MASTER ELECTRICIANS AUSTRALIA

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Consultation Regulation Impact Statement

Recommendations of the 2018 Review of the Model Work Health and Safety Laws

J O'Dwyer / August 2019

Introduction

Master Electricians Australia (MEA) is the trade association representing electrical contractors. As a driving force in the electrical industry and a major factor in the continued success and security of electrical contractors, MEA is recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. The organisation's website is: www.masterelectricians.com.au.

MEA believes that the death of a person in a workplace environment is totally unacceptable, and therefore advocates, supports and assists the education of consumers, employees and contractors in safety to obtain the benefit of the various protections, responsibilities and obligations under the -

- Work Health and Safety Act;
- Electrical Safety Act;
- Codes of Practice;
- Australian Standards; and
- Generation Distribution and Installation Rules

Recommendation 2: Make regulations dealing with psychological health

Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.

MEA agrees that designing of work needs to ensure that psychological factors are included in the design of jobs. MEA is of the view that many employers do not understand this area well and that in the vast majority of cases the impact of these factors are well controlled under current legislation. We would support and endorse further education materials and even the development of a Code of Practice for high risk industries such as Fly in fly out workforces or those workforces where roster periods place pressure on employees and families.

Documents such as Western Australia FIFO Code of Practice discusses and sets an appropriate example that should be used across varying industries in similar circumstances and jurisdictions.

https://www.commerce.wa.gov.au/sites/default/files/atoms/files/fifocode_of_practice.pdf

Recommendation 7a: New arrangements for HSRs and work groups in small businesses

Amend the model WHS Act to provide that where the operations of a business or undertaking ordinarily involves 15 workers or fewer and an HSR is requested, the PCBU will only be required to form one work group represented by one HSR and a deputy HSR unless otherwise agreed.

MEA agrees that consultation is an important feature of current safety leadership within a business. The recommendation to only form one work group is supported however we would make note that 94% of small businesses are micro businesses with less than 5 employees. MEA would suggest that in micro businesses the need for a Deputy HSR in a business with less than 5 employees should also be an exception under the model rules.

Recommendation 8: Clarify workplace entry of union officials providing assistance to an HSR

Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the *Fair Work Act 2009* (Cth) or another industrial law.

MEA does not support changing the current status quo. The history of Unions using safety as an industrial tool to achieve an industrial, non-safety outcome, is well documented in various Royal Commissions and Federal Court decisions.

If a HSR needs assistance from a specialist and that person is not a Union permit holder then at present that person is unable to:

- stop work
- request documents
- speak to workers or inspect other areas of a workplace
- issue a provisional improvement notice

MEA suggests that a person without a permit may be engaged at any time on the basis that they will be held to account for the advice and professional advice given to the HSR. They must be invited by the HSR with specific or clear instructions as to the issue that is causing them concern. The non-permit holder should only be allowed to deal with the safety issue as idenitifed. The non-permit holders name address and professional back ground must be provided to the PCBU upon entry and if providing advice should provide their professional indemnity insurance for providing such advice.

The HSR will continue to be held without personal liability for the health safety matter however the non-permit holder should be held personally or corporately liable for the advice they provide in which the HSR acts upon. Including relevant liquidated damages from the PCBU for losses incurred in the event of incorrect or erroneous advice.

These safe guards would maintain the integrity of the safety legislation by allowing advice to be received and acted upon however the advice given should be of sufficient rigour so as to be reliable for the parties.

Recommendation 9: Requiring inspectors to deal with safety issue when cancelling a PIN

Amend the model WHS Act to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be dealt with by the inspector under s 82 of the model WHS Act.

MEA suggests that if a HSR creates a PIN, it is assumed the HSR has:

- access to training as required,
- access to Entry Permit Holders and/or
- Non-entry permit holders to obtain advice from.

In these circumstances it is not unreasonable for a PCBU to expect a HSR to correctly create a PIN. MEA suggests that the status quo should remain in this area. MEA also suggests that due to a lack of any form of data that there is no justification issue is a major or minor occurrence.

Section 102 refers to a PIN cancelled for a substantial injustice. The aim of section 102 means that an inspector has made a decision that the PIN does not stand up to the requirements of the Act and that for some reason (an injustice most likely towards the PCBU) is to be unwarranted. Forcing an inspector to deal with an issue that has resulted in a PIN of an injustice level indicates that one or more party, most likely the party issuing the PIN, has been unreasonable and that the issue under dispute is not as the parties perceive.

Recommendation 10: HSR choice of training course

Amend the model WHS Act to make it clear that for the purposes of s 72:

- the HSR is entitled to choose the course of training, and
- if the PCBU and HSR cannot reach agreement on time off for attendance, payment of fees or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter.

MEA believes that in this area of training selection it is imperative that rural and remote Employers and Employees have criteria in selecting the training attendance. We believe that regulators must have a criterion by which to make their decision. Things to be considered would include:

- Distance to regional centre
- Provider availability
- Transportation meal and accommodation cost impact
- Size and work load of employer, of particular note micro businesses with 5 or less employees.
- Employee availability / rostering / supervision requirements (e.g. of apprentices)

Recommendation 15: Remove 24-hour notice period for entry permit holders

Amend the model WHS Act to retain previous wording in s 117 of the model WHS Act.

MEA recommends the current requirements remain in place and no change is made.

Recommendation 17: Require production of documents and answers to questions after entry

Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace.

MEA would agree that the regulator may ask for documents for 30 days.

Recommendation Industrial Manslaughter

Recommendation 23a: Enhance Category 1 offence

Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.

Recommendation 23b: Industrial Manslaughter

Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:

- the offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act
- the conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate
- the body corporate's conduct include the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers
- the offence covers the death of an individual to whom a duty is owed

Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels (Recommendation 22) and develop sentencing guidelines (Recommendation 25).

Master Electricians Australia opposes the introduction of Industrial Manslaughter into the model rules for many reasons. These include

- Coronial evidence that investigations into electrical and other workplace deaths are not to the requisite standard
- A lack of experience education and regulation of WHS Inspectors in terms of civil liberties for individuals.

- There is no “gap” in the current law that stops a person from being charged with manslaughter;
- The laws as proposed will breach a person’s civil liberty and there are not enough safe guards in place;
- The laws for manslaughter rightly sit within the criminal code;
- The laws will have unintended consequences for various parties not contemplated or detailed by the Government’s reviewer.

Construction/Concerns

MEA has serious concerns regarding the proposed legislative construction of these powers being held within the Work Health and Safety Act. Manslaughter, under the Criminal Code holds a 20-year custodial sentence. Industrial Manslaughter under the Work Health and Safety Bill has the same maximum sentence plus an additional $10,000,000 fine.

The draft laws create a new criminal charge outside of the Criminal Code. The justification of this will assist with successful prosecution of Senior Officers and PCBUs of large complex organisations; a circumstance that has allegedly proved difficult to prosecute under the Criminal Code. Effectively, the proposed draft laws will enforce the harshest punishment available on a person without the full protection of the current criminal justice system.

There are three main principles to criminal law –

1. Innocent until proven guilty;
2. The right to remain silent; and
3. Double jeopardy.

These rights should be available to all under the WHS Act if manslaughter is taken out of the criminal code. As further evidence in Queensland in the last 2 years there has been successful manslaughter prosecutions for two fatal accidents, resulting in prison time for directors.

Nathan Day was sentenced to seven years (min 2yrs prison) in March 2018 and in Feb 2019 Gary Lavin of Multi-run Roofing on the Sunshine Coast was fined $1 million and received 12 months prison for a fall from heights of an employee. Both fatal accidents occurred prior to industrial manslaughter laws.

Self-Incrimination

The Office of Queensland Parliamentary Council (OQPC), along with most other states and territories has guidelines detailing what establishes good law, or as it refers to them Fundamental Legislative Principles (FLP’s). After reviewing this information MEA believes that the proposed model laws have not taken some of those principles into account.

The first of which MEA has concerns is self-incrimination. Referring to the Queensland guide we see the following summary at the heart of the OQPC information

> "Consider whether legislation abrogates the common law protection that prevents a person from being compelled to provide evidence of the person's own fault or guilt. This includes the right to silence, penalty privilege, spousal privilege and use and derivative use immunities**. Legislation that impacts on the common law protection against being compelled to self-incriminate may interfere with the rights and liberties of the individual under section 4(3)(f) of the Legislative Standards Act 1992**".

Source https://www.legislation.qld.gov.au/Publications/OQPC/FLP_Self_incrimination.pdf

Section 172 of the WHS Act has remained unchanged in the draft laws. Section 172 states

> 172 Abrogation of privilege against self-incrimination
>
> (1) A person is not excused from answering a question or providing information or a document under this part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.
>
> (2) However, the answer to a question or information or a document provided by an individual, and other evidence directly or indirectly derived from the answer, information or document, is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.

This is of major concern to the implementation of these laws and their operation in such a serious new charge as manslaughter. Under all Criminal Code all people have a right to silence and non-self-incrimination; however, with the addition of this new manslaughter charge, no protections have been put in place to protect those involved.

Further the OQPC goes further on this topic to specifically make a difference between an individual and a corporation.

> "[39] The Scrutiny Committee considered its role to be essentially related to individuals. As a corporation cannot be imprisoned**, abrogation of the privilege against self-incrimination to it assumes a different aspect from its abrogation to an individual**."

MEA submits that these provisions within the draft laws contradict the intent and outcomes. Further, they do not reflect the Criminal Code practice.

Advocates of the proposed legislation would likely point to the 'lack of right to silence' under the *Building and Construction Industry (Improving Productivity) Act 2016* to rebut the submissions of MEA; however, the ABCC has never had any role in investigating breaches of the criminal law. It deals with possible industrial law contraventions, which are and always have been civil, not criminal matters.

As such it is the view of MEA that to combine the rights and obligations of corporations, executive officers and senior officers under one abrogation clause denies justice to individuals.

As such, it is apparent that individuals must remain under the purview of the criminal code and corporations subject to the charge under the WHS Act and subject to the $10,000,000 fine.

In addition to the above, people investigating a crime, and/or subject of those investigations and relevant witnesses have obligations, responsibilities and rights.

Currently in Queensland a charge of manslaughter enlivens a number of different legislative acts. These include powers, obligations and responsibilities in the areas of:

- creation of crime scene;
- powers to investigate;
- powers to seize documents and evidence, with and without Supreme Court approval / warrants;
- obligation on investigators / police to warn interviewees about their rights;
- rights of interviewees to not answer any questions and evoke their right to silence;
- rights to representation;
- rights to brief of evidence and right to non-incrimination;
- rights that a person cannot be tried twice for the same offence; and
- situations whereby some indictments may lead to a lesser charge or conviction.

The above are determined by the following acts

- Police Powers and Responsibilities Act 2000;
- Criminal Code Act 1899;
- Bail Act 1980;
- Evidence Act 1977; and
- Penalties and Sentences Act 1992.

MEA raises the following examples regarding the interaction of the draft laws and the increased powers and level of the offences proposed. Section 397 of Police Powers and Responsibility Act 2000 states that:

> 397 Right to remain silent not affected
>
> > *Nothing in this chapter affects the right of a person to refuse to answer questions, unless required to answer the questions by or under an Act*

A person under the criminal code has a right to silence and right to representation. However, the new draft laws will result in a lack of protection compared to a criminal case. An example of MEA's concern is a person's right to remain silent. Under the current Queensland Act and combined with the draft laws addition of Industrial Manslaughter we see section 171 indicate the following:

> *171 Power to require production of documents and answers to questions*
>
> *(1) An inspector who enters a workplace under this division may—*

(a) require a person to tell the inspector who has custody of, or access to, a document; or
(b) require a person who has custody of, or access to, a document to produce that document to the inspector while the inspector is at that workplace or within a stated period; or
(c) require a person at the workplace to answer any questions put by the inspector.

Under the Queensland Police Powers Act there are specific requirements. An example of such requirements is:

Division 3 Detention for investigation or questioning

403 Initial period of detention for investigation or questioning

(1) A police officer may detain a person for a reasonable time to investigate, or question the person about—

(a) if the person is in custody following an arrest for an indictable offence—the offence for which the person was arrested; or

(b) in any case—any indictable offence the person is suspected of having committed, whether or not the offence for which the person is in custody.

(2) However, the person must not be detained under this part for more than 8 hours, unless the detention period is extended under this division.

(3) If this part applies to the person because of section 398(b) or (c), the person must be returned to the watch-house or other place of custody as soon as reasonably practicable after the detention period ends.

It is foreseeable that requiring a person to answer a question is a way in which an Inspector may detain a person whom otherwise would not want to be questioned. Inspectors do not have the right or authority to detain a person. Other examples from the Queensland Police Power and Responsibilities Act include -

- 420 Questioning of Aboriginal people and Torres Strait Islanders;
- 421 Questioning of children;
- 422 Questioning of persons with impaired capacity; and
- 423 Questioning of intoxicated persons.

None of these protections are present in the current Act or the WHS draft laws. It is likely that during an investigation that Police were required to interview under-age children who were working as apprentices, part time or casually. It is foreseeable that such instances will again

happen in the future since the legal working age in Queensland for minors is 14 years and 9 months in most instances. MEA would again submit that these short comings lead to a responsible decision to abandon the draft laws and remain with the current criminal code and other relevant legislation.

MEA is significantly concerned that the consequences of these changes will have significant effect on Queenslanders' civil liberties.

MEA also raises concerns regarding the sharing of information between WHS Officers and Police. It is apparent in these draft laws that WHS Officials, not constrained by other laws such as the right to silence, could provide police information that they would not otherwise have available if a person enacted their right to silence.

MEA would use Section 172 of the WHS Act 2015 interrelationship with the new Bill.

> *172 Abrogation of privilege against self-incrimination*
>
> (1) A person is not excused from answering a question or providing information or a document under this part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.
>
> (2) However, the answer to a question or information or a document provided by an individual, and other evidence directly or indirectly derived from the answer, information or document, is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.

The Queensland Criminal Code allows for the right to silence however the Bill and the Act will remove this right from executives and senior officers.

Inspectorial Powers / Skill

Given the significant difference in charges between Category 1 and Industrial Manslaughter it is imperative that the legislation, if bestowing the responsibility of investigation onto inspectors, that those responsibilities are subject to investigation and review.

Under the Queensland Police Powers and Responsibilities Act, officers investigating manslaughter have sufficient powers when issued with particular warrants, such as the declaration of a crime scene. These declarations themselves also invoke rights for persons subject to those declarations. None of these protections or procedures are within the draft laws and only limited protections are contained within the WHS Act which were not drafted to include Industrial Manslaughter.

MEA also has serious concerns regarding the training and experience of inspectors to conduct what is effectively a criminal manslaughter investigation. Our concern is highlighted unfortunately in the tragic death of Dale Kennedy. Our concerns relate to the actions of the inspectors and the Department in the case. The Coroner made note of his concerns.

The Coroner repot on page 12 states: (emphasis added)

> **"I find it incredulous that laypersons such as myself and my coronial team could find what now seems obvious and should have been found by the ESO Inspectors, who are presumed to have the required technical expertise.** There are clearly limited possibilities about what trade persons may have needed to lower the catenary and for what purpose given the equipment located in that space. There may still have been difficulties in identifying who, when and why that catenary was lowered, BUT those investigations were far more likely to be productive in 2012. **This was a serious missed opportunity on the part of the ESO's."**

The Coroner's report goes on to say at page 13:

> A decision was made to prosecute Mr Goggin for failing to ensure that a person's business was conducted in a way that was electrically safe[75], evidenced by Mr Goggin failing to ensure there was an adequate risk assessment and not ensuring control measures necessary to prevent a person exposed to electrical risk. Essentially, WHS alleged the risk assessment completed by Mr Goggin was not adequate as he didn't look into the roof space of G Block which would have led to him identifying potential hazards and de-energising the building before non-electrical work was started. The matter proceeded to hearing and at the conclusion of the prosecution case, the defence submitted there was no case to answer. ***The court agreed and the charges were dismissed with ESO ordered to pay the costs of Mr Goggin. (emphasis added)***

MEA is seriously concerned that had a charge of industrial manslaughter been in place during this time that the Electrical Contractor involved may have been prosecuted for industrial manslaughter.

The Coroners findings included:

> 8.The person responsible for undoing the saddle and releasing the catenary was unable to be identified. However, there was a better prospect of identification if the full forensic ability of ESO was properly and competently engaged at the time of the scene investigation. It may be that that person did not appreciate the risk created by their action.
>
> 10. ESO missed a number of opportunities. Inspectors failed to notice that the catenary from which circuit 22 originated had been released from its supporting saddle. It missed the consequential opportunity to investigate who and why the catenary was released from the supporting saddle. Nonetheless, and somewhat ironically, it prosecuted Mr Goggin, asserting he failed to properly inspect the ceiling space for electrical hazards. It also missed the opportunity to check whether there was any like or other electrical hazards in the ceiling space that might have assisted forensically or in mitigating the risk of electrocution. All of the inspectors who gave evidence impressed as experienced, conscientious and hardworking; but their investigative knowledge and skills need better organisational support and backup.

Corporate Criminal Responsibility

The report has used as justification for the introduction of industrial Manslaughter highlighting the introduction of charges in Queensland and the difficulty for jurisdictions to obtain a Category 1 conviction. The report also points to that there are difficulties with this based on a difference in statute construction across Australia.

The 2018 Review found there are limitations to dealing with work-related deaths through general manslaughter offences in criminal law. There are issues in relation to attribution and aggregation of criminal conduct to a corporation, particularly larger organisations, which makes it difficult to successfully prosecute corporations for general manslaughter following a work-related death.

However, what is observed and of note is that the federal Criminal Code addresses physical and fault element immensely better than Qld, WA or Tasmania but also is a model for holding corporate entities to account. This then allows civil liberties of individuals are not breached and that prosecutors and investigators have the correct checks and balances in place for a criminal level indictment. MEA would suggest that only Corporate Responsibility be included in the WHS laws. This then allows for criminal prosecution of corporates to continue without jeopardising an individual's civil liberties.

Evidence of this suitability can be found in The Commonwealth Criminal Code: A Guide for Practitioners, 2002, page 296 – 337:

PART 2.5 - CORPORATE CRIMINAL RESPONSIBILITY

Division 12

12.1 General principles

(1) This *Code* applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.
Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body

corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and
(b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers;

or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

A significant issue with the current recommendations to accept industrial manslaughter into the model WHS Act is that it perpetuates the idenitifed issue that holding larger corporates to account due to attributable fault elements of the organisation as a whole is not resolved unless states like Queensland, Western Australia and Tasmania address the issue of criminalising corporate responsibility.

MEA would say that by the State adopting better regulation but maintaining criminal conviction of individuals is a better law and maintains the intent of the outcome.

Recommendation 26: Prohibit insurance for WHS fines

Amend the model WHS Act to make it an offence to:

- enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act
- provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and
- take the benefit of such insurance or such indemnity.

MEA support the existence of fines and penalties which are an import deterrent to adverse safety practices in all industries. However, we do foresee a serious problem in situations involving insurance. The current practice is an employer will engage an insurer and purchase management liability insurance. This insurance results in a yearly premium and covers in all cases legal advice, court costs and in some cases fines and penalties.

As we understand the process a claim may be lodged after an incident and notified to the insurer. A notification does not necessarily mean a claim will be made however notifies the

insurer possible action. If action is commenced by a third party, such as a regulator, the claim is lodged, the excess is paid and then the insurance company takes carriage of the claim. Terms and conditions of policies generally result in the insurer having the power of direction of the claim and the way it is defended, and which legal team is appointed to defend a claim. Currently it is within the insurer's interest to ensure that costs are minimised, and that the employer receives the best defence possible. The incentive of the insurer to ensure the best defence possible is the threat of the fine on top of the considerable court costs and legal bills that are incurred during the defence.

In the event that the laws enacted by each state outlaw the payment of fines, this means that the insurance company's main cost to control is that of the defence costs, as such in events where pressure from a regulator is placed on the insurers, lawyers and the employer to settle or if the insurer wishes to settle even though the defence team or employer wish to proceed with a the defence action, under the terms of the insurance contract the employer in many cases will not be able to influence the insurer's decision as to when the case is either resolved or that no more defence costs will be incurred.

If we use as the basis of an example the failed prosecution of Goggin Electrical, if an insurer was involved then without the threat of a large penalty from the courts, if an insurer was involved they would have close that matter, accept the charge and left the employer with possibly being convicted of an offence that the company and he did not commit, simply to save costs? In extending the case even further, based on the evidence from the Kennedy Coroners report this would have been done on a flawed investigation, with inspectors not trained appropriately and conducted through a flawed prosecution.

Goggin Electrical were not able to continue trading due to the costs associated with defending the claim and trying to deal with the tragic events.

It is imperative of the State to ensure that innocence is presumed until proper process is undertaken, and a proper defence is part of that obligation. MEA is concerned that the balance between the resources of a large Government Department prosecution and an PCBU defence is necessary so that Regulators who prosecute either incorrectly, indiscriminately or without due care attention and skill, as has been the case as described by the Queensland Coroner, have some chance to defend themselves. MEA would also highlight that in this one case the resources of Worksafe Queensland and the ESO attempted to prosecute a second electrical contractor. Once again the regulator was not able to prove their case and were defeated in court with no conviction against the second entity.

MEA believes, with the assistance of PCBU's, Insurance industry and regulators, there is a position that will allow for all parties to deliver a balanced system that allows and the presumption of innocence and meet investigation costs in the event that a prosecution undertaken by a regulator does not meet the required standard or indeed is contested. If, however a conviction is found to contravene the PCBU duties, results in a fine that will be a deterrent for other operators.

MEA would be available to assist in these discussions to arrive at a common-sense approach.



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