

# SAFETY IN THE WORKPLACE

Welcome to our 2019 Summer Edition of “Safety in the Workplace – WHS Quarterly”.

This edition includes:

- Breaking News – Final Report on the national review of the model Work Health and Safety laws;
- In an Australian first, a Company Director and a business owner have been imprisoned for WHS Breaches; and
- Labor government to Impose new workplace manslaughter provision and tougher penalties to change WHS culture in Victoria.

## Final Report - Review of the Model Work Health and Safety Laws

### *Breaking News – First National Review of the Model WHS Laws*

In important, breaking news, a comprehensive final report was released yesterday afternoon on the first national review of the model WHS laws, which was independently conducted by Marie Boland, the former Executive Director of SafeWork South Australia, in December 2018 (**the Review**).

The Review includes 34 recommendations to amend legislation and improve the current Work Health Safety laws in Australia.

Key recommendations include:

- Increasing WHS penalties;
- The introduction of a nationwide industrial manslaughter offence to apply “...*where there is a gross deviation from a reasonable standard of care that leads to a workplace death*”;
- The development of additional regulations on how to identify psychosocial risks in the workplace and the appropriate control measures to manage those risks; and
- Banning insurance policies that companies are using to cover fines imposed for breaching WHS laws.

The Review was undertaken at the request of ministers with responsibility for WHS matters, and the WHS ministers are now expected to respond to the recommendations later this year. It has been agreed that the content and operation of the model WHS laws will now be reviewed every five years.

In our next Autumn edition of ‘Safety in the Workplace’, we will look further in depth at the 34 recommendations made in the Review, the impact of the Review, and the reaction to the Review over the coming months.

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## *Company Director and Business Owner Imprisoned for Work Breaches*

For the first time, two employers in Australia have been sentenced to prison for breaching Australia's WHS laws. Two recent cases involving deaths contributed to by employer negligence in the workplace illustrate the need to put safety at the fore of any business as a small business owner, and a Company Director, have both been held responsible, and convicted, for contributing to workplace deaths.

### *WorkSafe Victoria v Jackson [1]*

The owner of a second-hand goods and recycling business in southern Victoria, Ms Maria Jackson (**Ms Jackson**), was handed a 6 month prison sentence for causing the death of a worker in February 2017 due to reckless endangerment. The Latrobe Valley Magistrates Court heard that Ms Jackson was recovering from a stroke and did not hold a current

forklift license when employee, Mr Robbie Blake (**the Employee**), fell three metres from a raised forklift Ms Jackson was operating.

The Employee, was cleaning scrap metal from a bin when Ms Jackson used a forklift to pick it up, causing the Employee to fall three metres to the ground when the bottom of the bin gave out, before being crushed by a load of steel poles.

WorkSafe Health and Safety Executive Director Julie Nielsen said Ms Jackson had shown an “...*abhorrent disregard for the health and safety of people in her workplace*”.

Ms Jackson pleaded guilty to breaching sections 24 and 32 of the *Occupational Health and Safety Act 2004* (Vic) which pertain to ‘Duties of self-employed persons to other persons’ and ‘Duty not to recklessly endanger persons at workplaces’. Ms Jackson was also fined \$10,000 and ordered to pay \$7,336 in costs.

[1] WorkSafe Victoria v Jackson [2018] LVMC 1068896

### *Workplace Health and Safety Queensland v Gary Lavin [2]*

In another recent decision in February this year, a Queensland District Court Judge sentenced Mr Gary Lavin (**the Director**) to one year of imprisonment for his involvement in the 2014 death of Mr Wharehepa Te Amo (**the Worker**). The Director’s company, Multi-Run Roofing Pty Ltd (**the Company**), was also convicted and fined \$1 million.

A dark blue banner with the text 'SAFETY IN THE WORKPLACE' in white, serif, all-caps font. The background of the banner shows a blurred image of a city skyline with construction cranes.

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This is the first conviction for a category 1 offence in Queensland for serious breaches where a duty holder recklessly endangers a person to risk of death or serious injury. The maximum penalties under this category are a \$600,000 fine and/or 5 years imprisonment for Directors and a \$3 million fine for companies.

The Company was engaged by Wimmers Soft Drinks to perform roofing works for their factory in 2014 in Coorey, Queensland. During the roofing work the Worker fell 6 metres from the factory roof to his death.

The Court heard that the Director had been motivated by money in his decision not to install edge protection on the roof. Wimmers Soft Drinks paid the Company to install it, however the Director chose to keep the money for the company rather than install the edge protection.

Judge Cash criticised the Director's decision to jeopardise his worker's safety in order to save money commenting:

*"You've shown a flagrant disregard for proper safety methods and were motivated by the desire to improve your and your company's financial position."*

Importantly, the Court held that edge protection would have stopped the fall and the lack of it could have been easily addressed.

The Court held that the Director and Company had recklessly exposed its workers to the risk of death or serious injury in omitting to install roof protection, and that whilst the workers were competent and skilled, the risk was significant as the roof edge provided 'a narrow margin for error'.

A method was adopted by the roofers (with the knowledge and supervision of the Company and the Director) where the rails of scissor lifts were used as a barrier alongside the roof edge, with the workers working near the edge to wear a safety harness.

At the time of his fall, the Worker was not wearing a harness.

Despite pleading not guilty, the Court accepted that the Director was remorseful. None of the defendants had a record of any relevant breaches of work health and safety laws.

The jury determined that both the Director and Company were both guilty of engaging in reckless conduct. The court ruled that the Company be fined \$1,000,000, to be paid within six months, with the Director sentenced to 12 months' jail, to be suspended after four months.

[2] *Health and Safety Queensland v Gary Lavin* [2019] QDC

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## ***Labor to Impose New Workplace Manslaughter Provision and Tougher Penalties to Change WHS Culture in Victoria***

Labor's pre-election commitments in May last year to amend the Occupational Health and Safety Act 2004 (VIC) (**the Act**) are set to be implemented after a landslide win in Victoria in November 2018. If implemented, the changes will increase the maximum fine for death caused by an employer's negligence to nearly \$16 million, making it the nation's highest maximum WHS fine.

Labor promised to create a criminal provision for industrial manslaughter under the Act. According to Premier Daniel Andrews, *"if an employer's negligence causes death – they will be held to account. That doesn't just mean thousands of dollars in fines, that means millions. And it'll mean jail time – up to 20 years"*.

Labor said the new penalties will act as a more vigorous deterrent, forcing employers to take WHS seriously, *"and not rely on deep pockets to avoid accountability while cutting corners on safety"*. To ensure this, the Premier stated that WorkSafe Victoria would be vested with more power and resources to carry out investigations and prosecutions in light of the new offence.

In response, CFMEU State Secretary, John Sekta, stated: *"The current arrangements, there's so many loopholes there. [S]ome employers... can kill people and never see the inside of a court. Or pay some fine somewhere... it's almost become like a bit of a joke."*

Labor has also made pre-election commitments to:

- Update the Act to include gender-based harassment and sexual violence under definitions of violence at work;
- Develop harsher penalties for gendered violence and sexual harassment at work; and
- Invest \$12.7 million to improve Victoria's capacity to deal with the unique health and safety risks on major construction projects.

If you have any questions on the articles above, or would like to discuss any WHS concerns your company may have, please do not hesitate to contact Stevens & Associates Lawyers.

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