

WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?

GENERAL COMMENTS

This paper has been formulated by a number of legal practitioners who practise predominantly in the area of occupational health and safety law. Those legal practitioners are Mr Bruce Hodgkinson SC, Mr Jeffrey Phillips SC, Ms Wendy Thompson of counsel, Mr Michael Tooma, Mr Paul Cutrone and Ms Lea Constantine.

Whilst all of us are based in New South Wales, our experience extends beyond the New South Wales OHS jurisdiction to the Commonwealth OHS jurisdiction and to other state and territory OHS jurisdictions.

The approach taken in this paper has been to focus upon those areas which we consider to be some key areas requiring reform.

Those areas are:

- consistency of laws and a single court system;
- individual liability, the appropriateness of "deeming" provisions and the recklessness test;
- duties of care and the introduction of greater accountability at all levels for safety; and
- consistency and transparency in the decision to prosecute.

Set out below is a short submission dealing with each of these areas.

Consistency of laws and a single court system

Harmonisation of occupational health and safety (OHS) laws involves consistency not only in the terms in which the laws are originally drafted but also in the application of those laws to workplaces throughout the country. It is also necessary that the new system rectify the discrepancies that have become obvious as a result of the different, unrelated systems now operating. There is a need for there to be a consistency in circumstances where a prosecution is brought, who is responsible for bringing the prosecution, the parties made subject to the prosecution and the results of the prosecution including, where appropriate, penalty. This consistency will only be achieved if a single court system is given the jurisdiction to determine OHS matters or if the systems given that jurisdiction are regulated through an appeal system.

Accepting for the purpose of this aspect of our paper that there will be a continuation of the criminal nature of any proceedings brought for breach of the harmonised OHS laws, then it would be appropriate that the jurisdiction conferred with the responsibility for determining whether the breach is made out and assessing penalty where appropriate is the criminal law system as it exists in each state or territory.

At the present time, there is already a significant degree of consistency developed in the state-based criminal law courts as a consequence of the application in those courts of precedent developed in other states or territories. It follows that the criminal law system has already demonstrated capacity and willingness to maintain consistency. There may be utility in recommending that each state and territory adopt through their court system, a more

formal recognition of the import of decisions made in other states and territories regarding the same laws and their applications although this step would need additional political support.

There are already a significant number of areas in which the court systems operating in states and territories have co-operated so as to retain a consistency in the operation of laws such as the Uniform Evidence Law.

Our system has relied, in order to ensure consistency, upon a process of appeal including appellant-based review through the various state and territory systems with ultimately access through the special leave mechanism to the High Court of Australia. Through this mechanism, a single court sitting at the pinnacle of the judicial system is able to determine appropriate matters thereby ensuring that each jurisdiction is bound through precedent to the application of the same judicial determination of principle in relation to a particular matter. It is of fundamental importance in our view in order to maintain consistency, particularly over a period of time that any system introduced has an appeals/appellant review system having at its pinnacle the High Court of Australia. In order to achieve this, it is necessary to ensure that the courts responsible for determining matters initially, are courts constituted consistently with Chapter III of the Constitution.

Unless the original jurisdiction for the determination of prosecution matters brought under the harmonised OHS laws is conferred upon courts constituted consistently with the terms of Chapter III of the Constitution, then there will always be a real possibility that the Constitution itself will become an impediment to having the decisions of that court reviewed by the High Court. This is presently the position in NSW.

Care should be taken to avoid having different systems with different appeal rights and impediments from determining matters at first instance. Such a system would not be seen as having the capacity to remain consistent over a period of time. As a consequence a level playing field will not have been created.

The Australian public accept as being appropriate the fact that the High Court of Australia sits at the pinnacle of the judicial system in Australia. It follows that if the new OHS laws adopt the approach suggested and install the High Court as the pinnacle for judicial appeal arising from alleged breaches of the OHS laws, then the basis for that process will be well understood and more readily accepted by the Australian public.

The system will be better accepted and therefore more robust if the Australian community consider it to be fairly and equally applied to all work being carried out. By conferring the original jurisdiction on Chapter III courts the system will be perceived in this way, particularly because ultimately the High Court will be able to ensure its even application throughout Australia.

Individual liability, the appropriateness of "deeming" provisions and the recklessness test

Safety needs to be the responsibility of every individual at a place of work.

In our view, the primary basis of any decision in relation to the liability of an individual pursuant to the model OHS Act should be the conduct of that individual, whether by act or omission, rather than the position which the person occupies within the relevant corporation.

In NSW the present system allows for directors or persons concerned in the management of a corporation to be blamed where an accident occurred as a result of actions by the corporation. It will then be up to the person to convince the court that either they were not in

a position to influence the conduct of the corporation or they exercised "all due diligence" to avoid the contravention by the corporation.

We think that "deeming" provisions, such as those contained within section 26 of the NSW OHS Act should not form part of the model OHS Act. Such provisions are unfair and impose a serious and disproportionate burden on those who occupy "director" or "manager" roles. One need only look to some reported decisions in the NSW jurisdiction to see the perverse outcome that such provisions can produce.

Given that offences under the OHS Act are criminal in nature, these "deeming" provisions have very serious personal consequences for individuals.

All of us have had direct experiences with individuals who have been prosecuted under the NSW OHS Act as a result of the position they occupy within a corporation, rather than on the basis of any act or omission by the individual. The personal effect that these prosecutions have on an individual cannot be underestimated.

The existence of deeming provisions of this nature are, in our collective experiences, a reason often given as to why an individual is not keen to take on, or to continue to occupy, a senior role within an organisation.

This often expressed view is compounded by the uncertainty which exists regarding the meaning and application of the "all due diligence" defence. The way in which this defence operates in NSW is to impose upon an individual the onus to demonstrate that the individual has used "all due diligence" in relation to a particular and specific contravention. For large organisations, the imposition of such a burden on an individual is unfair and, in many respects, unworkable.

We submit that the appropriate conduct-based test to be applied in determining the liability of individuals pursuant to the model OHS Act is the test of recklessness.

Underlying this submission is our belief that the focus of safety legislation should be to punish *behaviour* which can cause a risk to safety – not the outcome of that behaviour. It is undisputable that a blatant disregard for safety, although not leading to a serious outcome, is to be considered more reprehensible than behaviour demonstrating a focus on safety which, despite best intentions, nevertheless leads to a more serious outcome.

A test involving recklessness targets undesirable and morally reprehensible behaviour. Such a test is more conducive to reducing workplace accidents and is also fairer. This is particularly important as prosecution may result not only in the imposition of a fine, but also in a criminal conviction and a possible gaol sentence.

We note that our position is in line with the findings made in the Robens Report. This Report, commissioned by the British Government in 1970, focused on means to prevent safety accidents. The Report findings were supported by similar findings in the 1981 Williams Report – a report commissioned by the New South Wales Government in 1979.

Importantly, the Robens Report made the following recommendation as to the appropriate test to be applied to individuals:

We recommend that criminal proceedings should, as a matter of policy, be instituted only for infringement of a type where the imposition of exemplary punishment would be generally expected and supported by the public. We mean by this offences of a flagrant, wilful or reckless nature which either has or could have resulted in serious injury. (Robens, 1972, page 82)

The Robens report recognises, in our submission, the importance of distinguishing, in the interest of safety, honest errors from morally reprehensible behaviour.

Duties and care and the introduction of greater accountability at all levels for safety

The current regulatory laws seek to secure safety in workplaces by devolving responsibility onto persons at workplaces, commensurate with their level of control, by the creation of duties of care. Two aspects of the duties of care require comment.

For the legislation to operate effectively, all duty holders are required to participate in a workplace to secure safety. If the terms of the legislation and/or the enforcement strategy utilised has the practical effect of placing the duty of care only on some, but not all duty holders, then the effectiveness of the legislation is reduced. The remaining duty holders effectively have a free ride in relation to responsibility and liability.

In New South Wales, there has been active enforcement in relation to corporations and directors/senior managers but negligible enforcement in relation to individual employees. Arguably, this has created a perception within some workplaces that the responsibility for safety at work lies only with the employer and its most senior managers.

Secondly, any proposed change to the current legislation requires consideration of whether the duties of care in place adequately reflect the persons responsible for safety at a workplace. The legislation currently in place in New South Wales places duties of care on individuals who are directors or, concerned in the management of a corporation, and employees. There is no recognition of persons who occupy what may be described as middle management positions within a corporate structure who have delegated responsibilities for safety above what may be regarded as the duty of a mere employee. Such persons, for example, may run a plant or control a building site. The creation of an additional duty of care on that group of persons would reflect how safety is managed within corporate structures and improve compliance by creating another layer of individual responsibility.

Consistency and transparency in the decision to prosecute

There is value in the provision of skilled and impartial advice to workplaces by an independent agency, which could mean the OHS regulator. However, we are of the view that the prosecutorial and the advisory functions of an OHS regulator should be very separate. Inspectors should have clearly delineated roles which involve the investigation and prosecution of regulatory breaches only.

It is our belief that where inspectors themselves have a dual role to both prosecute and provide advice to workplaces, companies are reluctant to seek that advice as there is a fear that the company could then be targeted for investigation and ultimately, prosecution in relation to those matters.

It is in the interests of safety that advice be sought by companies in an unfettered way and this can only be achieved by a complete separation of the functions of the regulator as prosecutor and consultant in OHS matters. Alternatively, the OHS regulators can be dedicated to the advisory function, referring their enforcement function to the state or Federal Director of Public Prosecutions.

In relation to the regulatory function of inspectors, the OHS legislation should spell out the role and duties of inspectors when acting as prosecutors.

The Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales, for example, include the following detail about the role of the prosecutor:

“a prosecutor is a “minister of justice”. The principal role of a prosecutor is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness...”

A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest.”

The roles of the prosecutor need to be clearly articulated and understood. As Rand J stated in a Canadian Supreme Court decision, *Boucher v The Queen* (1954) 110 CCC 263:

"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

The expectations of the community in relation to role of prosecutor has been described as follows in *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 (Deane J):

"Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."

However, the unique nature of OHS prosecutions and the lay character of inspectors creates doubt as to the application of those guidelines to inspectors who are commencing prosecutions. In the circumstances, it is appropriate in our submission that those roles, responsibilities and duties of inspectors when prosecuting are spelled out in the legislation. Furthermore, the decision to prosecute is currently not a reviewable decision under OHS legislation. Although there are published guidelines for bringing of prosecutions, they differ from jurisdiction to jurisdiction and in any event are not consistently applied. This, in our experience, sometime results in injustices with duty holders which may have greater culpability in relation to a breach escaping liability simply because the OHS regulator chooses not to prosecute them.

This inconsistency in the application of the discretion to prosecute also manifests itself in the over-representation of employers amongst the class of defendants as compared to upper-stream duty holders such as suppliers of plant and controllers of premises and lower stream duty holders such as employees.

We recommend that the legislation provide for the making of clear guidelines on the triggers for the commencement of proceedings and that a mechanism be created for the review of decisions to prosecute (and decisions not to prosecute). Such reviews can be undertaken internally by the relevant OHS regulator, by the State or Federal Director of Public Prosecutions, by Administrative Appeals Tribunals or by a centralised Federal agency such as the Australian Safety and Compensation Council or its successor organisation.

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