



## NAVIGATING THE NEW INDUSTRIAL MANSLAUGHTER LAWS

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The new and very serious offence of “Industrial Manslaughter” was introduced to Queensland on 23 October 2017, when the Queensland Parliament passed the *Work Health and Safety and Other Legislation Amendment Act 2017* (“**Act**”).

The Act represents the Palaszczuk government’s response to recommendations contained in the report commissioned 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 work health and safety (“**WHS**”) regulatory framework in Queensland. The Act addresses the majority of these recommendations.

### INDUSTRIAL MANSLAUGHTER – THE NEW OFFENCE

The centrepiece of the Act is the introduction of a new offence of “Industrial Manslaughter” now included in each of the *Work Health and Safety Act 2011* (Qld) (“**WHS Act**”), the *Electrical Safety Act 2002* (Qld) and the *Safety in Recreational Water Activities Act 2011* (Qld). Notably, the offence does not apply to the mining industry.

At present, the ACT is the only jurisdiction in Australia to have enacted a specific industrial manslaughter offence. Other jurisdictions, including New South Wales, have also proposed the introduction of a similar offence, but these are yet to be legislated.

Under the Act, 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 Act states that a PCBU “causes” a worker’s death where the PCBU’s conduct “substantially contributes to” the fatality.

The new offence replaces 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 PCBU can commit. Relevantly, negligence is easier to prove than recklessness, as it is a broader test and does not consider the subjective state of mind of the defendant.

The Act provides that industrial manslaughter will be a criminal offence provision, meaning the relevant standard for a successful prosecution is “beyond reasonable doubt”. In effect, what has to be proven is the person’s

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conduct so far departs from the standard of care expected to avoid danger to life, health and safety, **and** the conduct **substantially contributed** to the death.

#### OFFENCE CAPTURES "SENIOR OFFICERS"

The new offence of industrial manslaughter also applies to individuals, in this case, any "senior officer" of a PCBU.

Curiously, the definition of "senior officer" contained in the WHS Act likely covers more individuals within an organisation than another relevant term, "officer", in the Act. Under the Act, a "senior officer" of a corporation includes any person who is *"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 PCBU, but any person who is part of a company's management team.

The message is clear: it is now highly probable that any individual with management responsibilities could be prosecuted for an industrial manslaughter offence.<sup>1</sup>

#### RECORD PENALTIES FOR OFFENDERS

In recognition of the seriousness of the new offence, the Act imposes maximum penalties 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 previous maximum penalty that could be imposed on a PCBU or an officer for a category 1 breach of the WHS Act.

The Act also excludes the availability of the 'accident' defence from the offence of industrial manslaughter.

The new offence is excluded from the current limitation periods on prosecution 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 other offences, which are:

- within 2 years after the regulator is first notified;

- within 1 year after a coronial report is made or coronial inquiry ended; or
- within 6 months dependent on a contravention or withdrawal of a WHS undertaking.

Industrial manslaughter will be considered as a potential new offence in other jurisdictions. Safe Work Australia's major review of the national model WHS laws is expected to be completed by the end of 2018, so the industrial manslaughter offence could be a reality for other jurisdictions in the near future.

#### SIGNIFICANCE FOR EMPLOYERS

All businesses should continue to adopt measures, driven by boards and management, to limit the risk of serious WHS incidents occurring. These measures should 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;
- considering appropriate insurance coverage for PCBUs and "senior officers";
- 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.

<sup>1</sup> 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.

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