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# TESTING THE LIMITS

**PAUL HARDMAN** outlines the Australian H&S legal scene and uses two cases to illustrate how the limits of the Model Law are being tested.

Australia is an interesting jurisdiction for work health and safety prosecutions, not least because each state and territory has its own laws and prosecuting authority. All states and territories have adopted the Model Law (with variations) with the exception of Victoria.

While New Zealand's legislation permits private prosecutions, it remains the position in Australia's Model Law that a prosecution for a health and safety offence can only be commenced by the regulator or an inspector.

Queensland has taken a different path and in 2019 established an independent and specialised Work Health and Safety Prosecutor. The WHS Prosecutor has taken over the role of the regulator in bringing prosecutions.

The decision on whether or not to prosecute is often a controversial one. The Auditor-General of New South Wales is currently conducting a performance audit into SafeWork NSW following allegations of political interference late last year.

## PROSECUTION TRENDS

Safe Work Australia's national statistics indicate that over $55 million in financial penalties were imposed in the 448 prosecutions commenced in 2020 and 2021. A guilty verdict was obtained in just over 91% of those matters.

Some industries in Australia have been more prone to prosecution than others. In the past few years in

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particular, there has been a proliferation of prosecutions in the building industry in New South Wales, particularly in roofing and scaffolding work. One judge reflected on these cases as demonstrating "without exaggeration, carnage in the roofing industry." (SafeWork NSW v Evolve Roofing Pty Ltd [2023] NSWDC 75 at [104] per Russell SC DCJ)

More broadly, the regulators and WHS Prosecutor have been testing the limits of the duties and offences in the Model Law through prosecutions. As a result, there have also been a number of interesting developments.

## MUSEUM H&S MANAGER

Maria Thornton was a work health, safety and risk manager for the Queensland Museum from 2015 to 2019. She serviced multiple sites in Brisbane, Ipswich, Townsville and Toowoomba.

In 2015 she attended a seminar by the Regulator about zoological diseases and engaged with an inspector after the seminar about managing the risks of Q-Fever, which can occur from exposure to animal organs or fluids. There were workers in the Queensland Museum who could be exposed to Q-Fever when collecting animal carcasses from roads and animal facilities or performing taxidermy work.

Ms Thornton started to prepare a risk assessment on Q-Fever. However, before it was completed and control measures implemented, a worker contracted Q-Fever in 2019, which became chronic and caused a spinal abscess. Ms Thornton was subsequently charged by the Work Health and Safety Prosecutor with a Category 2 offence for failing to meet the duty of a worker. She pleaded guilty to the charge.

The Magistrate sentenced Ms Thornton in March 2023. The Magistrate accepted that she was highly regarded in work health and safety and had made efforts to start preparing the risk assessment, but had a large workload at the time. The Magistrate also accepted that the risk of a worker contracting Q-Fever was very low to remote, given that there had never been a case of Q-Fever in a taxidermy worker in Australia. Further, the taxidermy workers were more experienced than her in undertaking their work with animal carcasses, which involved managing the risk of exposure to biological hazards, such as Q-Fever.

Controversially, the Queensland Museum was not prosecuted in relation to the incident as it was in the course of finalising an Enforceable Undertaking with the Regulator. The Magistrate took this into account and considered 'equal justice' in sentencing Ms Thornton. However, in the absence of serious misconduct by a worker, it remains highly unusual for a worker to be prosecuted for an incident and not the business or undertaking.

In my view, this prosecution misapplies the duties of a worker, which are intended to apply to direct acts and omissions in the workplace that may affect the health or safety of another person. The incomplete risk assessment did not itself directly affect the health or safety of the worker, but their exposure to Q-Fever from the animal carcass.

It is also concerning to see the worker duties being used to prosecute managers who are not officers and who do not have the capacity to control or influence the allocation of resources to work health and safety management by a business or undertaking.

## MANSLAUGHTER PROSECUTION

Industrial manslaughter offences have been introduced in a number of jurisdictions in Australia. Jeffrey Owens operated a business as a sole trader that repaired and maintained electronic items, including generators. Mr Owens was using a forklift to move a generator when it fell and landed on a worker and caused his death. Mr Owens did not have a licence to operate the forklift or any documented health and safety procedures for the activity, including on load capacity, unloading, and exclusion zones to separate forklifts from other people.

Mr Owen was found guilty of industrial manslaughter and sentenced to 5 years' imprisonment, to be suspended after 18 months. This was the first conviction of an individual for industrial manslaughter in Queensland.

While this case has established a precedent for prosecuting a director for industrial manslaughter, there remains a focus on operationalised directors in these prosecutions. An industrial manslaughter prosecution is yet to touch the board level, although I expect the regulators will be looking for the right test case for such a prosecution after this case.

## AGED CARE APPEAL

An aged care resident left a St Vincent's facility in Victoria for a walk and fell into an excavation area about 100m away, causing serious injuries. St Vincent's was prosecuted on the basis that it failed to provide an appropriate procedure to monitor residents leaving the facility unsupervised for short periods. St Vincent's allowed residents to use a Sign Out book or inform staff that they were leaving, but this was optional, not mandatory.

The prosecution of the aged care facility was successful in the first instance; they were found guilty and fined $25,000 with no conviction recorded.

However, the prosecution was overturned on appeal. The Victorian Court of Appeal found that there was a reasonable doubt that a safety duty did not arise for St Vincent's in the circumstances. This was because there was a real possibility that risk did not arise from the business, but external circumstances outside of the facility and the resident choosing to not use the Sign Out book or inform staff that they were leaving. The Court of Appeal also took into account the right of the residents of St Vincent's, as adults with capacity, to freedom of movement and choice.

The appeal of the prosecution is useful in understanding the scope of the duty to other persons in a workplace who are not workers. It illustrates that there is a limit to the matters that a business or undertaking has the capacity to control or influence for other persons in the workplace.

As the sphere of influence of the workplace grows, this is an important reminder to assert and defend the limits of health and safety duties where they arise. ■

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