

SAFETY IN THE WORKPLACE

Safety in the Workplace – WHS Quarterly

Our Spring/Summer 2020 edition includes:

- New Bill for Ten Days' Paid Domestic Violence;
- Heavy fines for employer that dismissed safety representative; and
- New Work Health and Safety legislation introduced in Western Australia



New Bill for Ten Days' Paid Domestic Violence Leave Being Introduced by the ALP

A new bill is being introduced by the Australian Labor Party (ALP) providing affected workers access to ten days' paid domestic violence leave under the National Employment Standards (the Bill). This move comes following recent comments made by opposition leader Anthony Albanese, confirming that domestic violence is an "epidemic" in Australia.

Shadow Minister for Families and Social Services Linda Burney has introduced a private members' bill to parliament, calling for ten days paid domestic and family violence leave.

"No one should have to choose between their livelihoods and their safety," Burney said in parliament on Monday.

"This is why we are introducing this private members' bill to provide for ten days paid domestic and family violence leave in the National Employment Standards."

As the law currently stands, domestic violence victims can get up to five days of unpaid leave each year under the National Employment Standards, after the Fair Work Commission ruled in mid-2018 it should be part of all modern industry awards and subsequent legislation expanded its coverage to all permanent employees.

In July 2020, the Australian Institute of Criminology recorded that almost 10% of Australian women in a relationship had experienced domestic violence during the COVID-19 pandemic.

Currently, workers have access to five days of unpaid family and domestic violence leave each year. The ALP is calling for the introduction of 10 days of paid leave as it would provide important time and financial support for safety measures such as "finding a new place to live; seeking legal support;

SAFETY IN THE WORKPLACE

receiving medical treatment; or enrolling their children in a new school”.

Domestic violence against women and their children, costs the Australian economy \$22 billion per year, with \$860 million of that attributed to absenteeism from paid and unpaid work as well as an inability for individuals to perform household tasks and voluntary work (KPMG 2016). Social Services spokeswoman for the ALP, Linda Burney, states that “no one should have to make the choice between their earning capacity and their safety”.

Many companies and large-scale employers in Australia currently offer some form of paid domestic violence leave for their workers. Last week, it was revealed by the Workplace Gender Equality Agency that more than a third of companies in Australia already offer some form of paid domestic leave, whilst only two-thirds actually had a policy or strategy in place for it.

The Bill, if passed, seeks to improve this. It will be introduced to Parliament over the next fortnight, or when Parliament resumes in early 2021.

If you have any questions relating to the above please contact [Nick Stevens](#), [Luke Maroney](#) or [Bernard Cheng](#).



Near maximum fines for employer’s “contrived” dismissal of safety rep

In July 2020, the Federal Court fined an employer and director a total of \$60,000 for fabricating the redundancy of an employee after he had lodged complaints with a workplace safety regulator. The employee was successful in his adverse action claim against Melbourne Precast Concrete Nominees Pty Limited (**the Company**) and its director, after they made him redundant due to his exercising of his workplace rights in reporting concerns with WorkSafe Victoria, in his position as health and safety representative.

The Court found that the Company implemented a “*contrived*” selection process to select the “*stellar*” employee for a redundancy dismissal. The Company attempted to argue that it had used a skills and attributes matrix to do so, however Justice O’Callaghan found “*that* [the

SAFETY IN THE WORKPLACE

director] *manufactured* [the worker's] *poor score on the 'employee skills and attributes evaluation' document, and added* [the production manager's] *name and signature*". The Court found the director's claims that the Company had followed due process were "demonstrably untrue".

With maximum available penalties of \$63,000 for the Company and \$12,600 for the director, Justice O'Callaghan decided to fine the Company and the director \$50,000 and \$10,000 respectively, nearing the maximum threshold, due to the severity and seriousness of the "deliberate and premeditated" contraventions of s 340 of the *Fair Work Act 2009* (Cth) (**the Act**).

The Company was also directed to reinstate the employee and make back pay payments from when he was dismissed.

Upset and Humiliation Compensation

In September 2020, Justice O'Callaghan ordered a further \$10,000 to be paid to the employee to compensate for his distress, shock, hurt and humiliation. The fact that the employee was falsely labelled a poor performer exacerbated his emotional distress contributed to this further order.

This decision is a reminder that the Federal Court is intolerant of flagrant breaches of the Act by employers. This case confirms that matters involving deliberate attempts to act unlawfully

under the guise of "procedure", are viewed as conveying blatant contempt for the Act and will be reprimanded heavily.

If you have any questions about employees raising health and safety issues, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#) or [Bernard Cheng](#).



Western Australia set for WHS reform

The Western Australian Parliament has now passed the Work Health and Safety Act 2020 (**WHS Act**). The *WHS Act* is set to align WA with other states and territories' including the introduction.

The *WHS Act* will not operate until industry-specific regulations are finalised. The WA Government has said it anticipates the new legislation and accompanying regulations will have commenced by July 2021, although acknowledges this is an ambitious time frame.

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

SAFETY IN THE WORKPLACE

The *WHS Act* is repealing various pieces of industry-specific occupational safety legislation such as for mining and onshore and offshore petroleum, codifying regulations into one comprehensive act.

In his second reading speech, WA's Minister for Industrial Relations, Bill Johnston, stated, "*we have serious penalties for drivers who cause death on our roads and for those who are guilty of manslaughter in the wider community; now it is time for the workplace to be treated in a similar way.*"

The key changes business need to be aware of include:

- new industrial manslaughter laws attracting a maximum of 20 years' gaol for individuals and up to \$10 million in fines for a company;
- an increase in penalties generally;
- "employer" is to be replaced by the wider catchment of "person conducting business or undertaking" (PCBU);
- that the primary duty of care for a PCBU will be to ensure, so far as is reasonably practicable, the health and safety of workers and others who might be affected by their undertakings;

- the broader concept of a "worker" which includes contractors, subcontractors, and the employees of contractors and subcontractors;
- the definition of "health" to include psychological health;
- protection for whistle-blowers against discrimination;
- Officers of PCBUs (including directors, secretaries, and key decision-makers) have an ongoing duty to conduct due diligence;
- a prohibition from entering into insurance policies for any WHS fines incurred under the WHS Act; and
- a specific duty of care for persons who provide services relating to work health and safety.

In effect, the new law is expected to create a major shift in how workplaces are required to address WHS incident prevention and procedure. It is aiming not just to capture conventional direct employment relationships and work arrangements. Rather the new legislation captures anyone affected by the operations in and around the workplace. To ensure the safety and protection of those affected, the WHS Act clarifies the obligations and duty of care

A background image of a city skyline with several tall buildings under construction, featuring cranes and scaffolding against a clear blue sky.

SAFETY IN THE WORKPLACE

expected, widening the scope of liability and how it is to be enforced.

Whilst the new legislation is being introduced in WA later than other states and territories, they have the benefit of following the recommendations outlined by SafeWork South Australia after former executive director Marie Boland reviewed the model WHS laws in 2018.

It is strongly recommended that businesses conduct reviews of their WHS policies, familiarise themselves with the new obligations under the new laws and ensure that they are complying with them the moment they come into force.

If you require any advice or assistance to ensure your firm is implementing effective and compliant workplace safety policies, procedures or training please contact [Nick Stevens](#), [Luke Maroney](#) or [Bernard Cheng](#).

This publication is intended only as a general overview of legal issues currently of interest to clients and practitioners.

It is not intended as legal advice and should only be used for information purposes only.

Please seek legal advice from Stevens & Associates Lawyers before taking any action based on material published in this Newsletter.