



RECORD PENALTIES PROPOSED FOR INDUSTRIAL MANSLAUGHTER OFFENCE UNDER WHS ACT AMENDMENT BILL

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AUGUST 2017

On 22 August 2017, the Queensland Industrial Relations Minister, the Honourable Grace Grace, introduced the *Work Health and Safety and Other Legislation Amendment Bill 2017* (Qld) (“**Bill**”) for consideration by the parliament.

The Bill represents the Palaszczuk government’s response to the recommendations contained in the final report of the best practice review conducted into Queensland’s existing work health and safety (“**WHS**”) regulatory practices. The review was commissioned by the Palaszczuk government in response to the workplace fatalities that occurred at Dreamworld and Eagle Farm racecourse in late 2016.

The review recommended a total of 58 changes to the WHS regulatory framework in Queensland. The Bill addresses the majority of these recommendations.

NEW OFFENCE OF INDUSTRIAL MANSLAUGHTER

The centrepiece of the Bill is the proposed introduction of a new offence of “Industrial Manslaughter” to be included in each of the *Work Health and Safety Act 2011* (Qld) (“**WHS Act**”), the *Electrical Safety Act 2002* (Qld) and the *Recreational Water Activities Act 2011* (Qld). At present, the ACT is the only jurisdiction in Australia to have enacted a specific industrial manslaughter offence.

Under the Bill, a person conducting a business or undertaking (“**PCBU**”) commits the offence of industrial manslaughter where:

- a worker dies, either whilst carrying out work for the PCBU, or after sustaining an injury whilst performing work for the PCBU; and
- the PCBU’s conduct causes the worker’s death; and
- the PCBU is negligent in engaging in the conduct that causes the worker’s death.

The Bill states that a PCBU “causes” a worker’s death where the PCBU’s conduct “substantially contributes to” the fatality.

If passed by the parliament, the new offence will replace the existing category one offence for recklessly exposing an individual to a risk of serious illness or injury or death as the most serious contravention of the WHS Act a person can commit.

The Bill provides that industrial manslaughter will be a criminal offence provision, meaning the relevant standard for a successful prosecution is “beyond reasonable doubt”.

OFFENCE CAPTURES “SENIOR OFFICERS”

The new offence of industrial manslaughter applies to PCBUs and to individuals. In this case, any “senior officer” of a PCBU.

Curiously, the definition of “senior officer” contained in the Bill is in some respects broader than the definition of an “officer” in the existing WHS Act. Under the Bill, a “senior officer” of a corporation includes any person who is

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“concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer.”

This means that those exposed are not just those individuals with “organisational” control of the PCBU¹, but any person who is part of a company’s management team.

By contrast, the definition of “senior officer” for an unincorporated PCBU is narrower, and is limited to a person whose position requires them to make, or take part in making, decisions that affect all, or a substantial part of, the PCBU’s business.

Notwithstanding these discrepancies, any individual occupying a “c-suite” managerial position within a PCBU could be prosecuted for an industrial manslaughter offence. Other “lower level” managers may also be caught by the definition.

RECORD PENALTIES FOR OFFENDERS

In recognition of the seriousness of the new offence, the Bill proposes record maximum penalties for a breach of the industrial manslaughter provision, fixed at 100,000 penalty units (which currently equates to \$10 million) for PCBUs and 20 years’ imprisonment for senior officers. Both penalties more than triple the existing maximum penalty that can be imposed on a PCBU or an officer for a category 1 breach of the WHS Act.

It is also important to note that the Bill proposes to exempt the new offence from the current limitation periods imposed on prosecution for existing offences under the WHS Act. This means that, at least in theory, a prosecution for industrial manslaughter could be commenced at any time against a PCBU or senior officer, regardless of how much time has elapsed since the date on which the fatality giving rise to the prosecution occurred. This contrasts with the limitation period imposed on prosecution of all existing offences under the WHS Act, which, with some limited exceptions, is currently fixed at 2 years from the date of the alleged offence.

OTHER NOTABLE AMENDMENTS

There are a range of other notable amendments proposed by the Bill, including:

- reinstating a requirement that a PCBU comply with the requirements of any Code of Practice that applies to their business as a default means of demonstrating compliance with the PCBU’s duty of care under the WHS Act;
- reinstating the “work health and safety officer” position, albeit on a voluntary basis at the discretion of the PCBU; and

- granting greater powers to WHS Inspectors to resolve right of entry disputes at the site level. Whilst this proposal may seem to provide PCBUs with greater certainty regarding WHS-based right of entry issues, it remains to be seen how effective this will be in practice.

SIGNIFICANCE FOR EMPLOYERS

The Bill has been referred to the Finance and Administration Committee for review. The Bill will likely become law, subject to the timing of any election.

Irrespective of the Bill’s commencement before the end of 2017, senior management of all businesses in Queensland should continue to take steps to ensure the business and its officers limit the risk of serious WHS incidents occurring. Prudent measures include:

- ensuring all officers are receiving regular refresher training on their WHS duties;
- reviewing existing WHS management systems to ensure they remain up to date and effective;
- identifying any existing Codes of Practice that may apply to work performed by the PCBU and assessing whether the PCBU is currently complying with the processes set out in the Code, or has an equivalent process or procedure in place;
- ensuring sufficient resources have been assigned for the effective management of WHS issues; and
- including WHS as a permanent and genuine topic for discussion at all meetings of senior management.

YOUR EXPANDED CLARKEKANN EIR&S TEAM

ClarkeKann is delighted to welcome Ben Keenan as a Senior Associate based in the Brisbane office. Ben brings with him more than nine years of experience in employment, industrial relations, and work health and safety law.

FOR MORE INFORMATION, PLEASE CONTACT:



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¹ See *Brett McKie v Munir Al-Hasani and Kenoss Contractors Pty Ltd (In Liq)* (2015) ACTIC1.