Article

Employment Law

Pivot in Enforcement Strategy to Create Safer Workplaces

Why legislators and regulators are increasingly focusing on targeting individuals for their actions to ensure PCBU's meet their work health and safety obligations

By Patrick Walsh

In 2017, the Full Court of the Supreme Court of South Australia dismissed an appeal against a sentence of 12 years imprisonment for the owner of a trucking company who was found guilty by the Supreme Court of South Australia of endangering life and manslaughter. The sentence was imposed because the owner failed to rectify defective brakes on trucks involved in a near-miss and a fatality.

Many would argue that prosecutions such as this, and the ability under the Work Health and Safety Act 2012 (SA) to impose a term of imprisonment of up to five years ought to be a sufficient deterrent for breaches of work health and safety. Yet, the recently elected Labor Government has confirmed its commitment to implementing the offence of industrial manslaughter in South Australia.

This appears to be part of a broader trend in which legislators and regulators are increasingly looking to prosecute individuals to address corporate misconduct, particularly regarding matters of work health and safety. While there have been relatively few prosecutions to date (and those that have resulted in imprisonment have involved smaller enterprises), there will be more appetite to initiate prosecutions against officers of larger enterprises as regulators become better equipped for prosecutions seeking to establish individual culpability.

Industrial manslaughter

The Australian Capital Territory was the first jurisdiction in Australia to introduce industrial manslaughter legislation. It was not until 2017 that Queensland followed suit with amendments to the Work Health and Safety Act 2011 (Qld) to introduce the offence of industrial manslaughter. At the time of writing this article, the only jurisdictions that do not have or are not intending to introduce the offence of industrial manslaughter are New South Wales and Tasmania. I believe a significant reason for this shift is the increasing desire amongst the general public and regulators across various regulatory areas to focus on individual accountability for corporate misconduct. In my view, this can be attributed to a number of events, including:

- The impacts of the 2008 global financial crisis, which resulted in the United States Federal Government stepping in to bail out financial institutions, amongst widespread revelations of serious financial misconduct, because they were too big to fail. The failure to convict any of the individuals perceived to be largely responsible for the crisis when so many low-to-middle income earners were devastated by the crisis was a turning point;

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- Increasing globalisation, which has meant that high net worth individuals can effectively insulate themselves from financial penalties; and

- Recent scandals in Australia relating to the underpayment of employee wages, such as the 7-Eleven underpayment scandal.

In 2021, Mr Mark Withers became the first person in Western Australia sentenced to a term of imprisonment for the death of a young worker and the serious injury of another worker; as a director of the employer, MT Sheds (WA) Pty Ltd. The two workers were installing roof sheets on a large machinery shed when a strong wind lifted a sheet from a pack of roof sheets, causing them to fall approximately 9 metres. Although the business had safety harnesses and associated equipment, there were no fall injury prevention systems in use at the workplace on the day of the incident.

On 25 March 2022, Mr Jeffery Owen became the first person to be found guilty of industrial manslaughter since the offence was first introduced in Queensland in 2017. Mr Owen was found guilty in relation to an incident in which he used a forklift to remove a generator from the back of a truck, but it was overloaded, and the generator fell from the tines and crushed his friend, who died of his injuries. He was sentenced to five years imprisonment to be suspended after 18 months.

At the time of writing, the only successful prosecution of a body corporate for industrial manslaughter is the matter of R v Brisbane Auto Recycling Pty Ltd & Ors (2020) 296 IR 327. This matter related to a forklift incident in which a worker was killed. The Body Corporate pleaded guilty to industrial manslaughter, and the two directors pleaded guilty to reckless conduct (a category 1 offence).

1Malaysia Development Berhad scandal

It is instructive to consider the example of the 1Malaysia Development Berhad scandal ('the 1MDB Scandal"). Amongst other things, it was alleged that Mr Low Take Jho and two bankers from Goldman Sachs conspired to pay $1bn (USD) in bribes to Malaysian and Abu Dhabi government officials in order to win Goldman Sachs $6.5bn (USD) in bond offerings. To put this in perspective, in its Full Year and Fourth Quarter 2021 Earnings Results, Goldman Sachs reported net earnings of $21.64bn (USD) for the financial year. There are two important things to note about this:

1. To make a (very) crude comparison, if the Goldman Sachs earnings results were a nation's GPD figure, it would allow Goldman Sachs to sneak into the top 120 nations (while clearly not comparing "apples with apples", this demonstrates the financial scale of the organisation).

2. The 1MDB Scandal occurred only 18 months after Goldman Sachs was charged in respect of a different bribery case and entered an agreement under which it committed to improvements in its compliance program in return for a deferral of the prosecution.

Even though Mr Low Take Jho had been flagged as a risk by Goldman Sachs compliance and control officials, individuals within the organisation allegedly set out to deliberately circumvent the organisation's compliance measures. This example is also illustrative of two issues confounding regulators:

1. Organisations have become so wealthy that fines are no longer a sufficient deterrent for corporate malfeasance.

2. Leaders of an organisation have a vested interest in ensuring the enterprise's profitability but don't appear concerned about being viewed as good corporate citizens.

A memorandum authored by Sally Quillian Yates (Deputy Attorney General for the US Department of Justice) notes:

"One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons it deters future illegal activity, it incentivises changes in corporate behavior (sic), it ensures that the proper parties are held responsible for their actions, and

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a court in relation to far less serious driving offences and makes it an offence to provide an indemnity. Section 272 of the new Work Health and Safety Act 2012 states that any term of a contract which seeks to modify the operation of the Act is void, but it does not specifically prohibit insurance of penalties, and it does not make it an offence for an insurer to provide an indemnity. Whilst the full scope of s 272 is unclear, it will still be possible for an insurer to sell such policies and to grant indemnity for perceived commercial benefit. Whether such indemnities should be outlawed under the current Act and under the new Act are policy considerations for Parliament. I make these observations to explain the legal significance of these surprising arrangements."

The Review of the model Work Health and Safety laws authored by Marie Boland[1] and published in December 2018 made a recommendation to amend the model Work Health and Safety Act to make it an offence to enter into a contract of insurance which provides cover for liability for a monetary penalty under the Act.

New South Wales became the first jurisdiction to implement a prohibition against insurance policies, covering monetary penalties under the Work Health and Safety Act 2011 (NSW). Similar prohibitions now exist in Western Australia and Victoria.

Breach of workers' duties

R v Watts [2020] ACTSC 91 is a particularly noteworthy case as it is an example of a successful prosecution of a worker under section 28 of the Work Health and Safety Act 2011 (ACT). In this matter, the offender was employed as a crane operator and was performing duties at the university of Canberra Hospital construction site. He was instructed to transport a large generator, and while performing the lift, the crane overturned. As a result, the crane boom impacted a nearby worker, Herman Holtz, who was crushed between the boom and the ground. He later died as a consequence of his injuries.

The Court found that the defendant had operated the crane in excess of its rated capacity, had not sufficiently planned the lift, and was working at night in reduced visibility, and on uneven terrain.

The Court sentenced the defendant to 12 months imprisonment, wholly suspended on entering a good behaviour bond for 12 months.

Importantly, the defendant had sought a safety induction, but was not inducted because of the pressure to perform the job quickly. Furthermore, at all times, the defendant performed the work in accordance with instructions from the employer and the entity in control of the site. Notwithstanding this and other considerations, the prosecutor sought (and obtained) a conviction and a sentence of imprisonment, albeit suspended.

Recent case law developments in our industrial relations framework

According to section 550 of the Fair Work Act 2009 (Cth) ('the FW Act') a person found to be involved in a contravention of a civil remedy provision of the FW Act may also be the subject of a penalty. Interestingly, the Explanatory Memorandum for the Fair Work Bill 2008 (Cth) makes the point that "while a penalty may be imposed on a person involved in a contravention, the clause does not result in a person involved in a contravention being personally liable to remedy the effects of the contravention …". Despite this, the Federal Circuit Court and the Federal Court of Australia, in several decisions, have found that section 545 of the FW Act provides the power to make an order that a person involved in a contravention pay compensation (see, for example, Veeraragoo v Goldbreak Holdings Pty Ltd (No 2) [2018] FCA 1448 at [45] and [46]).

This is not a surprising development because the Courts want to ensure that claims for underpayment of entitlements are not defeated simply because the employing entity has no assets to satisfy a judgment against it.

Lessons for organisations on their Work Health and Safety obligations

In considering how to meet their work health and safety obligations, leaders within every organisation need to turn their minds to their accountability for the organisation meeting its statutory obligations. In

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1 https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-final-report

particular, they should consider how the organisation will respond in the event that an officer or worker is prosecuted for a breach of work health and safety obligations.

In the event that a Court finds there has been a breach, individuals must be prepared to make submissions to the Court as to how they will accept accountability for the conduct, as Courts and Regulators are likely to see attempts to shield themselves from the real consequences of breaches of the work health and safety legislation as a factor to be taken into account when imposing a sentence.

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