Expectations of Leaders – now in law

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Industrial Manslaughter

A Refresher

- In October 2017, the *Work Health and Safety Act 2011*, the *Electrical Safety Act 2002*, and the *Safety in Recreational Water Activities Act 2011* were amended to make it an offence for a person conducting a business or undertaking (PCBU), or a senior officer (SO), to negligently cause the death of a worker.

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Expectations of Leaders

- The introduction of the new legislation placed an increasing focus upon the steps that employers and senior leaders must take to ensure the health and safety of workers.
- The Queensland government has stated that industrial manslaughter was required as a separate offence under safety legislation to ensure that prosecutions can be extended to the highest levels of a corporation.
- These changes increase the need for senior management to instil a positive safety culture and ensure that short cuts are not taken regarding safety matters.

When will the offence apply?

The offence will apply where:-

- A worker dies, or is injured and later dies, in the course of carrying out work for the business or undertaking (including during a break); and
- The PCBU's, or SO's, conduct causes the death of the worker; and
- The PCBU, or SO is negligent about causing the death of the worker by the conduct.

Where a PCBU, or SO, is convicted of industrial manslaughter, a maximum penalty of 20 years imprisonment applies to individuals and $10M applies to a body corporate.

Who is a senior officer?

A ***senior officer***, of a PCBU who is a corporation, means:-

- A person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer.
- Examples in a local government workplace include CEOs, Directors/Managers who report directly to the CEO, other employees who make decisions that affect the whole, or a substantial part, of the business or undertaking of a local government.

What is the standard of care required by PCBUs and SOs?

- As the offence is criminal in nature, the criminal standard of negligence will apply.
- The degree of negligence required for the offence is very high, and is greater than the standard required for civil liability.
- The act must be done with such a great falling short of the standard of care which a reasonable person would exercise, and must involve such a high risk that death or grievous bodily harm would follow, that the doing of the act merits criminal punishment.

R v Brisbane Auto Recycling Pty Ltd

- In June 2020, Brisbane Auto Recycling Pty Ltd was the first to be convicted of the offence of industrial manslaughter in section 34C of the *Work Health and Safety Act 2011*.
- The two directors of the company were charged with a reckless conduct – category 1 offence pursuant to section 31 of the *Act*.
- The deceased worker was employed casually by the employer to collect customer cars using a tray truck. The employee was killed when he was struck by a forklift being driven by an unlicensed forklift driver at the Brisbane Auto Recycling yard.

- Brisbane Auto Recycling had no traffic management plans in place and took no steps to reduce the risk of pedestrians being struck by the forklift.

- The District Court found that the risk of collision between pedestrians and mobile plant was high, and the consequences of that risk were catastrophic. Steps to lessen, minimise or remove the risk posed by mobile plant were available. Those steps were neither complex nor overly burdensome.

- The District Court took into account the guilty pleas by the defendants to the offences.

- Brisbane Auto Recycling was fined $3 million for the offence of industrial manslaughter.

- Each of the directors were sentenced to 10 months imprisonment, which was wholly suspended for 20 months.

Lessons for Leaders in Local Government

- Local governments and their senior officers must take steps to ensure that safety risks are identified and written policies and procedures are in place to address those risks.
- Particular focus should be given to addressing risks that could have catastrophic consequences.
- Areas of particular risk for local government workers include:-
  - Interactions with mobile plant and equipment;
  - Loading and unloading plant and equipment from transportation;
  - Non-road vehicles rolling over;
  - Working at a height;
  - Working in confined spaces;
  - Working with electricity.

Lessons cont.

- A safety culture needs to be embedded in the organisation.
- Workers must be sufficiently inducted about safety risks before works commence.
- Workers must have the necessary licences.
- Appropriate training, instruction and supervision of workers must be provided.
- Supervisors need to ensure workers do not take short cuts that compromise safety and comply with all work procedures.
- Don’t set and forget. Procedures should be regularly reviewed to ensure they are sufficient for addressing the risks.
- Where necessary, repeated safety breaches by workers should be dealt with as a disciplinary issue.

Respect @ Work Report

- In June 2018, against a backdrop of the #MeToo movement and in light of the prevalence of sexual harassment in Australian workplaces, the National Inquiry into Sexual Harassment in Australian Workplaces was announced.
- The AHRC was tasked with reporting on and making recommendations about workplace sexual harassment, including its prevalence, drivers, the role of technology and recommendations for reform.
- The report was delivered in March 2020, and made 55 recommendations.

The Federal Government's response

- In response to the report, on Thursday, the Federal parliament passed the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*.
- The legislation amends the *Fair Work Act 2009* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth).

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Changes to the *Sex Discrimination Act*

- Importantly, from the perspective of local government, the legislation expands the scope of SDA to capture those not previously covered by Act.
- Currently, the prohibition against discrimination in employment (section 14, SDA) and the prohibition against sexual harassment (section 28B, SDA) do not apply to the State or an "Instrumentality of the State".
- Upon commencement, all State based employees, including local government, will be subject to these provisions.

Changes to the *Sex Discrimination Act Cont.*

- The prohibitions against harassment will also apply to all persons working in a business or undertaking, not just direct employees or contractors. Interns, volunteers and self-employed persons are now all subject to these provisions.

A New Prohibition Against "*Harassment on the ground of sex*"

- A person will "*harass another person on the ground of sex*" if:-
  - by reason of the sex of the person harassed or a characteristic that appertains or is imputed to persons of the sex of the person harassed;
  - the person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and
  - the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Extension of the Third Party Liability Provision

- Currently, a person who causes, instructs, induces, aids or permits another person to engage in sexual harassment is not liable under the SDA, unless the person is also an employer.
- The amending legislation provides that where a person causes, instructs, induces, aids or permits another person to engage in sexual harassment or sex based harassment, that person will also be liable for the conduct.

Time to bring a complaint relating to the SDA extended

- The AHRCA currently requires complaints relating to the SDA to be commenced within 6 months.
- The amending legislation extends this time to 24 months.

The State Government's Response

- On 3 May 2021, the State government announced a review of sexual harassment protections for workers as part of Queensland's industrial relations laws.
- It remains to be seen what changes, if any, will be made at a State level.
- However, at the announcement, the Premier indicated that consideration would be given to empowering the QIRC to make anti-sexual harassment orders.

The State Government's Response Cont.

- At a Federal level, the amending legislation will expand the existing anti-bullying jurisdiction under the *Fair Work Act 2009* to include 'sexual harassment" as a basis upon which a person can apply for an order to stop harassment.
- It is likely that a similar approach could be taken at the State level to expand the basis upon which an order can be sought under the *Industrial Relations Act 2016*.
- The *Anti-Discrimination Act 1991* could also be amended to prohibit sex-based harassment.

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Expectations of Leaders

- Upon commencement of the amending legislation it will be necessary for leaders in local government to review existing policies and procedures to :-
  - ensure conformity with the SDA including the new prohibition on sex-based harassment;
  - refer to the broad range of individuals that can now be subject to harassment laws; and
  - refer to the broadening of third party liability.
- It will also be necessary for training to be provided to employees about these new requirements.

Expectations of Leaders Cont.

- Leaders will need to lead by example and ensure that employees who they supervise appreciate that the new prohibition, depending on the circumstances, may prohibit:-
  - asking of intrusive personal questions based on a person's sex;
  - making of seriously demeaning comments or jokes based on a persons sex or that are sexist, misogynistic or misandrist;
  - displaying or sharing seriously demeaning images or materials that are sexist, misogynistic or misandrist;
  - requesting a person to engage in seriously demeaning conduct based on their sex.

Expectations of Leaders Cont.

- It will also be necessary for leaders to keep abreast of changes proposed at the State level.
- Recommendations in the Respect @ Work report, that have not been taken up at the Federal level, but may be taken up at a State level, include:-
  - the adoption of a positive duty for employers to take reasonable measures to eliminate sexual harassment and sex-based harassment in the workplace, akin to the WH&S duty;
  - expansion of the protections in the *IR Act 2016* to expressly prohibit sexual harassment.

Taking Disciplinary Action Against Local Government Employees

A Refresher

- Section 197 of the *Local Government Act 2009* ("LGA") empowers the CEO to take disciplinary action against local government employees.
- Section 279 of the *Local Government Regulation 2012* ("LGR") provides that disciplinary action may be taken if the CEO is satisfied an employee has:-
  - failed to perform their responsibilities under the Act; or
  - failed to perform a responsibility under the Act in accordance with the local government principles; or
  - taken action under the Act in a way that is not consistent with the local government principles.

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Taking Disciplinary Action Against Local Government Employees

A Refresher

- The types of disciplinary action that may be taken include 1 or more of the following:-
  - dismissal;
  - demotion, including a reduction in remuneration;
  - A deduction from salary or wages of an amount of not more than 2 penalty units;
  - a written reprimand or warning.

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Taking Disciplinary Action Against Local Government Employees

A Refresher

- Before taking disciplinary action, section 283 of the LGR requires the CEO to give the employee:-
  - notice of:-
    - the disciplinary action to be taken;
    - the grounds on which the disciplinary action is taken;
    - the particulars of conduct claimed to support the grounds; and
  - a reasonable opportunity to respond to the information contained in the notice.
- "Notice" means written notice (Schedule 4, LGA).

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Bentzen v Hinchinbrook Shire Council [2021] QIRC 158

Facts

- A Council employee was dismissed and was informed that the reason for her termination was misconduct arising from negligent mismanagement and subsequent lack of diligent, effective, efficient and economical management of a public resource.

- The employee sought reinstatement on the basis that her dismissal was harsh, unjust or unreasonable and that the termination was invalid because in dismissing her, the CEO failed to comply with the notice requirement in s 283(1).

Issues for Determination

- Asserting that s 283 was invalid, the Council argued that:-
  - s 283 sought to prescribe how disciplinary action may be taken, whereas s 197(2) of the LGA only authorised a regulation prescribing when and the types of disciplinary action that may be taken against an employee;
  - A regulation could not operate to exceed the terms of its authorising law;
  - s 283 was not necessary or convenient to give effect to s 197(2) because there was no warrant to argue that s 283 was, objectively speaking, either necessary or convenient to seek to mandate how the disciplinary process should be carried out.

Issues for Determination Cont.

- The Council also sought to argue that where an employee has engaged in misconduct that warranted summary dismissal under the common law, it was not required to comply with s 283(1)(a), as to do so would exclude the operation of the common law.

The Decision

- Finding against the Council, the QIRC held that:-
  - s 283(1) was valid because it was necessary to give effect to the power to take disciplinary action against an employee;
  - Alternatively, s 283 was, at the very least, convenient, to be prescribed to give effect to the power in that it was incidental to the execution of that power;
  - This is because the measures in s 283(1) ensure that any disciplinary action is taken in a way that is procedurally fair; and
  - The scope and purpose of s 197(1) and s 283 are mutually inclusive.

The Decision Cont.

- Relying on *Promnitz v Gympie Regional Council* (2015) 248 IR 64, the QIRC found that:-
  - The question, in respect of whether the requirements under Chapter 8, Part 3, Division 1 of the LGR are mandatory, is whether disciplinary action is taken against an employee by reference to their responsibilities or actions under the LGA;
  - As the reasons for the employee's termination made reference to her failure to comply with the Code of Conduct and her responsibilities under the LGA, compliance with the LGR was mandatory;
  - As a result of the failure to comply with the requirements of s 283(1) the dismissal was invalid.
  - The QIRC also considered whether the termination was unfair and found that whilst there may have been a reasonable basis to terminate, overall the dismissal was unjust due to the procedural deficiencies leading up to the termination.

Expectations of Leaders

- Where the CEO or his or her delegate is satisfied there exists sufficient evidence to take disciplinary action against a local government employee, careful consideration needs to be given to the basis upon which the action is proposed to be taken.
- Where disciplinary action is being proposed due to an employee's failure to:-
  - perform their responsibilities under the LGA;
  - perform a responsibility under the Act in accordance with the local government principles; or
  - take action under the Act in a way that is not consistent with the local government principles,

  it is essential that a properly drawn written notice is given to the employee prior to the action being taken.

Expectations of Leaders Cont.

- Care needs to be taken by leaders when drafting the written notice.
- It is essential that the written notice contain:-
  - A statement identifying the disciplinary action proposed to be taken;
  - The grounds upon which disciplinary action will be taken; and
  - Particulars of the conduct claimed to support the grounds.

Expectations of Leaders Cont.

- In identifying the grounds upon which disciplinary action is proposed to be taken, the drafter of the notice must:-
  - consider s. 279 of the LGR to identify in the notice which ground is being relied upon to take disciplinary action;
  - consider the responsibilities of local government employees found in s. 13 of the LGA and the local government principles found in s. 4 of LGA as these are linked to the grounds;
  - identify in the notice which of the responsibilities of local government employees and/or which of the local government principles are being relied upon, including the relevant provision number/s;
  - identify in the notice the particular parts of the code of conduct that have not been complied with (if relevant), including the clause number/s.
  - identify in the notice any legislative provisions, including section numbers, that the employee has failed to comply with.

Expectations of Leaders

- In identifying the particulars of the conduct claimed to support the grounds, the drafter of the notice must:-
  - set out all of the relevant factual information being relied upon to support the grounds upon which disciplinary action will be taken;
  - ensure details such as date and time, location, what actions the employee took or failed to take are included;
  - ensure the notice contains particulars sufficient to identify how an employee has breached a law, code of conduct provision or policy;
  - ensure the notice contains sufficient detail so the employee can understand the case that is being made against them so that the employee can respond to the notice; and
  - set out in the notice all information that is credible, relevant and significant to the conduct claimed to support the grounds.

Expectations of Leaders

- A written notice that contains insufficient particulars of the conduct claimed to support the grounds can lead to a finding that the decision maker failed to give a "written notice" in the terms set out in the LGR.
- The consequence of such a failure is that disciplinary action taken on the basis of a defective notice will be declared to be invalid.

  Blows v Townsville City Council [2016] QIRC 066.
- To avoid such a declaration being made, it is important that leaders take the time to ensure that the written notice complies with the requirements of the LGR.