

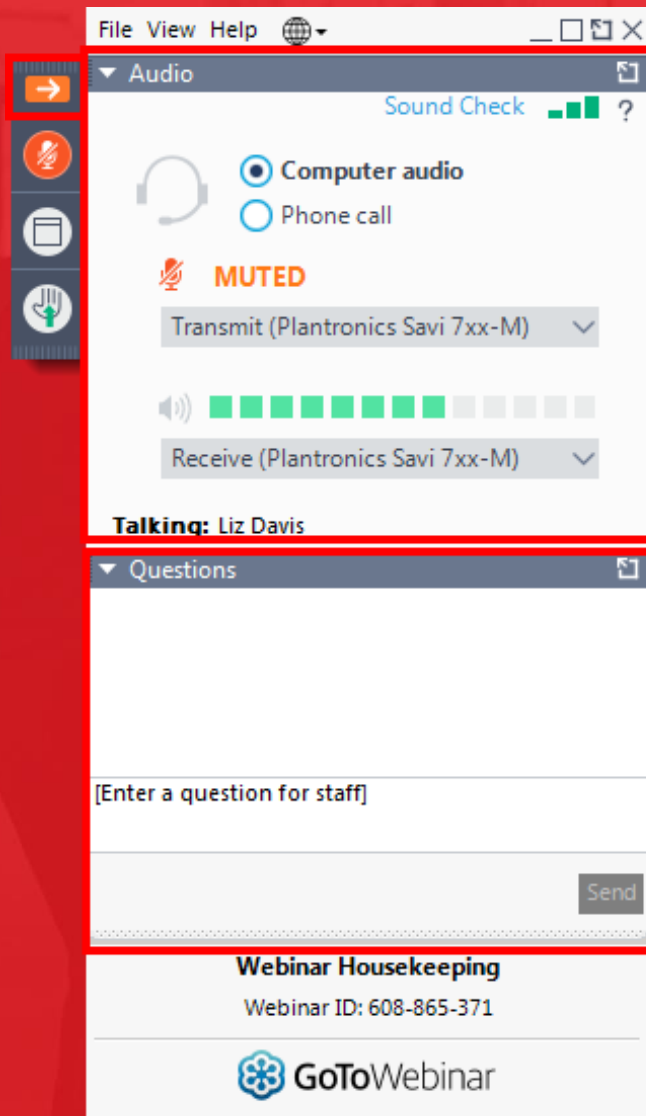
A man with glasses and a blue patterned shirt is looking towards a woman in an orange safety vest. They are in an industrial or warehouse setting. A large red diagonal shape is overlaid on the bottom left of the image, containing white text.

Live Webinar

WHS due diligence and the new industrial manslaughter laws

Monday | 10:30 – 11:30am AEST | 6 September, 2021





Housekeeping

- Today's session is being recorded
- You have joined in “listen-only” mode
- Please ask questions throughout the presentation using the ‘Questions’ window on your control panel
- We will endeavour to answer as many questions as possible in the Q&A session at the end of the webinar

Your speakers



Mario Machado

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Financial Services Group
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Angela Messih

Senior Claims Specialist,
Liberty Specialty Markets

Today's Agenda

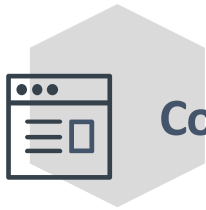
- Industrial Manslaughter – State of the nation
- Industrial Manslaughter legislation overview? What do these laws mean.
- Due Diligence and Industrial Manslaughter
- How do laws impact insurance?
- Things to consider



Why?



Insights from the Boland Report, December 2018



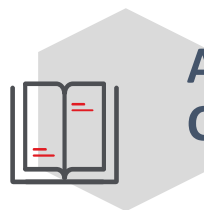
Confidence?

Workplace injuries and deaths ruin lives and shatter families. It is critical that the community is confident that the model WHS laws enable justice to be administered fairly and appropriately.



Include New Offence

I am recommending a new offence of industrial manslaughter be included in the model WHS laws.



Addressing Community Concerns

I consider that this new offence is required to address increasing community concerns that there should be a separate industrial manslaughter offence where there is a gross deviation from a reasonable standard of care that leads to a workplace death.



Industrial Manslaughter – State of the nation



Legislation not harmonized across Australia



No alignment with Model WHS legislation



Confusion national organisations



Current status by jurisdiction



In Force



Currently proposed for introduction



Unlikely to be introduced at this stage

Questions to reflect

How should I prepare my organisation for Industrial Manslaughter legislation?

Does Industrial Manslaughter legislation make workplaces safer?



Do IM laws reduce or enhance positive obligations on officers to exercise due diligence?



Do these laws drive the right behaviours?

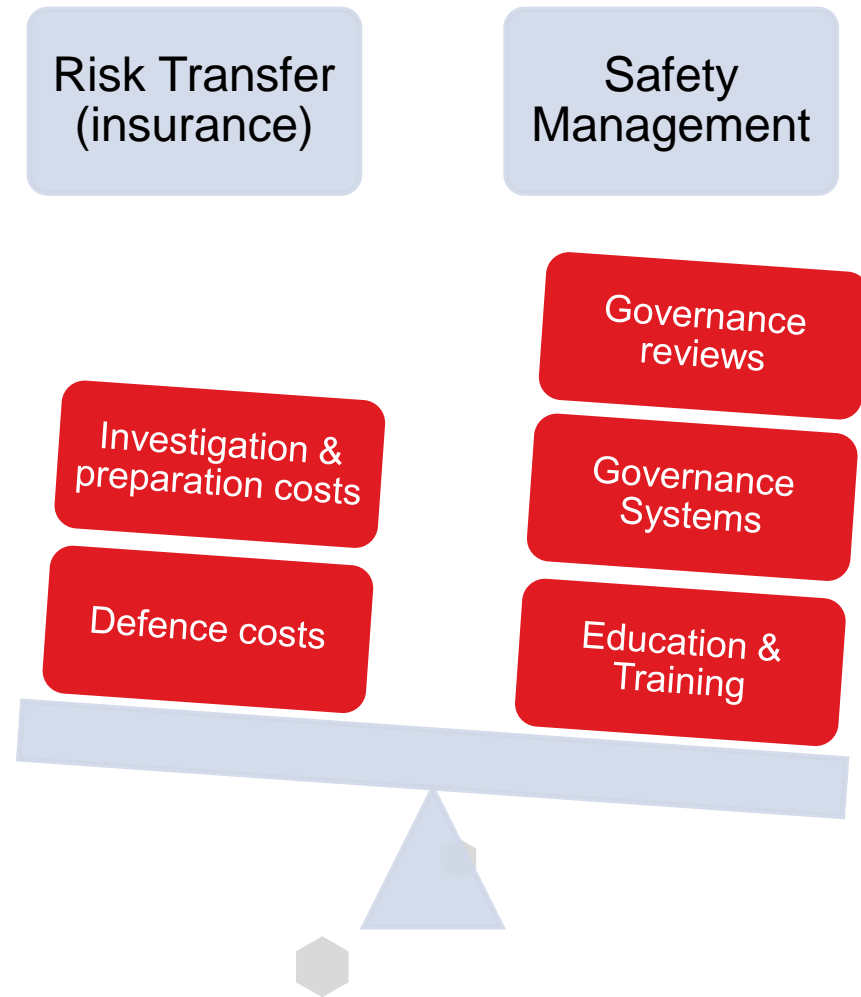


Aon Risk Survey 2019

- Changes in WHS legislation relate to numerous globally recognised risks
- Industrial manslaughter very much on the agenda of board rooms
- Damage to reputation / brand, business interruption, competition, customer needs all relate to these laws



Risk Management?



Insurance and WHS

- Individuals and businesses are prohibited from entering into a contract that insures it against paying monetary penalties under workplace safety laws. WA, NSW & Vic.
- What does this mean?

A woman with short grey hair, wearing a red polo shirt and grey safety overalls, stands with her arms crossed in a factory setting. In the background, another worker in a red shirt is visible, and large industrial machinery is partially seen. A large red hexagon is overlaid on the left side of the image, containing the title text. There are also smaller white and red hexagonal graphic elements.

Industrial Manslaughter Laws & Due Diligence Overview

Officer duties

DUTY TO EXERCISE DUE DILIGENCE

**If a person conducting
a business or
undertaking (PCBU)
has a WHS duty or
obligation**

**each officer of the
PBCU must exercise
due diligence**

**to ensure the PCBU
complies with WHS
duty or obligation**

Due diligence – six elements

Officers must take reasonable steps to:

Acquire and keep up-to-date knowledge of WHS

Understand the business and the hazards and risks associated with it

Ensure the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to WHS

Ensure the PCBU has processes for receiving and considering information regarding incidents, hazards and risks and responds in a timely way

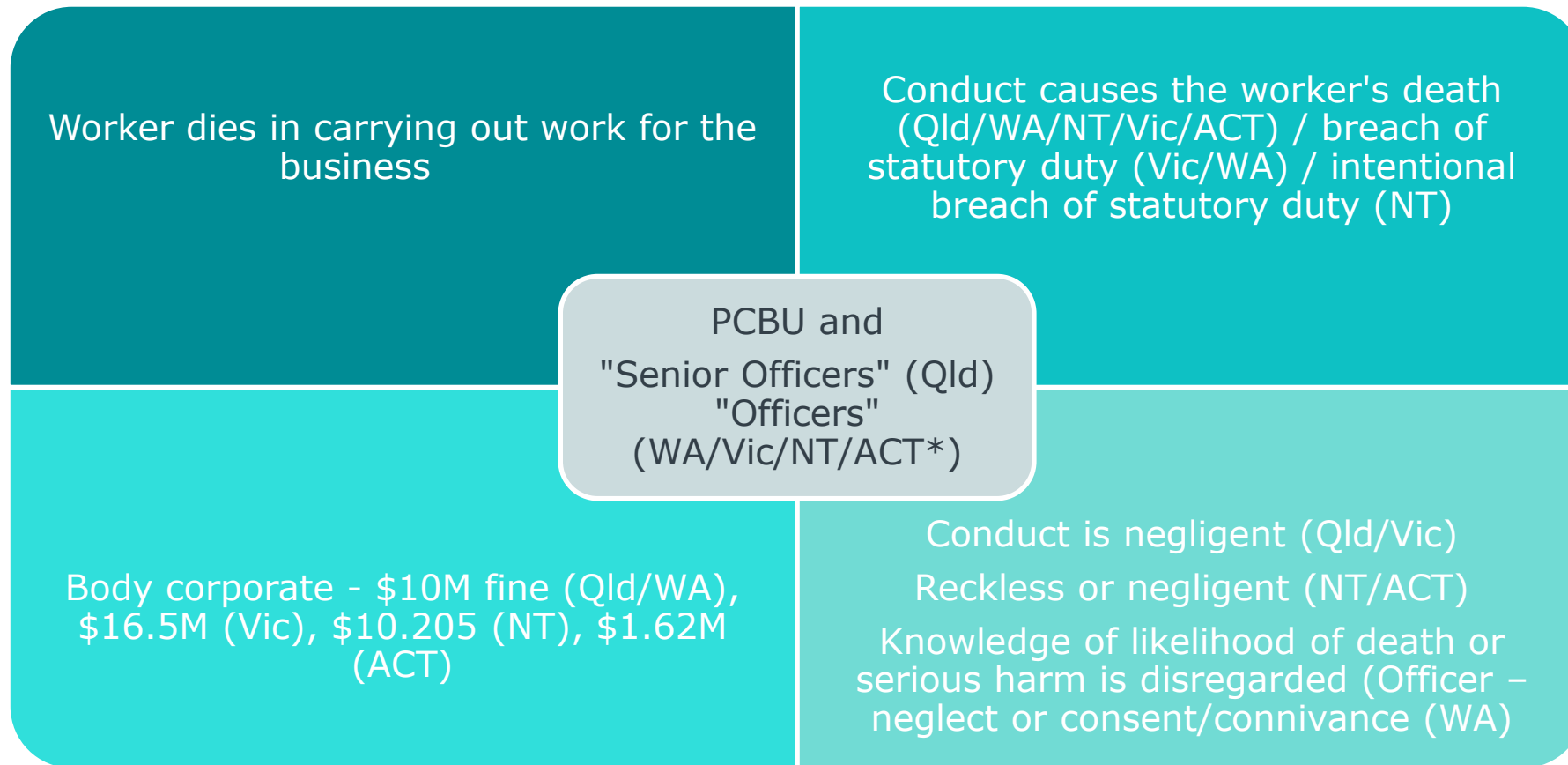
Ensure the PCBU has and implements processes for complying with WHS duties

On-going verification

Practical steps for compliance



Industrial manslaughter - ACT, Qld, Vic, NT and WA



* *Work Health and Safety Amendment Bill 2021* (ACT) effective 11 November 2021;
WA model WHS law assented on 10 November 2020 but not yet operative

Industrial Manslaughter

State/Territory	Pecuniary*	Imprisonment*
NSW	-	25 years
Victoria	\$16,522,000	25 years
Queensland	\$13,345,000	20 years
ACT	\$320,000**	20 years
NT	\$10,270,000	Life
WA	\$5,000,000 \$2,500,000	20 years (crime) 10 years (simple)

* Individual. Higher penalties for corporations in some jurisdictions

** Bill passed to increase penalties to \$16,500,000 from 11 November 2021
(*Work Health and Safety Amendment Bill 2021* (ACT))

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

QUEENSLAND

- Company fined \$3 million – convicted of industrial manslaughter
- Convictions of both directors for reckless conduct - 10 months imprisonment (whole of sentence suspended)

"[The directors] were reckless as to the risk to workers and members of the public who had access to the workplace. They failed to ensure that Brisbane Auto Recycling Pty Ltd controlled the interaction of mobile plant and pedestrians, failed to ensure that Brisbane Auto Recycling Pty Ltd effectively separated pedestrians and mobile plant, and failed to ensure that Brisbane Auto Recycling Pty Ltd effectively supervised operators of moving plant."

Canberra hospital crane rollover

The Canberra Times
TO SERVE THE NATIONAL CITY

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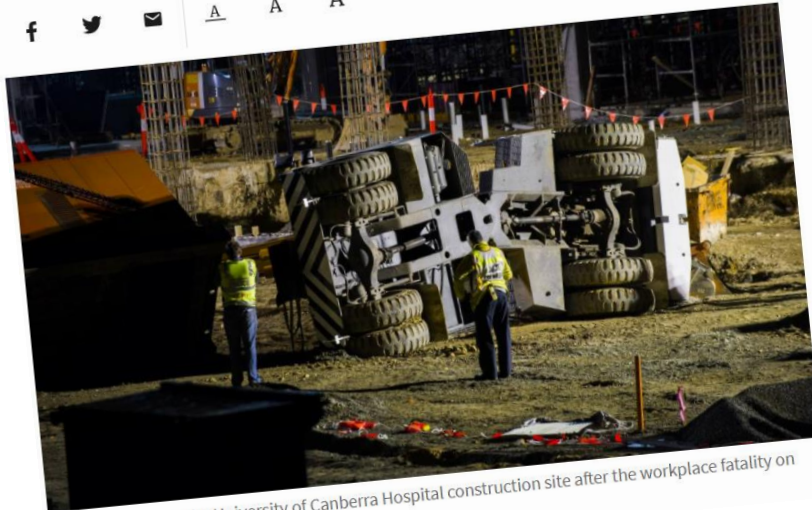
SUBSCRIBER

AUGUST 6 2020 - 12:00PM

Trio has charges dismissed in University of Canberra Hospital construction site death case

Latest News

Blake Foden



Authorities on the University of Canberra Hospital construction site after the workplace fatality on August 4, 2016. Picture: Rohan Thomson

9NEWS

Crane driver gets suspended jail sentence over University of Canberra hospital worksite death

By Michael Inman

Posted Mon 20 Apr 2020 at 12:28pm, updated Mon 20 Apr 2020 at 3:27pm



Risk Management & Insurance

Insurance?

Cover the company, senior management and employees for allegations of wrongful breaches of key legislation in the course of the company carrying out its business.



Statutory Liability Insurance

Directors & Officers (D&O) Insurance



D&O liability insurance protects corporate directors and officers in the event that they're personally sued for actual or alleged wrongdoing when managing a company.

Covers cover defence costs and damages (awards and settlements) arising out of wrongful action allegations and lawsuits.

WHS Specific Statutory Liability Insurance

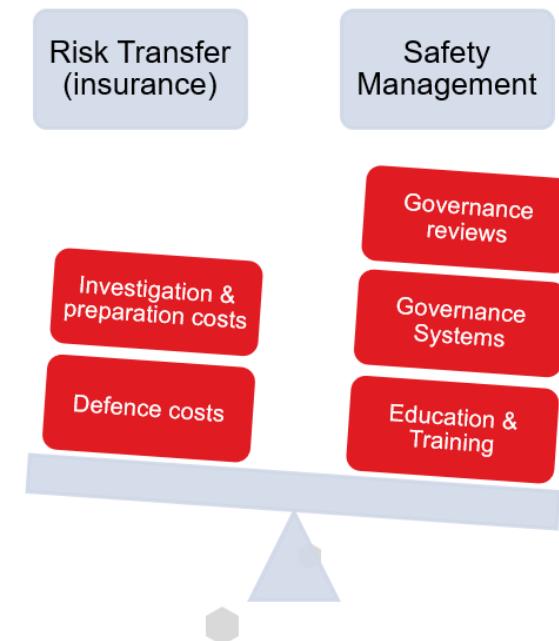


Extension to standard stat liability insurance designed to respond to specific WHS related events.

Exclusions associated with criminal convictions apply

Insurance and Industrial Manslaughter?

- Manslaughter Penalties Are Uninsurable (and always have been)
- Even where there is no ban on providing insurance under the current legislation, criminal behaviour is uninsurable by law.
- As such, the insurance industry has treated criminal penalties as being uninsurable, except for certain strict liability offences under WHS legislation.
- Insureds (organisation and natural persons) cannot currently be indemnified for any criminal penalty issued for a manslaughter or industrial manslaughter offence.



Critical Incident Response



- Immediate response to critical incidents is critical in preventing regulatory intervention and avoiding prosecutions
- Some policies do not require a formal notice of investigation from a Regulatory Authority before the policy will respond and begin paying costs. This means that the policy is triggered immediately from the time of a serious workplace injury/ fatality or a threatened or actual action by a Workplace Safety Authority.
- This can give policyholders immediate access to investigation, defence and crisis costs to assist with building a defence

The timeline of a serious WHS incident				
Date of serious injury or fatality	6 months	1 year	18 months	2 years
Who will you contact and how will you deal with the critical incident situation?	Complete evidence and prepare defence of WHS framework.	How much will it cost a WHS legal team to prepare evidence and compile a defence?	Workplace safety authorities can take up to 18 months to prosecute.	Resulting fines & penalties could be 2 years after an incident.

Claims Incident Response

Claims Approach

Association claims management recognises reputational risk to the business and continues throughout the life of a claim

Early Notification

Notification to insurer when self-reporting to the regulator

Initial Triage

Public Relations firm to manage negative publicity

Advance Defence Costs

A coverage assessment is communicated

Expert Partnerships

Specialist legal advisers are engaged from the outset of the investigation to assist the client to respond and protect legal interests

Claims Data

“The areas of the Policy called upon the most are investigation and defence costs, relative to fines and penalties, and is supported by our claims data”

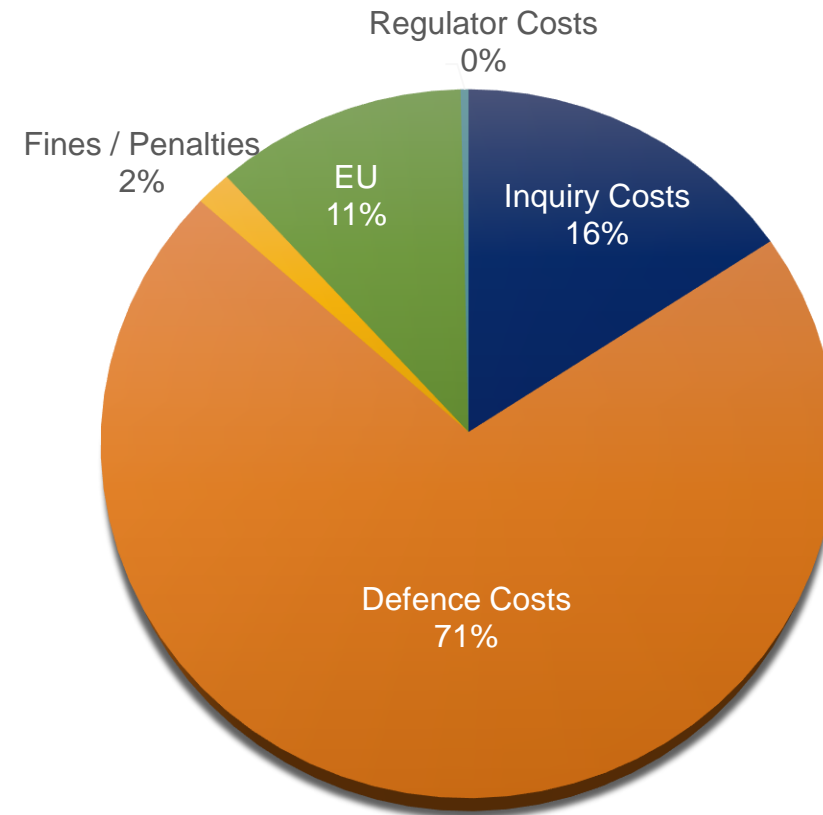


Figure 2: Claims paid to date as at 30 August 2020 under Liberty Specialty Markets Australia Professional and Financial Risks statutory liability policies

Key Conclusions

- Damage to reputation / brand, business interruption, competition, customer needs all relate to news laws
- Due Diligence is underpinning process to prepare
- Action – Identify ‘officers’, develop/implement a due diligence action plan and regularly monitor
- Insurance – Ensure you have appropriate coverage



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