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Abstract
Extract: The board of directors provides overall strategic direction for the company. Generally directors are not required to become involved in the day-to-day management of corporations. With the recent amendments to occupational health and safety ("OHS") laws, directors' duties have been expanded. Directors now have statutory duties to ensure their companies do not breach OHS standards. If their companies fail to discharge their OHS duties, then directors can face fines. If a person is killed because of their company's safety breach, then directors can face jail sentences up to 20 years. The imposition of these substantial penalties upon directors is aimed at increasing corporate compliance with OHS standards. This article outlines the extent of directors' liabilities. Whether the policy of holding directors liable for OHS duties results in safer workplaces remains to be seen.

Keywords
OHS, occupational health, safety, directors, penalties

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OCCUPATIONAL HEALTH AND SAFETY ISSUES AND THE BOARDROOM: CRIMINAL PENALTIES FOR DIRECTORS FOR COMPANY'S LACK OF SAFETY

Paul Harpur*

INTRODUCTION

The board of directors provides overall strategic direction for the company. Generally directors are not required to become involved in the day-to-day management of corporations. With the recent amendments to occupational health and safety ("OHS") laws, directors' duties have been expanded. Directors now have statutory duties to ensure their companies do not breach OHS standards. If their companies fail to discharge their OHS duties, then directors can face fines. If a person is killed because of their company's safety breach, then directors can face jail sentences up to 20 years. The imposition of these substantial penalties upon directors is aimed at increasing corporate compliance with OHS standards. This article outlines the extent of directors' liabilities. Whether the policy of holding directors liable for OHS duties results in safer workplaces remains to be seen.

OCCUPATIONAL HEALTH AND SAFETY LAWS

To increase workplace safety, most Australian jurisdictions have introduced occupational health and safety (OHS) duties which impose punitive sanctions directly against directors and company officers.[1] Queensland,[2] New South Wales,[3] South Australia,[4] Tasmania,[5] Western Australia[6] and Victoria[7] all impose OHS obligations over officers of the corporations personally. The obligations upon directors are extremely high. It is immaterial if the director is uninvolved in the day-to-day operations of the company. The OHS duty attaches to the corporations activities, and not to the director's sphere of influence. This means a director of a company with inter-jurisdictional operations can be liable for a breach in Sydney, even though the director is based on the Gold Coast.

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1 Nicolee Dixon, Karen Sampford and Renee Giskes *Industrial Manslaughter Research Brief* (2006) Queensland Parliamentary Library, 11-14.

2 Section 167 of the *Workplace Health and Safety Act 1995* (Qld).

3 Section 26 of the *Occupational Health and Safety Act 2000* (NSW).

4 Section 61 of the *Occupational Health, Safety and Welfare Act 1986* (SA).

5 Section 53 of the *Workplace Health and Safety Act 1995* (Tas).

6 Section 55 of the *Occupational Safety and Health Act 1984* (WA).

7 Section 144 of the *Occupational Health and Safety Act 2004* (Vic).

For example, in *Inspector Ken Kumar v Owens Container Services Australia Pty Ltd* Workcover prosecuted, inter alia, the CEO of the Owens Group of companies, for failing to fulfil his obligations under the New South Wales OHS legislation.[8] An employee of Owens Container Services Australia Pty Ltd was working in a tank using a combustible cleaning agent. The agent caused an explosion which killed the employee. Owens Container Services Australia Pty Ltd was part of the Owens Group of companies, consisting at the time of approximately 30 companies spread across Australia, Fiji and New Zealand. The director CEO of the Owens Group based in New Zealand claimed he spent approximately one day a month on issues related to Owens Container Services Australia Pty Ltd. Despite this, Haylen J found the CEO had sufficient control to be found liable for the death of the employee.

Directors can be liable even where their officer ship has no responsibility for OHS. In *WorkCover Authority of NSW (Inspector Belley) v Akerman-Apache (Joint Venture) Pty Limited, Jonathan Dwyer Herbert and John Lindsay Walker* there were three directors for a joint venture in Sydney at the time an employee was fatally wounded.[9] The director responsible for OHS had ensured safety policies were in place; however, the employees failed to follow the policy which caused the death. At the time of the accident, the director responsible for OHS was in the USA. Two other directors had non-executive roles. Staunton J held all directors were liable. When it comes to OHS, the duty imposed upon directors is high.

DIRECTORS AND JAIL

The most serious punitive measure in Australian law is incarceration. While monetary fines can cause financial hardship, imprisonment deprives a person of their liberty. The importance of the right to liberty of the person is reflected in human rights laws. Article 13 of the *Universal Declaration of Human Rights* provides:

> Everyone has the right to freedom of movement and residence within the borders of each State.

Article 12(1) of the ICCPR states:

> Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Reflecting the importance of the right to liberty, Article 14 of the ICCPR requires nations to presume all accused persons are innocent until proven

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8 NSWIRComm 324.

9 *WorkCover Authority of New South Wales (Inspector Belley) v Akerman-Apache (Joint Venture) Pty Limited, Jonathan Dwyer Herbert and John Lindsay Walker* [2006] NSWIRComm 370.

guilty according to law.[10] When charging a person, the charge must be given in a language the person understands, interpreters must be provided where necessary, accused persons must have the opportunity to present witnesses in their defence and their must be a right of appeal. [11]

Historically, directors and corporations could be liable under standard manslaughter provisions. These prosecutions were generally extremely difficult. As a consequence, very few prosecutions were even attempted; even where the risk to safety was caused by overall managerial risks. For example, following the explosion at Esso Australia Pty Ltd's Longford gas processing plant in 1998, where two employees were killed and eight serious wounded, Esso was prosecuted for a number breaches of the Victorian OHS Act.[12] The Royal Commission into the explosion found Esso's overall management systems were to blame for the accident.[13] Despite the fact that blame for the accident and deaths could be attributed to high level managerial problems, no directors or senior company officers were charged for the deaths.[14] While some convictions have been recorded,[15] the difficulties in obtaining such convictions resulted in calls for specialised industrial manslaughter provisions.

The NSW *Report into Serious Injury and Death in the Workplace,*[16] McCallum, Hall, Hatcher and Searle's *Workplace Death, Occupational Health and Safety Legislation Report*[17] and a Tasmanian Law Reform Institute Report[18] supported the introduction of punitive industrial manslaughter.

Not all Reports supported the idea of industrial manslaughter. The Commonwealth Parliamentary Committee in the *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005 Report* recommended that the Commonwealth Parliament should exempt all Commonwealth workplaces from state industrial manslaughter laws.[19] The Committee concluded that focusing upon punitive provisions did not assist in reducing the instance of workplace fatalities. The majority of the Committee argued that relying on soft law options, such as focusing upon further

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10 *International Covenant on Civil and Political Rights* (opened for signatures 16 December 1966) ATS 23 (came into force (except Article 41): 23 March 1976, entry into force for Australia (except Article 41): 13 November 1980, Article 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993); ('ICCPR') art 14(2).

11 ICCPR art 14(5).

12 *DPP v Esso Australia Pty Ltd* [2001] A Crim R 200.

13 Report of the Longford Royal Commission *The Esso Longford Gas Plant Accident (*1999) Victorian Parliament, 200.

14 Nicolee Dixon, Karen Sampford and Renee Giskes, above n 1, 9.

15 See, eg, *R v Denbo Pty Lt* (1994) 6 VIR 157, which was the first corporate manslaughter case in Australia. The company here pleaded guilty and was fined.

16 New South Wes Upper House Report. *Report into Serious Injury and Death in the Workplace* (Sydney, 2004).

17 Ron McCallum, Peter Hall, Adam Hatcher and Adam Searle *Workplace Death, Occupational Health and Safety Legislation Report* (WorkCover Authority of New South Wales, 2004).

18 Tasmania Law Reform Institute. *Criminal Liability of Organisations* (2005) Issues Paper No 9, Tasmania.

19 The Senate Employment, Workplace Relations and Education Legislation Committee. Provisions of the *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005* (2005).

education, advice and improved compliance strategies, was the best method of achieving safer workplaces.

Five Australian jurisdictions have now introduced industrial manslaughter law, or introduced imprisonment as a sentencing option for OHS breaches which result in an industrial death. The Australian Capital Territory was the first Australian jurisdiction to introduce industrial manslaughter provisions, which imposed penal sanctions against directors. The Australian Capital Territory claimed these provisions were intended to ensure directors received the appropriate punishment for OHS breaches which resulted in industrial deaths.[20] The *Crimes (Industrial Manslaughter) Act 2003* (ACT) amended the *Crimes Act 1900* (ACT) to introduce a new Part 2A. Pursuant to this part, an employer or senior officer can be convicted of industrial manslaughter where a worker is killed at work. An employer will be liable where their conduct causes the death of a worker and the employer is reckless or negligent for the worker's safety.[21] A senior officer will be liable for industrial manslaughter, where the worker is killed at work, where the senior officer caused the death of the worker through their acts or omissions and where the senior officer was reckless or negligent for the worker's safety.[22] Where an employer, director or senior officer is convicted of industrial manslaughter, the maximum penalty the employer could be liable to is a fine and/or imprisonment for 20 years or both.[23]

The *Crimes (Industrial Manslaughter) Act 2003* (ACT) regards a breach of OHS provisions as a breach of general criminal laws. In the ACT, industrial manslaughter and general manslaughter both attract a maximum punishment of 20 years.[24] All other Australian jurisdictions which include imprisonment as a sentence for OHS breaches, include the offence and punishment within the general OHS rubrics. As a consequence, the punishment is less severe.

The longest penal sanctions outside industrial manslaughter provisions appear in NSW and Victoria. The *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* (NSW) introduced Part 2A into the *Occupational Health and Safety Act 2000* (NSW), which introduced a new workplace death offence. When the *Occupational Health and Safety Act* 2004 (Vic) was enacted, it provided criminal sanctions for OHS breaches with resulted in death.[25] In NSW and Victoria a person will face the possibility of incarceration for a fatal injury at work, where the person's acts or omissions substantially contribute to the death, where the accused owed the deceased person an OHS duty, in circumstances where the person contributing to the death was reckless about

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20 Explanatory Memorandum of the *Crimes (Industrial Manslaughter) Amendment Bill 2002* (ACT).

21 Section 49C of the *Crimes Act 1900* (ACT).

22 Section 49D of the *Crimes Act 1900* ACT).

23 Section 49D of the *Crimes Act 1900* ACT). Section 49C and 49D of the *Crimes Act 1900* (ACT).

24 For the punishment of general manslaughter see section 15 of the *Crimes Act 1900 (ACT).*

25 Section 32 of the *Occupational Health and Safety Act 2004* (Vic).

the victim's safety.[26] Where a person breaches these provisions, they can be liable to a fine and/or up to 5 years imprisonment.

The other jurisdictions which have penal sanctions for workplace deaths are Queensland and Western Australia.[27] The *Workplace Health and Safety Amendment Act 2003* (Qld) introduced *Workplace Health and Safety Act 1995* (Qld) so the maximum punishment for causing multiple deaths at the workplace is 3 years, while causing a single death at the workplace attracts a maximum of 2 years imprisonment.[28] The Occupational Safety and Health Legislation Amendment and Repeal Act 2004 (WA) introduced the offence of gross negligence causing death into the *Occupational Safety and Health Act 1984* (WA). A person will commit gross negligence where they knew that their conduct would be likely to cause the death of, or serious harm to, a person, and death resulted.[29] The maximum penalty for gross negligence is 2 years. When these punishments are compared to the ACT's industrial manslaughter or the general manslaughter provisions, in the other states, the punishments for workplace deaths under the OHS Acts appear small.

General manslaughter in NSW attracts a maximum punishment of 25 years and in Victoria and Western Australia 20 years,[30] while in Queensland the maximum penalty for manslaughter is life imprisonment.[31] While most jurisdictions' laws do not regard workplace deaths as serious as manslaughter, the fact remains that most Australian jurisdictions punish serious OHS breaches with penal sanctions. While 5 or even 2 years may not be a substantial sentence for manslaughter, for the average OHS duty holder such penal sanctions would be very onerous. Incarceration can have a substantial impact upon an offender's health,[32] ability to obtain and retain employment, maintain personal relationships, obtain social security and to obtain housing.[33]

While the sentences for most workplace deaths is lower than general manslaughter provisions, the greater the punishment certainty is, the greater the deterrent impact of workplace death provisions will be. Punishment

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26 Section 32B of the *Ocupational Health and Safety Act* 2000 NSW); s 32 of the *Occupational Health and Safety Act* 2004 *(Vic).*

27 Currently the Northern Territory, Tasmania and South Australia have no penal sanctions for workplace deaths.

28 Section 24 of the *Workplace Health and Safety Act 1995* (QLD).

29 Section 18A(2) of the *Occupational Safety and Health Act 1984* (WA).

30 For the punishment of general manslaughter see section 24 of the *Crimes Act 1900* (NSW); section 5 of the *Crimes Act* 1958 (Vic); s 287 of the *Criminal Code* (WA).

31 Section 310 of the *Criminal Code*; where the penalty is sufficiently this sentence will be imposed: *R v Manson* [1974] Qd R 191; however not all convictions will result in this punishment. For example in *R v Young* [1969]Qd R 417 a sentence of 3 years, to be suspended after 9 months hard labour, was imposed for failing to provide a child the necessities of life.

32 Tony Butler, *'Owned by Nobody' : Health Status and its Determinants Among New South Wales Prisoners* (PhD thesis, University of New South Wales, 2001); Emma Miller, *HCV infection in South Australian prisoners : prevalence, transmission, risk factors and prospects for harm reduction* (PHD thesis, The University of Adelaide, 2006).

33 Jeanette Padman, *Relationship issues and newly released male prisoners* (PhD thesis, University of South Australia, 2001).

deterrent certainty increases as the probability that the offender will be apprehended, prosecuted and punished increases. Thus the certainty that an offence will result in punishment will dictate the degree of deterrent. Without the actual ability to enforce the offence, there will be no deterrent. While the perception of the ability to enforce the offence may have an impact on potential offenders for a time, if they realize their fear of suffering negative consequences is unjustified, then offenders will cease being deterred by the deterrent offence.[34]

Briscoe's PhD was primarily concerned with the deterrent effect of the severity of legal punishments in Australia.[35] Her research is especially relevant here, as it focused on the deterrent impact involving offences which do not have the same moral repugnance as murder and rape.[36] Briscoe examined the impact punishments for driving offences had upon deterrent unlawful conduct. Across all scenarios and all designs Briscoe found punishment certainty increased the deterrent impact of the punishment.[37]

The elements of the offences of industrial manslaughter and death caused by gross negligence are far easier to satisfy than the elements for general manslaughter.[38] While both industrial and general manslaughter require there to be a death, industrial manslaughter attributes criminal liability for negligent conduct, where general manslaughter requires recklessness or criminal intent.[39] The main difference between these two standards is that negligence is judged against objective criteria, while recklessness focuses upon the defendant's subjective state of minds. The adoption of the negligence standard for industrial manslaughter means an employer can be prosecuted for industrial manslaughter based upon imputed knowledge. In other words, even though an employer acted subjectively diligently, if they fell below the objective standard, then they will be liable. General manslaughter, however, requires more than negligence. To obtain a prosecution in general manslaughter, the prosecution must prove the defendant's degree of negligence amounted to recklessness.[40] As a

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34 Lawrence Sherman, 'Police Crackdowns: Initial and Residual Deterrence' in Michael Tonry and Norval Morris (eds), *Crime and Justice: A Review of Research* (vol. 12 University of Chicago Press, Chicago, 1990) 1- 48.

35 Suzanne Briscoe *Deterrence, punishment severity and drink-driving*, PHD Thesis, University of New South Wales, 2005.

36 Janet Chan and Deborah Oxley 'The deterrent effect of capital punishment: A review of the research evidence' (2004) 84 *Contemporary Issues in Crime and Criminal Justice*, NSW Bureau of Crime Statistics and Research; Offences which involve a larger divergeance from social norms involve different deterrent factors: Robin Sowell *Deterrence and morality: Interactions and causal connections*, PHD thesis, Washington State University, 1998.

37 Suzanne Briscoe *Deterrence, punishment severity and drink-driving*, PHD Thesis, University of New South Wales, 2005, at 47-50.

38 Andy Hall, Richard Johnstone and Alexa Ridgway *Reflection On Reforms: Developing Criminal Accountability For Industrial Deaths* (2004) Canberra, National Research Centre for Occupational Health and Safety, Australian National University.

39 Ibid.

40 *R v Lowe* [1973] QB 702.

consequence, those states which adopted the gross negligence test for punishing industrial deaths have made it easier to gain a prosecution for this offence than general manslaughter, and thus have increased the deterrent effect of industrial death provisions.

CONCLUSION

The director's main role is to provide companies strategic direction. With the introduction of OHS duties, directors are now required to become involved with how their companies manage safety. Directors who fail to become involved with their companies' OHS compliance face the possibility of fines or even imprisonment for their companies' OHS breaches. Through imposing such substantial punishments for non-compliance, these OHS laws will motivate directors to become actively involved in their companies' OHS. Whether these amendments will practically improve safety is yet to be determined.