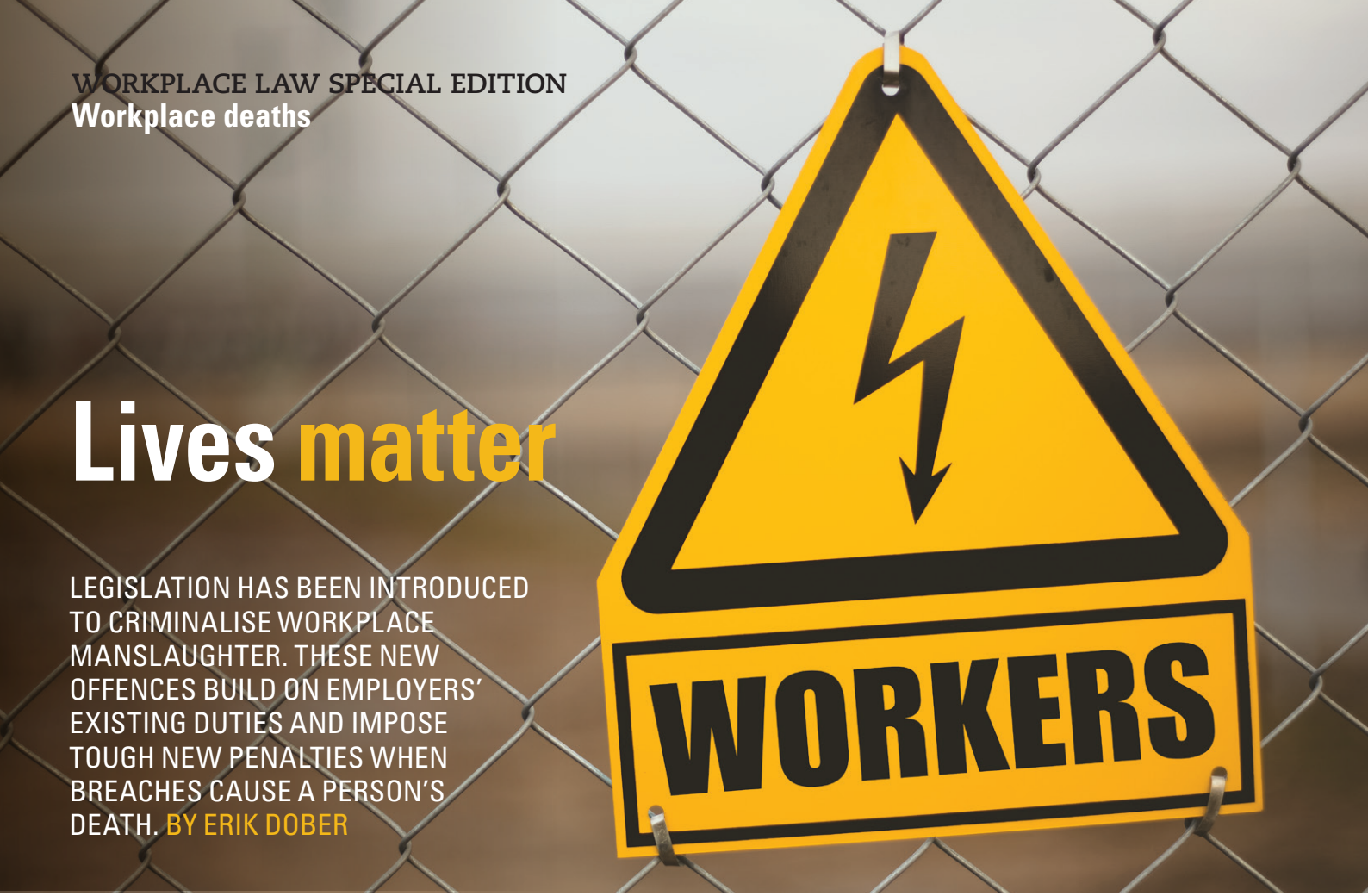
Lives matter

LEGISLATION HAS BEEN INTRODUCED TO CRIMINALISE WORKPLACE MANSLAUGHTER. THESE NEW OFFENCES BUILD ON EMPLOYERS' EXISTING DUTIES AND IMPOSE TOUGH NEW PENALTIES WHEN BREACHES CAUSE A PERSON'S DEATH. BY ERIK DOBER



RAW PIXEL

More than 100 people have died in the workplace in Victoria in the past five years. Most of those deaths were people under the age of 35. The Victorian government has introduced new laws aimed to reduce these deaths. The "workplace manslaughter" legislation comes into force on 1 July 2020, bringing with it penalties for employers of up to 20 years' imprisonment or a fine of $17 million.[1] There is a bill before Parliament for this to increase to 25 years.[2] The government hopes that the risk of these tough penalties will prompt improvements in workplaces throughout the state.

What conduct is covered?

The reforms introduce two offences into a new s39G of the *Occupational Health and Safety Act 2004* (Vic) (OH&S Act). Both offences criminalise conduct (including omissions) that:

- is negligent
- breaches a duty owed to another person under the OH&S Act
- causes the death of another person.

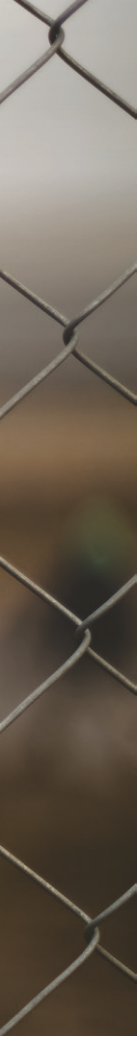
Negligence

- The reforms codify what is meant by "negligence" as involving:
- a great falling short of the standard of care that would have been taken by a reasonable person (or body corporate if the accused is a body corporate) in the circumstances in which the conduct was engaged in
- a high risk of death, serious injury or serious illness.

This definition is based on the common law standard of criminal negligence and that body of case law is likely to be relevant. This is a high hurdle. The criminal negligence test is much higher than the civil test which is simply "falling short" of the standard of care. For criminal negligence, conduct must fall far below the standard of care a reasonable person

SNAPSHOT

- Two new offences have been added to the *Occupational Health and Safety Act 2004* that criminalise "workplace manslaughter".
- The new offences carry maximum penalties of up to 20 years' imprisonment or $17 million.
- The offences target employers, officers and those self-employed, but exclude volunteers and non-managing employees.



would have exercised. A "reasonable person" means the test is an objective standard of a hypothetical person in the situation of the accused.[3]

Body corporates – which include partnerships, corporations, unincorporated bodies and unincorporated associations – can be negligent directly or indirectly. They can be liable because of conduct engaged in on their behalf by an employee, agent or officer. However, they will not be liable for "rogue" employees acting outside the scope of authority.

Breach of duty

The new offences in s39G build on existing duties contained in the OH&S Act. They will capture any conduct that would be a breach of a duty under the existing Part 3 of the OH&S Act other than the duties owed by employees who are not officeholders.

The existing duties under Part 3 are broad and will import into the offences the duties of:

- an employer to maintain a safe workplace for employees
- an employer to monitor its employees and workplace for health and safety issues
- an employer to people, other than its employees, affected by health and safety risks arising from its conduct
- a self-employed person to any person affected by health and safety risks arising from their conduct
- managers, controllers, designers, manufacturers, suppliers and installers to ensure safe work practices.

A breach of any of these duties could potentially render someone liable to a workplace manslaughter charge.

Importantly, each of the duties in Part 3 are owed to different categories of people. One may only be to employees, for example. Another might be to members of the public. This is an important distinction when considering whether the offence arises and which duty is relied on.

The offence includes duties that are owed to members of the public. Some jurisdictions have workplace manslaughter offences that only arise if an employee has died.

Causing death

The point of these new laws is to prevent workplace deaths. The crucial element of the offence is that a person has died because of the accused's negligent breach of duty. The conduct must be such that an ordinary person would hold it, as a matter of common sense, to be the cause of the death. Although it does not need to be the sole cause, it must have been a significant contributor to the death or a "substantial and operating cause".[4] It is not enough for the conduct to merely be a contributing factor.

The chain of causation could last for an extended period of time. For example, work practices with dangerous chemicals may lead to illnesses that cause a person's death years later. Parliament's intention was to capture such scenarios with the workplace manslaughter offences. This could encompass some of the very public issues we have seen in recent years with the use of asbestos or firefighting chemicals in the workplace. But the offences do not have retrospective effect and apply only to conduct occurring after the commencement date.

It could also include a mental illness. The workplace manslaughter offences could apply to death by suicide where the victim's mental state is attributable to the actions of a body corporate or even, potentially, an officer.

Who can be prosecuted?

The two offences in s39G are virtually identical other than to whom they apply.

The first offence, found at s39G(1) applies to any person owing a duty, other than a volunteer or an employee who is not an officer of the body corporate. "Person" has a broad meaning and can apply to employers and self-employed persons. This offence can, and likely will, apply to the body corporate itself. This offence is designed to attract direct and indirect criminal liability for organisations. Direct liability can arise from poor policies, practices or procedures. This could capture scenarios where no one individual is responsible but it is a cumulation of conduct within an organisation that amounts to the negligence. Indirect liability for an organisation arises when people within the organisation act negligently.

The second offence, at s39G(2), applies only to officers of a body corporate, unincorporated body/association or a partnership. It includes officers in charge of government agencies. "Officer" is defined in s9 of the *Corporations Act 2001* (Cth) and encompasses directors, senior managers and others strategically responsible for an organisation. Again, volunteers are excluded from the operation of this offence.

Parliament has intended that the offences could have extra-territorial application provided that either the fatality or the negligent conduct occurs in Victoria. There is also no carve out for certain industries as there is in Queensland (eg, the mining industry), at least for now. This could mean a mining company headquartered in Melbourne, which through its administrative negligence causes a death in a Queensland mine, would fall under the Victorian regime, but not the Queensland one.

When does an officer breach the duty?

The new legislation does not answer this question directly. The explanatory memorandum nominates the following matters as relevant:

- what the officer knew about the matter concerned
- whether the officer was able to make, or participate in making, decisions that affect the body corporate in relation to the matter concerned
- whether the contravention by the body corporate is also attributable to any other person's act or omission
- any other relevant matter.

Another mode of liability for officers

Those familiar with the OH&S Act would be aware that officers of a body corporate can be personally liable for the failings of that body corporate. Under ss144 and 145 the officer will be liable for the offence if the contravention was caused by the officer's failure to take reasonable care. It will be possible for this liability to arise in relation to the workplace manslaughter offence under s39G(1). But the standard "failing to take reasonable care" is a lower one than criminal negligence. For this reason, Parliament has reduced the maximum penalty if the offence is alleged in this way to 10,000 penalty units (more than $1.6m).

Why are employees excluded?

Employees also owe duties under the OH&S Act but these are not captured within the workplace manslaughter offences unless they are "officers" of the body corporate. They were excluded because the reform's purpose is to hold to account those with power and resources to improve safety. The government's view was that employees do not have such power or resources and should not be liable for the offence. This distinction has attracted some criticism, with employer groups arguing it unfairly targets them.

How does this change the existing law?

The conduct element of these offences relies on a breach of existing duties under the OH&S Act. It should not capture any conduct that is not already a potential offence under the Act. Where it differs is the causal connection of a death, and the significantly larger penalty that flows from that.

A criticism is that conduct captured by these offences is already dealt with by existing regulation. The new offences overlap with existing offences under the OH&S Act and the common law offence of negligent manslaughter.

The workplace manslaughter offences are a refined version of common law manslaughter. The offences comprise essentially the same elements but are confined to a workplace context. Like negligent manslaughter, no element of malice is required. The offence of workplace manslaughter, however, does not require that the negligence "merits criminal punishment". Whether this makes any substantive difference to how the offences are prosecuted is an open question.

Corporate liability for common law manslaughter is difficult to establish. This is cured by these offences in clearly stating how that liability arises but confining it to duties that already exist at law. It is also assisted by being housed in the OH&S Act. This is because, unlike the *Crimes Act 1958*, the OH&S Act limits the protection against self-incrimination when it comes to the coercive powers of WorkSafe inspectors to require documents related to the investigation be provided.

Unlike other indictable offences under the OH&S Act, the time limit for commencing a prosecution (contained in s132) will not apply to the workplace manslaughter offences. The rationale for this was that investigations for workplace manslaughter offences can be complex and time consuming, and no such limitation exists for the common law offence of manslaughter.

The maximum penalties

The offences have a maximum penalty of 20 years' imprisonment – expected to increase to 25 years – for a natural person or 100,000 penalty units for a body corporate. That means a maximum fine of approximately $17m.[5] But there are more remedies available under the OH&S Act than just imprisonment or a fine.

A sentencing judge can also (usually in addition to imprisonment or a fine):

- disqualify a person from acting as a director of a company
- make an adverse publicity order which requires the offender to publicise the offence, its consequences and the penalty imposed
- order the offender to undertake improvement projects.

How likely is this offence to be prosecuted?

The threshold for criminal negligence is high. These offences will not be easily prosecuted, and likely hotly contested when they are. One key feature of many offences under the OH&S Act, compared with other criminal offences, is that they do not require proof of harm caused; it is enough that a risk arises. The burden for the prosecution is significantly greater for the workplace manslaughter offence. Similar laws have been introduced in two other Australian jurisdictions. The ACT enacted an industrial manslaughter law in 2004 but the first charge under the reform was not filed for more than a decade. Queensland introduced industrial manslaughter laws at the end of 2017 and it took two years to commence a prosecution. It is likely that in Victoria the workplace manslaughter offences will only be used for the most serious examples of industrial deaths where the culpability of the workplace is high.

RAWPIXEL

Will the reform reduce workplace deaths?

It is difficult to know what impact these reforms will have. Queensland saw a reduction in the number of workplace fatalities in the year following the introduction of its industrial manslaughter offences. However, this was consistent with a falling trend of fatalities that existed for many years. The ACT's fatality rate (per 100,000 workers) has been lowest of all jurisdictions both before and after it introduced its industrial manslaughter laws. That is likely a result of the nature of employment opportunities in the ACT compared with other jurisdictions. The experience in these two jurisdictions reveals little about the likely impact in Victoria.

Victoria's new laws may fill a gap when it comes to risks caused by culture or an aggregation of failings within a company which may prompt improved practices. But it is far from clear that this fact, combined with the tough new penalties, will mean a significant decrease in workplace fatalities. Like other jurisdictions, the trend in Victoria is already fewer workplace deaths each year. In fact, the number of fatalities halved between 2007 and 2018. The government will be hoping that the trend downwards accelerates as a result of these reforms.

Erik Dober is a barrister at the Victorian Bar. Previously he was a senior solicitor of the Office of Public Prosecutions Victoria. He is experienced in criminal and regulatory prosecutions.

1. *Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019* (Vic).
2. Crimes Amendment (Manslaughter and Related Offences) Bill 2020.
3. R v Richards & Gregory [1998] 2 VR 1.
4. Royall v R (1991) 172 CLR 378.
5. Calculated using www.penaltyunits.com.au.