



HERBERT
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Industrial Manslaughter

Centre for Excellence in Child and Family Welfare

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Content of this paper and key message

The purpose of this presentation is to explore the potential impact on government agencies of the recently passed Victorian industrial/workplace manslaughter offence, due to commence on or before mid-2020.

Content

The paper is set out in the following parts:

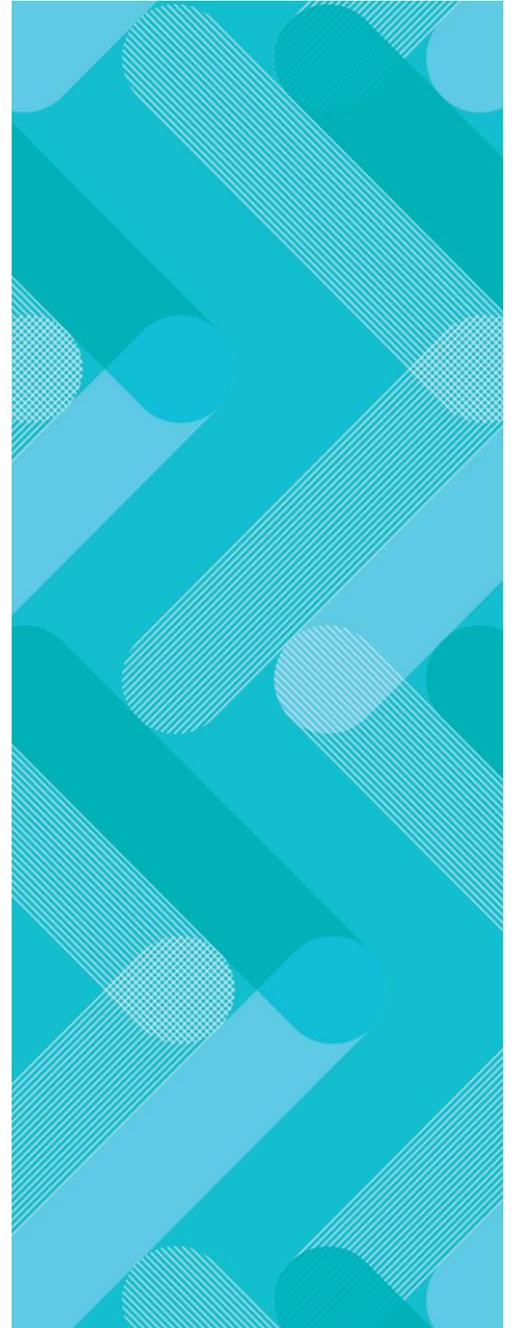
1. Context and intent of the new workplace manslaughter laws (**Laws**)
2. A summary of the legal 'elements' which need to be proven to establish an offence against an Agency/Corporation or an Individual 'Officer' (as defined)
3. Recommendations for managing legal risk

Key messages

- There is a willingness of WorkSafe Victoria to prosecute State Government Departments or Agencies. Overall, the introduction of the new Laws increases the seriousness of potential sanctions for a death caused by the actions of these entities
- Where an agency greatly departs from its procedures, or the standard of care demonstrated by other state/territory/federal police agencies, there is a risk of prosecution under these Laws



Context: Reform of the OHS Act



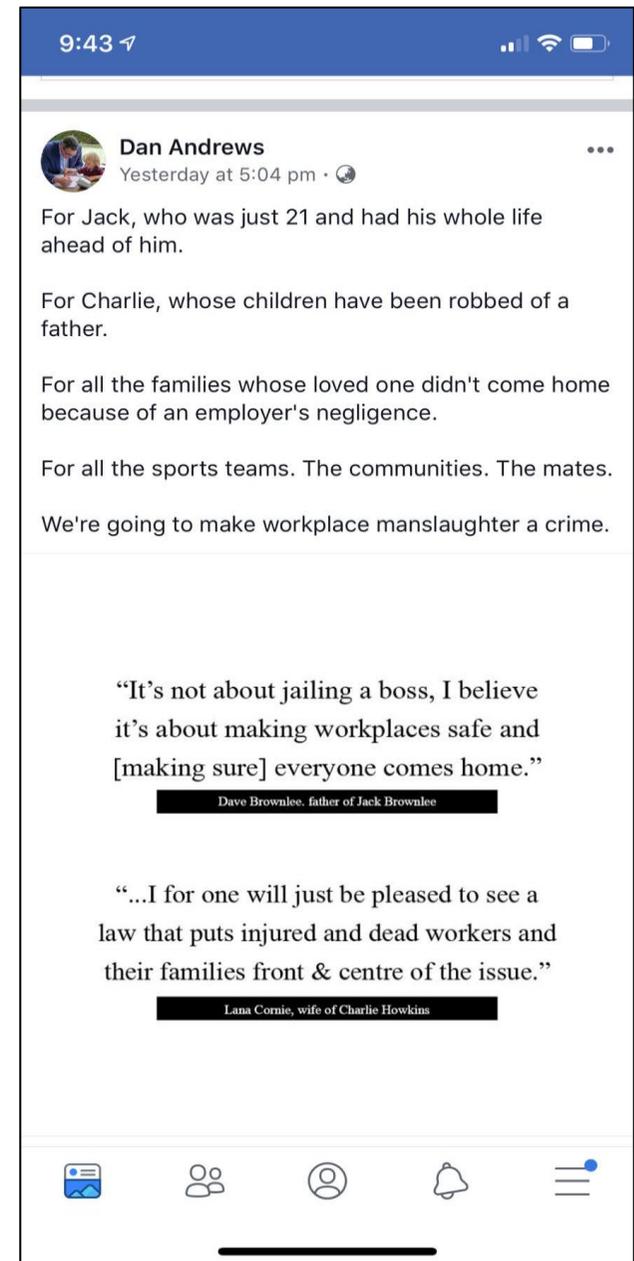
Policy focus



Industrial Manslaughter: Kill a Worker, Go to Jail

Last year in Australia 190 workers were killed at work and there have already been more than 115 workers killed so far this year. No worker should go to work and die.

This conference affirms our support for industrial manslaughter laws through amendments of WHS laws and/or the state and territory criminal codes and sets an objective to have industrial manslaughter laws enacted in all States and Territories in Australia within the first year of a Shorten Labor Government.



Legal context

The introduction of a workplace manslaughter offence was a policy objective of the Andrews Government leading into the last election.

Legislative change

On 26 November 2019, the *Workplace Safety Legislation Amendment (Workplace Manslaughter and other matters) Bill 2019* (Vic) was passed. These Laws amends the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**) by creating a new offence of workplace manslaughter.

Building on existing laws

- Today, a workplace fatality in Victoria will be investigated by WorkSafe, and can result in prosecutions for existing offences under the OHS Act. These existing offences include potential multi-million dollar fines for companies and individuals, or potential terms of imprisonment for individuals who engaged in 'reckless' conduct (s.32).
- A few years ago, the Victorian Government increased the penalties available under s.32, following comments from the Court of Appeal .
- There has only been one occasion where an individual has served a custodial sentence for a breach of the OHS Act.



Elements: How will a workplace manslaughter offence be proven?



Elements to the offence

In general terms, proving a workplace manslaughter offence requires 4 things to be proven by the prosecution.



- First, there must be a death for the Laws to be enlivened.
- There must be a breach of a general duty under the OHS Act (this does not include the duty a *worker* owes to take reasonable care).
- That duty-holder's conduct must have caused the death.
- In terms of proving the relevant negligence element:
 - The relevant conduct (an act, or a failure to act) must have involved a high risk of death, serious injury or serious illness
 - The relevant conduct must be a great falling short of the standard of care which would be expected in the circumstances

We discuss these elements further below, including the extent to which these Laws apply to "Officers".

Elements to the offence



In relation to this element, the Prosecution must prove a failure to meet an existing duty under Part 3 of the OHS Act

- Generally, a government agency must ensure health and safety by eliminating or mitigating risks to health and safety, so far as is reasonably practicable. This includes a duty to others (s.23) as well as a duty to members/employees (s.21).
- In determining what is *reasonably practicable*, a government agency must consider:
 - a) the likelihood of the hazard or risk concerned eventuating;
 - b) the degree of harm that would result if the hazard or risk eventuated;
 - c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
 - d) the availability and suitability of ways to eliminate or reduce the hazard or risk; and
 - e) the cost of eliminating or reducing the hazard or risk.

Elements to the offence



- “Duty” means any duty within Part 3 of the OHS Act. These are duties owed by any employer in its ‘corporate’ capacity. Individual employees are excluded from the Manslaughter offence, because the definition expressly excludes:
 - ✓ A duty imposed by s.25 (duties of employees); or
 - ✓ a duty imposed by s.32 on a person who is an employee, but not an officer.
- In practical terms, if an agency or its Officers do not take steps, where reasonably practicable, to ensure that health and safety risks have been eliminated or mitigated, they may be alleged to be in breach of duties under the OHS Act.
- Importantly, conduct can be an act or omission to perform an act, and may constitute a breach:
 - ✓ whether or not any other conduct also contributed to the breach; and
 - ✓ whether or not any proceeding has been commenced in relation to that breach.

Elements to the offence



To prove this element, there must be a direct connection between the conduct and the death

In practical terms, this likely means:

- There should be a common-sense connection between the offending conduct and the death.
- The conduct must have “contributed significantly” to the death, or be a “substantial and operating cause” of it.

This is not to suggest that the conduct needs to have been officially sanctioned. What matters is the conduct engaged in by the body corporate itself, and it does not matter whether any of the body corporate's officers were involved in all or any part of the conduct.

The Explanatory Memorandum provides that liability for workplace manslaughter may be imposed on a body corporate (or other entity) where: “...*the organisation's unwritten rules, policies, work practices or conduct implicitly authorised non-compliance, or failed to create a culture of compliance, with its duties, and a death resulted from this negligent conduct*”

Elements to the offence



In relation to this element, the prosecution must prove that the conduct involved a high risk of death, serious injury or illness.

In practical terms, the prosecution will rely on the evidence leading up to the incident to prove that the conduct involved a “high risk” of death, serious injury or serious illness, and also that the steps taken or things provided to prevent or minimise the risk were insufficient, and fell short of the appropriate standard of care that was required in the circumstances.

In considering the evidence which the prosecution may rely on to provide this element of ‘negligence’, we do note that there are often many internal documents and risk assessments which themselves draw a conclusion that an activity is inherently high risk.

Elements to the offence



In relation to this element, the Prosecution must prove that the conduct amounted to a great falling short of the standard of care that would be taken by a reasonable person in the circumstances in which the conduct was engaged in.

In practical terms:

- Explanatory materials accompanying the changes to the laws suggest that the prosecution will not merely rely on evidence of the formal systems of work, such as policies and procedures of an employer. It may also rely on ‘unwritten rules’, ‘informal work practices’ and ‘culture’ as proving that the conduct involved negligence falling short of the required standard of care.
- Similarly, Parliament has also highlighted that the introduction of the new Law is focused on organisations’ “culture of compliance”.
- This presumably involves an assessment of whether the business’ work conduct or practices has failed to create a “culture of compliance” in relation to safety matters and OHS obligations.

What is an ‘Officer’?

A Workplace manslaughter offence can be committed by both an organisation, as well as an individual. The individual must be an ‘officer’ for the purposes of the OHS Act.

- ‘Officer’ has the meaning given by s9 of the *Corporations Act 2001* (Cth). This includes persons who participate in the making of decisions that affect the whole or a substantial part of the organisation’s business are deemed “Officers”.
- In an ordinary corporation, senior personnel including Directors, CEOs, COOs and senior executives will be considered officers.
- This law has not been considered in the context of a government agency, certainly not in the context of an OHS prosecution.



Recommendations



Key message and recommendations

Key messages

- There is a willingness of WorkSafe Victoria to prosecute State Government Departments or Agencies. Overall, the introduction of the new laws increases the seriousness of potential sanctions for a death caused by the actions of any agency or its senior leaders.
- Where a department or agency greatly departs from its procedures, or the standard of care demonstrated by other police agencies, there is a risk of prosecution under these laws.

Recommendations

We recommend all agencies view the new Laws as an opportunity to ask:

1. Risk: “What are our fatal and catastrophic risks and activities, and what are we doing about them? What are our controls?”
2. Risk controls: “Are we meeting industry practice standards in relation to the way in which we control these fatal and catastrophic risks?”
3. Consultation: “Is there a process of actively consulting with workers regarding these fatal or catastrophic risks?”
4. Resources: “Are we allocating sufficient resources to these controls? Is our position defensible? Are our systems of work appropriate?”
5. WHS Governance: “Are our governance and accountabilities clear, so we can clearly articulate the role of our Officers, if pressed? Do we have a culture of compliance? Do we have any informal practices conduct that does not align with a culture of compliance?”

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