

INDUSTRIAL MANSLAUGHTER AND THE RIGHT TO DISCONNECT

SIGNS OF AN EVER-CHANGING EMPLOYMENT LAW
LANDSCAPE

FACILITATORS:
NEVILLE JOHN
AND TILLY WISE





*WORK HEALTH AND SAFETY (INDUSTRIAL
MANSLAUGHTER) AMENDMENT BILL 2022*

New Section 30A of the *Work Health and Safety Act 2012 (SA)*



30A—Industrial manslaughter

(1) A person (being a person conducting a business or undertaking, or an officer of a person conducting a business or undertaking) commits an industrial manslaughter offence if—

- (a) the person has a health and safety duty; and**
- (b) the person engages in conduct that breaches that duty; and**
- (c) the conduct causes the death of an individual to whom that duty is owed; and**
- (d) the person is**
 - (i) reckless or grossly negligent ; or**
 - (ii) Is reckless as to the risk to an individual of death or serious injury.**

Maximum penalty:

- (a) in the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking —20 years imprisonment;**
- (b) in the case of an offence committed by a body corporate—\$18, 000 000. 00**

(2) For the purposes of this section, conduct causes the death of an individual if it substantially contributes to the death.

(3) If at the trial of a person for an offence against this section the trier of fact is not satisfied that the accused is guilty of the offence charged but is satisfied that the accused is guilty of a Category 1 offence, a Category 2 offence or a Category 3 offence, the trier of fact may bring a verdict that the accused is guilty of that offence if the proceedings of the offence charged commenced within the applicable limitation period for the lessor offence.

(4) For the purposes of this Section, a person is grossly negligent as to the risk to an individual of death if the person's conduct involves—

- (a) Such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and**
- (b) High risk of causing the death of an individual, that the conduct merits criminal punishment for the offence.**

ADDS TO EXISTING OFFENCES UNDER WHS ACT 2012 SECTIONS 30-33

Category 1

Negligent or reckless conduct that exposes a person to risk of death, serious injury or illness. These are the most serious breaches.

- Corporation/government body: up to \$3 million
- PCBU or an officer of the PCBU: up to \$600,000 or 5 years jail or both
- Individual (e.g. a worker): up to \$300,000 or 5 years jail or both.

Category 2

Failure to comply with a health and safety duty that exposes a person to risk of death, serious injury or illness.

- Corporation/government body: up to \$1.5 million
- PCBU or an officer of the PCBU: up to \$300,000
- Individual (e.g. a worker): up to \$150,000.

Category 3

Failure to comply with a health and safety duty.

- Corporation/government body: up to \$500,000
- PCBU or an officer of the PCBU: up to \$100,000
- Individual (e.g. a worker): up to \$50,000

Max 20 year imprisonment, max \$18 million corporate fines

Applies to PCBU and Officers

Not subject to 2 year statute of limitations to cover dust diseases and injuries of late onset

Alternative verdicts Category 1, 2 or 3 will be available

No enforceable undertakings available

Queensland Law

- Section 34C of the Work Health and Safety Act 2011(Qld)
 - negligence test
 - max 20 years
 - \$10m fine for a company

Western Australia Law

- Section 30 A *Work Health and Safety Act 2020 (WA)*
 - Knowledge Test
 - Max 20 years
 - \$10m fine for a company

Queensland Cases

R v Jeffrey Owen [2022] QDCSR 168

- The defence argued that because Mr Ormes was not employed or contracted by Mr Owen, he was not a 'worker carrying out work'.
- The defence argued that Mr Ormes was 'helping a friend'
- Under the WHS Act, a volunteer (which is defined as a person acting on a voluntary basis) is a worker if they carry out work in any capacity for a PCBU.
- The jury found Mr Owen guilty and he was sentenced to five years' jail, to be suspended after serving 18 months

R v Brisbane Auto Recycling Pty Ltd & Ors [2020] QDC 113

During an investigation of the incident it was uncovered that the business:

- had no written safety policies or procedures within the workplace;
- had no traffic management plan at the worksite, across which a number of forklifts operated constantly in close proximity to workers and the public;
- simply told workers to 'be safe and look after themselves';
- did not check the licence status of forklift operators or carry out other assessments of worker's competencies, but instead relied on what they were told by workers; and
- did not have a WorkCover policy because the directors were not aware of the requirement to have one.

Western Australia Case
Mr Withers (Director of MT Sheds (WA) Pty Ltd (2020))



MITIGATE YOUR RISK

Do your due diligence

Ensure directors and officers and senior managers are aware of their potential liability – even if not in SA

Review WHS policies and procedures and systems of work, equipment

Conduct risk assessments – identify hazards and remove, limit and control them

Induction, training , revision – keep up to date

Keep good records

LEAVE A MESSAGE AT THE TONE:
FAIR WORK AMENDMENT (RIGHT TO DISCONNECT)
BILL 2023 (CTH)

The details

First introduced on 20 March 2023

Introduced by Adam Bandt, Leader of the Australian Greens Party

Stems from Senate Select Committee on Work and Care Final Report

Final Report made 30 recommendations and was released on 9 March 2023

What does the proposed Bill say?

PRIVATE MEMBER'S BILL

Mr Adam Bandt MP
(AG, Melbourne, Vic.)

Fair Work Amendment (Right to Disconnect) Bill 2023

A Bill for an Act to amend the *Fair Work Act 2009*, and for related purposes.

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 PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES

[ABOUT THE HOUSE](#)

Availability Creep

What is it?

Why does it matter?

What are the signs
its effecting my
employees?





The right to disconnect is an international trend

The right to disconnect has already been implemented into legislation in the following countries:

- France
- Italy
- Spain
- Belgium

Victorian Police Example



- Right to Disconnect Clause in their EBA
- Managers and supervisors are only permitted to contact employees out of hours during emergencies, for genuine welfare reasons or if the employee is being compensated by way of an availability allowance

What can you do as an employer?

Conduct Risk assessments

Create clear policies

Be a good role model

Invest in training and education

Use technology for good not evil

Quick Update: Family and Domestic Violence Leave Entitlements

From 1 February 2023, employees of non-small business employers can access 10 days of paid family domestic violence leave. This includes part-time and casual employees.

Employees employed by small business employers can access paid leave from 1 August 2023. Until then, they can continue to take unpaid family and domestic violence leave.

QUESTIONS FROM THE FLOOR?

FOR MORE INFORMATION AND ADVICE:

NEVILLE – 0410447291

TILLY - 0411515540

The logo for KJK LEGAL features the letters 'KJK' in a large, bold, dark blue font above the word 'LEGAL' in a smaller, dark blue font. To the left of the text are three dark blue circles of varying sizes, arranged vertically. The entire logo is set against a light blue rectangular background.

KJK
LEGAL

THE VARYING NATURE OF
EMPLOYMENT ARRANGEMENTS AND
OBLIGATIONS UNDER SECTION 18
OF THE *RETURN TO WORK ACT*
2014 (SA):
DO THEY RUN TOGETHER NEATLY?

FACILITATORS:

MARK KEAM



Section 18 and Employment Obligations

- Background to the current legislative provision – a quick bit of social policy
- The concept behind section 18 – the protection of an injured worker's right to work

In what circumstances does Section 18 apply?

- Work injury
- Current incapacity for work
- Reasonable practicability to provide work the same as or equivalent to the pre-injury role



In what circumstances does Section 18 not apply?

- When it's not reasonably practicable to provide
- Cessation of employment before or after the work injury
- Where there is an agreed change of employment direction

What does suitable employment mean?

- it is not suitable duties
- it can be a mix of contracted roles
- It can extend past the weekly payment entitlement period

There are penalties the SAET can apply where an employer is directed to but fails to provide suitable employment

When it is reasonably practice to provide suitable employment or not? The 'defences'

- the size of the employer
- the breadth of the roles available
- the make up of the work force
- the financial circumstances of the employer
- if the worker a "bad egg"?
- WHS considerations

And now, to Mr Morphett's case [2022] SAET 143,
[2022] SAET 39

- A seasonally employed worker gets injured
- A return to work on rolling contracts
- A desire to pursue something new
- The ending of the last contract
- An Application for Suitable Employment and an exploration of what employment means. Is this a concept around the nature of the employment contract and/or the nature of the duties to be performed?

Issues the Tribunal addressed

Is Section 18 limited by the nature of the pre-employment contract relationship?

Is it open to create a whole new employment relationship?

Can an employer create a role where none currently exists?

‘The equivalency concept’

How should we best balance the interests of future protection with a past obligation?

Can seasonal can become permanent?

QUESTIONS FROM THE FLOOR?

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MARK – 0410447291

