Work Health and Safety Queensland

The Queensland government made major changes to work health and safety laws in 2017. What do you need to know to be on top of those changes?

Industrial Manslaughter[1]

In a step away from harmonised legislation, on 23 October 2017, the Queensland government made industrial manslaughter a criminal offence in Queensland.[2]

Industrial manslaughter is not a new concept. Similar provisions exist in the Australian Capital Territory, which was introduced at the end of 2003.[3] Whilst the Minister introducing industrial manslaughter in the ACT suggested the ACT offence would be enforced,[4] there have been no prosecutions in the ACT for industrial manslaughter.[5]

There are two industrial manslaughter offences in Queensland:

- Industrial manslaughter by a person conducting a business of undertaking (**PCBU**);
- Industrial manslaughter by a senior officer.

The Queensland industrial manslaughter offences do not apply to volunteers, do not apply to events prior to 23 October 2017 and do not apply if no-one is killed.

Under neither offence can the defendant claim that neither the defendant nor an ordinary person could reasonably have foreseen that the event would occur.[6] This (and other provisions) makes the industrial manslaughter offence a much more dangerous offence than the manslaughter offence under the ordinary criminal law.

The elements of industrial manslaughter are:

1. A person died.
2. The defendant's conduct caused the death.
3. The defendant was negligent.

Under the industrial manslaughter charges a person need not die immediately. This is particularly important where workers die many years after the causal effect (e.g. Asbestosis and Black lung (pneumoconiosis).

Conduct means both acts and omissions and conduct causes death if it substantially contributes to the death.[7] More importantly however, and unlike ordinary manslaughter

[1] Part 2A of the Work Health and Safety Act 2011 (Qld)
[2] Work Health and Safety and Other Legislation Amendment Act 2017 (Qld)
[3] Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT)
[4] The Honourable Katy Gallagher, ALP, in Parliament when moving the Bill for the first time on 15 May 2002 said, "workers deserve to know that there is more than an insignificant fine compelling corporations to provide safe workplaces"
[5] Part 2A of the Crimes Act 1900 (ACT)
[6] Section 34B of the Work Health and Safety Act 2011 (Qld) excludes the operation of section 23 of the Criminal Code Act 1899 (Qld)
[7] Section 34A of the Work Health and Safety Act 2011 (Qld)

charges under the Criminal Code,[8] the industrial manslaughter offences are clearly designed to capitalise on the imputation provisions in the Act.[9] The imputation provisions[10] provide that conduct engaged in on behalf of a company by an employee, agent or officer that appears to be within the scope of their employment, is conduct also engaged in by the body corporate.[11] This makes companies in particular more vulnerable to a charge of industrial manslaughter.

Negligence is not defined in the Act. However, drawing upon the directions[12] that would ordinarily be given to a jury when considering a charge of manslaughter, it is possible to anticipate that a jury might be told that industrial manslaughter involves a level of negligence that is much more than would be required in a civil case.[13] How juries apply this concept cannot be for certain as their conduct in the jury room is confidential and largely unregulated.

The **senior officer offence** was created to make a distinction between a person who makes, or participates in making, decisions that affect a substantial part of the business of a corporation (e.g. a general manager)[14] and a person who holds an executive position or is concerned with, or takes part in, a corporation's management.[15] Although not clearly enunciated in the Act, the use of the phrase "senior officer" is intended to capture individuals of the highest levels in an organisation, those who can decide and influence safety management and culture at their workplace. The rationale for capturing these higher level officers is to encourage work health and safety to be managed as a cultural priority within organisations and ensure that safety standards are managed and supported from the top down.[16]

What should not be overlooked, but clearly intended in the drafting of the senior officer offence[17], is that "officers" (as against "senior officers") must exercise "due diligence" to ensure that the business complies with the Act.[18] So even though an "officer" may not fall within the senior officer offence for industrial manslaughter,[19] they may still be charged with failing to exercise due diligence. The trap here is that even though the imputation provisions[20] will not apply to the senior officer offence for industrial manslaughter, an officer may indirectly have to address imputed conduct under the due diligence offence.[21]

The maximum sentencing discretions for industrial manslaughter are:	
Industrial manslaughter by a corporate PCBU	$0 - $10,000,000
Industrial manslaughter by a non-corporate PCBU	0 - 20 yrs imprisonment
Industrial manslaughter by a senior officer	0 - 20 years imprisonment
Failure of an officer to exercise due diligence in preventing industrial manslaughter	$0 - $300,000 0 - 5 yrs imprisonment
Note that a fine is not an option for a person charged with industrial manslaughter.	

8 Criminal Code Act 1899 (Qld)
9 Note the reference in section 34C of the Work Health and Safety Act 2011 (Qld)
10 Sections 244 and 251 of the Work Health and Safety Act 2011 (Qld)
11 Note that a similar provision exists for public service bodies under section 251 of the Work Health and Safety Act 2011 (Qld).
12 Supreme and District Courts Criminal Directions Benchbook (Qld)
13 *"[T]he lack of care which suffices to establish liability in a civil case is not enough here. A very high degree of negligence is required before a defendant may be found guilty of criminal negligence. To convict, you must be satisfied beyond reasonable doubt that his conduct in (describe act or omission), if you find that act or omission proved, so far departed from the standard of care incumbent upon him to use reasonable care to avoid a danger to life, health and safety, as to amount to conduct deserving of punishment... Before you can convict on the basis of criminal negligence, you must be satisfied that there has been a very serious departure from reasonable standards of care. Because it involves an assessment of what standard of care a reasonable member of the community would use in similar circumstances and the seriousness of the degree of departure from it by the accused, it is for you, as representatives of the community in this trial, to make up your minds whether you are satisfied beyond reasonable doubt that his conduct was criminally negligent or whether it falls short of the degree of deviation from proper standards necessary to prove criminal negligence."*
14 "Officer" is defined in schedule 5 of the Work Health and Safety Act 2011 (Qld) by adopting the definition in section 9 of the Corporations Act 2001 (Cth)
15 Section 34A of the Work Health and Safety Act 2011 (Qld)
16 Queensland Treasury's first response dated 20 September 2017 to the Finance and Administration Committee review of the Work Health and Safety and Other Legislation Amendment Bill 2017
17 Queensland Treasury's first response dated 20 September 2017 to the Finance and Administration Committee review of the Work Health and Safety and Other Legislation Amendment Bill 2017
18 Section 27 of the Work Health and Safety Act 2011 (Qld)
19 Section 34D of the Work Health and Safety Act 2011 (Qld)
20 Sections 244 and 251 of the Work Health and Safety Act 2011 (Qld)
21 Section 27 of the Work Health and Safety Act 2011 (Qld)

Businesses Should Now Review:

1 Their contractual relations with employees, agents and officers to ensure that the scope of their employment is clear;

2 How the business is presenting employees, agents and officers to ensure that the true scope of their employment is apparent;

3 Whether officers and in particular, senior officers, of the business:

- **a** know what is required to exercise "due diligence";
- **b** are exercising due diligence; and
- **c** could quickly prove in an emergency with documented evidence, that they are exercising due diligence.

Codes of Practice[22]

Commencing on 1 July 2018, Codes of Practice take on a new level of importance.

Prior to 2017 amendment,[23] the Minister could approve a Code of Practice[24] and that Code of Practice was admissible as evidence to assist the court in determining what was known about a hazard or risk, risk assessment or risk control.[25] A breach of a Code of Practice was not in itself an offence.[26]

The 2017 amendment makes a breach of a Code of Practice an offence. It continues to be the case that a PCBU can argue that they are lawfully managing hazards and risks in a way that is different to the code, but provides a standard of health and safety that is equivalent to or higher than the standard required under the Code of Practice.[27]

The significance of the amendment will be largely indirectly felt. Various persons are given power under the Act to take compulsive action if a breach of the Act is occurring. So for example, an official of a union entering a workplace under a WHS entry permit[28] would be able to rely on a suspected breach of a Code of Practice as the basis for entering.[29] Similarly, a Health and Safety Representative could issue a Penalty Improvement Notice (**PIN**) requiring their employer to remedy a contravention of a Code of Practice[30]. A breach of the PIN would attract a penalty of up to $250,000.[31] Inspectors appointed under the Act can issue Improvement Notices (**IN**)[32] and Prohibition Notices (**PN**).[33] A contravention of a IN or a PN attracts a maximum penalty of up to $250,000 or 500,000 respectively.[34]

To give a practical example, the Code of Practice "PN11161 Hazardous manual tasks" states that ergonomic principles should be applied at the design stage of plant or structures. For many businesses, they would not normally engage an ergonomist to certify plant and structures. If the business could not demonstrate that they had applied ergonomic principles, then they may find themselves arguing with a union official or an inspector about whether the Code of Practice requires this or the word "should" can be considered as creating a discretion.

Businesses Should Now:

- Engage an expert to audit their compliance with Codes of Practice.
- In areas where the business cannot comply with a Code of Practice, legal advice should be sought to determine with the non-compliance will amount to an offence.

22 Part 2, Div 3 of the Work Health and Safety Act 2011 (Qld)
23 Work Health and Safety and Other Legislation Amendment Act 2017 (Qld)
24 Section 274 of the Work Health and Safety Act 2011 (Qld)
25 Section 275 of the Work Health and Safety Act 2011 (Qld)
26 Section 26A of the Work Health and Safety Act 2011 (Qld)
27 Sections 26A(b) and 275(4) of the Work Health and Safety Act 2011 (Qld)
28 Part 7 of the Work Health and Safety Act 2011 (Qld)
29 Section 117 of the Work Health and Safety Act 2011 (Qld)
30 Section 90 of the Work Health and Safety Act 2011 (Qld)
31 Section 99 of the Work Health and Safety Act 2011 (Qld)
32 Section 191 of the Work Health and Safety Act 2011 (Qld)
33 Section 195 of the Work Health and Safety Act 2011 (Qld)
34 Sections 193 and 197 of the Work Health and Safety Act 2011 (Qld)

Work Health and Safety Officers and Health and Safety Representatives

The 2017 amendment introduces a new variant of Work Health and Safety Officers (**WHSO**)[35] and modifies the rules for Health and Safety Representatives (**HSR**)[36].

WHSO

Commencing on 1 July 2018, a PCBU can appoint a statutory WHSO.[37] Existing WHSOs will not be automatically recognised under the Act and prospective WHSOs will have to apply to the "regulator"[38] for a certificate of authority for appointment as a WHSO.[39] In addition, regardless of the qualifications of the prospective WHSO, the WHSO will have to have obtained a Certificate IV in Work Health and Safety BSB41412 (**Cert IV**) on or after 1 April 2018. Whilst the regulator may approve other courses, at the moment a person that possesses a PhD focused on work health and safety, but not a Cert IV obtained in 2018, could not apply for a certificate of authority to be appointed as a WHSO. The effect of these provisions means that many people who were WHSOs under earlier legislation[40] or currently hold roles as safety officers, will have to enrol and complete a Cert IV next year.

The most important function of the new WHSO is to conduct annual assessments of risks to health and safety in the business.[41] The WHSO does not have to immediately provide the assessment report to Workplace Health and Safety Queensland, but the report would not be privileged and could be discovered at any time.

HSR

A significant (although easily missed) amendment in the Act is the removal of the right of an employer to seek external review of a decision of an inspector in relation to negations on work groups[42] and a decision of an inspector in relation to HSR training.[43] The amendment was made by omitting these matters from the schedule of reviewable decisions (i.e. Sch 2A).[44] Consider for example a workplace where workers were demanding that multiple HSRs be appointed and that each of those HSRs were training at an expensive (but approved) 5 day union course. The employer and the contenders could not agree, largely because the employer cannot afford the cost. The union then calls their favourite inspector to attend and determine the matters.[45] The inspector determines that there will be multiple HSRs and each HSR can attend the expensive union run training. The employer would be committing an offence if they did not comply with the inspector's decision.

EVIDENTIARY AMENDMENT

During the introduction of the amending legislation, the government promoted the introduction of the new WHSO provision by highlighting a new evidentiary provision in the Act.[46] The new evidentiary provision provides that appointment of a WHSO or HSR is admissible as evidence that a duty or obligation under the Act has been complied with (**2017 evidentiary amendment**).

A number of interesting points flow out of the 2017 evidentiary amendment:[47]

1. The provision does not explain how evidence of the appointment of a WHSO or HSR is to be applied when considering whether or not there has been a breach of a duty or obligation.
2. It seems implicit in the government's argument that you need to appoint a WHSO to take advantage of this provision (as HSRs have been around since the commencement of the Act). However, the amending Act[48] uses the words "WHSO or HSR".
3. The use of the words "or not" make it clear that failure to appoint a WHSO and a HSR is admissible as evidence that a duty or obligation under the Act has not been complied with. Applying purest logic there would need to be the absence of both a WHSO and a HSR for their absence to amount to evidence of a breach of duty or obligation. However, purest logic does not always apply in the Courts. It may be that evidence of either a WHSO or an HSR will be admissible evidence of a breach.

35 Part 5A of the Work Health and Safety Act 2011 (Qld)
36 Part 5, Div 3 of the Work Health and Safety Act 2011 (Qld)
37 Section 103A of the Work Health and Safety Act 2011 (Qld)
38 Currently the "regulator" is Dr Simon Blackwood of the Office of Industrial Relations, Queensland Treasury
39 Section 31A of the Work Health and Safety Regulation 2011 (Qld)
40 For example, the Workplace Health and Safety Act 1995 (Qld)
41 Sections 103D and 103E of the Work Health and Safety Act 2011 (Qld)
42 Sections 52 and 53 of the Work Health and Safety Act 2011 (Qld)
43 Section 72 of the Work Health and Safety Act 2011 (Qld)
44 Section 25 of the Work Health and Safety and Other Legislation Amendment Act 2017 (Qld)
45 Sections 53 and 72 of the Work Health and Safety Act 2011 (Qld)
46 Section 273A of the Work Health and Safety Act 2011 (Qld)
47 Section 24 of the Work Health and Safety and Other Legislation Amendment Act 2017 (Qld)
48 Work Health and Safety and Other Legislation Amendment Act 2017 (Qld)

In a practical sense, if a HSR or an inspector appointed under the Act wanted to investigate whether there has been a breach of the Act, an easy opening question is whether the PCBU has appointed a WHSO and HSRs. If the question is answered in the negative, then the investigator has initial evidence of a breach.

Businesses Should Now:

- Organise training for HSRs.
- Prepare to appoint a WHSO after 1 April 2018.
- Seek legal advice on how WHSO assessment reports should be structured.

LABOUR HIRE

The Labour Hire Licensing Act 2017 (**LHL Act**) was assented to on 13 September 2017, but a commencement date for its operation has not yet been determined.

The LHL Act has extraterritorial application and applies to businesses outside of Queensland, but whose business has a nexus with Queensland.[49]

The objective of the LHL Act is to provide for the licensing and regulation of providers of labour hire services, with the objective of protecting workers from exploitation.[50] However, the operation of the LHL Act is not clear and it would appear to have far reaching application beyond what one might initially envisage. The potentially wide ranging application of the LHL Act is caused by the vague definition of "provider":[51]

*"A person (a **provider**) provides **labour hire services** if, in the course of carrying on a business, the person supplies, to another person, a worker to do work."*

The Queensland government has made it clear that it intended to capture the triangular relationship between the worker, provider, and the client that a worker is supplied to. The labour hire provider usually retains the contractual, employment or other relationship with the worker. The labour hire provider is usually responsible for ensuring the worker's entitlements are met as well as associated responsibilities and liabilities, including legal requirements for workplace health and safety, workers' compensation and taxation. However, the legislation captures more complex relationships such as where the worker is supplied indirectly through one or more agents or intermediaries.[52]

There were numerous submissions to the Finance and Administration Committee during the enactment process, but the definition of provider was not narrowed. The government has now indicated that it will introduce regulations to narrow the definition, but when and how that might be done has not yet been determined.

What is immediately concerning for many businesses, is that within their corporate group, the company that pays workers' wages is different to the company that gives directions to workers. This would appear to amount to being a labour hire situation within the definitions of the LHL Act and the company that pays the wages would have to obtain a labour hire licence.

Under the Act it is an offence to:

- Provide labour hire services unless the person is the holder of a licence.[53]
- Counsel, procure or aid in the provision of labour hire services when the provider is not the holder of a licence.[54]

[49] Section 5 of the Labour Hire Licensing Act 2017
[50] Section 3 of the Labour Hire Licensing Act 2017
[51] Section 7 of the Labour Hire Licensing Act 2017
[52] Explanatory Notice to the Labour Hire Licensing Bill 2017
[53] Section 10 of the Labour Hire Licensing Act 2017
[54] Section 92 of the Labour Hire Licensing Act 2017

A provider's licence can be cancelled or suspended if the provider contravenes a "relevant law".[55] The LHL Act defines "relevant law" very broadly as a provision of a law of the State, the Commonwealth or another State imposing an obligation on a person in relation to workers.[56] The LHL gives the following extensive list of examples:

- Age Discrimination Act 2004 (Cwlth)
- Australian Human Rights Commission Act 1986 (Cwlth)
- Anti-Discrimination Act 1991
- Child Employment Act 2006
- Disability Discrimination Act 1992 (Cwlth)
- Electrical Safety Act 2002
- Fair Work Act 2009 (Cwlth)
- Independent Contractors Act 2006 (Cwlth)
- Industrial Relations Act 2016
- Migration Act 1958 (Cwlth)
- Payroll Tax Act 1971
- Queensland Building and Construction Commission Act 1991
- Racial Discrimination Act 1975 (Cwlth)
- Sex Discrimination Act 1984 (Cwlth)
- Superannuation Guarantee (Administration) Act 1992 (Cwlth)
- Work Health and Safety Act 2011
- Workers' Compensation and Rehabilitation Act 2003

What is clear is that it would be very easy for the government or another aggrieved person to form a suspicion that a contravention of a relevant law has occurred. A provider may not receive any warning that the licence is about to be suspended,[57] but will receive a show cause notice if the licence is about to be cancelled.[58]

For a host employer, the most concerning aspect of the LHL Act is that there is no obligation on the provider to alert the host employer that there has been a suspicion that the provider has contravened a relevant law. Consequently, the host employer may get no notice before a licence is suspended or cancelled and on being so advised, must cease using the worker. Of course many labour hire contracts contain a provision that requires that the host employer pay a fee to the labour hire provider if the host employer wants to employ the worker directly.

A motivated party (e.g. a union) could wreak havoc with the LHL Act.

The provider must supply an extensive report to the government every 6 months that sets out amongst other things, information about the provider's compliance with relevant laws and the number of notifiable incidents under the Work Health and Safety Act 2011 that involved labour hire workers.[59] Information from the report is kept on a public register.[60] If the provider provides misleading information, then they have contravened the Act,[61] which in turn makes it a breach of a relevant law and grounds for suspension or cancellation of a licence.[62]

A motivated party could complain to the regulator that the provider has breached a relevant law, with a view to having the provider's licence suspended or cancelled. The motivated party could further wait for the provider to provide their official report and if it did not disclose the contravention of the relevant law, use that as the basis for applying pressure for the provider's licence suspended or cancelled. Lastly, a motivated person could prosecute the provider for a breach of the LHL Act, due to the absence of a provision constraining who may prosecute.[63]

Any involvement by the host employer to counsel, procure or aid the provider in the commission of an offence, would place the host employer in breach of the LHL Act.[64]

The maximum penalties under the LHL Act are:

- $378,450.00 for a corporation, and
- $130,439.10 or 3 years imprisonment.

55 Part 3, Div 3 of the Labour Hire Licensing Act 2017
56 Schedule 1 of the Labour Hire Licensing Act 2017
57 Section 22 of the Labour Hire Licensing Act 2017
58 Section 23 of the Labour Hire Licensing Act 2017
59 Section 31 of the Labour Hire Licensing Act 2017
60 Section 103 of the Labour Hire Licensing Act 2017
61 Section 91 of the Labour Hire Licensing Act 2017
62 Schedule 1 of the Labour Hire Licensing Act 2017
63 Section 42 of the Acts Interpretation Act 1954
64 Section 92 of the Labour Hire Licensing Act 2017

Businesses Should Now Review:

1. Their structural arrangements to determine whether they fall within the definition of labour hire;
2. Their contractual arrangements with their labour hire providers to determine if they fairly address what will happen in circumstances where the providers licence is suspended or cancelled; and whether officers and in particular, senior officers, of the business; and
3. Prepare a contingency plan in the event that the provider's licence is suspended or cancelled.

Any business that operates in Queensland must be aware of these WHS legislation changes. The penalities for non-compliance are severe for businesses and individuals involved in safety management and culture in the workplace.

It is strongly recommended that you consult Alan Girle, Director at Australian Business Lawyers & Advisors on 1300 565 846 for a comprehensive review of these legislative changes and how it will impact your business specifically.

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