



## WORKPLACE SAFETY AUSTRALIA PTY LTD

### Safety Alert: 16 - 2005

## NSW Occupational Health and Safety Legislation Amendment (Workplace Deaths) Bill 2005 Released

... “Make no mistake – if you are indifferent to occupational health and safety, if you have no concern for the consequences of that behaviour and a workplace death results - you will face the consequences.”

Ministerial Statement released by the Hon John Della Bosca MLC in May 2005 (see below link for full text)

A Ministerial Statement released by the Hon John Della Bosca MLC in 2004 implied that the Bill would be used only to target “*rogue employers*”. However, it appeared that the Bill would if implemented operate to catch not only grossly reckless and indifferent conduct but also where an employer had implemented sound OHS practices but where those practices had not been followed by an employee and as a result there was a workplace death.

After consultation about the 2004 Bill and strong employer opposition, the NSW Government has now amended the draft bill. The key new features of the revised Bill are:

- a new offence for a person who engages in reckless conduct that causes death at a workplace;
- the penalty for contravention of this new offence is proposed to be \$165,000 for individuals and/or up to five years imprisonment and \$1.65 million penalty for corporations;
- a new defence of a reasonable excuse. That is, if actions can be justified given all the facts and circumstances of the incident. The current defences under the OHS Act will continue to apply;
- a company director or manager could also be personally charged if they were personally reckless as to the risk of serious injury or death of another person;
- a worker could also be prosecuted under this new offence if their reckless conduct caused the death of another person at work;
- it is proposed that the new offence can only be prosecuted by a WorkCover inspector or by a mines inspector (in relation to mines), or by another person only

with Ministerial consent. Note that there was strong opposition to the previously proposed clause that a union could in the first instance prosecute the then proposed new offence;

- a person convicted will only have the right to appeal to the Court of Criminal Appeal if they are sentenced to a term of imprisonment.
- the prosecutor will not be able to appeal if a person is acquitted by the Court (this is contrary to the current ability of WorkCover to appeal acquittals with respect to other offences under the OHS Act);

A link to the full text of the Bill is:

[http://www.workcover.nsw.gov.au/NR/rdonlyres/28B8EFEF-5510-4417-A14A-B6935BE3BFE2/0/occupational\\_health\\_and\\_safety\\_amendment\\_workplace\\_deaths\\_bill\\_2005\\_4593.pdf](http://www.workcover.nsw.gov.au/NR/rdonlyres/28B8EFEF-5510-4417-A14A-B6935BE3BFE2/0/occupational_health_and_safety_amendment_workplace_deaths_bill_2005_4593.pdf)

The Minister's Statement on the Bill (3 pages) can be found at:

[http://www.workcover.nsw.gov.au/NR/rdonlyres/3E4CB7CA-5D89-4324-8BD2-932ADBED192E/0/ministerial\\_statement\\_on\\_workplace\\_deaths\\_4594.pdf](http://www.workcover.nsw.gov.au/NR/rdonlyres/3E4CB7CA-5D89-4324-8BD2-932ADBED192E/0/ministerial_statement_on_workplace_deaths_4594.pdf)

Background Information on the Bill (2 pages) is at:

[http://www.workcover.nsw.gov.au/NR/rdonlyres/3C9112E3-3FBD-4B96-A895-E1EDE4D434A2/0/information\\_sheet\\_on\\_workplace\\_deaths\\_4595.pdf](http://www.workcover.nsw.gov.au/NR/rdonlyres/3C9112E3-3FBD-4B96-A895-E1EDE4D434A2/0/information_sheet_on_workplace_deaths_4595.pdf)

### **“Shift Work Sleep Disorder” examined**

The ABC reports that we are getting less and less sleep and much of this is due to the rise in shift work. An online article in the ABC's "Health Matters" refers to a report published in the latest edition of the Medical Journal of Australia. The below link to the article includes a further link to this journal article and other information.

The article indicates that doctors have coined the term for the price that shift workers have to pay: "shift work sleep disorder".

The article suggests a number of types of illness and health effects suffered by shift workers including a higher risk of heart disease, depression and poor memory. The article also suggests that accidents are more common when persons are working on too little sleep.

The article does provide some suggestions as to the answer, including that employers can make their workplace more shift worker friendly by, for example, providing healthy canteen food so that employees do not resort to fast food. In addition, some suggestions for shift workers to combat the effects of shift work are included in the two page article. The article can be accessed at the following link:

<http://www.abc.net.au/health/thepulse/s1359332.htm>

## **High Court decision about workplace safety and an employee's responsibility at work**

While it might be suggested by some that a recent High Court judgment places more responsibility on an individual employee as distinct to largely or solely on the employer, the judgment needs to be seen in context. The case of *Thompson v Woolworths (Queensland) Pty Ltd* was an action in negligence for damages. It did not involve a prosecution under State OHS law where such legislation places a high duty on an employer to ensure safety. In common law actions for negligence, it is open to raise an argument of contributory negligence. In this case it was held that the employee had attempted to move waste bins without waiting for assistance and had done so in the knowledge of a recent injury, an injury that the employer was not aware of. A link to the judgment is as follows:

<http://www.austlii.edu.au/au/cases/cth/HCA/2005/19.html>

## **Harassment at Work Decision**

In a recent case, sexual harassment was held to exist involving an apprentice electrician (16 years old when he commenced work) against his former supervisor at work. The evidence was uncontested and the Tribunal found the complainant to be a credible and honest witness. Further, the Tribunal accepted that the former employee apprentice had suffered physical injuries and emotional hurt from the acts of his former supervisor. An order for the payment of \$15,286 was made. A link to the decision is as follows:

<http://www.lawlink.nsw.gov.au/adtjudgments/2005nswadt.nsf/aef47b40967d6150ca25684e00413827/db6d8c1aa4cab3e0ca256ff20021956b?OpenDocument>

Subscriber employers should ensure that young persons are supervised appropriately and that supervisors have the skill, competencies and appropriate attitude to supervise young persons at work. In a 2004 Safety Alert we reported of another harassment case involving a young employee and the above case is a reminder of such instances and that employers should take steps to check that supervision is appropriate.

## **Reasonable management action and claims for stress?**

It is now accepted law in Australian jurisdictions that a worker's claim for stress caused by work can be compensable under workers compensation acts in certain circumstances. Generally, however, Worker's Compensation Acts exclude conduct on the part of an employer that is "reasonable management activity"; that is, an employee cannot claim for stress where the conduct of the employer is reasonable conduct undertaken as part of a reasonable management strategy. For instance, the NSW Act states;

In a recent case heard by the NSW Court of Appeal, the issue of whether an employer might be liable for mental suffering or stress caused by an employer undertaking investigations into alleged employee misbehaviour or misconduct was considered. This case looked at the common law relationship between an employer and employee rather than at the statutory duty excluded by clauses such as the above. Remember that an

employee may have the opportunity to seek compensation under the Act, but may also sue an employer for breach of contract, or bring a tort claim, based on the same “psychiatric injury” they may have allegedly suffered.

In that case an employee was charged by her employer with four charges, with 28 specific particulars. The charges related to allegations that the opponent was at times not discharging her duties for the Department of Education, but was engaged in work for the New South Wales Rural Fire Service; that when in outside employment she claimed and received sick leave entitlements from the Department; that she failed to comply with her stated itinerary; and that she claimed travel expenses from the Department when engaged in activities on behalf of the New South Wales Rural Fire Service.

The findings of the Court of Appeal were complex, and much of what they found is not relevant here – especially since the proceedings were of a technical nature and, in legal jargon, did not finally resolve the issues in dispute. However, the Court did note that the case in question raised...

“...the possibility of a duty, arising from the relationship of employer and employee and perhaps other circumstances in the case, [requiring the employer to] exercise reasonable skill and care with a view to reasonably minimising foreseeable risks of harm [when] carrying out disciplinary procedures.”

Yours Faithfully,

Workplace Safety Australia Pty Ltd.

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**Important Note**

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The information contained in this Safety Alert is in general terms only and does not constitute legal advice or other professional advice. The information contained in this Safety Alert should not be relied upon and is no substitute for seeking legal or other professional advice as appropriate to any facts, circumstances and materials that might be necessary for you to provide to a professional advisor. While all reasonable care is taken in producing Safety Alerts, Workplace Safety Australia, its consultants and all others involved in providing this Safety Alert All expressly disclaim all and any liability for the results of any actions or failure to act taken on the basis of this Safety Alert, and for any error or omission arising therefrom. Should you wish to discuss this further, please contact Workplace Safety Australia on 02 9387 1248.

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