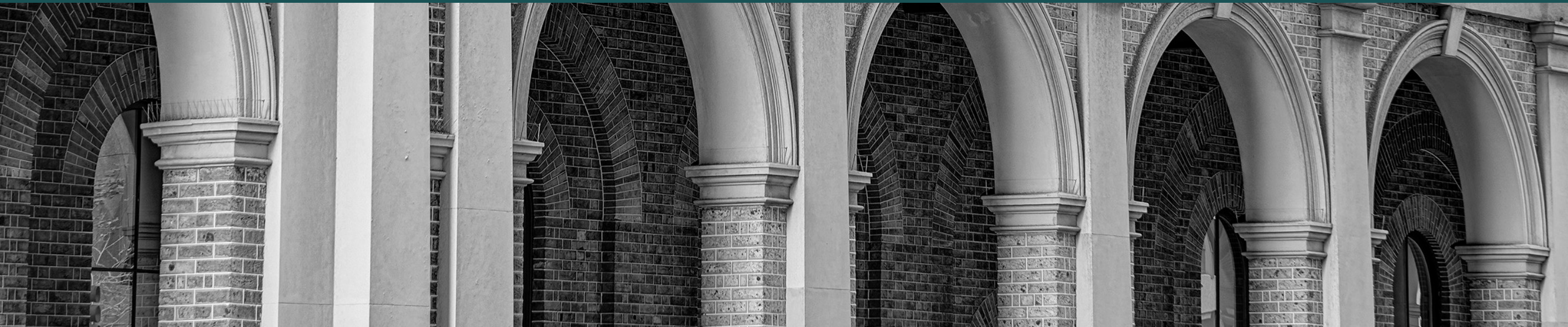




GREENWAY CHAMBERS

INDUSTRIAL MANSLAUGHTER AND RECKLESSNESS OFFENCES

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Industrial manslaughter and recklessness offences

Presentation outline

1. Recent amendments to the Work Health and Safety Act 2011 (NSW) - liability of bodies corporate
2. A new offence of "industrial manslaughter" in NSW?
3. Recent judgment - does recklessness require that a defendant foresaw a possibility, or a probability, of a risk?
4. Recent Category 1 sentencing judgments



Work Health and Safety Act 2011 (NSW) – new provisions

- Section 244 – “authorised person” and “board of directors”
- Section 244A – imputing conduct to a body corporate
- Section 244B – imputing a “state of mind” to a body corporate
- Section 244C – “mistake of fact” defence
- Section 244D – “reasonable precautions” exemption

Definitions

“authorised person” – an officer, employee or agent of the body corporate acting within the actual or apparent scope of the officer’s, employee’s or agent’s–

- (a) employment, or
- (b) authority

“board of directors” – the body, **whatever it is called, exercising the executive authority of the body corporate**

Imputing conduct to a body corporate

"244A Imputing conduct to body corporate

For this Act, conduct engaged in by the following on behalf of a body corporate is conduct also engaged in by the body corporate—

- (a) the body corporate's **board of directors**,
- (b) 1 or more authorised persons,
- (c) **1 or more persons acting at the direction of or with the express or implied agreement or consent of—**
 - (i) the body corporate's board of directors, or
 - (ii) an authorised person"

State of mind

- **Section 244B(1)(a) and (c)** – sufficient to show that a **board of directors** or **authorised person**:
 - “intentionally, knowingly or **recklessly engaged** in the relevant conduct”
 - “expressly, tacitly or **impliedly** authorised or **permitted** the carrying out of the conduct”
- **Section 244B(1)(c)** – sufficient to show that “a **corporate culture** existed within the body corporate that **directed, encouraged, tolerated** or led to the carrying out of the conduct”
- **Section 244B(2)** – State of mind not to be imputed from “board of directors” or “corporate culture” if the body corporate proves it took “**reasonable precautions**” to prevent “the conduct” or “authorisation or permission of the conduct”

Mistake of fact

“If mistake of fact is relevant to determining liability for an offence, a body corporate may rely on mistake of fact only if–

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted the offence, **and**
- (b) the body corporate proves it took **reasonable precautions** to prevent the conduct”

Failure to take reasonable precautions

“For **sections 244B(2) and 244C**, a failure to take reasonable precautions may be evidenced by the fact that the conduct was substantially attributable to–

- (a) **inadequate management, control or supervision** of the conduct of one or more of the body corporate’s employees, agents or officers, or
- (b) **failure to provide adequate systems for conveying relevant information** to relevant persons in the body corporate”

An offence of “industrial manslaughter” in New South Wales?

Rumblings

“The Minns Government will introduce an industrial manslaughter offence in NSW.”

...

The NSW Government will formally begin the consultation process in coming weeks and intends to introduce a bill to parliament in the first half of next year.”

Minister for Work Health and Safety, Sophie Cotsis, Media Release, 19 October 2023



Potential features of an “industrial manslaughter” offence

Commonwealth and South Australian WHS offences

Maximum penalties

- For individuals:
 - **SA** - 20 years imprisonment.
 - **Cth** - 25 years imprisonment, with no substitutable pecuniary penalty.
- For a body corporate:
 - **SA and Cth** - \$18,000,000.

Potential features of an “industrial manslaughter” offence

Commonwealth and South Australian WHS offences

Causation

- Conduct causes death if it “**substantially contributes** to the death” (Cth and SA): s 30A(2)

Alternative verdicts

- Defendant may be found guilty of a Category 1 or Category 2 offence:
 - **Cth** - so long as the defendant has been accorded procedural fairness in relation to that finding of guilt: s 30A(4).
 - **SA** - if proceedings for the alternative charged offence commenced within the applicable limitation period: s 30A(3)

Potential features of an “industrial manslaughter” offence

Commonwealth and South Australian WHS offences

Limitation period

- **Cth** - “There is **no limitation period** for bringing proceedings for an offence against [s 30A(1)]”: Note to s 30A(1).
- **SA** - “This section does not apply to proceedings for an industrial manslaughter offence”: s 232(3).



Potential features of an “industrial manslaughter” offence

Commonwealth WHS offence

Liability - s 30A(1)

(a) the person is:

- (i) a person conducting a business or undertaking; or
- (ii) an officer of a person conducting a business or undertaking; and

(b) the person has a health and safety duty; and

(c) the person **intentionally engages in conduct**; and

(d) the conduct breaches the health and safety duty; and

(e) the conduct causes the death of an individual; and

(f) the person was **reckless**, or **negligent**, as to **whether the conduct would cause** the death of an individual.

Potential features of an “industrial manslaughter” offence

South Australian offence

Liability - s 30A(1)

- (a) the person has a health and safety duty; and
- (b) the person engages in conduct that breaches that duty; and
- (c) the conduct causes the **death** of an individual to whom that duty is owed; and
- (d) the person—
 - (i) engages in the conduct with **gross negligence**; or
 - (ii) is **reckless as to the risk** to an individual of death or serious injury or illness.

Legislative framework

Category 1 offence - s 26F of the Schedule to the *Heavy Vehicle National Law 2013* (SA):

“(1) A person commits an offence if–

- (a) the person has a duty under section 26C; and
- (b) the person, without a reasonable excuse, engages in conduct related to the duty that exposes an individual to a risk of death or serious injury or illness; and
- (c) the person is **reckless as to the risk.**”

Compare, s 31(1)(c)(ii) of the *Work Health and Safety Act 2011* (NSW): “a person commits a Category 1 offence if: ... the person... is **reckless as to the risk** to an individual of death or serious injury or illness.”

Competing constructions of section 26F

- **Regulator's proposed construction** - the accused must be aware of the possibility of death or serious injury or illness occurring as a result of conduct and proceeded nonetheless to engage in the conduct.
- **Defendant's proposed construction** - the accused must be aware of the probability (i.e. a more than 50 per cent chance) of death or serious injury or illness occurring as a result of conduct and proceeded nonetheless to engage in the conduct.

The proper construction of section 26F

Blue J at [66]:

“On the proper construction of section 26F, a person is reckless as to the risk of death or serious injury or illness if they are aware of the possibility of death or serious injury or illness occurring as a result of their conduct and nevertheless proceed to engage in that conduct. The possibility need not have a probability greater than 50 per cent, although it must be a real, as opposed to a fanciful or theoretical, possibility.”

Recent sentences for Category 1 Offences in New South Wales

Maximum penalties under the WHS Act and HVNL

Section 31 of Work Health and Safety Act 2011 (NSW)

- *For an individual (other than as a PCBU or officer) - 3,465 penalty units (i.e. \$381,150), or 5 years imprisonment or both*
- *For an individual (as a PCBU or officer) - 6,925 penalty units (i.e. \$761,750), or 5 years imprisonment or both*
- *For a body corporate - 34,630 penalty units (i.e. \$3,809,300)*

Section 26F of the Heavy Vehicle National Law 2013 (NSW)

- *For an individual - \$300,000, or 5 years imprisonment or both*
- *For a body corporate - \$3,000,000*



Penalties imposed under the WHS Act and NHVL

- 1. *SafeWork NSW v A1 Arbor Tree Services Pty Ltd and Anor* [2023] NSWDC 256** – \$2,025,000 penalty imposed for guilty plea in respect of a Category 1 offence under the *Work Health Safety Act 2011* (NSW).
- 2. *SafeWork NSW v Synergy Scaffolding Services Pty Ltd* [2022] NSWDC 584** – \$2,000,000 penalty imposed for guilty plea in respect of a Category 1 offence under the *Work Health Safety Act 2011* (NSW).
- 3. *National Heavy Vehicle Regulator v Connect Logistics Pty Ltd* (Unreported, New South Wales Local Court, Magistrate Arms)** – \$2,310,000 penalty imposed for guilty plea in respect of a Category 1 offence under the *Heavy Vehicle National Laws 2013* (NSW).



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