



Legal Implications for Companies and Individuals under “Industrial Manslaughter”

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PROPOSED NEW OCCUPATIONAL HEALTH AND SAFETY LAWS

There has been a lot of discussion recently over proposed new occupational health and safety (OH&S) legislation which will include the provision to prosecute corporations and individuals under industrial manslaughter laws. State and territory governments are enacting these new laws in response to workplace deaths in the hope that it will force company directors and senior executives to improve the safety cultures within their organisations.

Organisations that will be the most exposed to these new laws will obviously be those that operate in high risk industries and the resulting punitive actions of an industrial death will not be solely confined to the senior executives and directors. Responsibility will potentially fall on every person involved with a workplace death where it can be shown they had some part to play. It should be noted also that responsibility for the death or an individual is also not restricted to the employees of the organisation but also includes other people employed by the company such as contractors, apprentices and volunteers.

The ACT and Victorian Governments both have OH&S laws that enable companies and individuals to be held accountable for workplace deaths while the WA government and the remaining states are all considering similar laws. The ACT Act was the first bill to be passed and carries with it penalties of up to \$200,000 for individuals and \$1 million for corporations with the added option of prison for up to 20 years. It also includes the provision for the court ordered release of information in the form of public notices which has been dubbed “name and shame”.

PROSECUTING FOR INDUSTRIAL MANSLAUGHTER

Previously, under OH&S and common law it has proven difficult to successfully prosecute corporations for industrial death because the cause of the death needs to be established as a wilful or mindful act. It would therefore need to be shown that a company’s intentions were wilfully negligent. It is difficult to establish in a legal sense the individual or individuals who are responsible for the company’s intentions because of hierarchy and delegation. Another problem with prosecuting for industrial manslaughter lies with the fact that the majority of deaths occur as a result of errors or negligence that occur as a result of decisions made at mid-management or lower levels and at this level, the employees are rarely the main driver behind the mindset of an organisation.



This problem with prosecuting under common law has become known as the *Tesco principal* after the UK company successfully defended itself on an industrial death charge by proving that the company (read the directors and executives) could not be held accountable for delegated authority and decisions made at a lower management level.

The *Tesco principal* has proved to be an effective barrier to prosecution under common law in Australia which is why the more popular route has been to prosecute under OH&S legislation. The only drawback for prosecutors here is that the only penalties available are relatively small fines and custodial sentences are not included.

ACCOUNTABILITY

State legislators believe that that these new laws will improve the level of duty of care and organisational safety by making individuals more accountable if somebody dies at work as a result of negligence. There has been considerable criticism of this approach with many opponents saying that these laws will not make workplaces any safer than they are under existing OH&S laws and that it will only foster a culture of litigation, blame and avoidance. Many also believe that these “hang the boss” laws inadequately deal with the contributory negligence of other parties such as middle managers, employees, contractors and manufacturers or suppliers of plant and equipment.

CONCLUSION

The likely reaction to any new legislation will be for organisations to engage in major legal proceedings to protect their management and directors rather than working cooperatively with authorities to resolve any OH&S issues. Where industrial manslaughter charges have been brought it is also possible that scapegoats within organisations will be sought.

These changes and the fact that there have already been successful prosecutions under this legislation in Australia, highlight the critical importance for companies and individuals directly involved in high risk industries to be diligent in following current best practice industry standards as well as following company procedures. To fail to do so could be potentially disastrous for all parties concerned.