

Workplace Health and Safety Presentation
by
Ken Phillips
Director Institute of Public Affairs Work Reform Unit
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Topic.

- *The two opposing direction of Australian OH&S laws- one presupposing employer guilt, the other targeting shared obligations.*
 - *Case studying the opposing directions*
 - *The differing models of industrial manslaughter legislation attempted or implemented in Vic, ACT and NSW.*
 - *The starkly different OHS laws in NSW compared to the new Victorian legislation*
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Ladies and gentlemen

Thank you to the *Australian Financial Review* for the opportunity to make this presentation.

Before giving you my views about the topic of this presentation, it will help to state the basic guiding principles of Occupational Health and Safety regulation.

Internationally, the accepted principles of OHS regulation were established by the Robens Committee in the United Kingdom in 1972. Robens explained that the principles involved

... a general duty of care imposed on those having control over aspects of the workplace, backed by detailed regulations and codes of practice.
and further that it
... involves a principal OHS Act that codifies the duties of care that are owed under common law. ...

The duty is imposed on employers, the self employed, owners, occupiers of premises and suppliers. The duty is owed to both employees and others (workers other than employees, customers and visitors)....

Workers have obligations not to put others at risk and to obey the reasonable instructions of their employer in relations to OHS.

These guiding principles impose obligations on all parties involved in any aspect of controlling work situations. No-one is excluded. These principles have been

internationally reinforced by the International Labour Organisation under Convention 155. Importantly, 155 looks at what people ‘control’ within what is ‘reasonably practicable’ for them to do.

In lay language, these principles of work safety regulation allocate duties and responsibilities based on:

- A recognition that all parties at work being held responsible for what they control; and
- Notions of responsibility couched within frameworks of what is ‘reasonably practicable’.

And it should also be clear that for safety regulations to be effective, people must have confidence in the integrity and commonsense of the regulations. Hence:

- Regulations need to allocate responsibility where control is real and not in name only; and
- Principles of natural justice must apply to enforcement.

Australia recently announced our intention to ratify Convention 155, which means that we have agreed to incorporate these principles in our laws.

My proposition to you today, however, is that our Australian OHS laws are pulling in two opposing directions, depending on the jurisdiction one examines.

- One direction breaches these OHS principles by presupposing employer guilt. The laws breach principles of justice and allocate liability where control is not real. Such regulation lacks integrity and does not and will not retain community confidence. As a result, this threatens work safety.
- The other direction is in accord with OHS principles. It allocates responsibility to each person according to his or her level of real control. In this respect, principles of justice apply and community confidence should follow. This will assist work safety.

I shall demonstrate the two directions by case studying and comparing OHS laws in Victoria and New South Wales (with a quick glance at the Australian Capital Territory). In doing this, I want to focus on the core structures of the laws.

Trends

But first some background facts may be helpful.

Between 1997 and 2002 the incidence of annual compensable workplace fatalities—a proxy for avoidable deaths—has fallen by nearly a third:

- There were 429 deaths nationally in 1997
- There were 297 deaths nationally in 2002

In this five-year period, the incidence of worker deaths per 100,000 workers fell from 5.9 to 3.6.

These figures are both unacceptable and tragic, but at the same time the downward trend is positive.

It is unacceptable that anyone dies in a work situation. It is positive that Australia has produced a dramatic drop in yearly work deaths. It is imperative that we continue this trend and have safety regulations, cultures and practices that target zero deaths and zero injuries in work situations.

Guilt

However, we also suffer from politicised cultures and mindsets that presume that workplace injury and death is, by nature, the fault of a specified class of persons. The bad people who are seen as responsible for death and injury are the bosses, the employers. And they must pay, so this cultural mindset reasons.

It is one thing for such a view to exist. It is another thing for this view to be the basis of OHS legislation. But this is what has happened quite recently.

This mindset—predetermined employer guilt—was the design feature of the Victorian attempt at industrial manslaughter legislation in 2002–03. Fortunately, this was rejected and replaced in 2004 with legislation generally in accord with the Robens’ and ILO principles.

The New South Wales legislation of 2000, by contrast, has predetermined employer guilt as its design mainstay. NSW’s legislation breaches OHS and justice principles and the Government is now looking at further change which will make the problem worse.

In 2003, the Australian Capital Territory enacted a variation of the rejected Victorian industrial manslaughter model focused on brand damaging corporations

Victoria

The headline for an article in the Melbourne *Herald Sun* on 28 October 2003 read as follows:

‘Death at work: will bosses pay?’

The article was commenting on the Victorian Government’s decision not to proceed with industrial manslaughter legislation. It described the decision as

‘one of its more notorious legislative backdowns since coming to office.’

The author asked

‘should directors and officers be made more accountable for breaches of OHS laws by their companies?’

The article reflected an important series of events. In 2002, the Victorian Government tried to pass its Workplace Deaths and Serious Injuries Bill, but it failed in the Upper House which it did not control. After gaining control of the Upper House in the subsequent election, the government dropped the Bill when it could have easily passed it. In two short years there has been an important and dramatic shift in the Victorian Government’s concepts of OHS liability.

The structure of the 2002 manslaughter Bill presumed employer guilt for workplace deaths. In particular, the Bill:

- held that a collective of persons was capable of criminality in relation to work deaths, but declared that only one legal form of a collective—the corporation—could act criminally;

- excluded other forms of collectives, such as the public service, not-for-profit bodies and unions from such collective criminality;
- blamed the corporate system as the instrument of criminal behaviour, asserting that corporate culture and organizations committed criminal acts; and
- identified senior officers as the 'fall guys' who could incur jail sentences on the corporation's behalf.

This legislative structure which posits employer guilt by virtue of the existence of a 'corporation' breaches key notions of justice, particularly criminal justice, upon which civilized societies depend.

People who steal, beat up, rape, blackmail, murder and so on, might do so in the context of seeking to further the interests of a collective, be it a gang, a religious group, a political or ethnic group or whatever. But in every criminal case, individuals have to be the instruments of the criminal act and individuals are held responsible for their individual criminal actions. Collectives are never held criminally responsible. Individuals are.

Where a society frames laws to hold collectives capable of criminal acts and holds specified members of the collectives to be guilty and punishable for the collective's alleged crimes, that society steps in a dangerous direction. Guilt by virtue of membership of a collective is a first step which has, in some societies, and only after many other steps have been taken, led to state-sanctioned genocide and other human rights atrocities. Declaring collectives capable of criminality is an early warning signal of a state-induced social sickness.

The Victorian government rejected this approach. It commissioned a review of OHS laws and went back to the basics that are in line with the Robens' principles and ILO Convention 155.

The Maxwell Review reported in March 2004. The Report gives a very clear statement on the balance required in OHS prosecution. The report said:

'A prosecution for a breach of OHS duty is also quite unlike a typical criminal prosecution. First, the offence is committed whether or not harm was caused.... Nor is the seriousness of the breach of duty measured by the seriousness of the consequences ... secondly, proof of a breach of an OHS duty does not depend upon proof of a relevant state of knowledge or intent (mens rea). And there are no statutory defences under OHS'

'With manslaughter ... it is the causing of a death which constitutes the offence, and that properly remains within the province of the general criminal law.'

Following the Maxwell Review, a new Victorian OHS Act was passed in late 2004 and is to become law in mid-2005. It allocates duties and responsibilities to all parties involved in the work situation according to levels of control and what is 'reasonably practicable'. It does make provision for jail terms as punishment for breaches of OHS law, but only in certain circumstances.

Victorian Act 2004

The objects of the Victorian legislation state:

Clause (4) 'The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.'

Importantly, the reach of the Act is wide. The Crown, for example, is taken to be a corporation for the purposes of the Act. Employers, the self-employed, employees, and anyone else involved with a work situation has obligations under the Act.

This is demonstrated in the wording used to describe obligations of different parties in a work situation. The wordings are similar for each party with variations to accommodate the differences in situations of each category.

Clause (21) 'An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health'.

Clause (24) 'A self-employed person must ensure, so far as is reasonably practicable, that persons are not exposed to risks to their health or safety arising from the conduct of the undertaking of the self-employed person.'

Clause (25) (1) While at work, an employee must -
(a) take reasonable care of his or her own health and safety and
(b) take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace'.

Clause (26) 'A person who (whether as an owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace etc...' 'apply only in relation to matters over which the person has management or control.'

The Act has a consistent theme of allocating responsibilities

"...in relation to matters over which the person has management or control".

The consistency is further demonstrated by the penalties: all natural persons of each category face penalties of up to 1,800 penalty units for a variety of offences.

A manager who breaches the Act as an individual faces the same potential penalties as an employee for the same breaches of the Act. There is no distinction for individual actions based on legal status. Managers, employees, self-employed independent contractors, servants of the Crown, suppliers and others are all equally liable.

It may be drawing a long legal bow, but clause 26 may arguably extend obligations to unions and union officials where they have demonstrably acquired measures of control of work situations through industrial instruments or cultural and behavioural factors.

Corporations face large financial penalties, but managers are not held liable for breaches of the Act by the corporation. Managers are held liable for their own breaches.

The equity of this regime of punishments sends out the necessary and powerful real signals that everyone has equal and shared measures of responsibility over safety. No one can complain. It is the same as driving a car. Whether you are a P-Plater or a politician, you are and will be held responsible for your actions on the road, no matter what your alleged importance or power. This wide-scale 'equality' is a prime and necessary legal step in the creation of community cultures of OHS compliance and safety.

And, yes, people can be sent to jail:

'A person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury....'

Penalty natural person	<u>up to 5 years jail</u> or 1,800 units
Corporation	9,000 units

Heard and determined subject to the *Magistrates Court Act* 1989.

In commenting on jail provisions, I need to defer to legal advice, but to this layperson the Act seems to tie the prospect of jail to an individual's actions and, presumably, applies a presumption of innocence, allows proper legal proceedings, rights of appeal and so on.

There are criticisms of the Victorian OHS Act on union right of entry and other issues, but within its core structure it is miles away from the 2002 Industrial Manslaughter Bill and strongly conforms with internationally accepted OHS principles. Further improvements perhaps could be made, but the core structure looks sound and probably leads Australia in this respect.

New South Wales

The same cannot be said for the NSW *Occupational Health and Safety Act 2000* which has a completely different structure from the Victorian Act.

Employers and the self-employed in NSW are charged with an absolute OHS obligation under the Act which is not measured against what they 'control' or contained within the parameters of what is 'reasonably practicable'.

Div 1

8 Duties of employers

'An employer must ensure the health, safety and welfare at work of all the employees of the employer.' [Extends to 'people']

9 Duties of self-employed persons.

'A self-employed person must ensure that people ... are not exposed to risks..etc'

This legislative framework creates a presumption that employers and self-employed persons are guilty of OHS breaches even before any incident occurs. The Act automatically apportions guilt to both legal categories once an incident occurs. There is no consideration of the reality of practical control in presupposing guilt. It is an Act of clear legislative discrimination.

There is, however, some consideration of ‘control’ for persons who supply or manage a premises, supply plant and equipment and so on

Div 1

10. Duties of controllers of work premises etc.

(1) A person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.’

And in relation to plant or substances responsibility exists

“...only to matters over which the person has control...”

Only employees are accorded ‘reasonableness’ in their actions

Div 3

20 Duties of employees.

(1) ‘An employee must, while at work, take reasonable care...’

In its structure, the NSW Act applies OHS obligations in a totally inequitable and discriminatory manner:

- Employers and the self-employed are assumed to have total control over their workplaces and are, therefore, presumed to be guilty before incidents even occur.
- Controllers of work premises and suppliers are allocated obligations over what they control.
- Only employees are allocated obligations according to what they can reasonably exercise.

But it is in the realm of penalties that the inequitable standards become glaring. Employers, the self-employed and suppliers as individuals face large penalties and even jail for breaches of the Act:

Div 1

Individuals	up to 750 penalty units. (\$82,500)
Individual 2nd offence	2 years jail.

Individuals who are employees face comparatively (and mockingly) small penalties and no prospect of jail:

Div 3

Employees	up to 45 penalty units
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The glaring difference between the penalties applied to individuals as employers and the penalties applied to individuals as employees demonstrates a systemic bias and sickness within the Act. The Act sends powerful signals to some people at work that they have comparatively minimal obligations under OHS and that other people have heavy obligations. It encourages a work culture of liability and responsibility transference, where ‘others’ are seen as responsible for safety instead of each individual person. This must lead to dangerous work cultures where responsibility for safety is not shared.

But the NSW Act is not content to stop at that point. It moves on to apply the ‘fall guy’ principle. Where a corporation breaches the OHS Act, directors and managers are automatically found guilty of the same breach. No evidence or facts are needed to determine guilt.

Div 4

Clause 26. Offences by corporations

- 'If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation and each person concerned in the management of the corporation is taken to have contravened the same provision.....'
- 'A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.'

To my mind, NSW is a State of injustice.

The only occasion in which the Robens' principles or ILO Convention 155 are given any sort of consideration lies in the defence that managers, directors or corporations who are already presumed guilty can attempt to mount to disprove their guilt.

Clause 28; Defence

Must prove 'it was not reasonably practicable for the person to comply...'
'the person had no control...' and 'impracticable'.

But the fact that 'control' within the bounds of what is 'reasonably practicable' is a basis for individuals to 'un-prove' their guilt is a distortion of the Robens' principles, Convention 155, and normal justice, rather than an application of them.

But the NSW Act still does not stop there. Remember, we are talking about potential jail terms here.

Trial is not before a jury and not before a proper Court with a background and expertise in matters of normal justice. Instead, judgment takes place before the peculiar institution of the NSW Industrial Relations Commission which has been heavily criticized on more than one occasion by the NSW Supreme Court for stepping beyond its expertise and brief. And there are no appeals to decisions of the Full Bench of the IRC.

This is law gone mad.

And NSW now proposes to jail people under this regime on a first offence in the event of a workplace fatality.

Still there is more!

The NSW OHS Act gives NSW unions the power to undertake prosecutions. And there is an added hook because the NSW *Fines Act 1999 Sect 122* allows for payment of a share of a fine to go to the prosecutor.

Here's a few examples:

- In 2002, the Public Service Association prosecuted the NSW Roads and Traffic Authority over an LPG bottle explosion. The RTA was fined \$90,000. The union received \$45,000.
- In 2003, the Public Service Association prosecuted the NSW Department of Education over attacks on teachers by violent students. The Department was fined \$160,000. The union received \$80,000.
- In 2003, the Finance Sector Union prosecuted ANZ over an armed robbery. ANZ was fined \$156,000. The union received \$78,000.
- March 2005 and the ANZ were fined a further \$175,000 over four armed robberies
- March 2005 Patrick Stevedores were fined \$115,000 over work practices that risked repetitive strain injury. The MUA was the prosecutor and received \$57,500. Patrick had to pay the MUA legal costs of around \$529,000.

What the heck is going on here? In NSW, OHS prosecution has been turned into a legalized money-making scam.

A Glimpse of the ACT

The ACT Government entered the fray in late 2003. The ACT *Crimes (Industrial Manslaughter) Amendment Act* does not make the errors of the early Victorian Bill. Jail for senior officers only occurs where an officer's direct action causes death. But the Act persists with the view that collectives can commit criminal acts and it includes religious, ethnic, business, government and any other collective in its ambit. But the real focus of the Act becomes clear when penalties are examined. Part of the penalty regime involves court-ordered public humiliation for breaches of the Act. But public humiliation applies only to corporations, not to any other collective. It's why the Act has been called an 'act of corporate loathing'.

Why?

How or why has this come about? Why would legislatures create law that presumed guilt against a particular class of persons or legal status?

It appears to me that, in Australia, we suffer from a cultural pre-disposition toward predetermined guilt based on a political, ideological and academic obsession with the notion of class consciousness and class warfare within the work environment. The employment relationship is supposed to be one in which the employee is powerless and witless. The employer is supposed to be all-powerful and controlling. This may be the nature of the employment contract, whether right or wrong. But when transferred to work safety laws, it is dangerous and stupid.

Under the employment contract, the law of vicarious liability involves the transfer of liability of personal actions from the employee to the employer. This may serve sound commercial purposes, but on work safety issues it is an invitation to death and injury.

The bedrock of safe work cultures, systems and behaviours must be that individuals are held liable and responsible for situations and actions over which they personally have reasonable and practical control. Legislation that distorts this foundation contorts work behaviours and invites unsafe workplaces.

Conclusion

Work safety is too important an issue for games to be played with it. Laws cannot make people behave safely. But laws can set the frameworks within which work cultures, systems and behaviours are formed. The laws must imbue people with confidence that obligations and responsibilities are applied equitably, fairly and with common sense. The principles of justice must apply. Transference of liability and transference of obligations cannot be allowed to occur. If the law fails in these areas, people will conspire to avoid their obligations for fear of the unjust laws. This sets the scene for work cultures that are endemically unsafe. People's well-being and lives will be placed at risk.

The Robens' principles and Convention 155 have laid the international standards for OHS regulation, based on accountability for that which persons actually 'control' within the confines of what is 'reasonably practicable'.

Australian regulators are involved in a tug-of-war either to breach these principles or to comply with them. Compliance should lead to safer work environments. Non-compliance risks creating more dangerous work environments.

Ken Phillips is an Australian commentator and lobbyist on labour and workplace reform issues. Through his articles in the Australian Financial Review, other newspapers and think tank and academic journals, Ken is known for approaching labour issues from outside normal perspectives. Among his many activities Ken coordinates the Institute of Public Affairs' Work Reform Unit where he conceived and leads research on the IPA's cutting edge Capacity to Manage Index. He directs research on industrial relations verses trade practices issues, is a published authority on independent contractor issues and promotes the concept of markets in the firm. He is currently completing a book, *Independence and the Death of Employment*.

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