council. The Model Work Health and Safety Bill 2010 (the 'Model Bill') provides for three categories of offence for persons who have a health and safety duty under the Model Act.[13]

The most serious offence, Category 1, requires proof that the duty holder 'engages in conduct that, without reasonable excuse, exposes an individual to whom that duty is owed to a risk of death or serious injury or illness' and 'the person is reckless as to the risk of death or serious injury or illness to that individual'.[14] Proof that the conduct was engaged in without reasonable excuse rests with the prosecution.[15] A Category 2 offence requires proof that the person failed to comply with their health and safety duty and the failure 'exposes an individual to a risk of death or serious injury or illness'.[16] The Category 3 offence is the typical absolute liability offence seen in current state and territory Acts, being a failure to comply with a health and safety duty.[17]

The NSW Commission considered that the drafting of the offences in the Model Bill with respect to differing levels of culpability and risk was desirable, and that the Model Bill 'effectively removes the need for a separate workplace deaths offence in OHS law'.[18]

IV SOME ISSUES

A *Prosecution, Culpability and Deterrence*

The Commission's report raises some issues about the NSW provisions that are worth reflecting upon with respect to the Model Bill. The first is the extent to which the more serious offences (Category 1) are likely to be prosecuted. Section 32A of the NSW Act commenced operation on 15 June 2005. From that date until 31 March 2008, 111 workplace fatalities were reported to and investigated

13 These include: persons conducting a business or undertaking, including one that designs, manufactures or supplies plant, substances or structures to be used at a workplace; officers of corporations and other organisations; and workers: see Model Work Health and Safety Bill 2010 pt 2.

14 Ibid cl 31.

15 Ibid cl 31(2).

16 Ibid cl 32.

17 Ibid cl 33.

18 *Report 122*, above n 2, ix.

by the NSW WorkCover Authority.[19] Only a few prosecutions arising from these incidents had been reported at the time the report was written, and of these none were taken under s 32A.

There may be a number of reasons for this, as the Commission acknowledged, in particular the difficulty of proving recklessness. By comparison, it is less problematic to prove a general breach of the Act — that an employer failed to do all that was reasonably practicable to ensure safety — as no fault element needs to be established. There is a real question as to whether recklessness is too high a threshold to establish in the workplace context,[20] as it requires proof of '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'.[21] Gross negligence is arguably a more appropriate standard against which to measure an employer's breach, as it measures the employer's conduct against an objective standard — what a reasonable employer would have done in all the circumstances. If there is a gross departure from that standard, without reasonable excuse, and that departure exposes a worker to a risk of death or serious injury (in the case of the Model Bill offence), then the offence merits criminal punishment. It is interesting to note that the National Review recommended that the culpability for a Category 1 offence be either recklessness or gross negligence, but this recommendation was rejected by the Workplace Relations Ministers' Council.

The legislature in NSW envisaged that s 32A would be used rarely, and only against so-called 'rogue operators'.[22] Similar comments have been made about the Category 1 offence in the Model Bill.[23] Nevertheless, it is vital from a deterrence perspective, that the toughest provisions are used in appropriate cases. Provisions that are rarely if ever used become merely tokenistic and lose their deterrent effect.[24] Importantly too, the pursuit of the most serious penalties against reckless employers has an important symbolic value in reflecting the community standard that workers are entitled to the highest protection of their health and safety at work.

Another reason impacting upon the number of prosecutions is the approach to compliance used by WorkCover NSW and indeed all OHS agencies. These agencies operate using an 'enforcement pyramid' model, which focuses most efforts on advice, education and persuasion, with prosecutions generally being taken as a last resort.[25] This approach is generally regarded as promoting good relationships between business and the regulator, and resulting in the best

19 Ibid [1.8] citing Letter from Mr Job Backwell, Chief Executive Officer, WorkCover, to the NSW Law Reform Commission, 6 May 2008.

20 *Report 122*, above n 2, [4.16].

21 Ibid [4.11].

22 Ibid [3.12].

23 Barry Sherriff and Michael Tooma, *Understanding the Model Work Health and Safety Act* (CCH Australia, 2010) 109.

24 Ron McCallum et al, 'Advice in Relation to Workplace Death, Occupational Health and Safety Legislation and Other Matters' (Report to the WorkCover Authority of NSW, June 2004) [48], cited in *Report 122*, above n 2, [4.16].

25 See generally Productivity Commission, above n 1, ch 5.

compliance outcomes, but this is contested.[26] The compliance and enforcement provisions of the Model Act have much in common with the current system, although the Model Bill does provide a mechanism for the review of decisions by the regulator not to prosecute an offence.[27]

B *Prosecuting Corporations*

The Commission observed that the NSW Act fails to make clear how the recklessness of a corporation is to be established for the purposes of s 32A, given that the Act does not include any principles of attribution. In the absence of such principles, the common law identification test will apply, requiring the prosecution to show reckless conduct by someone who is the 'directing mind and will' of the corporation, as well as showing that the conduct of that individual caused the death of the worker.[28] Such a test may catch small corporations, where the managing director is likely to be involved in the day to day business and therefore may be closely involved in a serious incident where a worker is killed.[29] In larger corporations, a person who is senior enough to be a directing mind of a corporation (a chief executive officer or managing director, for example) is unlikely to be directly involved in the circumstances of a death on the shopfloor. Such a chief executive or managing director might have failed to ensure risk assessments were carried out, or failed to allocate funds for OHS programs, but it is unclear whether such omissions could be successfully argued as substantially contributing to the death of a worker, particularly where there are a number of other general and specific contributing factors to the incident leading to the death. The broader tests for establishing corporate fault found in pt 2.5 of the Commonwealth Criminal Code have not been adopted in NSW.

The application of the Category 1 offence in the Model Bill to corporations poses similar problems with respect to the fault element of recklessness, as the only rules of attribution in the Model Bill are for the conduct of the corporation and not its state of mind.[30] The National Review recommended that the state of mind of employees, agents or officers be attributed to the corporation but this does not appear in the Model Bill, probably because such a rule would make corporations vicariously liable for the reckless acts of any employee or agent within the scope of their employment, and would therefore be of unacceptably wide operation. It appears therefore that the identification test will apply to determine corporate liability for a Category 1 offence in all jurisdictions except the Australian Capital

26 See, eg, Gobert and Punch, above n 9, 292–301.

27 Model Health and Safety Bill 2010 pt 12.

28 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

29 See, eg, *R v Denbo Pty Ltd* (Unreported, Supreme Court of Victoria, Teague J, 14 June 1994) and the discussion in *Report 122*, above n 2, ch 2.

30 Clause 244 provides that 'any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate': Model Health and Safety Bill 2010 cl 244.

Territory, where the principles in the Commonwealth Criminal Code have been adopted.

Prosecutions for a Category 2 offence will be more straightforward. There is no fault element and the conduct of the duty holder does not have to *cause* the death or serious injury, but only expose the individual to a risk of death or serious injury.

C *Penalties and Sentencing*

The penalties for recklessly-caused workplace deaths do not match those for manslaughter at common law. Under the NSW Act, a breach of s 32A by an individual carries a maximum penalty of five years imprisonment, or a fine of $165 000. Manslaughter carries a maximum of 25 years imprisonment in NSW; similar penalties apply in the other jurisdictions. The Model Bill provides for higher penalties than the NSW Act, with the maximum penalties for a Category 1 offence being five years imprisonment for an individual, $300 000 fine, or both.[31] It is not clear why the penalties for a recklessly-caused death in the workplace should be less than those for a similar death outside the workplace.

The penalty for a corporation is a fine under the NSW Act, and the Model Bill also provides for fines for corporations.[32] Fines for corporations are inherently problematic. In the case of larger corporations, they may represent such a tiny proportion of the wealth of the corporation that they have no punitive or deterrent effect at all. A 2008 study by the Centre for Corporate Accountability found that, in the case of health and safety prosecutions in the United Kingdom involving a death, most large corporations received fines that represented less than one per cent of gross profits.[33] The Model Bill takes a more creative approach to corporate penalties by providing for a wide range of penalties other than fines, including enforceable undertakings, community service and publicity orders. These have the capacity to bolster compliance in ways that fines may not.

The other serious problem is with sentencing. As the NSW Commission has noted, high maximum penalties do not necessarily translate into substantial penalties in actual cases.[34] Writing in 2004, the McCallum Committee noted that in the overwhelming majority of cases, average penalties in NSW were in the area of 10–20 per cent of the maximum available. Similar trends can be seen in other states.[35] The National Review did not analyse the trend in penalties actually

31 The maximum fine increases to $600 000 where the individual is an officer of a body (corporation or a public sector body): ibid cl 31.

32 The maximum penalty for a corporation under the NSW provision is $1.65 million and under the Model Bill it is $3 million: *OHS Act 2000* (NSW) s 32A; Model Health and Safety Bill 2010 cl 31(1).

33 Centre for Corporate Accountability, 'The Relationship Between the Levels of Fines Imposed upon Companies Convicted of Health and Safety Offences Resulting from Deaths, and the Turnover and Gross Profits of These Companies' (Research Report, March 2008) 5.

34 *Report 122*, above n 2, [3.3]–[3.6].

35 For a study of Victorian sentencing, see Richard Johnstone, *Occupational Health and Safety, Courts and Crime; The Legal Construction of Occupational Health and Safety Offences in Victoria* (Federation Press, 2003).

imposed for OHS breaches, but recommended heavy penalties for serious offences 'to allow the Courts to impose more meaningful penalties, where that is appropriate'.[36] The National Review did recommend that consistent sentencing guidelines tailored to OHS prosecutions be developed for use in all jurisdictions and that victim impact statements be permitted when hearing a prosecution for breach of duty with respect to Category 1 and 2 offences, as a way of achieving more appropriate penalties.[37]

V CONCLUSIONS

Although the Commission could not fulfil its remit under the *OHS Act 2000* (NSW), Report 122 nevertheless makes an important contribution to the area. First, it provides a useful summary of how different jurisdictions have addressed the call for specific workplace deaths provisions, and the approach taken in overseas jurisdictions including Britain, the United States and Canada. The different approaches taken in different jurisdictions demonstrate the complexities that beset the legal responses to workplace deaths. The report also shows that the issues have been controversial and politically difficult, with business interests sometimes rallying to defeat government initiatives to extend the liability of corporations and their officers.[38]

The Commission's report also highlights some issues that will be important as Australia moves towards uniform state and territory OHS legislation. These include: how corporate liability is to be established under the new Category 1 offence; the place of prosecutions for the more serious offences in the overall compliance approach of regulators; and how sentencing guidelines and victim impact statements might be used to guide the courts in their sentencing of OHS offenders. It is to be hoped also that the Workplace Relations Ministers' Council will follow the lead of the NSW legislature in ensuring that the new harmonised laws are reviewed comprehensively on a regular basis.

One issue that remains open is the use of the general criminal law to prosecute workplace deaths in appropriate circumstances. The Model Bill does not preclude the use of state and territory criminal laws to address workplace deaths, although in an environment of uniform laws it would seem unlikely that the states will follow the lead of the ACT and introduce dedicated industrial manslaughter offences.

Now that Australia is operating under a national system of workplace laws, it is sensible to move towards uniform OHS laws. These will no doubt reduce complexities for business. It is hoped that they will also provide real protection for Australian workers from death, injury and disease at work.

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36 Australian Government, above n 12, 100, Recommendation 55.

37 Ibid 126, Recommendation 67.

38 *Report 122*, above n 2, Appendix A.19.