

# WORK HEALTH AND SAFETY AND OTHER LEGISLATION AMENDMENT BILL 2017

Submissions



## Introduction

Master Electricians Australia (MEA) is a modern 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](http://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

## MEA's Position on the Work, Health and Safety Bill

MEA has reviewed the Bill and does not support the Bill in its current form. There are 4 areas which we believe require major alteration or deletion, being -

1. Industrial Manslaughter;
2. Enforceable Undertakings;
3. Codes of Practice; and
4. Transfer of powers to QIRC.

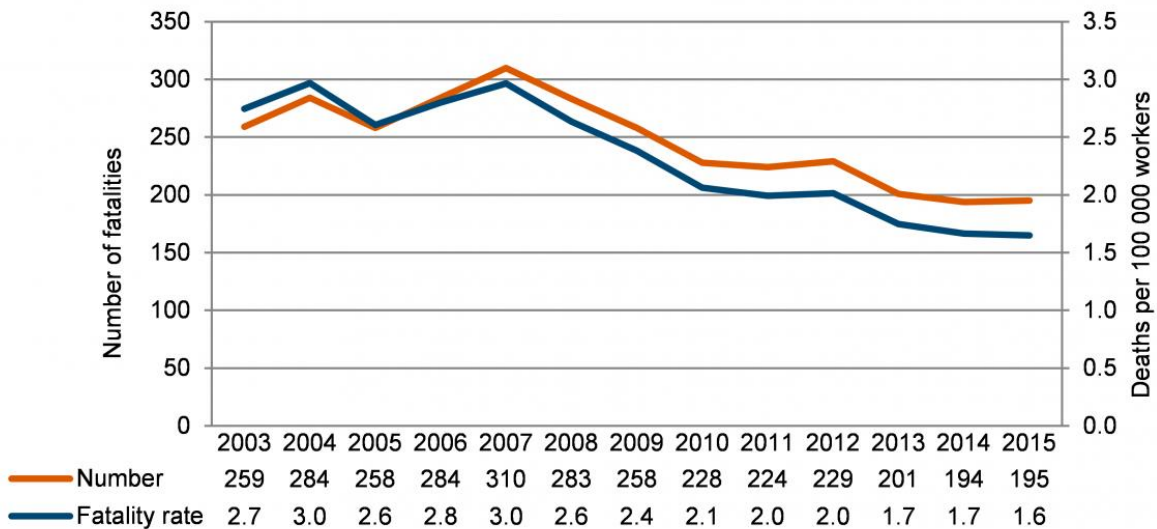
### 1. Industrial Manslaughter

MEA is opposed to the introduction of Industrial Manslaughter laws in the Work Health and Safety (WHS ) Act. MEA has taken this view based on the following:

- The statistics demonstrate the current legislative framework is working and that over the last 15 years the fatality rate of workers has reduced by 44%;
- 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 law's aim is to impose penalties on a "Large Corporation" however the proposed laws fail to address what large and complex corporations are
- The laws will have unintended consequences for various parties not contemplated or detailed by the Government's reviewer.

## Trends and Statistics

In Australia, we see that the trend of worker fatality has been decreasing since 2003. These statistics are reflected in most industries across Australia.



Source SafeWork Australia web site

Safework Australia in their report for the period 2003 to 2015 states that worker fatalities have reduced by 44% in that period. The results have reduced from 3 fatalities per 100,000 workers in 2003 to 1.6 in 2015. This indicates that the current system's enforcement and actions by WHS departments, employers and employees are all working to ensure that there is a focus on safety that is increasingly preventing workplace deaths.

The following tables obtained from the OIR in relation to the Best Practice Review details the visits done by inspectors in each reporting period. The OIR states that there are 52 dedicated inspectors whose primary function is solely to examine safety in the construction industry. The data and tables below were supplied to inform the initial Best Practice Review Discussion Paper.

Table 1 – Number of Workplace Visits conducted by WHSQ inspectors

Industry Group	2011/12	2012/13	2013/14	2014/15	2015/16	Total
Agriculture, Forestry and Fishing	539	650	763	711	1030	3693
Construction	14791	14682	12672	13204	16118	71467
Health care and social assistance	470	540	448	324	507	2289
Manufacturing	4473	3399	2628	2663	2863	16026
Transport, postal and warehousing	1301	978	858	1045	853	5035
Other*	10270	11026	9519	10166	11350	52331
<b>Total</b>	<b>31844</b>	<b>31275</b>	<b>26888</b>	<b>28113</b>	<b>32721</b>	<b>150841</b>

\* Includes industries such as 'Accommodation and Food Services', 'Administrative and Support Services', 'Arts and Recreation Services' and 'Professional, Scientific and Technical Services'

## Current Prosecutions

In Queensland, a former electrical contractor is currently before the courts charged with manslaughter due to the death of a worker on site. It is also understood that charges have been laid by Queensland Police in relation to workplace deaths related to an incident at Eagle Farm.

According to the WHS Qld website the following summary of successful prosecutions have been undertaken and completed thus far in 2017 -

- 25 successful prosecutions under section 32 of the WHS Act;
- 1 successful prosecution under section 32 whereby a court ordered undertaking was the outcome;
- 3 prosecutions under WHS Reg 446;
- 1 successful prosecution for each section 43 and 268 of the WHS Act;
- 1 successful prosecution under the Recreational Water Act; and
- 3 successful prosecutions under section 39 and 38 of the Electrical Safety Act.

Source <https://www.worksafe.qld.gov.au/laws-and-compliance/prosecutions/court-summaries>

MEA believes that this demonstrates that the Department are engaged and undertaking their responsibilities to prosecute breaches appropriately and that the Courts have sufficiently utilised the relevant existing legislation by imposing penalty provisions which has helped the demonstrated downward trend. The Courts have determined in previous matters that the breaches resulted in total fines of \$1.44 million with an average time to conviction of approximately 2 years . The OIR has provided the following in relation to success rates of prosecutions -

Table 13 – Prosecutions Data – Success Rate of Finalised Prosecutions

2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17
81%	81%	77%	89%	81%	80%	80%	89%	78%	88%	*

\*Data on 2016/17 is for 1 July 2016 to 20 June 2017.

## Bill Construction/Concerns

MEA has serious concerns regarding the proposed legislative construction of these powers being held within the Work Health and Safety Act (WHS Act 2017). 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 Bill creates a new criminal charge outside of the Criminal Code. The justification of this as per the briefing given by departmental officers states that the Bill 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 Department's proposed Bill is enforcing the harshest punishment available on a person without the full protection of the current criminal justice system.

In Queensland, there are three main principles to criminal law -

1. Innocent until proven guilty;

2. The right to remain silent; and
3. Double jeopardy.

## Self-Incrimination

The Office of Queensland Parliamentary Council (OQPC) 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 laws have not taken some of those principles into account.

The first of which MEA has concerns is self-incrimination. Referring to the 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](https://www.legislation.qld.gov.au/Publications/OQPC/FLP_Self_incrimination.pdf)

Section 172 of the WHS Act has remained unchanged in the Draft Bill. 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 the Queensland Criminal Code all people have a right to silence and non-self-incrimination; however, with the addition of this new manslaughter charge, protections have not 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 Bill 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 Bill 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 Act 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 Act and combined with the Bill 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 the protections are present in the current act or the WHS Bill. Given the Minister's public announcement about this Bill referring to the Dreamworld incident, it is likely that during that investigation that Police were required to interview under-age children who were working part time or casually within the park on the day. 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 Bill 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 would question 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.

## **Unintended Consequences**

In addition to the above, MEA is concerned on a broader community / industry front. The definitions used for what constitutes a senior officer will have effects which we believe are unintended. MEA foresees broad effect for electrical supervisors of an electrical contracting business, doctors and senior clinicians of public and private hospitals, senior school administrators and possibly teachers of small independent school, and community organisations that are deemed to be conducting an undertaking and do not have the volunteer exemption.

MEA would again contest that this, combined with other reasoning set out in this Paper, should require that the Bill be altered. Specifically, it should delete Industrial Manslaughter from the proposal and that this remain in the purview of the criminal code.

## Inspectorial Powers

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 Bill and only limited protections are contained within the WHS Act which were not drafted to include Industrial Manslaughter. This is yet another reason for the Industrial Manslaughter charge to remain in the Criminal code as it has been the case within the Australian Capital Territory.

## Complex Corporate Structures

The Minister's parliamentary speech informed the House that the aim was to ensure those at the top of a corporate structure were held accountable. Minister Grace referred to the tragedy of Dreamworld during her speech. Mr Goldsbrough the Director General of the Department in his briefing indicated that "complex structure(s)" were the target. MEA can find no provisions in this Bill where complex legal structures are addressed. Mr Goldsbrough gave evidence that the Bill will enable them to prosecute in circumstances where criminal manslaughter was unable to achieve a conviction. However, we say that the proposed clause goes no further than the current criminal statute in definition. The WHS Bill clause specifically states:

(b) the person's conduct causes the death of the worker; and

Mr Goldsbrough has made no submissions and the Bill's explanatory memorandum does not detail how the current difficulties of prosecuting manslaughter are addressed by the Industrial Manslaughter clause and insertion into the Act. It is our submission that the word "causes" in the WHS Bill will present the same barriers to prosecution that criminal manslaughter presents.

## 2. Enforceable Undertakings

MEA believe that the removal of an ability to give an enforceable undertaking in the event of a death is a mistake that does not allow any flexibility when prosecuting in the event of foreseeable but unlikely events.

In the electrical industry, many of those businesses are family owned small businesses. If one of these employees, who may well be a director, is killed, their partner who has suffered the death of a family member "must" be prosecuted under the current draft law with no ability for an undertaking. MEA accepts that enforceable undertakings are usually not acceptable in the event of a death, however it is foreseeable that such circumstances will/may arise that warrant such an exemption.

It is also foreseeable that there will be other circumstances within different industries where the death of a worker on a site may have extenuating circumstances. These include suicide or a death by misadventure of an employee.

MEA believes that the DPP and the Regulator are sufficiently removed from work sites, that based on the prosecutorial policy, may make decisions whereby an undertaking is particularly relevant and whereby a trial / prosecution hold no advantage or outcome that would benefit any party.

MEA would strongly recommend that while not allowing, in most circumstances, an undertaking be allowed in some limited exceptions and that this be left at the discretion of the DPP and the Regulator.

It can also be shown that enforceable undertaking has a benefit in broader situations. In data ascertained from the Office of Industrial Relations the following information was provided

Table 8 – Enforceable Undertakings, 2011-12 to Q1 2016-17

Sanction	2011-12	2012-13	2013-14	2014-15	2015-16	Q1 2016-17
Total number of electrical safety and WHS undertakings accepted by the Director-General	6	17	10	7	10	0

The OIR also made the following note regarding the above undertakings.

*Since the inception of enforceable undertakings by WHSQ in 2004, 141 applications to enter into an enforceable undertaking have been accepted, which WHSQ estimate has translated into over \$28.8 million in safety benefits provided to workers, workplaces and the community.*

### 3. Codes of Practice

MEA is concerned over the proposal to reinstate the legislative status of Codes of Practice. MEA is particularly concerned that by stealth the clause imposes a reverse onus of proof on the employer.

The OPQC information on Principles of good legislation in its guide on “Reverse onus of proof” states -

The general principle is that the prosecution bears both the evidential onus and legal onus of proving each element of an offence, although this general principle may be expressly reversed by legislation. (Reversals of this kind, known as ‘statutory reversals’, are discussed further in paragraphs [15]-[17]). However, where a statutory provision states grounds for liability but also includes a distinct exception to liability, the prosecution does not bear the onus of proving that the exception applies. (Legislative provisions of this kind, known as ‘statutory exceptions’, are discussed further in paragraphs [8]-[14]).

It is unclear how clause 26 in the Bill will impact on an industrial manslaughter case. The clause does not allow for abrogation in the event that the circumstances do not allow for a worker / PCBU to use the Code of Practice in those specific circumstances where compliance cannot be achieved.

In the electrical industry, there is a great deal of innovation and that processes and products mean work practices have to change quickly. Currently Codes of Practice are only to be reviewed every 5 years. This will result in Codes of Practice falling behind industry practice at an accelerating rate. Without the abrogation of the Code this will lead to stagnation of industries who may well be trialling innovative, efficient or safer ways that can eventually assist the industry achieve fewer deaths.

#### **4. Transfer of powers to QIRC - Workplace Health and Safety Disputes**

Nationally in the last 12 months the ABS report 6321.0.55.001 - Industrial Disputes, Australia, Jun 2017 shows 47 Non EBA disputes relating to Work Health and Safety. This involved 7100 employees losing a total of 6700 days nationally. Due to data collection, it is impossible to tell how many of these disputes were located in Queensland. In addition to this, there have been only 14 cases lodged with Queensland Civil and Administrative Appeal tribunal for determination. Current dispute numbers of Inspector decisions do not indicate that the system is broken or that any party has been disadvantaged or that QCAT does not have the experience or resources to deal with disputes.

Transferring this to the QIRC raises many jurisdictional issues that will complicate resolution of matters and lead to lengthy delays and create industrial disputation. The jurisdictional issues include The Fair Work Act, Code for the Tendering and Performance of Building Work 2016 Federal Safety Commissioner and the referral of powers by the Queensland Government under the State IR Act. It is likely such a move will increase the length of disputations and be an opportunity for parties to create mischief over workplace safety which results in a diminution of its effectiveness in the workplace.

Additionally, an action being launched in the QIRC has an ability to adversely affect employer's, employees and create uncertainty and confusion. Safeguards need to be put in place. Any applicant lodging such an appeal against an inspector's decision should be required to ensure "as far as reasonably practicable" that the dispute only effects the work place/practices/circumstances of the specific disputed decision. Applicants must ensure other work on the site continues as it does not relate to the decision of the Inspector. It is unsatisfactory and open to abuse for a distinct/geographically small work practice task or issue to halt work on a large multifaceted work site.

We appreciate the opportunity to be able to make these submissions



**Jason O'Dwyer**

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