

**Industrial Relations
Society of NSW
Contact Details**

PO Box 74
OATLANDS NSW 2117

PHONE:
02 9630 5211

FAX:
02 9630 5233

E-MAIL:
IRSNSW@bigpond.com

WEB
www.irsa.asn.au

Editors

**Sue-Ern Tan
Nikki Town**

NEWSLETTER

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Merry Xmas & Happy New Year

The Industrial Relations Society of NSW wishes all members a very Merry Christmas and a prosperous New Year.

We hope to see you all at the upcoming Christmas Party.



Dates for your Diary

19 December 2003
IRS of NSW Christmas Party
Tattersalls Club
5.30pm – 9.30pm
irsnsw@bigpond.com

5 February 2004
Women in IR Function
Gilbert + Tobin Offices
Level 37
2 Park St
Sydney
irsnsw@bigpond.com

14 – 16 May 2004
IRS of NSW Annual Convention
The Entrance.
irsnsw@bigpond.com

21-23 October 2004
National IRS Conference - Melbourne
www.irsa.asn.au

Please forward any "dates for your diary" that may be of interest to our readers to:-
irsnsw@bigpond.com

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irs INDUSTRIAL
RELATIONS
SOCIETY OF
NSW

NEWSLETTER

**Industrial Manslaughter the Case
for the Crime**

by John Robertson *

Special Interest Article:

**Industrial
Manslaughter the
Case for the Crime**

by John Robertson

NSW Labor Council secretary John Robertson outlines the arguments in favour of a special crime of industrial manslaughter as a vehicle for cutting workplace deaths.

".....under the current law, the individual director is regarded as being party to the offence committed by the corporation..."

Recent attention of the death of a 16-year-old building worker on only his third day on the job has trained public attention to the union movement's campaign for industrial manslaughter laws.

With an ALP State Conference resolution behind it and firm commitments from the NSW Industrial Relations Minister John Della Bosca

to review the current penalty regime, mean the question is not whether we will have tougher penalties, but rather what those penalties should be.

The union movement believes the time has come to create a specific crime of industrial manslaughter that gives WorkCover, the police and the courts the power to pursue employers and directors, and where there is proven negligence associated to a workplace death, charge an individual.

"....the time has come to create a specific crime of industrial manslaughter..."

That said we are not wedded to any particular form or home statute for such laws, whether the crime sits in the

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Industrial Manslaughter the Case for the Crime ...

Occupational Health and Safety Act, or the Crimes Act, is not the key issue. Likewise, whether it is called Industrial manslaughter, Workplace homicide or some other form of words is immaterial to us. The crux is that there is a specific crime that employers know could be applied to them.

Indeed, there is an argument that the new penalty should sit under the OH&S Act. If the new provisions were enforceable in the District and Supreme Courts under the Crimes Act, rather than the Industrial Relations Commission in Court Session, then it is more likely than not there will be trial by a jury rather than judge alone. This may have consequences for securing convictions. One vote for not guilty on a jury of twelve persons in NSW will lead to an acquittal.

".....the building blocks for tougher penalties are already in place...."

A difficulty with the criminal law proper is that a positive act of wrong-doing needs to be shown to have been committed by a specific person, whereas the focus in OH&S law is the failure to ensure safety. In this sense, the two areas of law come at the issue of offences from very

different perspectives.

In the mainstream criminal law, there is also the issue of needing to show criminal intent. Even where the issue is alleged criminal negligence, the standard of proof to secure a conviction is very high.

"....the overwhelming majority of penalties imposed have been one fifth or less of the maximum..."

These are just some of the reasons why the mainstream criminal law has not been used against companies in relation to workplace injuries and death. Therefore, if the new law is based in the usual criminal law, there is a risk that it may prove to be ineffective due to the difficulty in establishing direct wrongdoing.

Sending a Message

There is no doubt that some revision of penalties is required. With one worker being killed at work every two days, there clearly needs to be another strategy used to bring this unacceptable situation under control.

Continued pg...3

Book Review "The Work/Life Collision" by Barbara Pocock

Longer working hours, insecure jobs, child care, declining birth rates, parental leave, the 'mummy track', the success or failure of feminism - the levels of passion, vitriol, despair and guilt these subjects engender attest to the importance Australians place on them, and rightly so. Their effects go beyond how we feel.

The Work / Life Collision, grounded in thorough quantitative and qualitative research, analyses how these factors affect each other, in particular the collision of work and care and its implications for how we live.

Pocock demonstrates how the existing 'work/care' regime that shapes how we live and work has high social costs - for mothers, fathers, families and those who want to be both workers and carers. She weighs the hidden costs of how we live and work now - costs that can be measured in bedrooms, kitchens, workplaces and streetscapes - and in our declining birth rates and embedded gender inequality.

The Work / Life Collision goes further than just explaining our growing anxiety

about quality of life, despite the evidence of unmatched material wealth. Pocock proposes ways in which a new 'work/care' regime can be built through:

- the redistribution of working hours
- the rehabilitation of degraded and insecure part-time jobs
- a new system of leave from paid work, and
- better support for mothers, fathers and all kinds of dependants.

Pocock guides us through the real experiences of Australian households and points to a uniquely Australian solution to a fairer world.

**2003 The Federation Press
ISBN 18674751, Paperback, 300
pages, rrp \$39.95 (incl.GST)**

THE IRS WELCOMES THE FOLLOWING NEW MEMBERS

Robin Bosch	TAFE – Hunter Institute
Michael C Burns	McClellands Lawyers
Emma Charnock	Noel Arnold & Associates
Jackie Choi	Air Liquide Healthcare
Fiona Cochrane	AMWU Library
Peter Devine	Hunter Health
Jane Gouldstone	MLJ Lawyers
Liz Hall	Office Employment
Gary Kennedy	Newcastle Trades Hall Council
Marc Levingston	University of Technology
Sydney	
Michael Lyons	Uni of Western Sydney
Danielle Mesa	Australia Post
Adam W Mooney	Turnbull Hill Lawyers
Christopher Perrett	Uni of Western Sydney
Alison Spivey	Uni of Wollongong
John Stafford	CCH Aust Limited
Chris Walsh	Uni of Newcastle
Lynn Westwell	Injury Management Assist
Tiffany Wright	CSC Australia P/L

Industrial Manslaughter the Case for the Crime

Workplace accidents also cost the community an estimated \$40 billion per year.

Like the very successful drink driving and anti-smoking campaigns, there needs to be a commitment by government over a decade or more of unremitting education and advertising. This process commenced when Jeff Shaw was Minister.

As the Premier so often publicly states, the criminal law is an important vehicle for sending messages to the community. During his time in power he has created a range of specially targeted laws, including gang laws, knife laws, gun laws, child protection laws. Similarly, the number of deaths at work requires laws that we send a message to employers that they must take greater personal responsibility for the safety of their workers. And if they don't, they like all other law-breakers, should face the consequences.

“.....WorkCover does currently prosecute a number of company directors where the company has breached the Act.....”

What makes such reform even more urgent is that the courts have, up until

recently, demonstrably failed to apply the current penalties. According to the Crown Advocate, the state government's senior criminal law barrister, 75 per cent of workplace deaths have attracted penalties of less than 20 per cent of the statutory minimum.

"The overwhelming majority of penalties imposed have been one fifth or less of the maximum," the Crown Advocate says. "There is quantitative evidence of a pattern of excessive leniency."

The comments are based on statistics provided by the NSW Judicial Commission to WorkCover regarding prosecutions for fatalities, finding that:

- 23 per cent of cases led to fines of five per cent of the maximum penalty
- 48 per cent of cases led to fines 10 per cent of the maximum
- 75 per cent of cases led to fines of 20 per cent of the maximum.
- only nine per cent of fines attracted 50 per cent of the maximum

Industrial Manslaughter the Case for the Crime ...

- and there were no cases which attracted 80 percent or above the maximum.

Where To Now?

The building blocks for tougher penalties are already in place. Under the NSW OH&S law, each director of a corporation and "each person concerned in the management of a corporation" is taken to have committed any breach of the OH&S Act committed by the corporation.

"...75 per cent of workplace deaths have attracted penalties of less than 20 per cent of the statutory minimum..."

Under this provision (s50 of the 1983 Act and s26 of the 2000 Act) WorkCover does currently prosecute a number of company directors where the company has breached the Act.

The company itself does not have to be charged with breaching the Act, but a breach by the company must be shown to have occurred and be shown beyond reasonable doubt.

Under the current law, the individual director is regarded as being party to the offence committed by the corporation.

The individual can also escape liability if they can show that they were not in a position to influence the conduct of the corporation, or that they used all due diligence to prevent the breach. The individual bears the onus of proving this.

One effect of this provision is that an individual convicted is not only liable to the maximum penalty for that offence but also the broader range of penalties under Pt 7, Division 2 of the 2000 Act (sections 111 to 117) - including publicity orders, and orders to undertake specified projects to improve OHS and welfare. Bearing in mind that part of the draft resolution covering sentencing options, amendments to Pt 7, Division 2 are clearly the correct place for these concepts if they are to be placed in the legislation.

So a simple amendment to the OH&S Act could do the trick; not just tightening the existing law, but making our workplaces safer. And it is this simple principle that will continue to be the focus of union campaigns until the government acts to amend the law.

John Robertson is the Secretary of the Labor Council of NSW.

<http://www.lcnsw.labor.net.au>

NEXT WOMEN IN IR FUNCTION - SHARAN BURROW

The Industrial Relations Society of NSW is pleased to announce the upcoming Women in IR event to be held on 5 February 2004. These events have been very successful and well attended by female IR practitioners and on this occasion, we are proud to announce Sharan Burrow as our keynote speaker.

Currently the President of the Australian Council of Trade Unions (ACTU), Sharan Burrow will discuss her experiences in industrial relations as well as her role with the ACTU.

We are pleased to confirm the function will be hosted by Gilbert + Tobin at **no charge** to attendees.

WHEN: Thursday 5 February 2004
TIME: 6pm
WHERE: Gilbert + Tobin
Level 37
2 Park St (Citigroup Building)
Sydney NSW 2000

RSVP: IRSNSW@bigpond.com or Fax 02 9630-5233
CONTACT: Phone: 02 9630-5211
E-mail: IRSNSW@bigpond.com

These events are a great opportunity to bring together and foster discussion and networking for female IR practitioners including members of both the NSW and Federal Industrial Relations Commission, Trade Unions, Employer Associations, Legal Professionals, Academics, Students, Managers and other interested parties.

There will be cheese plates and nibbles served on the evening as well as beer, wine and soft drink. The IRS of NSW would like to thank Gilbert + Tobin for their assistance in making this event possible.

Patrons Dinner 2003

Following the success of the inaugural Patron's Dinner in 2002, the Industrial Relations Society held this event again on Saturday 18 October 2003.

Society members and partners attended the Dinner in honour of our Patron, the Hon John Cahill, at the Museum of Sydney which proved a most unique venue with the many artefacts exhibited providing an interesting talking point.

Although Peter Fitzsimmons' appearance last year was a difficult act to follow, guest speaker, comedian Peter Berner, who is well known for his ABC show 'Backberner', regular guest appearances on the Ten Network's Good News Week and daily 2MMM morning program, succeeded in entertaining guests and keeping the room laughing!

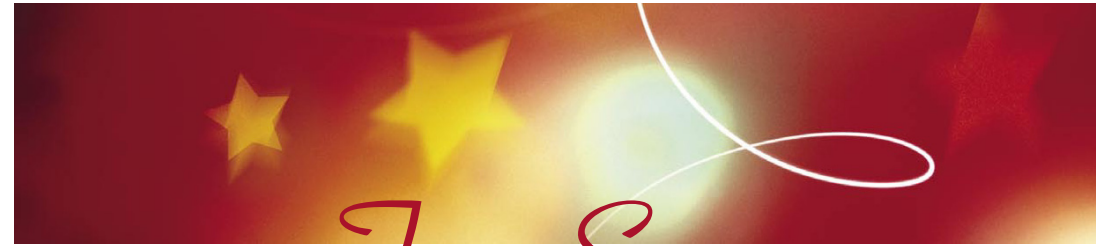
The Society extends sincere thanks to sponsors, the AHA, ClubsNSW and Lion Nathan, for their generous contribution to the success of the evening.



Nikki Town

John Cahill

Nicole Law



It's the *Festive Season* and the Industrial Relations Society of NSW would like to invite you to its informal Christmas get-together.

when Friday 19 December 2003

time 5:30pm - 8:30pm

where Tattersalls Club
181 Elizabeth Street, Sydney

price \$30.00 members
\$40 non members
\$20 students

rsvp Email IRSNSW@bigpond.com
Fax 02 9360 5233

dress Business casual

contact Phone 02 9360 5211
Email IRSNSW@bigpond.com

**There will be free beer, wine,
soft drinks and nibbles served on
the evening.**



Christmas Party RSVP

I, _____ (print name) will be attending the IRS
Christmas Party on 19 December 2003 at the Tattersalls Club.

Accompanying me will be _____

*I enclose a cheque / money order for \$ _____ payable to
the NSW Industrial Relations Society; OR*

Please debit my credit card for \$ _____

Card Details: Visa / Bankcard / MasterCard / Diners / Amex

Card Number: _____ Expiry: ____/____

Card Name: _____

Sign: _____

Please forward to NSW IRS by 10 December 2003

(numbers strictly limited)

PO Box 74 Oatlands NSW 2117

Fax: 02 9630-5233

Email: IRSNSW@bigpond.com

Member Profile ... Di Banks

Current Position:

Partner Gilbert + Tobin

What is your favourite football team?

The Mighty Dragons

What was your first job in IR?

Clayton Utz

What advice would you give those entering the field on the ground floor?

Try the back door

What does IR mean for you?

Industrial Relations

Highlights of your IR career?

Court 8, Level 6, 2001

Lowlights of your IR career?

Court 1, Level 2, 1999

Suggestions to people starting out in IR?

See answer to question 4

If you had your choice of careers, would you choose IR again?

Possibly – either that or synchronised swimming

Who inspires you the most?

Ordinary people who overcome

adversity.

What motivates you? Wild Turkey

What is the last book you read? Fergus the Ferry by JW Noble (G+T partner).

Favourite holiday destination? Ostrich farm at Moama

Any regrets? Regrets, I've had a few. But then again, too few to mention. I did what I had to do and saw it through without exemption. I planned each charted course, each careful step along the byway. But more, much more than this, I did it my way.



Di Banks