

WORK HEALTH AND SAFETY BILL 2019

Committee

Resumed from an earlier stage of the sitting. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

Committee was interrupted after clause 234 had been agreed to.

Clauses 235 to 272 put and passed.

Clause 272A: No insurance or other indemnities against fines —

Hon RICK MAZZA: I have some concerns about this clause and having a blanket prohibition over insurance indemnities. As I said in the second reading debate, I understand that charges under clause 30A are now a category 1 offence and should not be covered by insurance. I imagine that most underwriting policies would not respond to a claim for those types of offences. However, there are other offences in the bill for which there may be financial penalties. In some cases, the offences might not be specifically the fault of the PCBU. Most businesses have the ability to insure against risk. In this case, I think it is quite clear that we do not want insurance to cover issues of manslaughter. With that, I move —

Page 177, line 21 — To delete “an offence against this Act.” and substitute —
a crime under section 30A or a Category 1 offence.

Hon ALANNAH MacTIERNAN: I understand the member's concern, but this really is a fundamental principle. The member will recall the case that I read out regarding the young electrical apprentice in which the fine was in the order of \$36 000 and was paid out by insurance. I think there is a strong principle that people should not be able to indemnify liability of this type. This is fundamental to the whole culture that we are trying to inculcate, and that is that work health and safety becomes deeply ingrained and is the centre of management's focus. This measure was specifically recommended by the Boland review. It looked at the New Zealand system that dealt with this by declaring contracts of insurance against the payment of fines to be void under section 29 of its health and safety legislation. The Boland review states —

It appears clear that the most effective way to prevent a person required to pay a penalty under the WHS law from recovering that penalty under a contract of insurance ...

Recommendation 26 of the Boland review was very clear about making it an offence to —

- enter into a contract of insurance or other arrangement under which the person or another person is covered for liability ...
- provide insurance or a grant of indemnity ... and
- take the benefit of such insurance or such an indemnity.

New South Wales has done a similar thing. The minister, who is not on our side of politics, Minister Kevin Anderson, has spoken about this. He stated —

Both the 2018 review and the Senate report strongly condemned the availability of this insurance, and found that it had the potential to seriously undermine the deterrent power of the Act. If those who breach work health and safety ... are able to escape the consequences of their actions, their incentive to take those duties seriously is substantially lessened. The new offences will put an end to the practice of insuring for liability for work health and safety offences, and contribute to creating a strong health and safety culture in New South Wales workplaces.

Point of Order

Hon MARTIN PRITCHARD: Sorry, this is a strange point of order, but I thought it would be the quickest way to resolve this. A bag has been left outside the chamber. Has anyone in the chamber left their bag there?

The CHAIR: One of the attendants will deal with it, thank you, member.

Committee Resumed

Hon RICK MAZZA: I thank the minister for that. The penalty imposed by the court in the case in which the young man was electrocuted was, I think, \$38 000, and it was covered by insurance. During the week I spoke to his father, Greg Zappelli, and that was one of his main points: a penalty of \$38 000 was handed down, and it was covered by insurance. I was a bit surprised that an insurance policy would respond to a criminal offence, but apparently this policy was underwritten by a group scheme to do with the electrical industry at the time. For whatever reason, it decided to pay out on this insurance policy, maybe to keep its business going with that scheme. I am

Hon Rick Mazza; Hon Alannah MacTiernan; Hon Martin Pritchard; Chair; Hon Alison Xamon; Hon Nick Goiran

proposing through this amendment for there to be insurance cover for things other than an offence against clause 30A or a category 1 offence under clause 31, which I think would cover that off. As I said, that was a unique situation in which the insurance company responded to that \$38 000 penalty, but I would not think many insurance policies would cover it now. In the case of Jayden Zappelli's death and the resulting fine, this amendment would have prohibited that \$38 000 being paid out. Some businesses are not keeping their workplaces as they should and there are penalties involved. However, in respect of this bill I think that overall, when it is beyond a business's control, there should be the ability to have insurance against that.

Hon ALANNAH MacTIERNAN: We still think the member's amendment would seek only to limit the ability to obtain insurance for a crime under clause 30A or a category 1 offence. To get that culture, we think this needs to apply to the other offences. Often, even when there is a death, a charge is preferred under a lesser category because of some of the evidentiary problems. I will not mention the name of the companies, but there are companies that have been charged for much lesser offences, even when there have been deaths, because of the difficulty of establishing some elements of the crime.

Obviously, this does not preclude insuring for obtaining legal advice and having legal representation. A party would still be entitled to insure themselves against any potential legal costs, including the cost of legal representation, but would not be able to effectively contract out of their financial penalty. We think this is incredibly important and say that the Boland review, and the New South Wales government, which has obviously updated its legislation recently, have taken this position. We therefore cannot accept that amendment.

Hon ALISON XAMON: I rise to indicate that the Greens will not support this amendment for two reasons. Firstly, far too often we see that companies often incorporate the fact that they are likely to get insurance payouts as part of their business model. It becomes a disincentive for companies or PCBU's to ensure that they are undertaking safe work practices. That is the purpose of this Work Health and Safety Bill. We hope we will never have to penalise anyone, because there is enough incentive for people to ensure they have safe workplaces. The second reason is that when companies choose to abuse the insurance provisions to incorporate them as part of their business model, all the other PCBU's who are doing the right thing get hit with higher rates. Overall, it is not a good balance to strike, we do not want to make it too easy for people to create unsafe workplaces from a financial perspective and we do not want good worksites to be penalised.

Hon NICK GOIRAN: The opposition understands why the government has sought to include clause 272A. As the minister said, it is one of the Boland review recommendations. Members will have heard the minister this afternoon strongly mention how this is a Boland review recommendation. I once again remind members that this is the same minister from the same government who said it was not important that the Boland review recommended the insertion of "gross negligence" on that earlier issue. I therefore find it a bit rich that this government has decided to cherry-pick from the Boland review when it suits it. Nevertheless, consistent with that, the opposition supported the inclusion of "gross negligence" because the Boland review had recommended it and we understand why this provision is included.

The Standing Committee on Legislation touched on this issue only because some evidence was given to it. Unfortunately, this is one of the regrettable scenarios in which the information provided to the Standing Committee on Legislation fell outside the scope of the inquiry because the house had said that the committee should look only at part 2, and, of course, this provision falls under part 14. I note that the Standing Committee on Legislation received evidence, including from Northern Star Resources Ltd, which said, and I quote from page 82 of the report —

there should be no prohibition on companies and officers from obtaining insurance for health and safety offences and fines included in the bill; and

the current position should be preserved that allows companies and their officers to obtain insurance for health and safety fines and costs other than those involving gross negligence.

That is probably what Hon Rick Mazza is trying to do here. Having said that, I am inclined to agree with the minister that other offences under this bill are grave offences that people should not be able to insure against. One example is in clause 268, "Offence to give false or misleading information", which we recently passed. An individual could be fined \$12 500 or a body corporate \$55 000. If a person gives false or misleading information, they should not be able to insure against that. They should have the law book thrown at them for giving false or misleading information. That said, the minister will remember that earlier in the debate, I drew the minister's attention to what I would describe as a lower level offence for which, unfortunately, an employer could be found guilty because of a worker's misleading or deceptive conduct. The worker has to indicate to the employer that they have a qualification, but there is a strictness towards that provision.

Progress reported and leave granted to sit again, pursuant to standing orders.