

2018 MODEL WORK HEALTH AND SAFETY LAW REVIEW

COMPLAINTS AND ENFORCEMENT

INDUSTRIAL MANSLUGHTER



Compliance and Enforcement

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au.

Master Electricians appreciates the opportunity to provide comment. MEA wishes to highlight that in all jurisdictions in Australia the electrical industry operates on a two-tier regulatory basis. Electrical contractors and their employees comply with not only WHS legislation but also electrical safety legislation. The WHS Acts in most states are important but are usually subordinate given the specific nature of the electrical industries risk. It is important that the WHS review does not introduce further complexity or competing responsibilities into high risk industries such as the electrical industry.

Compliance and Enforcement

Compliance and enforcement are an important part of any regime, in all states and territories additional inspection resources and penalties are applicable to the electrical industry. Penalties are replicated and match those in the WHS Act in most states however electrical work, employees and PCBU's are subject to additional penalties and safeguards due to the requirements and expectations of the electrical industries.

MEA's general observation regarding the current laws of compliance and enforcement are that they are effective, however, different states approach compliance, education, enforcement and prosecution in different ways. These differences can lead to significantly different cultures, preferences and outcomes. For example, a state that embraces enforceable undertakings and achieves significant compliance and improvement from these, may have less prosecutions, but the results may be no better or worse than another state that concentrates more on prosecutions. From the data available we see that injury rates are improving and deaths are reducing so without in depth analysis it appears the present mix of undertakings and prosecutions are having a positive effect.

The business community has also observed courts considering decisions from other jurisdictions to set appropriate penalties. We believe that with continued pressure and observation of state courts regarding interstate prosecution benchmarks, we will start to see increasingly consistent outcomes that align with the community's expectations.

We do not see that major changes in enforcement options are required and that each state will need to, over time, evaluate what mix may best suit each state.

However, to ensure a consistent approach it is important that interstate competitiveness does not mean the introduction of inconsistent penalties. We have seen states over the last few years reach a level of consistency. Queensland, however, has now moved away from this and raised the stakes. Queensland introducing a higher level of offence than category 1, Industrial Manslaughter, could be seen to be "tough" on rogue employers.

INDUSTRIAL MANSLAUGHTER

Over the past 12 months MEA has witnessed an ever-increasing call for the introduction of “Industrial Manslaughter” charges in different jurisdictions. This has been included in both Tasmanian and South Australian recent election campaigns whereby both Labour parties identified the recent introduction of Queensland law as the justification for their policy position. The CFMEU has now started an online petition in Victoria to pressure the State Government into introducing laws similar to Queensland.

Manslaughter in all states and territories is contained in the criminal code. It is a well understood crime with the relevant 20 – 25 year maximum sentence. It is supported by relevant Acts including the evidence Act, sentencing Act and police power/responsibility Acts which not only assist victims, but witnesses and those accused to receive a fair trial “beyond reasonable doubt”. MEA questions the need to duplicate manslaughter with crimes like “Industrial Manslaughter” or “Hospital Manslaughter” in the health Act or “Vehicular Manslaughter” in the traffic Act. The relevant Act is the Crimes Act not the WPHS Act.

MEA does not believe that the criminal proceeding of industrial manslaughter has any place in WHS law and if such a charge was to be introduced it should be within the criminal code but only after a demonstrated gap in the current criminal code is identified in each state jurisdiction.

Queensland laws were introduced after a period when two serious accidents had occurred. One of these resulted in the deaths of two workers and the other resulted in the death of four customers at an amusement park.

Views about the introduction of these laws were split. MEA supports the reliable and unbiased views of the Queensland Law Society and the Queensland Bar Association. In which, they identified that these proposed laws did not address any current gap in the legislation that would result in the non-prosecution of a PCBU for manslaughter or a category one breach of the WHS Act.

MEA’s major concern regarding the introduction of the laws was the lack of civil protection, the powers given to investigators and the difference in proof between criminal jurisdiction and WHS jurisdiction where the punishment could both result in a 20 year imprisonment of a person. We will not reproduce our arguments here however have attached to these submissions a copy of MEA’s previous submission to the Queensland Parliamentary inquiry. All of the submissions can be found <https://www.parliament.qld.gov.au/work-of-committees/former-committees/FAC/inquiries/past-inquiries/WHsOLAB2017>

The laws were passed in late 2017.

Since that date we have seen 2 cases in Queensland that demonstrate that

- A) The current criminal and WHS laws do work and that there is no gap, and;
- B) Significant courts have identified MEA’s concerns are real concerning the training and experience needed by non-criminal investigators to undertake investigations involving the death of workers

In 2012 Jason Garrels was electrocuted on a building site. After a 2016 coronial inquest recommended criminal charges, Nathan Day, an electrical contractor, was convicted and sentenced to imprisonment for Jason's death. This tragic case clearly demonstrates that the laws, prior to the Industrial Manslaughter being introduced, demonstrates no gap in the law.

The second case on 12 December 2012 Dale Kennedy, a 3rd year apprentice electrician, was working at Bentley Park College at Edmonton Qld installing data cables in the ceiling space of G Block when he was electrocuted and died.

The sequence of events included the following

- 2012 ESO conducted an investigation
- 2014 ESO prosecuted Mr Goggin, electrical contractor, for failing to conduct an adequate inspection and risk assessment, and for failing to de-energise the ceiling space, thereby causing the death of Mr Kennedy. The charge was dismissed on the basis the prosecution failed to disclose a prima facie case. Electrical Safety Office were ordered to pay costs.
- 2015 Queensland Coroners investigation begins
- 2015 Queensland Coroner orders ESO attend and inspect the reported electrical concerns in TS Block along with a Police Scenes of Crime officer to photograph and note relevant findings.
- 2016 Coronial hearings
- 2018 Coronial findings

The following extracts from Coroners report demonstrate our concerns regarding skill of inspectors not being equipped to undertake complex investigations. The Coroner states:

"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."

"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, 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. It was farcical that a prosecution of Mr Goggin was pursued, based substantially on an allegation of inadequate inspection and risk assessment on his part, when ESO's conducting a scene investigation following a fatality, miss finding critical evidence relevant to that risk."

"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.”

MEA would strongly suggest that as part of the review into the powers of officers that given many of these powers are the same as Police officers e.g. search seizure, compulsory interview etc, that a review of the Police powers and responsibilities in each state is taken as well.

One important feature that is not in the WHS Act is the right to silence, but is present in the Criminal code. We can see benefit in having the right to silence and subsequently not being able to use that information in prosecution. We believe that there are unintended consequences in not having the right to silence and Industrial Manslaughter charges in the WHS Act whereas, under Criminal proceedings accused do have a right to silence.

INSPECTORS AND NOTICES

On a casual observation we note that inspector numbers have stabilised whilst notices and prosecutions appear to be declining. A key indicator of injury and deaths however, are improving, possibly indicating a system that is working and achieving. Detailed analysis would be beneficial to make further comment. MEA is unclear if the inspection figures include relevant electrical and building inspectors that may or may not be under the relevant WHS Department in each state. Again, examination of state by state inspectors, methods, notices and relevant demographic / population data and results would benefit the industry and create transparency that would greatly assist all states and the review in determining if current methods are effective.

MEA receives very mixed messages concerning the operation of inspectors based on different jurisdictions but also different localities within jurisdictions. So it is very hard to identify if the concerns raised or experiences is the result of the laws or how the laws are implemented. A common thread of much feedback usually resolves around specialty areas such as electrical, where non-specialists in WHS perhaps do not understand the specific industry. This can lead to confusion and frustration of electrical PCBU's working with generalist WHS Inspectors. Again, this is anecdotal and not consistent indicating variability of skill and interpretation rather than systematic issues.

INSURANCE AGAINST FINES AND PENALTIES

Management, Professional and Public Liability Insurance is a significant feature of many industries for organisations and necessary to obtain registration to operate in some industries. It must be clear that high risk industries do have the potential for high risk injuries and

accidents, as such it is imperative that companies can insure for risks and associated legal investigation costs including damages. There must be a clear delineation between the costs incurred for defending investigations and making good on incidents “damages” that occur and the clear definition of fines and penalties. We agree that penalties must affect behaviour, however, insurance and associated foreseeable costs must be able to be provided by insurance.

In summary MEA does not see the need for major change in the WHS laws, however a research based approach of lead indicators, education, enforcement and review may highlight strategies that address attitudinal blockages to faster and or further improvements in safety.

Our members regularly make the following observations to our safety staff:

- Consumers and Customers question costs associated with safety and fail to understand modern safety practices and thus costs involved.
- Tender winners are perceived to go to companies that do not provide quality safety management systems
- Identification of lead indicators to assist small to medium businesses understand the warning signs or trends that might lead to serious injuries or death.

It would be more beneficial to focus attention on the above rather than wholesale changes of the current laws.



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