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The framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia

Submission

J O'Dwyer / June 2018



Industrial Deaths in Australia

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

Industrial Deaths in Australia are, simply, not acceptable. Workplace deaths have far reaching consequences for all related parties such as families, workmates, employers, emergency workers and so on. One death has a lasting and incalculable effect on several hundred people.

Electrical industry scope and performance

Australian industry has improved over the years as the below Safework Australia data shows the fatality rate has halved, whilst the number of employee has increased the raw number has decreased. MEA would say that this signifies that Australian industry has embraced and improved through regulation, enforcement and cultural change, all three arms which have to work in unison to achieve such a result.

Figure 1: Worker fatalities: number of fatalities and fatality rate, 2003 to 2016

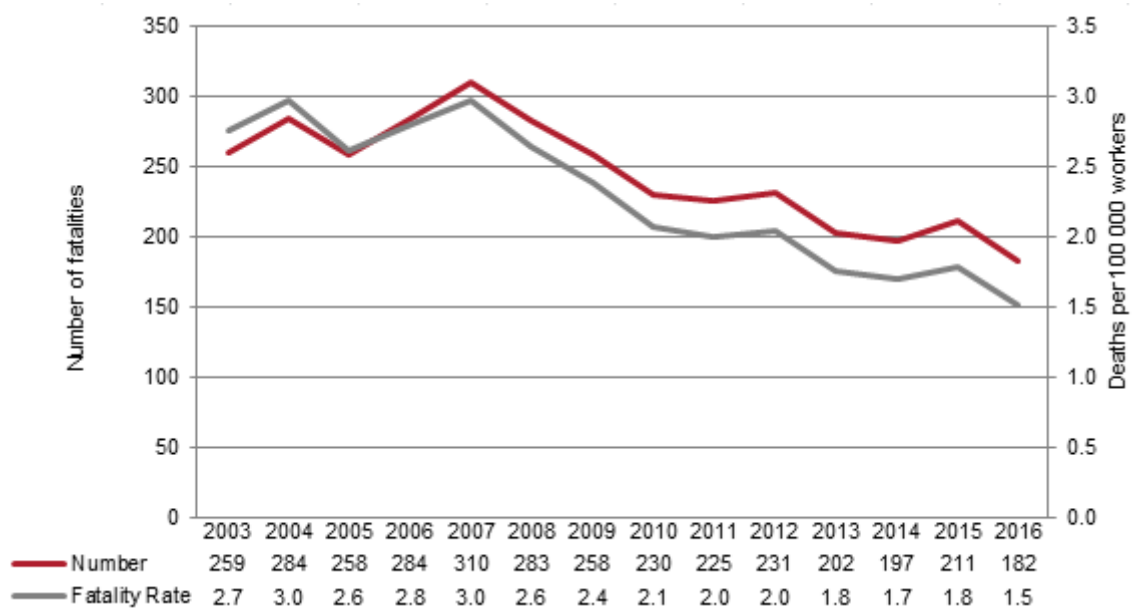
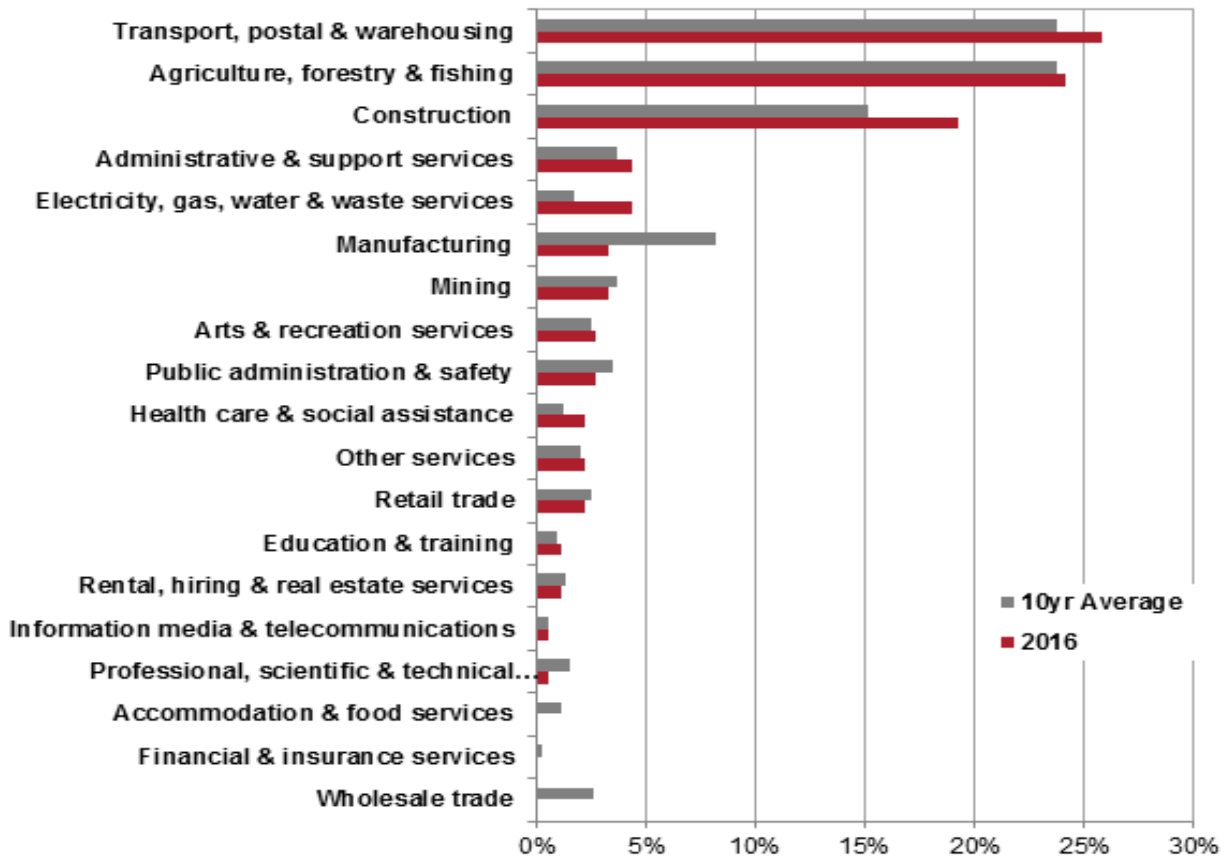


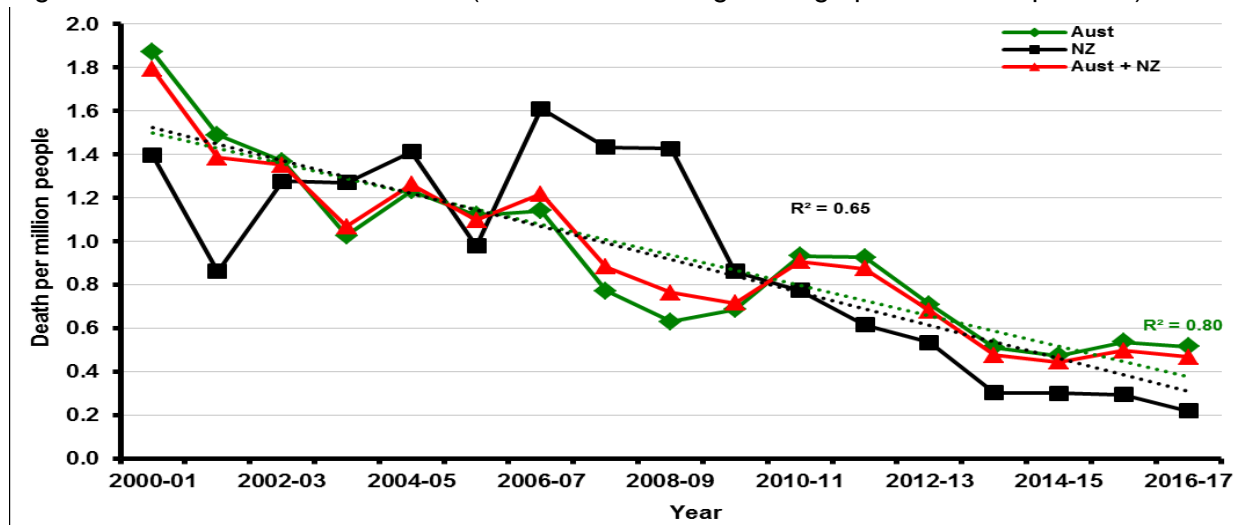
Figure 2 shows the results from industries with a 10 year average. Unfortunately given the electrical industry crosses so many industries die to energy’s inherent requirement in all industries we do not see the specifics of the electrical industry. However we can see that Construction, utilities, manufacturing and mining are 4 of the top 7 worst industries for workplace deaths.

Figure 2: Worker fatalities: proportion by industry of employer, average of last 10 years (2007 to 2016 combined) and 2016



According to the 2016-17 Electrical Regulatory Authorities Council (ERAC) the trend in electrical deaths is mimicking those of the broader workplace deaths data.

Figure 3 Trend in Electrical Deaths (Three Year Moving Average per Million Population)



The victimology over the last 17 years of data shows that the general public and non electrical workers are the two largest groups.

Figure 4 Electrical Deaths Sorted by Victim Categories

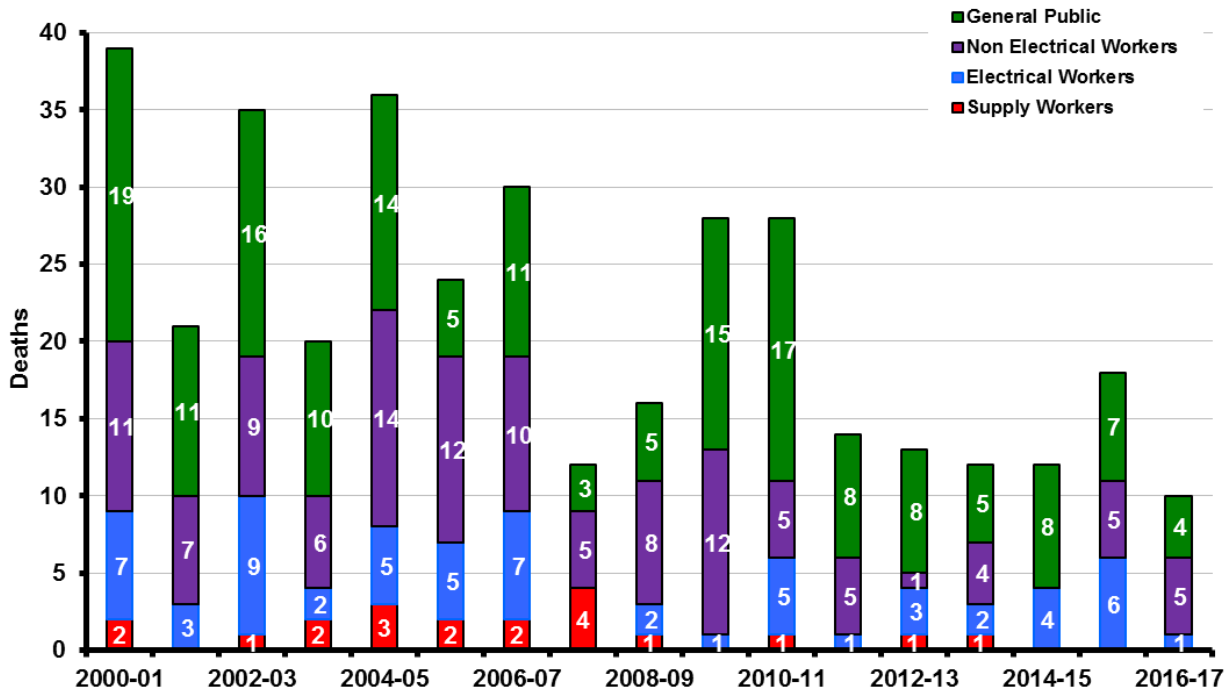
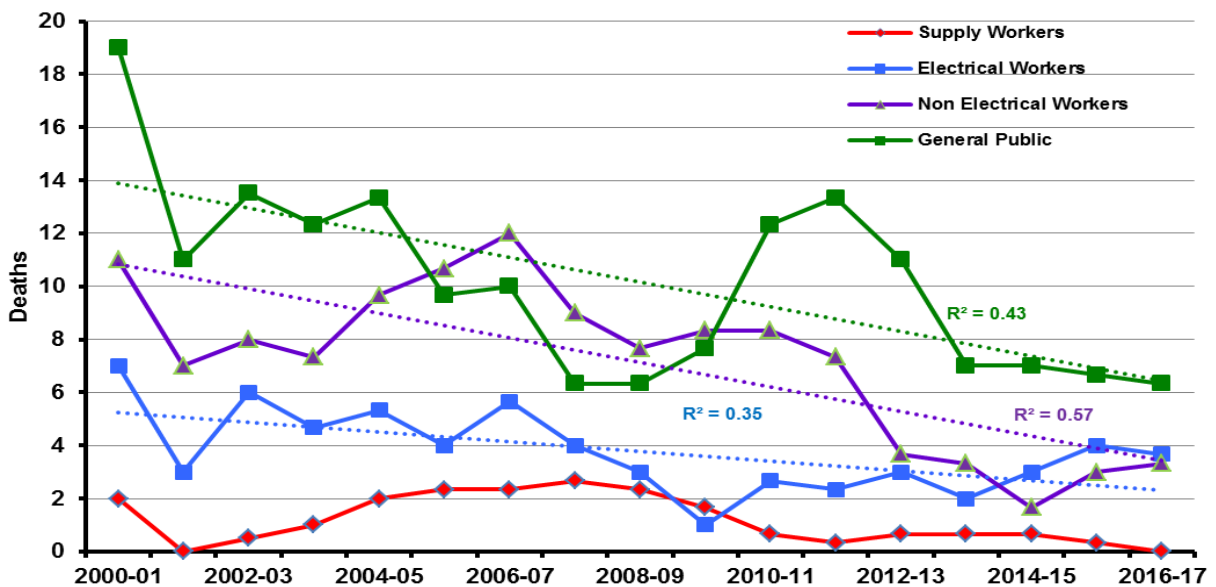


Figure 5 Trends by Victim Categories with Three Year Moving Average



Concerning for all workers is an increasing trend from 2013 to 2017 and no improvement of general public trend of electrical deaths since 2006-7.

The WHS systems in each state has at it core, risk management. The obligation of the PCBU is to consult to identify hazards, manage risk, and taking reasonably practicable steps to ensure the safety of workers, visitors and the public. State Governments have a dual role of regulator and employer/PCBU/Landlord and is perfectly placed to ensure WHS laws extend to reduce death and injuries both with workers and general public. The public would consider that a State Government has a primary duty of care to protect the general public.

Where a death occurs the WHS system commences and the investigation, prosecution, correction and future prevention is undertaken and the relevant regulatory offices promote the outcome to demonstrate the consequences. MEA supports these actions. However, a double standard occurs when a death and subsequent process impacts more than just employers.

The issue of RCD's is a prime example of this double standard in WHS. The most recent example is the comments made by the Queensland Coroner on the 28 February 2018 into the death of Mr Dale Kennedy. The comments from the Coroner can only be described as scathing

"I would consider an RCD an engineering control vis-à-vis electrocution – no brainer! Just about every safety regulator insists on higher order controls if reasonably practicable. But when it comes to a government and a financial impost on building owners, including home owners, the sensitive issue of cost effectiveness arises. Or to put it more directly, how many deaths does it take to justify the costs of mandating RCD's on all circuits where that is practicable (some circuits serve a purpose not amenable to RCD protection). Only government can answer that question."

The corrective action considered to be "reasonably practicable" is affected, as it means our nominated elected officials and regulatory bodies are required to act possibly contrary to the political environment. In some cases, Governments do not act in the public interest and fail even the simplest of test that a PCBU would be subjected too. A PCBU defending a prosecution where they have admitted they knew of the hazard, they knew the risk and the resultant outcome and yet did nothing about it would result in a category one conviction.

MEA has been advocating for more than 12 years and in that time, we have seen numerous injuries, house fires and unfortunately industrial deaths. Including the failed Home Insulation Program (HIP). In most cases the deaths we have seen are non-electrical workers and in private residence. Which become a workplace once a contractor is engaged to undertake work.

This topic affects EVERY Australian and RCD on all circuits is now recognised in the AS/NZS 3000 wiring rules. Queensland have had two Coronial inquest call on Queensland State Governments to act to introduce Safety Switches on all circuits in domestic settings. It is a prevention that will significantly reduce hazards and risks and ultimately save both work related and non-work-related deaths. If the WHS system prevention fails at these basic hurdles it is difficult to see how any State Government can be seen as being serious about eliminating workplace deaths

Prevention

Prevention of injuries and deaths in Australia has many different components. Combined these have shown the improvements that are evident in the statistics. Those components are

- Technical and procedural advancement
- Safety culture / leadership
- Enforcement / regulation

Prevention in Australia we believe suffers from a lack of focus on safety culture / leadership.

Technical and procedural advancements of work practices have, and will continue to, reduce significant risks via codes of practice, manufacturing and technical improvements, Australian Standards and other regulatory instruments. As a society, we see the introduction of statutes like non-conforming product legislation as an example.

MEA recognises the speed of technology change is accelerating, but increasingly MEA is concerned about the inability of regulation to keep pace. This scenario creates both opportunities and limitations for safety improvement.

Regulation and enforcement regimes across the country are largely appropriate, albeit with some concerns that will be address later concerning consistency, skills and categories.

The key area in Australia to improve prevention of injuries and deaths is engagement of all parties in safety culture / leadership. MEA believes that significant improvements in prevention can be made if community, business and employee attitudes move from a reactive / complacent level to a proactive or valuing culture. Governments both state and federal can lead safety culture and leadership philosophy across business and the community by understanding and better engaging/educating what to expect from a quality safe service.

95% of Australian business are small businesses. Feedback from members relay customers are concerned primarily about cost. Not safety. Businesses report competing with operators lacking safety and other technical systems results in unfair competition. MEA's experience is this feedback is heard at all levels of the industry and is a genuine concern.

Governments both state and federal have assisted via tender processes by insisting on demonstrated safety systems. Feedback from industry, relays stories of public and private projects subject to major rework, underquoting and lacked safety which ultimately win the project on price, however the value for the project is not realised because of poor workmanship and reduce longevity and increased cost for the customer.

This is even further frustrated by contractors receiving communication from tender assessment teams, after assessment of safety, from both public and private detailing the their price is X% above the lowest tender and asking if they would like a further opportunity to quote the project and adjust price. It is difficult to see where one company could have significant margin cost reduction without affecting safety or quality, or both. If the price is met one must wonder will that lead to adverse outcomes for the project and clients.

The question we believe that perhaps the Federal Government could assist with is that of a cultural campaign with consumers to understand in all industries “the quality of the job is remembered long after the price” or “If its cheap? What aren’t you doing?”.

Investigation and Prosecution

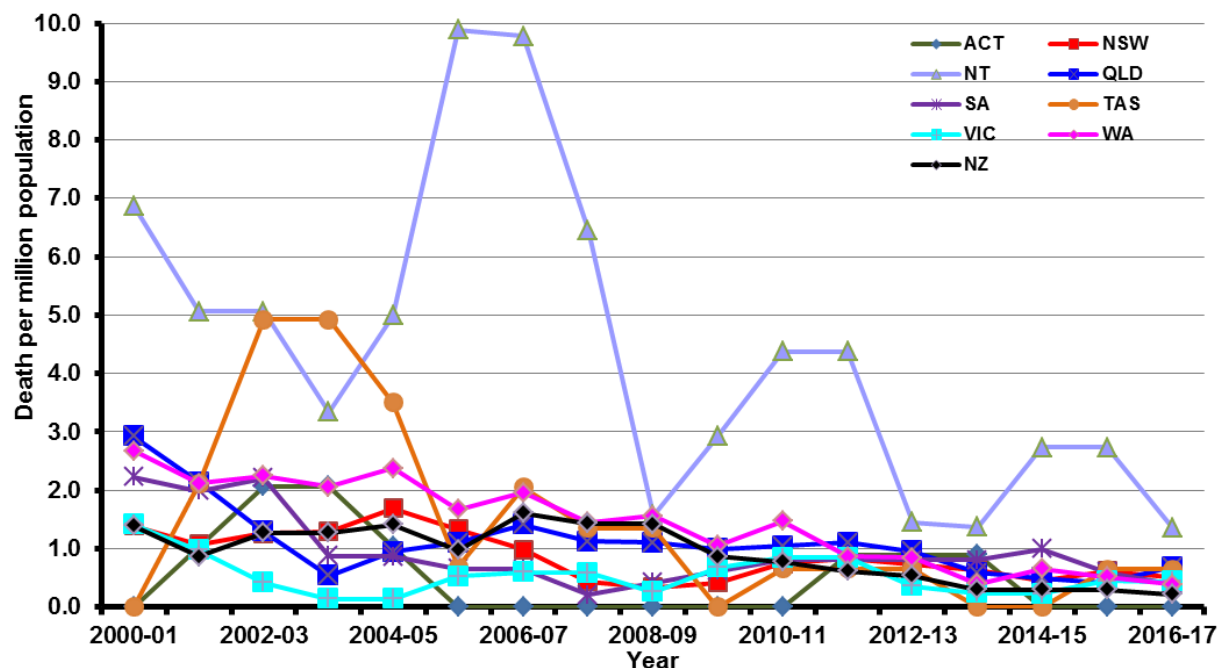
MEA recognises that overall most states operate a similar enforcement regime of investigation, notices, improvement notices and category offences with civil and criminal penalties ultimately leading to Category 1 offences or Industrial Manslaughter charges.

The electrical Industry across Australia are in addition to WHS inspection also subject to separate Electrical Inspectors. Broadly there are 3 different methods of electrical inspection used across Australia.

- Government (sole responsibility for all inspections)
- Industry (Private inspectors)
- Deregulated (No proactive inspections, complaint based)

Looking at the ERAC data from 2017 the relevant data may indicate that the type of inspection and prosecution regime does not have a correlation that would indicate which system is best suited

Figure 6 Trend in Electrical Deaths (Three Year Moving Average per Million People)



Industrial Manslaughter

MEA has strongly campaigned against Industrial Manslaughter charges being contained in the WPH Safety act of any state. In Australia there are 2 states that have crimes called industrial manslaughter. Those being Queensland (QLD) and Australian Capital Territory (ACT).

MEA would highlight that the ACT model is a crime under that territories crime act. As such prosecution is contained and affected by all the relevant acts and legislation that pertain to the crimes act.

Alternatively under the Queensland legislation none of the protections that are afforded under the Crimes act or other relevant statutes that determine Police and Prosecution apply or are called upon by the WHS Act Queensland. As an example of concerns MEA outlines our objections.

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

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

We believe that the WHS Act in Queensland does not allow these civil rights to be afforded. The following is an extract from our submissions to the Queensland Parliamentary Committee and issues we raised we supported and further explained by the Queensland Bar Association and the Queensland Law Society in their submissions.

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

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.

In our submission also we raised to prospect that ESO Inspectors also did not have the skill and knowledge to undertake complex and involved investigation to the beyond reasonable doubt level. We understand that under the Qld legislation an separate body being created to undertake these prosecutions was to be established. Our concern that Queensland police were and are the most appropriately qualified and skilled to do so as these investigations of complex matters were undertaken regularly. We also noted that it was imperative that the DPP Department of Public Prosecutions take carriage. This was ignored

In support of our submissions to this committee we refer to the Coroner's report previously referred to regarding the death of Mr Dale Kennedy. Unfortunately, our concerns were proved correct. In that coroners reports the following was said concerning the investigation conducted by Qld Electrical Safety Office Inspectors.

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 safe⁷⁵, 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 believes that industrial manslaughter outside of the criminal code is not appropriate. This belief is not a partisan belief simply for employers. It applies to all persons including workers, supervisor's, managers and business owners. On May 17 of this year the Canberra Times reported <https://www.canberratimes.com.au/national/act/prosecution-for-canberra-industrial-death-appears-in-court-20180517-p4zfup.html> that a man has been charged with Industrial Manslaughter in the ACT, along with 6 other men and 2 companies. It is imperative that all alleged offender facing criminal charges have the benefit of being innocent until proven guilty, the right to silence and the reliance that they can not be prosecuted for the same offence twice and that those investigating have the appropriate controls in place to regulate and afford natural justice. A process we say currently in Queensland fails to do.

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