



New South Wales

Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The objects of this Bill are:

- (a) to amend the *Occupational Health and Safety Act 2000* (**the OHS Act**) to make it an offence for a person who owes a duty under Part 2 of that Act to engage in reckless conduct that causes death at a workplace, and
- (b) to amend the *Criminal Appeal Act 1912* to provide for a right of appeal to the Court of Criminal Appeal where a person has been convicted and sentenced to imprisonment by the Industrial Relations Commission in Court Session for the proposed new offence.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent.

Clause 3 is a formal provision that gives effect to the amendments to the *Occupational Health and Safety Act 2000* set out in Schedule 1.

* Amended in committee—see table at end of volume.

Clause 4 is a formal provision that gives effect to the amendment to the *Criminal Appeal Act 1912* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendment to the *Occupational Health and Safety Regulation 2001* set out in Schedule 3.

Schedule 1 Amendment of Occupational Health and Safety Act 2000

Schedule 1 [1] inserts proposed Part 2A (sections 32A and 32B) into the OHS Act to give effect to paragraph (a) of the Overview.

Proposed section 32A provides that a person:

- (a) whose conduct causes the death of another person at any place of work, and
- (b) who owes a duty under Part 2 of the OHS Act with respect to the health or safety of that person when engaging in that conduct, and
- (c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct,

is guilty of an offence. The proposed offence will carry a maximum penalty of \$1,650,000 (in the case of a corporation) or imprisonment for 5 years or \$165,000, or both (in the case of an individual).

A similar offence is contained in section 32 (Duty not to recklessly endanger persons at workplaces) of the *Occupational Health and Safety Act 2004* of Victoria.

The proposed section also provides for a defence to proceedings against a person for that offence if the person proves that there was a reasonable excuse for the conduct. This defence is in addition to the general defences to proceedings for offences against the OHS Act set out in section 28 of that Act.

Section 26 (Offences by corporations—liability of directors and managers) of the OHS Act provides that, in certain circumstances, if a corporation has contravened a provision of the OHS Act or the regulations under that Act, the directors of the corporation, and other persons concerned in the management of the corporation, are taken to have contravened the same provision. Proposed section 32A (6) provides that section 26 of the OHS Act does not apply to this new offence. However, proposed subsection (6) (and proposed subsection (5)) make it clear that this does not prevent a director or other person concerned in the management of a corporation from being prosecuted under the proposed section for an offence committed by the director or other person.

Proposed section 32B deals with prosecutions for offences under the proposed Part. Proposed section 32B (1) provides that, despite section 105 of the OHS Act, proceedings for an offence against this Part may only be dealt with summarily before the Industrial Relations Commission in Court Session. (Section 105 of the OHS Act generally also allows for proceedings for offences against the OHS Act to be dealt with summarily before a Local Court.)

Proposed section 32B (2) provides that, despite section 106 of the OHS Act, proceedings for an offence against the proposed Part may be instituted only with the written consent of a Minister of the Crown or by an inspector appointed under the OHS Act. (Section 106 of the OHS Act generally also allows proceedings for offences against the OHS Act to be instituted by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate or with the written consent of an officer prescribed by the regulations.)

However, proposed section 32B (3) provides that any person who would, but for proposed section 32B (2), have been entitled to institute proceedings for such an offence may make a written application to the WorkCover Authority for a statement of the reasons why proceedings for an offence have not been instituted in respect of alleged conduct that may constitute such an offence. The WorkCover Authority is then required to provide a statement of those reasons to the applicant as soon as practicable after the application is made, unless the alleged conduct has been referred to the Director of Public Prosecutions for consideration of the institution of proceedings.

Proposed section 32B (4) provides that section 197A of the *Industrial Relations Act 1996*, which allows appeals against acquittals in certain proceedings for offences against occupational health and safety legislation, does not apply to an offence against the proposed Part.

Schedule 1 [2] amends Schedule 3 to the OHS Act so as to permit the making of regulations of a savings and transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Criminal Appeal Act 1912

Schedule 2 inserts proposed section 5AG into the *Criminal Appeal Act 1912* to give effect to paragraph (b) of the Overview.

Proposed section 5AG provides that a person convicted of an offence under proposed section 32A of the OHS Act and sentenced to any term of imprisonment by the Industrial Relations Commission in Court Session (including a sentence imposed on appeal) may appeal to the Court of Criminal Appeal against the person's conviction (including any sentence imposed). Such a person may not appeal under the proposed section unless the person has first exercised any right the person has to appeal to the Full Bench of the Industrial Relations Commission in Court Session under the *Industrial Relations Act 1996*.

The Court of Criminal Appeal, in proceedings before it on an appeal under the proposed section, may confirm the determination made by the Industrial Relations Commission in Court Session or may order that the determination made by the Industrial Relations Commission in Court Session be vacated and make any determination that the Industrial Relations Commission in Court Session could have made on the evidence heard on appeal.

Schedule 3 Amendment of Occupational Health and Safety Regulation 2001

Schedule 3 makes a consequential amendment to clause 358 of the Regulation to provide, pursuant to section 133 of the OHS Act, for the construction of references in proposed section 32B for the giving of reasons by WorkCover in connection with a decision not to prosecute for the proposed offence under section 32B in relation to mines. In the case of mines the function will be exercised by the Department responsible to the Minister for Mineral Resources who has administration of the OHS Act in relation to mines.