

SAFETY IN THE WORKPLACE

Safety in the Workplace – WHS Quarterly

Our Winter 2020 edition includes:

- Important changes to NSW Work Health & Safety Laws;
- Launch of SafeWork NSW Reporting App; and
- Australia's first industrial manslaughter conviction.



Legal Update – Key changes to NSW health and safety laws

On 10 June 2020, the Work Health and Safety Amendment (Review) Act 2020 (NSW) (**the Act**) came into effect, introducing a number of significant reforms to the Work Health and Safety Act 2011 No 10 (NSW) (**WHS Act**). The changes

include an expansion of gross negligence, prohibition of insurance contract indemnities, and increases in fines for WHS breaches. The new laws are intended to implement some of the recommendations from the [2018 Review of the Model WHS laws by Marie Boland](#), who was appointed as independent reviewer by Safe Work Australia.

Despite the recommendation by Marie Boland that a separate offence for industrial manslaughter should be introduced, the Bill does not create such an offence. The Bill does however insert a note that the death of a person at work may also constitute manslaughter under the Crimes Act 1900 (NSW) in certain circumstances. Currently, a separate offence for industrial manslaughter exists in a number of other state and territory jurisdictions including the ACT, Northern Territory, Queensland, and Victoria. Some of the key changes to the WHS Act are explained below.

Expansion of Category 1 Offence – Gross Negligence

The scope of Category 1 Offences (the most serious category) has been expanded under the WHS Act to include any businesses who wrongly engage in grossly negligent conduct that exposes a worker to a risk of death, serious injury or illness. This is in addition to the existing test, which requires a business to have been “reckless” as to the risk of death, serious injury or illness. The ‘gross negligence’ standard creates a lower threshold test than the previous “recklessness” test.

SAFETY IN THE WORKPLACE

It is expected that the amendment will make it easier to prosecute Category 1 offences for the most serious safety shortcomings.

Prohibition of Insurance Arrangements

A new provision has been inserted into the WHS Act which prohibits insurers and companies from entering into insurance contracts that indemnify the companies from monetary penalties under the WHS Act. It is now an offence to enter into such contracts. Significant penalties apply for breaches of these sections, and officers of a body corporate can be held personally accountable for this offence.

Increase in Fines for WHS Breaches/ Change to unit system

The new Act implements a penalty unit system, replacing pre-determined monetary amounts for breaches of the *Work Health and Safety Regulation 2017 (NSW)*. For FY20, the value of a unit is \$100 which will be adjusted each year in accordance with the consumer price index (CPI). This unit system will cover any offences occurring after 10 June 2020. The Act also increases fines arising from the WHS Act and the Regulation overall.

The takeaway for employers

The changes mean that employers in NSW must ensure that they have comprehensive workplace health and safety policies and procedures in place, and crucially, ensure that they are followed and communicated to workers.

Senior management must ensure that their organisation is complying with its WHS duties, as this is necessary to avoid exposure to criminal liability with respect to their duty as officers. Insurers will no longer be able to cover WHS fines, placing the financial burden on companies and their officers.

If you require any advice or assistance to ensure your firm is implementing effective and compliant workplace safety procedures please do not hesitate to contact [Nick Stevens](#), [Jane Murray](#) or [Bernard Cheng](#).



SafeWork NSW launches 'Speak Up, Save Lives' app

SafeWork NSW has announced the launch of a mobile reporting app.

"The app is a quick, easy and confidential way for anyone to report unsafe worksite or work practices using only their mobile phone," NSW

SAFETY IN THE WORKPLACE

Minister for Better Regulation and Innovation Kevin Anderson said.

"If you spot anything risky, play your part in protecting your own safety as well as that of your work mates by immediately reporting it to SafeWork."

Since the 'Speak Up, Save Lives' web platform was launched last October, the regulator has received 1,647 reports from workers, handed out 472 improvement notices and issued \$56,880 in penalties. These figures are expected to increase with the release of the mobile app.



Company fined \$3 million in Australia's first industrial manslaughter conviction

Brisbane Auto Recycling (**the Company**) has become Australia's first company to be convicted of industrial manslaughter under Queensland's

new Work Health and Safety (**WHS**) industrial manslaughter laws.

The Company purchased used motor vehicles for resale, recycling and parts. Its two directors, Mr Asadulla Hussaini and Mr Mohammad Ali Jan Karimi (**the Directors**), who both supervised the workplace, were handed 10 month suspended jail terms over their involvement in a worker's death.

The Company was also fined \$3 million for industrial manslaughter under provisions of the Queensland Work Health and Safety Act. Queensland District Court Judge Anthony Rafter noted that the Company did not have the capacity to pay such a large fine, but went on to say:

"That does not preclude the imposition of an appropriate fine in the circumstances," observing that anything less "would not adequately punish [the Company] or serve to adequately deter others".

Queensland's industrial manslaughter legislation is designed to punish companies and senior management whose conduct grossly falls below the standard required and which warrants criminal punishment. Under the new legislation, the maximum penalty which may be imposed against a company is \$10 million, while the maximum penalty for an individual is \$600,000 or five years' imprisonment.

SAFETY IN THE WORKPLACE

The Accident

The worker was loading tyres at the Company's site at Rocklea in May 2019 when he was unfortunately crushed between a reversing forklift and a truck. The worker later died as a result of the serious injuries sustained.

Despite the incident being captured on several CCTV cameras, the Court heard that the Directors told ambulance responders and the deceased worker's daughter that the worker had fallen off the back of a truck and that the accident may have been his own fault. Judge Rafter criticised the Directors' "disgraceful behaviour" as a desperate attempt to "deflect responsibility".

The Directors were aware of risks

The Court heard that the Company had no safety systems in place at the time of the incident — instead, workers were verbally told to "look after themselves".

"The defendants knew of the potential consequences of the risk, which were catastrophic... The cost of implementing such measures was quite modest... They knew of the risk to the safety of their workers, but consciously disregarded that risk," Judge Rafter said.

The Judgement

The Company was charged with industrial manslaughter contrary to s 34C of the *Work Health and Safety Act 2011* (Qld) (**Act**). The Directors were also charged with the category 1 offence contrary to s 31 of the Act for failing to comply with their duty, as an officer of the Company, under s 27 to ensure that the Company complied with its work health and safety duty under s 19(1). The Company and the Directors pleaded guilty to the charges.

The District Court of Queensland found that the gravity of the offence and the moral culpability of each defendant was high, taking into account that:

- there were no safety systems in place;
- the Directors knew of the potential consequences of the risk posed by mobile plant operating near pedestrians;
- steps to lessen, minimise or remove the risk posed by mobile plant was available — which were neither complex nor overly burdensome;
- there were no real attempts to assess or control the risks posed by mobile plant;
- the offending conduct of the directors was not a momentary or isolated breach. By contrast, the business had grown in size, in terms of employees, turnover and the presence of mobile plant, to the point where

A dark blue banner with the text 'SAFETY IN THE WORKPLACE' in large, white, serif capital letters. The background of the banner shows a city skyline with several construction cranes and buildings under development.

the conduct of the Directors, in not taking steps to ensure the risk posed to workers was controlled, amounted to recklessness;

- the lengthy period of time over which many workers were placed at risk was relevant to an assessment of the criminality of the Company; and
- the imputed conduct of the Directors led to the death of the worker, as did the conduct of the forklift driver, which flowed from the prolonged failures.

The Court concluded that the reckless conduct of the Company caused the death of the worker, because it failed to control the interaction of mobile plant and workers at the workplace, to effectively separate pedestrian workers and mobile plant, and to effectively supervise operators of moving plant and workers. The Court held that the Directors were reckless as to the risk to workers and members of the public who had access to the workplace and failed to ensure that the Company complied with its duty.

The Court noted that the Directors engaged in conduct that was designed to deflect responsibility for the incident by deliberately naming someone else as the forklift driver and proposing a different version of the incident that placed responsibility for it on the deceased worker.

Nevertheless, the Court also considered a number of mitigating factors, among other things the Directors' ages and prospect of deportation.

The Court considered the gravity of the offence to be high and the Company was convicted and fined \$3 million out of a potential maximum of \$10 million. The Directors were both convicted and sentenced to 10 months imprisonment but, having regard to the significant mitigating factors, the whole of the term of imprisonment was suspended for an operational period of 20 months.

The takeaway for employers

This is a significant industrial manslaughter conviction as it sets an expectation for penalty levels under these new laws. Currently, a separate offence for industrial manslaughter exists in a number of jurisdictions including the ACT, Northern Territory, Queensland and Victoria. New South Wales has determined not to implement a separate offence at this stage.

This decision serves as a timely reminder that individuals will be prosecuted for workplace health and safety breaches, especially those that cause the serious injury or death of workers. As such, directors must ensure that the safety of workers is their number one priority, having well drafted policies, procedures and training in place to reflect this.

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

SAFETY IN THE WORKPLACE

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](#), [Jane Murray](#) or [Bernard Cheng](#).

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