Work Health and Safety Act 2011 (NSW) – A Refresher

A paper given at a seminar held at Hunter Street Chambers, 22nd May 2015

The purpose of this paper is to highlight some of the critical elements found in the *Work Health and Safety Act 2011 (NSW)* (The Act), to identify some fundamental changes between the provisions of the Act and the legislation it replaced, being the *Occupational Health and Safety Act 2000 (NSW)* (The OH&S Act), and to identify some as yet rarely used provisions of the Act.

The Act repealed and replaced the OH&S Act and commenced operation on the 1st January 2012. Central to the Act's scope is it's principle object *"to secure the health and safety of workers and workplaces…"* (S. 3(1) of the Act). In other words the Act is about the safety of workers at their workplaces, the Act's reach and operation, even though broad, is limited to persons who are workers (as defined in S 7 of the Act) and workers' workplaces (as defined in S 8 of the Act), or persons affected by workplace activity.

The core responsibility, as prescribed in the Act, is found in section 19 in the following terms:

> *" 19. Primary duty of care*
>
> *(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of;*
> *(a) workers engaged, or caused to be engaged by the person, and*
> *(b) workers whose activity in carrying out work are influenced or directed by the person,*
> *while the workers are at work in the business or undertaking.*
>
> *(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking."*

There are two important issues which emerge from this section directing responsibility for the primary duty of care. They are

a) The concept of what *"is reasonably practicable"*
b) What is to be guarded against is the 'risk' to the worker, or indeed other persons affected by the work.

Dealing firstly with "*the risk*". Spiegelman CJ, when giving judgement involving an assessment of section 8 (of the OH&S Act) *Pty Ltd and Hochtief AG vs Industrial Court of New South Wales (2010) 205 IR 263,* observed at [67]

"In my opinion, the word "risks" in 8(2) also refers to the possibility of danger"

Indeed, in *Inspector Peter Beacham v BOC Pty Ltd [2007] NSW IRComm 92* the Industrial Court heard a prosecution under the OH&S Act, which had resulted from an explosion at the Defendant's workplace. At the time of the explosion no one was in the vicinity of the plant which exploded. Irrespective of this absence of any workers, Her Honour Kavanagh J found the offence proven, on the basis of a present 'risk', and imposed a fine of $140,000. The presence of a 'risk', being all that is necessary for a successful prosecution, imports a very wide catching net into the Legislation.

Secondly, this key section of the Act, previously found in section 8 of the OH&S Act, has had incorporated into it the qualification, *"so far as is reasonably practicable"*.

Under the OH&S Act there was, in section 28, a general defence provision available to a defendant to prove *that "it was not reasonably practicable for (the defendant) to comply with the provision"* alleged against it. Under this general defence provision, it was up to the defendant to raise the defence and then to prove, on the balance of probabilities that it was impracticable for the defendant to comply with the provision alleged against it.

The insertion of the words *"so far as is reasonably practicable"* into section 19 of the Act has created a further element of the offence, which the prosecutor must now prove beyond a reasonable doubt. This is a fundamental and significant shift by making the issue of reasonable practicability an element the prosecution must prove to the criminal standard

against the defendant, who under the OH&S legislation had the onus of not only raising the defence but proving it, though only to the civil standard.

The Act provides express guidance as to what is *"reasonably practicable"* by defining that term in section 18 as follows;

> *"**S18. What is "reasonably practicable" in ensuring health and safety***
> *In this Act, **reasonably practicable**, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters include:*
>
> *a) The likelihood of the hazard or the risk concerned occurring, and*
> *b) The degree of harm that might result from the hazard of the risk, and*
> *c) What the person concerned knows, or ought reasonably to know, about:*
> *i. The hazard or the risk, and*
> *ii. Ways of eliminating or minimising the risk, and*
> *d) The availability and sustainability of ways to eliminate or minimise the risk, and*
> *e) After assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."*

Importantly the High Court has given consideration to this phrase, and definition, and in *Baiada Poultry Pty Ltd v The Queen [2012] HCA 14*, the court observed;

> *"The words "so far as is reasonably practicable" indicate that the duty does not require the employer to take every possible step that could be taken. The steps that are to be taken in the performance of duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the*

duty imposed by s 21(1). The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment."

The Act, as it's predecessor the OH&S Act, spreads the net of responsibility to ensure the safety of workers and workplaces far beyond those attached to the direct employer. This responsibility is spread to;

- Persons conducting businesses or undertakings involving the management or control of workplaces and the management or control of fixtures, fittings or plant at workplaces (s 20 & 21)
- Persons who design plant or structures or who manufacture such plant or structures (s 22 & 23)
- Persons who import plant or structures or those who supply such plant or structures (s 24 & 25)
- Persons who install, construct or commission plant or structures (s 26)

At each point of responsibility, as found in ss 20-26 of the Act, there remains the further need for the prosecutor to prove the issue of reasonable practicability.

The responsibility for ensuring a safe and healthy workplace does not just rest with the employer, controller or designer of the workplace, plant or equipment but is also vested as the duty of officers of the business or undertaking (such officer as defined in s 4 of the Act) and workers, as earlier defined as is found in s 28 of the Act. An officer of a business has a duty of due diligence to ensure compliance with the Act which responsibility includes taking reasonable steps to keep up to date with health and safety matters and ensure that workers at the place of work, and this includes contractors, are adequately trained to ensure their own health and safety.

Workers are obliged to take reasonable care for their own health and safety and that of other persons at their workplace.

Significant penalties up to imprisonment can be imposed on individuals found to have recklessly exposed persons to death or serious injury.

I wish to make note of two further critical provisions of the Act which carry over from the OH&S Act.

A person who conducts a business or undertaking is required to notify the Work Cover Authority immediately they become aware of the occurrence of a notifiable incident (section 28). A notifiable incident is defined as an incident which results in the death, serious injury or illness of a person or the occurrence of a dangerous incident (section 35). A dangerous incident is defined in section 37. The failure to notify of the occurrence of such incident carries heavy penalties and in the case of a body corporate it currently stands at $50,000.

The principle behind the obligation to notify the Work Cover Authority, is clearly to allow that Authority quick access to the site of the incident and to enable the Authority to commence its investigation, uninhibited by the potential disturbance of evidence of the causation of the event.

As part of its investigation an inspector, authorised by the Work Cover Authority, is empowered to interrogate any person considered able to assist in those enquiries and the person is obliged to answer questions properly put. An individual can claim privilege against a prosecutor using the information so obtained to commence a prosecution against that person individually for breach of a provision of the Act. To claim such privilege the individual must first be informed that they are compelled to answer the authorised person's questions and then claim privilege. They would be unlikely to receive such indemnity if the person was voluntarily providing information without the threat of compulsion. As such, the interrogating Inspector is first obliged to advise the compulsion and then invite a claim for indemnity.

Offences Under the Act

The Act has introduced grades of conduct which, for their breach, carry differing penalties. This is in contrast with the provisions of the OH&S Act which, in effect, left it to the court to determine whether a breach was in a high medium or low range and thus the court was given broad discretion to determine what could have been seen as a subjective penalty result.

The categories of seriousness of offence are three fold and are in the following terms:

31. Reckless conduct – Category 1

(1) A person commits a Category 1 offence if:

(a) The persons 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.

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.

(2) The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.

32. Failure to comply with health and safety duty – Category 2

A person commits a category 2 offence if:

(a) The person has a health and safety duty, and

(b) The person fails to comply with that duty, and

(c) The failure exposes an individual to a risk of death or serious injury or illness.

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.

33. Failure to comply with health and safety duty – Category 3

A person commits a category 3 offence if:

(a) The person has a health and safety duty, and

(b) The person fails to comply with that duty.

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.

34. Exceptions

(1) A volunteer does not commit an offence under this Division for a failure to comply with a health and safety duty, except a duty under section 28 or 29.

(2) An unincorporated association does not commit an offence under this Act, and is not liable for a civil penalty under this Act, for a failure to comply with a duty nor obligation imposed on the unincorporated association under this Act.

(3) However:

(a) An officer of an unincorporated association (other than a volunteer) may be liable for a failure to comply with a duty under section 27, and

(b) A member of an unincorporated association may be liable for a failure to comply with a duty under section 28 or 29.

Part 3 – Incidence Notification

35. What is a "notifiable incident"

In this Act, ***notifiable incident*** *means:*

(a) The death of a person, or

(b) A serious injury or illness of a person, or

(c) A dangerous incident.

The defence of reckless conduct has been introduced to the Act, in a formal sense, and envisages the very worst kind of disregard for the duties imposed under the Act. The maximum penalty for breach by a corporation has been increased, for a first offence, by a factor of 6 and the potential for imprisonment for individuals has also been significantly increased.

In essence, the category 2 offences are described in similar terms to the category 1 offences, absent the reckless conduct, but such category offences still require the exposure to a risk of death or serious injury or illness. Serious injury is defined in section 36 of the Act.

Category 3 offences are those of a lesser nature which do not expose an individual to the risk of death or serious injury or illness. Thus category 3 offences catch all other provisions of offences against the Act as well as what might otherwise be a significant event, yet one which does not involve the risk of death or serious injury or illness. Never the less, it is

important to note that the maximum penalty for such category 3 offences is $500,000 for a corporation, $100,000 for an officer of that corporation and even $50,000 for a worker who breaches such a provision of the Act, which offence qualifies as a category 3 offence.

The Prosecution

Most prosecutions under the Act are brought by an inspector authorised by the Work Cover Authority to so act. There is provision for a prosecution to be launched by a Secretary of an Industrial Organisation of Employees (a trade union) in certain circumstances as prescribed. (Section 230)

A prosecutor has a limited choice, though never the less a choice, of where the prosecution will be commenced. Prosecutions for any category of offence may be commenced in the Local Court with the exception of category 1 offences alleged against an individual (which may lead to imprisonment) and these individual prosecutions must be taken on indictment. The District Court has jurisdiction over proceedings for an offence categorised as either 1 or 2 and the Industrial Court is left to deal with proceedings for category 3 offences along with the Local Court (section 229 B of the Act).

The empowerment of the courts, with whom jurisdiction for prosecution lies, is somewhat curious and exhibits a fundamental change from the OH&S Act.

The Industrial Court is a court created by the Industrial Relations Act 1996 (NSW) and is, under chapter 4 part 3, a Court of Supreme Court status, a superior court of record with a declaratory jurisdiction. The Industrial Court, stands in the hierarchy of New South Wales courts, above the District Court, yet is precluded from hearing proceedings for the more serious offences prosecuted under the Act and is only permitted to hear appeals under the Act from the Local Court, which has determined a category 3 offence.

An issue, which goes for consideration as to where a prosecutor commences proceedings is the provision of section 229B(4) of the Act, which despite the maximum penalties prescribed section 31-33 of the Act, limit a penalty imposed by the Local Court in any proceedings for an offence against the Act to $50,000. Thus the prosecutor may choose the court into which it brings the proceedings when, even though a maximum penalty for a corporation for a category 1 offence is set at $3,000,000, the maximum amount such an

offender would be liable to is $50,000 if the prosecutor chooses the Local Court as the venue for the proceedings.

The change in jurisdiction of the Courts to hear prosecutions for breaches of Work Health and Safety provisions, has led to, no doubt, unintended consequences from this shift.

Firstly there appears, in some cases, an inconsistent approach to penalty as determined by the District Court and Local Court. For example I have recently appeared for the defendant in a prosecution brought in the District Court and another prosecution brought in the Local Court. Both matters involved guilty pleas. The prosecution in the District Court involved an alleged failure by an employer to adequately safeguard a contractor from risks to his health and safety arising from the conduct of the employer's undertaking. The unfortunate contractor fell from a height of approximately 3 meters and his injuries resulted in his death shortly after his fall. Following a plea of guilty the District Court imposed a penalty of $5,000 on the defendant corporation.

In a very recent matter brought under the Act and prosecuted in the Local Court the Defendant had a penalty imposed of $17,000 for only failing to notify the Work Cover Authority of a dangerous occurrence. The disparity in sentencing outcomes is palpable.

Secondly, and to an extent a result of what I have described above, it is very difficult for practitioners to advise clients, with any degree of confidence, as to the likely outcome of a prosecution brought either in the Local Court or the District Court. Prior to the commencement of the Act prosecutions for breach of the OH&S Act, leaving aside the circumstance pertaining in the mining industry, were brought either before the Industrial Court of New South Wales or the Chief Industrial Magistrate. There was a level of consistency of approach then pertaining which one hopes will be quickly remedied within the current Court structure.

Hidden Treasures/Traps

Section 12A of the Act is in the following terms

> *"**12A. Offences are offences of strict liability***
>
> *Strict liability applies to each physical element of which offence under this Act unless otherwise stated in the section contained the offence."*

Provisions of section 12A were not found in the OH&S Act. Indeed the legislative predecessors to section 19 of the Act were described by Boland J (as he then was) in *Cahill v NSW Department of Community Services (2008) 182 IR124 at [153]* in the following terms;

"That a breach of the general duties under Div. 1 of Pt 2 of the 2000 OHS Act is to be regarded as an absolute liability offence has been the accepted wisdom of this Court since the Act came into force. The predecessor provision to s 8(1) of the 2000 OHS Act, which was s 15 of the Occupational Health and Safety Act 1983 (NSW) (the 1983 OHS Act), has also been regarded as an absolute liability offence ever since the decision of Watson J in *Carrington Slipways Pty Ltd v Callaghan (1985) 11 IR 467*, a decision the correctness of which has been repeatedly affirmed by Full Benches of this Court." (emphasis added)

A strict liability offence, it could be argued as being a different type of offence from an offence described as *"an absolute liability"*. It could be put that the deliberate shift from an absolute liability offence to one of strict liability exposes the potential for a submission that a strict liability offence may be defeated, if the defendant can successfully raise a defence of honest and reasonable mistake of fact. The observations of Dixon J in *Proudman v Dayman (1941) 67CLR 536 at 540* is pertinent to this discussion;

> *"As a general rule an honest and reasonable belief in the state of facts which, if they existed, would make the defendant's act innocent of forging excuse for what would otherwise be an offence."*

The availability of the defence of an honest and reasonable mistake of fact was fully examined by Boland J in *Cahil,* though in the circumstance where there was no statutory equivalent to section 12A of the Act and in the circumstance where His Honour felt compelled to consider the proceedings for an offence, under the then legislation, as an offence of absolute liability as opposed to strict liability.

I am unaware of any defendant taking this point in a prosecution under the Act since it came into force on the 1st January 2012.

A further innovation into workplace health and safety legislation in New South Wales, is the provision for the application of an Enforceable Undertaking, as prescribed in section 216 of the Act. The concept of such an enforceable undertaking, if committed to by a defendant, is entered into in lieu of a prosecution proceeding and is an alternative to a defendant being convicted of an offence under the Act. Enforceable Undertakings are as yet not common, and are used sparingly as an alternative to a prosecution. Such undertakings have been entered into by substantial corporations, with no earlier history of conviction for offences under workplace health and safety legislation. Such undertakings are enforceable under the Act (section 219), under pain of significant penalty for breach, as well as then the penalties available for a successful prosecution for the original offence.

Indeed the availability of a work health and safety undertaking, is a sentencing alternative available to a court, in lieu of recording a conviction against an offender. (Section 239). The imposition of such an undertaking by the court can be likened to an individual being placed on a bond to be of good behaviour, in lieu of the court recording a criminal conviction.

The Act specifically prohibits parties contracting out of obligations imposed under the Act. Section 272 in the following terms

> *"272 No contracting out*
>
> *A term of any agreement or contract that purports to exclude, limit or modify the operation of this Act or any duty owed under this Act or to transfer to another person any duty owed under this Act is void."*

The OH&S Act was silent on this specific provision though the Courts had long upheld the common law provision of persons being prohibited from reaching an agreement contrary to a specific statutory provision. A principal contractor or occupier of premises cannot by contract or otherwise shift its responsibility for workplace health and safety, as provided for under the Act, to a subcontractor or other party, such as an insurance company.

The health and safety of workers in a workplace, of other persons in a workplace or persons safety as a result of a work activity, have been comprehensively codified in the Work Health and Safety Act (2011), which Legislation's mysteries will continue to surface.

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