# NSW Legislative Assembly Hansard Full Day Transcript

Extract from NSW Legislative Assembly Hansard and Papers Friday, 27 May 2005.

## OCCUPATIONAL HEALTH AND SAFETY AMENDMENT (WORKPLACE DEATHS) BILL

**Bill introduced and read a first time, by leave.**

**Second Reading**

**Mr KERRY HICKEY** (Cessnock—Minister for Mineral Resources) [11.19 a.m.], on behalf of Dr Andrew Refshauge, by leave: I move:

That this bill be now read a second time.

I am pleased to introduce the Occupational Health and Safety Amendment (Workplace Deaths) Bill. It will create a new offence, with a higher penalty regime, under the Occupational Health and Safety Act 2000 where a person who owes a duty of care under the Act engages in reckless conduct that causes the death of a person in a workplace. In October 2004 the Minister released the Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004 for consultation. Since then the Government has consulted widely with employers and unions on the nature of the workplace death offence. In more than six months of extensive consultations about the draft bill employers have consistently told the Government they want the full force of the law to apply to rogues whose disregard of basic safety obligations results in the death of a vulnerable worker.

Employers have consistently commented that they support strong action being taken against rogue employers whose conduct is negligent or reckless. Based on these constructive views, the Minister gave a commitment that the bill would not be introduced in the form as originally released in 2004. In a ministerial statement on 5 May 2005 the Minister announced the release of a revised bill—the Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005. This is the bill I have introduced today. The revised bill is aimed at a small minority of rogues whose indifference to health and safety in the workplace results in death. The bill represents the most effective means of targeting those who are most culpable and deserving of greater degrees of punishment.

I turn now to the specific provisions of the bill. The bill creates a new offence where a person who owes a duty under part 2 of the Act engages in conduct that causes the death of another person at any place of work and that person is reckless as to the danger of death or serious injury arising from that conduct. Those who have duties under part 2 of the Occupational Health and Safety Act 2000 and to whom the workplace death provision may apply include employers, controllers of work premises, directors and managers, employees and persons hindering the aid of injured workers. "Recklessness" has been defined as heedless or careless conduct where the person can foresee some probable or possible harmful consequence but nevertheless decides to continue with those actions with an indifference to, or disregard of, the consequences.

One example of a reckless act could be if an employer directs workers to work at heights without fall protection. The death of a person under the new offence is taken to have been caused at a place of work even if the person is injured at work but dies elsewhere, such as a hospital. It also does not matter where the culpable conduct that led to the death at work took place. An employer can therefore be held accountable for conduct or decisions taking place at corporate headquarters although the fatal injury to the worker took place at the worksite. Under the bill a corporation that engages in reckless conduct that causes the death of a person at a workplace can also be charged under the new provision. Directors and managers will also be liable to prosecution under the new offence, although they will have to be personally engaged in reckless conduct causing death to be convicted under the new offence. This accords with one of the prime objectives of the bill: to target and punish those who are most culpable and indifferent to the health and safety of employees and others at the workplace.

The bill provides for a significantly higher penalty regime in relation to the new offence. These higher penalties are justified given the greater degree of culpability needed to be proven by the prosecution under the new offence. The penalties for this new offence are up to $165,000 for individuals and/or up to five years' imprisonment and $1.65 million for corporations. These penalties are an appropriate reflection of the gravity of the consequences of the reckless behaviour of the offender. Under the bill a person who is charged with the new provision will be able to use the defence that they had a reasonable excuse. What constitutes a reasonable excuse will be a matter for the court to determine on the particular facts of a case, but will require a compelling and overriding reason why reckless conduct causing death in the workplace might be excused. An example might be where, in an emergency, some action is taken that causes a death in the workplace. The court will be able to take the circumstances of the action into account in determining whether a conviction is warranted.

This defence is wider than that of "lawful excuse" which would relate, for example, to police engaging in certain conduct in the execution of their duties. This additional defence ensures that a court will take into account the inherent dangers and difficulties of particular types of work, such as policing, when considering the application of the new offence. The current defences under section 28 of the Act will continue to apply. That is, it was not reasonably practicable for a person to comply or the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

The bill provides that the new offence can be prosecuted only by a WorkCover inspector or, in the case of mines, a mines inspector in the Department of Primary Industries. However, if either of these agencies decided not to prosecute a person following a workplace death, a union will be able to ask the relevant agency for the reasons behind the decision not to prosecute under this offence. The bill also provides for another person to bring a prosecution with ministerial consent. This provision takes into account circumstances where it may be necessary to prosecute either WorkCover or the Department of Primary Industries.

In addition, the bill provides that the prosecution will not be allowed to appeal if a person is acquitted of charges under proposed section 32A. That is very important. The bill also includes amendments to the Criminal Appeal Act 1912 to allow a person sentenced to a term of imprisonment under the new offence a right of appeal from the Full Bench of the Industrial Relations Commission in Court Session to the New South Wales Court of Criminal Appeal. This bill is the result of a thorough and exhaustive process of consultation. The views of all stakeholders have been well vented and the result in the form of this bill is a rewarding one. The bill is the most effective form of achieving the goal of safe workplaces by punishing those few who are indifferent to the health and safety of those at the workplace. The Government thanks those unions and employer groups who have contributed so constructively to the development of the bill.

This reform ensures there will be sufficient punitive measures to punish those with the requisite degree of culpability. The vast majority of employers have nothing to fear from this new provision—the rogue employers must now realise that very harsh consequences will follow their criminally reckless acts. The community has the right to expect that the appropriate penalties and deterrents are in place to ensure that people who leave for work every day can return home safely to their families and friends. I believe we all want safe workplaces. We all want our loved ones to return home safely from work. This bill is not some token measure but is an effective amendment to ensure the health and safety of everyone in the workplace. I commend the bill to the House.