

26 October 2017

NAT 022/17

### SUMMARY

This Advice provides important information about:

- **QLD Industrial Manslaughter and other changes:** Amendments to Queensland work health and safety legislation have passed. These include industrial manslaughter offences, reintroduction of non-mandatory WHSOs, clarification of the legal status of Codes of Practice and changes to HSR provisions.
- **NSW Workers' Compensation:** Update on changes to premium and claims management.
- **NSW Review of Workers' Compensation Scheme:** Government response to report indicates that they "support" or "support in principle" all recommendations made by the legislative standing committee on law and justice.
- **SA: WHS investigations and prosecutions:** SafeWork SA plans to implement all 18 recommendations of a recent review into their approach to investigations and prosecutions.
- **VIC Premium Appeals:** WorkSafe Victoria is seeking feedback on the process for appealing workers' compensation premium decisions.
- **International Standard for OHS Management Systems:** We report on progress.

### QLD: INDUSTRIAL MANSLAUGHTER INTRODUCED, AND OTHER CHANGES

[The Work Health and Safety and other Legislation Amendment Bill](#) was passed on 12 October 2017. This Bill makes amendments to the *Work Health and Safety (WHS) Act*, the *Electrical Safety (ES) Act* and the *Safety in Recreational Water Activities (SRWA) Act*.

#### Overview of main changes

General duties of a person conducting a business or undertaking (PCBU) to provide a healthy and safe workplace under the relevant Acts have not changed; obligations of officers, workers and other persons also remain unaltered.

However, increased penalties, in the form of **industrial manslaughter offences** for senior officers and corporations have been introduced where there has been a fatality through negligence. There are no new duties but this potential for an increased penalty reinforces the need to ensure WHS is being managed effectively in workplaces.

New provisions establish a *non-mandatory role of Work Health and Safety Officer (WHSO)*, with effect from 1 July 2018. Ai Group will provide further information about this role in a separate Fact Sheet, once more detail is available.

The WHS Act already provides for the election of **Health and Safety Representatives (HSRs)**. It is not mandatory to have HSRs in your workplace, unless your workers have requested them.

If you do have elected HSRs, there are changes to: training arrangements; obligations to provide a list of HSRs to the regulator; and requirements to send Provisional Improvement Notices (PINs) issued by HSRs to the Regulator.

The status of **Codes of Practice** has been amended, adopting the previous QLD approach. The amendment clarifies the expectation that you must comply with a Code, unless an equivalent or better level of safety can be achieved through another approach.

If these legislative changes have prompted your organisation to have a closer look at your WHS compliance, Ai Group has the expertise to assist you.

Contact your local Senior Adviser, Safety and Workers' Compensation, [Annette Alexander](#) on 0400 621 948.

## The changes in more detail

### **Industrial Manslaughter**

The industrial manslaughter offence will apply to a person conducting a business or undertaking (PCBU) and/or a senior officer of the PCBU, if:

- In the course of carrying out work for the business or undertaking, a worker dies, or is injured and subsequently dies; and
- The PCBU or senior officer's conduct caused the death; and
- The PCBU or senior officer was negligent about causing the death of the worker by the conduct. Negligence will be tested against the level of culpability that currently applies to manslaughter under the Criminal Code.

In line with the current WHS Act, volunteer officers will be exempted from Industrial Manslaughter offences under these provisions.

Maximum penalties will be \$10m for a body corporate and 20 years' jail for an individual.

Industrial Manslaughter will sit alongside the current "reckless conduct" provisions of the WHS Act that have a maximum penalty of 5 years' jail and financial penalties of \$3m for a body corporate, \$600k for an officer and \$300k for an individual.

It should be noted that any individual can already be charged with manslaughter under the criminal code in relation to a workplace death.

### **Work Health and Safety Officers (WHSOs)**

The Bill re-establishes the role of a WHSO from 1 July 2018, but will not make it a mandatory requirement. A person can be appointed as a WHSO if they hold a *certificate of authority for appointment* from the Regulator. This would generally be granted if a person has completed the Certificate IV in WHS – BSB41412 within the previous 3 months.

Alternatively, a Registered Training Organisation may determine competence. The Regulator will be able to accept alternative qualifications or experience.

If appointed, a WHSO will have a range of functions specified in the Bill and will be required to undertake an assessment of risks at least every 12 months and provide an assessment report to the PCBU and any safety committee that is in place.

The Bill establishes that, if you ever face a WHS prosecution, having a properly functioning WHSO can be used in evidence to support a case that you have complied with your WHS duties.

It is not clear how this provision will be considered by the courts; it seems to imply that having a properly functioning WHSO will be helpful but it is highly unlikely to protect an organisation from prosecution if there is a significant breach of WHS duties.

The Bill also clearly states that "the appointment of a work health and safety officer at a business or undertaking ... does not affect any duty or obligation owed by the person under the Act".

This means, whilst the appointment of a WHSO may assist the organisation to meet its obligations, it will not replace the obligation of officers to exercise due diligence to ensure that the organisation complies with WHS obligations.

This is a significant risk for organisations and officers, unless the WHSO role is well understood – the appointment of a WHSO does not mean everyone else should feel they can step back from their responsibilities.

WHSOs have not been referred to in Queensland WHS laws since January 2012. This new provision does not require a company to make any changes to arrangements that are currently in place within their workplaces. However, if they choose to appoint someone formally as a WHSO, the Act sets out the requirements of the role.

### **Health and Safety Representatives (HSRs)**

It is not mandatory to have HSRs in your workplace, unless your workers have requested them. If you do have elected HSRs, a range of changes will apply.

*Obligation to provide information to the regulator - Workplace Health and Safety Queensland (WHSQ)*

List of HSRs: In addition to the current requirement to maintain a current list of HSRs, an employer will be required to send that list to WHSQ. This provision reinstates obligations that previously existed in the WHS Act. Most

jurisdictions use an online portal to provide this information; we expect WHSQ will do the same.

**PINs:** HSRs that have completed the required 5 day initial training course have the power to issue a provisional improvement notice (PIN), if they have raised the issue with the PCBU and the issue remains unaddressed. The amendments create a requirement that any PCBU who receives a PIN from an HSR must send a copy of it to WHSQ.

It is currently unclear how this process will be implemented, and what WHSQ will do when they receive the PINs. They have no role to intervene unless a PIN is challenged by the PCBU.

### *Training of HSRs*

From 1 July 2018, there will be changes to training obligations.

An employer must ensure, so far as is reasonably practicable, that an HSR receives their initial 5 day training within 6 months of their election. This compares to the current obligation to provide training within 3 months of a request by the HSR.

It is currently unclear what the implications are for an HSR if they refuse to attend training. Ai Group will advise when this is clarified.

Obligations for a 1 day refresher training will be reduced from annually to once every three years.

### **Codes of Practice**

The obligation of employers in relation to Codes of Practice will be amended from 1 July 2018 with the insertion of a new section, which states:

A person conducting a business or undertaking must, if the Minister approves a code of practice for the purposes of this Act—

- (a) comply with the code; or
- (b) manage hazards and risks arising from the work carried out as part of the conduct of the business or undertaking in a way that is different to the code but provides a standard of health and safety that is equivalent to or higher than the standard required under the code.

This more or less clarifies the current status of Codes of Practice.

Codes of Practice will now expire 5 years after they have been approved and will have to be reviewed and remade if they are to continue.

It is not clear how this will apply to Codes that have already passed the 5-year expiry date.

### **Other Amendments**

The Bill also introduces a range of other amendments, as summarised below.

#### *Office of the WHS Prosecutor*

On a date yet to be determined, a separate body will be established which will have responsibility for most WHS prosecutions. In some cases, the lowest level offences may still be pursued by inspectors.

#### *Disputes*

On a date yet to be determined, the Queensland Industrial Relations Commission (QIRC) will be given the power to deal with disputes related to:

- access to information by HSRs;
- HSR requests for assistance;
- issues around entry permits;
- powers of HSRs; and
- work cessations.

The Bill allows for disputes to be notified to the QIRC by a PCBU, worker, HSR or relevant union, but only if at least 24 hours has elapsed since an inspector became involved and was unable to resolve the situation.

#### *Inspector Powers*

Inspectors will be given the power to decide and direct that union entry be granted where there is a dispute over union right of entry.

Inspectors will be able to require production of documents and answers to questions for up to 30 days after first coming to a worksite. The current provisions imply that this can only occur whilst the inspector is on site.

### **Background**

These changes reflect the Qld Government's reaction to the *Dreamworld* incident and a multiple fatality on a Brisbane construction site, both in late 2016. These incidents led to a [Best Practice Review of Workplace Health and Safety Queensland](#) released on 22 August, which made a number of recommendations for changes to workplace safety legislation and to how compliance is enforced in the state.

Ai Group made a detailed [submission](#) and appeared before Parliament's Finance and Administration Committee that examined the legislative change proposals. The Committee was split on whether to support the proposals.

Ai Group published a [media release](#) and wrote to all political sides requesting the changes be reconsidered, particularly in relation to industrial manslaughter. We believe the changes: are unnecessary given Queensland's improving WHS statistics; are poorly drafted; and move away from the national harmonisation model. A copy of our correspondence was tabled in Parliament by the Opposition.

The [Bill](#) was passed with the support of the four independent MPs.

### **NSW: PREMIUM AND CLAIMS MANAGEMENT**

We have recently received an update from icare (Insurance and Care NSW) in relation to the changes to premium and claims management.

Members have previously been advised that:

- workers' compensation premiums are now renewed directly with icare; and
- with effect from 1 January 2018, all new claims will be managed by EML (Employers' Mutual Limited).

Transition arrangements, in place in relation to claims management, are summarised below.

New claims:

- If your claims agent is CGU or QBE, all claims received from 1 October 2017 to 31 December 2017 must be lodged with GIO; this can be done by emailing [wclaimsnsw@gio.com.au](mailto:wclaimsnsw@gio.com.au).
- If your claims agent is Allianz, new claims will continue to be lodged with them up to 31 December 2017.
- If your claims agent is EML, all new claims will continue to be lodged with EML.

Existing claims:

- If your claims agent is CGU or QBE, claims will be transitioned to GIO or EML, in the period leading up to 31 December 2017; workers, employers and nominated treating doctors will receive a letter from CGU or QBE outlining the date of transfer and providing contact details for the new agent.
- All other existing claims with EML, Allianz and GIO will be managed as usual by those agents.

### **NSW: REVIEW OF THE WORKERS' COMPENSATION SCHEME – GOVERNMENT RESPONSE**

Members have previously been advised of the release of a committee report on the review of the workers' compensation scheme. See [Member Advice NAT 006/17](#), dated 12 April 2017.

The government response to the recommendations has now been released. All recommendations have been either "supported" or "supported in principle". Ai Group will continue to work with the government and the State Insurance Regulatory Authority (SIRA) to ensure that member views are considered as the recommendations are implemented.

The report and the government's responses can be found [here](#). Ai Group's submission to the review can be found [here](#).

### **SA: NEW APPROACH TO INVESTIGATION AND PROSECUTION ARRANGEMENTS**

A review into the investigation and prosecution arrangements within SafeWork SA for offences under the Work Health and Safety Act 2012 has been conducted by a senior prosecutor from the Office of the Director of Public Prosecutions, and was finalised in June 2017. The review was initiated by The Greens, following concerns about "abandoned" prosecutions that led to enforceable undertakings being accepted in lieu of prosecution.

This review was a broad consideration of how matters handled by SafeWork SA are investigated and, where appropriate, prosecuted. Recommendations focused on:

- training of personnel involved in investigations;
- reviewing procedures and practices that determine which incidents will be the subject of initial response;
- implementing a vigorous case management and review regime from point of notification to conclusion; and
- reviewing guidelines for accepting enforceable undertakings in lieu of prosecution.

SafeWork SA has now provided [information](#) about how it will be implementing the recommendations.

## **VIC: APPEALS ON PREMIUM DECISIONS; WORKSAFE VICTORIA SEEKING EMPLOYER FEEDBACK**

If an employer is unhappy with a decision related to their workers' compensation premium in Victoria, the Act allows an appeal to be made via the Victorian Civil and Administrative Tribunal (VCAT) or the Supreme Court of Victoria. WorkSafe is currently reviewing how effectively this process is working for employers.

If you have experience appealing a WorkSafe Premium Review Determination or have considered appealing one, WorkSafe is seeking your feedback on the following:

- What is your general view about seeking an appeal via VCAT or the Supreme Court of Victoria against a WorkSafe Premium Review Determination?
- If you have appealed a WorkSafe Premium Review Determination, what was your experience throughout the appeal and are there any areas of the appeal process that need improvement?
- If you have considered appealing a WorkSafe Premium Review Determination, but did not follow through – what were the reasons behind not pursuing the appeal?
- Do you consider VCAT a viable option for appealing a WorkSafe Premium Review Determination? If not, why?

If you would like to share your experiences, contact [Tracey Browne](#) on 0438 207 799.

## **INTERNATIONAL STANDARD FOR OCCUPATIONAL HEALTH AND SAFETY MANAGEMENT SYSTEMS**

Over recent years work has been progressing, at an international level, on the development of a new standard for occupational health and safety management systems (OHSMS).

Standards Australia has been coordinating Australia's input through a committee established for this purpose; Ai Group is a member of the committee.

At a recent international meeting, a range of decisions were made in relation to the draft standard. Resulting amendments need to be made before the standard is released to member countries for a final 2 month period prior to a final ballot which will determine the future of the standard at an international level. The final standard will not be available publicly for some time.

If the international standard is accepted Australia will need to consider whether to adopt the Standard, with or without amendments.

Companies should wait until further information is available before making any decisions as to whether to utilise the international standard in their workplaces.

## **DO YOU REQUIRE FURTHER ASSISTANCE?**

**For information or assistance, please contact Ai Group's Workplace Advice Line on 1300 55 66 77.**

For information about our safety and workers' compensation consulting and training services, contact:

### **Consulting Services:**

[Trinette Jaeschke](#) – 0400 282 477

### **Training Services:**

[David Tiller](#) – 0499 193 307



### **Tracey Browne**

Manager – National Safety & Workers' Compensation Policy and Membership Services