LIMITING COSTS FOR WHS PROSECUTIONS IN NSW

The proposed amendments to the *Criminal Procedure Act 1986* (NSW) to address the limitation on costs in criminal prosecutions under the *Work Health and Safety Act 2011* (NSW)

FEBRUARY 2021

BUSINESS NSW

INTRODUCTION

Business NSW welcomes the opportunity to make a submission to the Better Regulation Division of the Department of Customer Service in respond to the proposed amendments to the *Criminal Procedure Act 1986* (NSW) to address the limitation on costs in criminal prosecutions under the *Work Health and Safety Act 2011* (NSW).

As NSW's peak business organization, *Business NSW* has more than 30,000 member businesses across NSW. We work with businesses spanning all industry sectors including small, medium and large enterprises. Operating throughout a network in metropolitan and regional NSW, Business NSW represents the needs of business at a local, state and federal level.

Business NSW not only strongly opposes the removal of section 257D(2)(b) from the *Criminal Procedure Act 1986* (CPA), but is also concerned by the justification for its removal.

SafeWork NSW cites the possibility of having a large costs order being made against it as being a deterrent from commencing legal proceedings for breaches under the WHS Act.

Deciding not to execute a statutory obligation for fear of a costs order is not in the public interest.

In our submission we explain why the proposed amendment should not be allowed to proceed by addressing each of the arguments provided in the NSW Government's discussion paper and identifying the key issues and evidence that should be considered.

SUBMISSION

Do you support s 257D(2)(b) CPA being removed? Why/why not?

Business NSW strongly opposes the removal of section 257D(2)(b) from the *Criminal Procedure Act 1986* (CPA).

ARGUMENT #1: A high risk of significant costs orders being made against the regulators even when prosecutions are properly brought

This statement is not supported by any evidence.

High risks

Data obtained by *Business NSW* indicates that the risk of cost orders being made is not 'high'.

Based on the data contained in the following correspondence[1], the risk of being ordered to pay the defendant's costs under section 275D of the CPA is less than 1 per cent:

> *"Further to our discussions this week, since 2012 the Resources Regulator has undertaken 33 prosecutions under the WHS laws (including those still in progress). During the same period, there has been three unsuccessful prosecutions where costs could be ordered against the regulator under section 257D.*
>
> *Further to my previous email, SafeWork NSW have advised us that they have filed 803 charges against 619 defendants in 363 matters under the Work Health and Safety Act 2011.*
>
> *To date, SafeWork NSW has been ordered to pay the defendant's costs in respect of 8 unsuccessful charges where proceedings were commenced under the Act.*
>
> *Also, since 2016 the Resources Regulator's Major Investigations unit has undertaken 60 safety investigations of which 9 have resulted in prosecutions being undertaken. Note that we receive about 2000 safety incident notifications each year."*

Business NSW conducted a desk audit of prosecutions brought before the District Court in 2020. The audit shows that, of the 45 matters prosecuted before the NSW District Court in 2020, only one was unsuccessful. A second matter was partially successful due to securing only one conviction instead of two.

[1] Source: Mr Tony Linnane, Director Regulatory Programs, NSW Resources Regulator, Department of Regional NSW, 29 January 2021.

Significant costs

The discussion paper also does not properly explain what is meant by 'significant'.

Although an individual costs order (if sought by the successful defendant) could be large and therefore 'significant' in any given year, consideration also needs to be given to the proportion of prosecutions that are successful.

Business NSW's desk audit shows that for 36 of the 45 matters brought before the court, costs were awarded in favour of the prosecution.

Of the remaining nine matters, only one was entirely unsuccessful with the others being either still 'on foot' or silent as to costs.

Of the two unsuccessful prosecutions that took place in 2020, our desktop audit could not find any order as to costs brought by the successful defendant made against the prosecution.

Even if such a costs order had been made, when offset against the total value of the costs orders made in favour of the regulator, it is unlikely that its value would be seen as 'significant'.

Prosecutions properly brought

There are also circumstances where, from the accused's perspective, despite having been 'properly brought', circumstances may exist that would make it unjust to deprive the successful defendants from recovering their costs from the prosecution.

For example, of the 45 matters referred to earlier, one matter failed because the labour hire employer was misled by its customer about where the worker would be situated within the workplace. In a second matter, the prosecution of the subcontractor was successful, but the prosecution against the contractor was unsuccessful because it was found that the subcontractor lied to the contractor about the work being performed.

In both of these cases, even if the proceedings were 'properly brought', it would be unjust to deprive the successful defendants from recovering their legal costs from the regulator.

Another example, that is still 'on foot', involves the prosecution seeking to add further particulars to the summons some six months after the accused entered a plea of not guilty. The court had to decide whether the summons was defective and whether granting leave to amend the summons would create an injustice to the accused.

Although, in this case, the court exercised its discretion in favour of the amendment, it still highlights the need to keep measures in place to ensure prosecutions are 'properly conducted' as well as 'properly brought'.

ARGUMENT #2: It is possible that this risk (of significant costs orders being made against the regulators) may deter agencies from bringing prosecutions to protect worker safety, which would not be in the public interest.

Deterrent from bringing prosecutions

Leaving to one side the question of whether there is a risk of 'significant costs orders', it is difficult to see how a regulator could be 'deterred' from bringing prosecutions to protect worker safety when it is under a statutory obligation '*to monitor and enforce compliance with this Act*' and '*to conduct and defend proceedings under this Act before a court or tribunal*'.

Bringing prosecutions v failing to investigate

This argument also fails to recognize that leaving this measure in place deters a regulator from failing to properly investigate the matter before deciding to bring a prosecution.

A failure to properly investigate whether an offence has been committed causes more detriment to society as a whole than a failure to bring a prosecution.

ARGUMENT #3: The proposed amendment would 'bring WHS prosecutions in line with other criminal prosecutions'

WHS offences differ from other types of offences within the NSW criminal system because they are offences of strict liability.

This means that the WHS regulator does not have to prove what the accused's state of mind was at the time of the offence (unless otherwise stated), only the factual elements. The accused can then successfully defend itself if it can satisfy the court that it held an honest and reasonable but mistaken belief about those factual elements.

It would be unjust to prevent an accused from recovering the costs of a failed prosecution if they successfully argued that they held an honest and reasonable, but mistaken, belief as to the facts relating to the offence.

ARGUMENT #4: It would remove the risk of costs being awarded in unsuccessful matters where the proceedings are commenced on a reasonable basis and conducted in good faith

Conducting a prosecution in good faith is not mutually exclusive from conducting a prosecution so poorly that the accused is placed at a disadvantage.

Should a poorly conducted prosecution ultimately fail, it would not be in the public interest to deny the successful accused from recovering its costs from the prosecution.

ARGUMENT #5: It is not in the public interest to exclude WHS prosecutions 'because the underlying policy rationale is unclear'

Business NSW cannot agree with this statement for two reasons:

- as a matter of statutory interpretation, by expressly excluding WHS prosecutions from the rest of section 257D, the NSW parliament's intention is clear
- although the second reading speeches do not explain why WHS offences are excluded from the section, the contents of the parliamentary debates (as recorded by Hansard) do. The reason given to the house was due to the ability of unions to bring a prosecution under the WHS Act.

When you look at the relevant sections of the Act, as 'prosecutor', the union would arguably be acting 'in a public capacity'.

ARGUMENT #6: It is not in the public interest to exclude WHS prosecutions 'and deter regulators from bringing prosecutions'

The concerns raised in this argument have been addressed under Argument #2.

ARGUMENT #7: It is not in the public interest to exclude WHS prosecutions because 'NSW appears to be the only jurisdiction which distinguishes WHS prosecutions from other prosecutions for this purpose'.

This argument fails to consider that the reason why the NSW WHS Act distinguishes WHS prosecutions from other prosecutions is because, unlike the other jurisdictions, the NSW WHS Act allows unions to bring a prosecution under the NSW WHS Act.

ARGUMENT #8: Costs awarded can be significant because prosecutions brought against large employers with deep pockets can be prolonged, complex and hard fought. Costs awarded against the NSW regulators in unsuccessfully criminal prosecutions brought in the public interest have sometimes reached an estimated $4M-$5M.

Large employers with deep pockets

The discussion paper fails to consider the impact that such a measure would have on micro-businesses and small to medium-sized businesses (SMEs), often described as being the 'engine-room' of the NSW economy.

The importance of the differences between small and large businesses within the NSW WHS system was recognized in ***Unity Pty Limited v SafeWork NSW*** [2018] NSWCCA 266 at [79], where the Court of Criminal Appeal said that:

> "… *questions of specific deterrence should take into account the size and scope of the operations of the defendant; a fine which may be crippling to a small business may have virtually no impact on the financial operations of a large corporation.*"

Micro-businesses and SME's rely on insurance to cover the cost of defending WHS prosecutions. If the ability to recoup these costs are removed, insurers may no longer offer an insurance product to cover these costs.

Micro-businesses and SMEs typically operate on narrow profit margins and, without insurance cover, will most likely be unable to afford to defend themselves in court.

The inability to take out cover for the costs of defending themselves against a prosecution brought by the WHS regulator will lead to an increase in PCBUs pleading guilty to avoid the cost of going to court to defend themselves if they can no longer recoup some of the costs incurred.

As recently as June 2020, Her Honour, District Court Judge Strathdee held in ***SafeWork NSW v Buddco Pty Ltd*** [2020] NSWDC 318 (19 June 2020), at [39] that:

> *"There are public interest considerations underpinning the WHS Act, particularly in ensuring that offences alleged under the WHS Act are properly heard and determined, including that all measures contended by the Prosecutor reflecting the failures on the part of the Defendant to comply with its duty under the WHS Act are properly put before the court."*

Awarding of fines

The discussion paper fails to mention that, in addition to awarding costs, a court can also exercise its discretion to award to the prosecution up to 50 per cent of fines imposed upon a conviction of a WHS offence.

In 2020 alone, over $4 million worth of fines was awarded by the District Court to the prosecutors of the WHS proceedings brought before it.

ARGUMENT #9: Recent reviews and legislative amendments aim to encourage justified prosecutions 'by providing alternative avenues for prosecuting workplace deaths'

This argument is misleading.

Offences under the NSW WHS Act are risk-based offences not outcomes-based offences. The relevant risk is the risk of serious injury or death.

The legislative amendment alluded to in this argument concerns the addition of the concept of 'gross negligence' (to the concept of 'recklessness') in the Category 1 offence.

In 2020, the inclusion of an offence of industrial manslaughter in the NSW WHS Act was considered and rejected by the NSW parliament. This was due to the fact that, in NSW, manslaughter offences (regardless of location or context) are already covered by the *NSW Crimes Act 1914* and are prosecuted under well-understood and established principles.

All of the 45 matters referred to in this submission involved the risk of serious injury or death and all concerned events that took place prior to the NSW WHS Act being amended. Eight of the 45 matters involved a fatality and all secured a conviction.

Do you have any other comments?

Business NSW believes that the contents of Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces report strengthen its position in opposing the removal of section 257D(2)(b) from the CPA.

On 21 August 2020, the Ombudsman's Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces was tabled in parliament.

Business NSW notes that the report identified "*a number of occasions where SafeWork's compliance notices were issued contrary to law.*

In particular, on a number of occasions SafeWork Inspectors issued notices without holding the reasonable belief that is required under the legislation. Instead, they issued the notices because they were directed to do so.

The investigation also found some cases where the Council was required by SafeWork to take action that was not justified by legislative guidelines and relevant industry standards. SafeWork also failed to provide clear and documented evidence as to why other standards were being applied."

It noted that the "*impact of SafeWork's conduct in the cases identified imposed significant financial costs on Blue Mountains City Council, and therefore indirectly on its ratepayers. . . where risks such as asbestos raise legitimate and significant community concerns, it is even more critical that a regulator acts in a rigorous, consistent and proportionate manner. It must act in accordance with its legislative powers, with decisions made on the basis of relevant standards and the best available evidence.*"

Included in its recommendations was for SafeWork NSW to "*improve its policies, procedures and training*" and to "*apologise to the Council and provide compensation for the undue expenses caused by its actions*"

Contact

Elizabeth Greenwood
Policy Manager, Workers' Compensation, WHS and Regulation
t. +61 419 758 779
e. Elizabeth.greenwood@businessnsw.com

businessnsw.com

BUSINESS NSW