

SAFETY IN THE WORKPLACE

Safety in the Workplace – WHS Quarterly

Our Autumn 2022 edition includes:

- WHS Enforcement Plan for COVID-19 Revised, Employer liable for COVID-19 Death;
- Western Australia Recognise Insecure Work as a Health Hazard; and
- Five Serious Burns and Zero Convictions: Workers Dismayed at No Prosecution Decision.



WHS Enforcement Plan for COVID-19 Revised by SafeWork NSW and Employer Held Liable for COVID-19 Death

In January 2022, Safework NSW ("Safework") has amended its statement of regulatory intent with respect to COVID-19.

The noticeable omission from the statement was the explicit protections, that were discussed by the National Cabinet, to protect employers who do not mandate vaccinations. In fact, Australia's premiers and chief ministers agreed at an August 2021 meeting to consult their WHS regulators on amending their enforcement policies to ensure businesses are not accused of breaching WHS laws for not mandating COVID-19 vaccines for staff and others. This suggestion from the cabinet was widely criticised by WHS experts, who said such a policy would constitute a shift away from the risk-based framework of the country's WHS legislation, and would be potentially incorrect at law.

The current advice for Employers is that NSW businesses must take action to prepare and manage the risk of exposure to COVID-19 for workers and others at their workplace so far as is reasonably practicable consistent with statutory requirements and in line with Public Health Orders.

SafeWork first released its statement of regulatory intent for the pandemic in March 2020, outlining plans to "*take a reasonable and proportionate response*" to enforcing compliance with certain WHS duties where a duty holder is constrained by COVID-19 issues.

It said these duties included: participating in face-to-face training and practical hands-on training demonstrations; maintaining records in prescribed formats; securing access to health surveillance

SAFETY IN THE WORKPLACE

clinics; testing emergency plans; and complying with "other regulatory requirements".

The revised statement adds, to this list, the duty to make notifications about COVID-19. However, it stresses that PCBUs should continue to notify SafeWork of any work-related fatalities, serious injuries or illnesses, including COVID-19 cases.

Safework NSW advise that all businesses should:

- review their exposure and infection control policies and procedures, actively promote social distancing, good hand and respiratory hygiene and ensure cleaning of common areas within the work environment;
- develop and implement safe systems of work (in consultation with workers and/or their HSR's) that include directions and advice provided by our health authorities;
- keep monitoring the COVID-19 situation as it develops; and
- continue to comply with statutory requirements including notifying SafeWork NSW of any work-related fatality, serious injury or illnesses (including COVID-19).

Ensuring that your business effectively implements and carries out the above protocols is essential to reduce your WHS legal liability.

NSW Health Recommendation

The WHS duties surrounding COVID-19 are particularly important given the NSW Health Recommendation in early March for the

reintroduction of mandatory indoor masks, density limits, a ban on singing and dancing, and a return to working from home ahead of daily COVID-19 cases reaching a projected 25,000.

The recommendations were contained in an internal presentation to Health Minister Brad Hazzard. The recommendations represent a return to the restrictions in place before 18 February 2022.

In March 2022, Mr Hazzard said the new Omicron subvariant – known as the BA-2 strain – was a timely reminder the community had a "responsibility" to get vaccinated to continue living without restrictions.

"The pandemic has not gone away," he said.

"The advice is it's much more transmissible. So we are expecting that more people may get it. Potentially that means more people in hospital and more people potentially in ICU and possibly dying."

This timely advice reaffirms that the COVID-19 pandemic is something that businesses will likely have to deal with on an ongoing basis.

Employer held liable for COVID-19 Death

Last year, In the Australian case of *Sara v GMS Sara Pty Ltd*, an employer was held liable for the death of an employee whilst travelling for work.

The estate of a deceased worker was awarded \$834,200 in a lump sum payment in addition to \$11 million (USD) for the cost of medical and hospital

SAFETY IN THE WORKPLACE

related treatment which the deceased worker received in New York.

Whilst this is an extreme example of employer's liability with respect to COVID-19, it demonstrates that where an employee contracts COVID-19 in the course of their employment, the employer may be liable for compensation payable to the worker which includes but is not limited to medical treatment expenses, weekly payments and in circumstances where the injury is serious enough, death benefits as well.

This decision serves as a costly reminder about the WHS liability surrounding COVID-19 in the workplace, and the risk that COVID-19 poses to workers.

The Takeaway

It is essential that businesses stay up to date on what is expected of them from Safework NSW with respect to their WHS obligations and COVID-19.

This is critical due to the very real possibility of being prosecuted for risks to health and safety arising from an employee contracting the COVID-19 virus in the course of employment. The decision underscores the importance of taking all measures, so far as is reasonably practicable, to prevent the transmission of COVID-19 in the workplace. Employers should be aware of their obligations to provide a safe work environment and the extent this may require them to mandate vaccination in

the workplace, even in the absence of health directives to do so.

We strongly advise that all employers consider implementing COVID-19 policies to effectively manage the safe return to work amidst the global pandemic. If you have further questions about implementing a COVID-19 policy in your business, or questions about your WHS duties with respect to COVID-19 more generally, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), [Daphne Klianis](#) or [Josh Hoggett](#).



Western Australia Recognise Insecure Work as a Health Hazard

In an Australian first, Western Australia has formally recognised insecure work in its new Code of Practice on Psychosocial Hazards in the Workplace ("the Code"), which provides practical guidance on how Western Australia workplaces can comply with

A background image of a construction site with several tall buildings under construction, cranes, and a clear blue sky.

SAFETY IN THE WORKPLACE

their duties under the state's *Occupational Safety and Health Act 1984*.

A psychosocial hazard is defined as any social and organisational factor with the potential to cause psychological or physical harm. In terms of work, it's anything in the design or management of work that can cause stress.

Approximately 3 million Australian workers lack job security. An estimated 2.4 million – 20% to 25% of the total workforce – are casual workers, with no paid leave entitlements.

What are psychosocial hazards at work?

The World Health Organization lists ten psychosocial hazards that can arise at work. These cover issues including high uncertainty in job content, lack of control, lack of support and job uncertainty. Long term exposure to these hazards has been found to increase the risk of acute and severe mental or physical injury.

Better recognition of such hazards was recommended in 2018 by the Boland Review into the 'model' laws, regulations and codes that underpin uniformity between Australia's state and territory work health and safety regimes.

Australia's federal, state and territory ministers agreed to this recommendation in May 2021. However, Western Australia are the only State to include insecure work thus far.

Research Backs WHS Legislation Changes

A growing body of research shows insecure work is a health hazard.

A submission to the Senate inquiry into job security found insecure work has three major negative outcomes:

- higher incidence/frequency of injuries, including fatalities;
- poorer physical and mental health; and
- poorer knowledge of, and access to, employment rights and less willingness to raise concerns.

Fear of losing work, which is commonplace with insecure work, was found to be a powerful disincentive against complaining or using rights available to them. For example, a 2021 survey of 1,540 workers by the Australian Council of Trade Unions found:

- 40% of all insecure workers said they had worked while unwell because they didn't have access to paid leave
- 67% of those who worked through an ailment, rather than taking time off, said they feared taking leave would affect their job (compared with 55% of permanent workers)
- 50% of those who were sexually harassed took no action because they feared negative consequences (compared with 32% of permanent workers)

SAFETY IN THE WORKPLACE

Step in the Right Direction

Western Australia's recognition of job insecurity in the WHS Code has been praised as a 'step in the right direction' for the State's WHS legal framework. It will be interesting to see if the other States follow suit and incorporate it in their own WHS framework.

If you have further questions about developing WHS policies for your business please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), [Daphne Klianis](#) or [Josh Hoggett](#).



Five Serious Burns and Zero Convictions: Workers Dismayed at No Prosecution Decision

Background

In May 2020, five labour hire workers sustained severe burns after a Queensland coal mine exploded due to "spontaneous combustion" of highly explosive methane gas.

An investigation into the explosion ("the **Investigation**") conducted by the Queensland Coal Mining Board of Inquiry ("BOI") found that duty holders of the mine had failed to take "*timely and meaningful*" action to control excess levels of methane gas. BOI found that coal production regularly exceeded the mine's gas drainage capacity of 70,000 tonnes a week, despite management being advised otherwise. In the weeks preceding the explosion, the BOI heard that there were 14 incidents of methane exceedance at the location - which are considered near misses in the industry.

The Investigation found a general perception amongst workers at the mine that raising "*safety concerns at a mine might jeopardise their ongoing employment*". Another significant finding of the Investigation was a failure on behalf of the Resources Safety & Health Queensland ("the **RSHQ**") to pre-emptively identify the risk at the mine.

The Mining and Energy Union Queensland ("the **Union**") described the incident as an "*accident waiting to happen*". The Union called for those responsible for mismanagement of the mine should face criminal prosecution for exposing workers to an unacceptable level of risk.

The Law

For an employer or a labour supplier to be criminally liable for an incident occurring in a Queensland coal mining operation they must be in breach of the *Coal Mining Safety and Health Act*

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SAFETY IN THE WORKPLACE

1999 (QLD) (“the Act”). Similar criminal liability provisions exist in New South Wales under the *Work Health and Safety Act 2011* (NSW).

The Act clearly defines what constitutes ‘acceptable risk’, the actions that must be taken to reduce the risk to an acceptable level, what is to occur when the risk becomes unacceptable and the protocol for evacuating to a safe location.

No Prosecution to be Pursued

In August 2021, the matter was referred to the Office of the Work Health and Safety Prosecutor by the RSHQ. However, after reviewing over 90,000 pieces of evidence, Mr Guilfoyle, the Work Health and Safety Prosecutor determined not to commence criminal prosecution. In a statement to the media, he said:

“Having assessed the brief of evidence against the Guidelines of the Director of Public Prosecutions, I am not satisfied there exists a reasonable prospect of securing a conviction against any of the identified duty holders under the Coal Mining Safety and Health Act 1999.”

Recommendations Following Investigation

The BOI made 40 recommendations in their report. They called on managers of the Grosvenor mine to audit gas drainage, regularly assess production to

ensure they do not exceed gas drainage levels and conduct an internal review on policies and procedures to improve safety incident and injury reporting.

More broadly, the BOI proposed for laws to be amended to compel mine managers to develop performance criteria for gas drainage, monthly reporting to the RSHQ and the conduct of regular internal and external audits.

While no criminal liability was determined in this case, the takeaway is that employers have a legal and an ethical duty to provide and maintain a safe working environment for their employees. The 2020 mining explosion represented a systematic failure in reporting and maintaining a safe working environment. As a result, five people were critically injured and require ongoing medical support.

If you have any questions about work health and safety obligations, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), [Daphnie Klianis](#) and [Josh Hoggett](#).

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