



Précis Paper

Criminal Sanctions for Workplace Accidents

Associate Professor Neil Foster discusses one of his primary research interests – the *Work Health and Safety Act 2011* (NSW).

Discussion Includes

- The *Work Health and Safety Act 2011* (NSW) makes it a criminal offence for failing to take reasonable precautions to ensure the safety of workers
- Section 7 of the Act contains a broad definition of "worker", essentially constituting any person that "carries out work in any capacity for a person conducting a business or undertaking"
- While officers are excluded from the definition of a "person conducting a business or undertaking", section 27 of the Act imposes obligations to exercise due diligence to ensure the company complies with its statutory obligations
- Insurance is likely to be void where it indemnifies officers and directors against criminal penalties

Précis Paper

Criminal Sanctions for Workplace Accidents

1. In this edition of BenchTV, Mr Neil Foster (Associate Professor) and Mr Ian Benson (Solicitor) present on criminal sanctions in the context of workplace health and safety laws.

Work Health and Safety Act 2011 (NSW)

2. The *Work Health and Safety Act 2011* (NSW) ("the Act") provides a framework to ensure the health and safety of workers and workplaces. Under the Act, a person conducting a business or undertaking that fails to take reasonable precautions to see to the safety of their employees may be liable for a criminal offence. Uniform legislation has been enacted by seven jurisdictions in Australia, not including Western Australia and Victoria, in an attempt to harmonise workplace laws between States.
3. Section 19 of the Act sets out the primary duty of care, imposing obligations on "persons conducting a business or undertaking" to implement procedures and consultations that are reasonably practicable to ensure the health and safety of their workers. Section 7 defines "worker" as essentially constituting any person that "carries out work in any capacity for a person conducting a business or undertaking", including volunteers and contractors. Whilst there is an important distinction between employees and contractors in cases of common law liability, there is no distinction for the purposes of this Act.
4. Section 5(4) explicitly excludes officers as a "person conducting a business or undertaking". However, s 27 imposes obligations on officers to exercise due diligence to ensure the company complies with its obligations. The liability is not strict and is conditioned on a failure to exercise due diligence. In s 26 of the previous *Occupational Health and Safety Act 2000* (NSW), where a company was found to have committed an offence, the officer was deemed to have committed the same offence, however there was a defence of due diligence. Whilst the substance of the obligation remains the same between the two Acts, the main distinction lies in the onus of proof. The current Act provides that the onus of proving a failure to exercise due diligence lies with WorkCover.

Due Diligence

5. Section 27(5) sets out the requirements of due diligence where a failure to exercise due diligence in any of the outlined areas may constitute an offence. Interestingly, the legislation does not require the company to have breached the Act for an officer to be prosecuted. An officer may be prosecuted notwithstanding a lack of incidences of injury, so long as they have failed to take reasonable steps to ensure the health and safety of the workers. The

focus of the legislation is on risk and compliance and Mr Foster notes that one of the key drivers of corporate compliance with work health and safety laws is the possibility of personal liability for company officers. Section 27(5) is set out below:

SECTION 27:

Duty of officers

- (1) *If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.*

...

- (5) *In this section,*

"due diligence" includes taking reasonable steps:

- (a) *to acquire and keep up-to-date knowledge of work health and safety matters, and*
- (b) *to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and*
- (c) *to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, and*
- (d) *to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and*
- (e) *to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act, and*

For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include:

- *reporting notifiable incidents,*
- *consulting with workers,*
- *ensuring compliance with notices issued under this Act,*
- *ensuring the provision of training and instruction to workers about work health and safety,*
- *ensuring that health and safety representatives receive their entitlements to training.*

- (f) *to verify the provision and use of the resources and processes referred to in paragraphs (c)-(e).*

Insurance

6. Insurance is available to directors and officers against civil penalties and damages. However, Mr Foster suggests that a contract to indemnify someone from a criminal penalty is void and directors/officers cannot take out insurance for a criminal fine, particularly where there is an element of personal fault in the crime - although Mr Foster acknowledges that this is not explicitly set out in the Act. The reality is that insurance companies are offering policies covering criminal penalties. Whilst Mr Foster believes that if this type of policy was challenged in court, it would be deemed unenforceable, the problem is that neither party to the contract would have an interest in challenging it - the director/officer benefits from their liability being covered, and it is in the interests of insurance companies to continue selling policies. Mr Foster suggests that regulators should consider applying pressure to amend the legislation to explicitly invalidate such insurance policies. Alternatively, a test case may be brought to seek declaration or injunction from an appropriate court to clarify that this type of insurance is unenforceable.
7. The penalty structure under the Act can be found in ss 31-33.

SECTION 31:

Reckless conduct - Category 1

- (1) *A person commits a Category 1 offence if:*
 - (a) *the person has a health and safety duty, and*
 - (b) *the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and*
 - (c) *the person is reckless as to the risk to an individual of death or serious injury or illness...*
- (2) *The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.*

Mr Foster notes that "reckless" is defined as meaning something more than mere carelessness and is a subjective test imputed with the interpretation found in criminal law.

The penalty under s 31 is subdivided into 3 categories:

Maximum penalty:

- (a) in the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking) - \$300,000 or 5 years imprisonment or both, or

- (b) in the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking - \$600,000 or 5 years imprisonment or both, or
 - (c) in the case of an offence committed by a body corporate - \$3,000,000.
- 8. Section 32 is a category 2 offence and simply requires there be a duty, a failure to comply with that duty and that such failure exposes an individual to a risk of death or serious injury or illness. It is a less onerous offence to prove as there is no need to show recklessness or no reasonable excuse. The penalties are set out below:

Maximum penalty:

- (a) in the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)-\$150,000, or
 - (b) in the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking-\$300,000, or
 - (c) in the case of an offence committed by a body corporate-\$1,500,000.
- 9. Under s 33 a person commits a category 3 offence if they have the requisite duty and fail to comply with that duty. The maximum penalties are shown below:

Maximum penalty:

- (a) in the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)-\$50,000, or
 - (b) in the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking-\$100,000, or
 - (c) in the case of an offence committed by a body corporate-\$500,000.

Jurisdictional Requirements

- 10. The previous *Occupational Health and Safety Act 2000* (NSW) operated under the purview of the Industrial Relations Court of NSW. Under the current *Work Health and Safety Act 2011* (NSW), the default forum is the District Court with residual jurisdiction in the Industrial Relations Court for category 3 offences. Additionally, Mr Foster notes that Category 1 offences are indictable and may be taken to the Supreme Court, however there have not been any prosecuted cases. Furthermore, the Local Court has jurisdiction limited to claims of \$50,000 or less and decisions may be appealed to the Industrial Relations Court. However,

Mr Foster suggests that appeals from the District Court will go to the Court of Criminal Appeal.

Instituting Prosecutions by Unions

11. Under the previous *Occupational Health and Safety Act 2000* (NSW), unions were able to institute prosecutions, however due to political concern and pressure, there now only remains limited circumstances under which a union may be involved in prosecutions. Mr Foster posits that where WorkCover declines to initiate a prosecution and the Director of Public Prosecutions declines to review WorkCover's decision, a union may possibly initiate a prosecution. In the previous regime, the court was empowered to order that part of the fine imposed on the company be paid to the prosecutor, which enabled the funding of union prosecutions. This is now excluded from the current regime.

Privilege

12. The Act explicitly recognises that legal professional privilege is applicable to investigations under the Act so that documents which have been prepared by or under the authority of a solicitor for the purposes of possible litigation are exempt from being produced to the regulator pursuant to s 269. However, the Act provides powers to the investigator that exceed that of ordinary police powers: see Parts 7-9 of the *Work Health and Safety Act 2011* (NSW). Investigators are able to enter and inspect premises (open workplaces) without warrant and ask for the production of documents.

SECTION 269:

Act does not affect legal professional privilege

Nothing in this Act requires a person to produce a document that would disclose information, or otherwise provide information, that is the subject of legal professional privilege.

SECTION 117:

Entry to inquire into suspected contraventions

- (1) *A WHS entry permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of this Act that relates to, or affects, a relevant worker.*
- (2) *The WHS entry permit holder must reasonably suspect before entering the workplace that the contravention has occurred or is occurring.*

BIOGRAPHY

Associate Professor Neil Foster

Newcastle Law School, University of Newcastle

Neil Foster is an Associate Professor in Law at Newcastle Law School, in NSW. His primary research interests include law and religion, property law, torts and workplace health and safety law. He has published leading textbooks in these areas including *Property Law in New South Wales* (2012), *Torts: Cases and Commentary* (2013) and *Workplace Health and Safety Law in Australia* (2012), among others. He has also published more than 25 articles for various Australian and International law journals.

Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Legislation

Work Health and Safety Act 2011 (NSW)

Occupational Health and Safety Act 2000 (NSW)