

SAFETY IN THE WORKPLACE

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

- Featuring the first of our new "How To" series, offering employers a practical guide on how to avoid WHS prosecutions; and
- The NSW government's rejection of recommended industrial manslaughter laws.



“How To” series – WHS Prosecutions are on the rise. How can you avoid a WHS Prosecution?

Welcome to our new “How To” series of ‘Safety in the Workplace – WHS Quarterly’.

This 4 part series will offer employers a practical and easy to follow guide on how to ensure best practice and protect your business from a Work Health and Safety perspective.

In recent years, there has been a slow but steady increase in prosecutions, penalties and prison time imposed for WHS breaches. In this first ‘How To’ guide, we recommend practical steps to avoid prosecution under the new WHS legislation through risk management.

Model WHS Laws Introduced

The model WHS laws have now been implemented in NSW, the ACT, the Northern Territory, Queensland, South Australia, Tasmania and the Commonwealth. This harmonised model features higher category prosecutions imposing a three-tiered category system of offences:

Type of offence	Maximum penalty for corporation	Maximum penalty for officers	Maximum penalty for workers
Category 1 – Breach of a health and safety duty involving recklessness as to the risk of death or serious injury or illness without reasonable excuse	\$3,000,000	\$600,000 or 5 years’ imprisonment	\$300,000 or 5 years’ imprisonment
Category 2 – Breach of a health and safety duty which expose	\$1,500,000	\$300,000	\$150,000

SAFETY IN THE WORKPLACE

an individual to death or serious injury or illness (without recklessness)			
Category 3 – Other breaches of health and safety duties	\$500,000	\$100,000	\$50,000

Increase in Prosecutions

2019 has seen a substantial increase in the number of Category 1 prosecutions. Courts are demonstrating an increased willingness to impose the highest penalties for WHS breaches on both companies and their officers. This reiterates the importance of duty holders being diligent when discharging their WHS duties.

There are, however, ways in which you can reduce your likelihood of prosecution..... **So, how can you avoid a WHS prosecution?**

Take Proactive Action: Avoid the WHS accident in the first place

It may sound obvious, but preventative action will greatly help you avoid a WHS prosecution. Companies and their responsible officers must ensure the company has well-drafted WHS policies and procedures **and** that these policies and procedures are implemented and followed within the organisation.

Risk Management: A proactive initiative to avoid WHS prosecutions

The process of eliminating or minimising health and safety risks is called **risk management** and it involves four steps (*as recommended by Safe Work Australia*):

1. Identifying Hazards

Find out what could cause harm.

Examples of common office hazards include:

electrical hazards (exposed wires, dodgy wall sockets or appliances), poorly maintained equipment, fire hazards, ergonomic hazards, trip/fall risks, contagious illness, ergonomic hazards and inadequate lighting.

2. Assess the Risks (if necessary)

Understand the nature of the harm that could be caused by the hazard, how serious the harm could be and what the likelihood of harm occurring is.

A risk assessment is necessary when: there is uncertainty about how a hazard may result in injury or illness; the work activity involves a number of different hazards and there is a lack of understanding about how the hazards may interact with each other to produce new or greater risks; or changes at the workplace occur that may impact on the effectiveness of control measures.

SAFETY IN THE WORKPLACE

3. Control Risks

Implement the most effective control measure that is reasonably practicable in the circumstances.

WHS regulations make it mandatory for duty holders to work through the following hierarchy (top to bottom) when managing risks:

1. Eliminate risks;
2. Substitute the hazard with a safer alternative, isolate the harm from people, reduce the risks through engineering controls;
3. Reduce exposure to hazard using administrative controls; and
4. Use personal protective equipment.

You must always aim to eliminate the risk, as this is the most effective control. If this is not reasonably practicable, you must minimise the risk by working through the other alternatives in the hierarchy.

Implementing Control Measures will usually require changes to the way work is carried out. In such circumstances it is necessary to:

A. Develop Work Procedures:

Develop a safe work procedure, including Safe Work Method Statements that describe the task, identify

the hazards and document how the task is to be performed to minimise the risks.

B. Training, Instruction & Information:

Train your workers in the procedure to ensure that they are competent in performing the task in accordance with the procedure.

C. Supervision:

The level of supervision required will depend on the level of risk and the experience of the workers involved.

D. Maintenance:

Control measures need regular monitoring and maintenance to ensure they remain effective. You should establish a schedule for routine checks and maintenance.

You can prepare a risk register identifying the hazards, what action needs to be taken, who will be responsible for taking the action and by when.

Example of controlling a hazard: Trip/Fall Risk

- Ensure office walkways are kept clear.
- Phone and computer cables and electrical wires should be properly secured and not stretched across walkways.

SAFETY IN THE WORKPLACE

- All liquid spills should be cleaned up immediately and the slip risk marked with signage.

Example of controlling a hazard: Ergonomic Hazard

Conduct an information session for employees on how to avoid ergonomic hazards in the office. This could include tips on optimal seating, desk and computer positions, correct posture, stretching exercises, and regular standing/walking breaks.

4. Review Control Measures (to ensure they are working as planned)

Risk management should not be a one-off process. Instead, risk management is a proactive and dynamic process that should be undertaken constantly to help you respond to change and facilitate continuous improvement in your business.

Risk management should be planned, systematic and cover all reasonably foreseeable hazards and associated risks. To review your controls, ask the following questions:

- Are the control measures working effectively in both their design and operation?
- Have the control measures introduced new problems?
- Have all hazards been identified?
- Have new work methods, new equipment or chemicals made the job safer?

- Are safety procedures being followed?
- Has the instruction and training provided to workers on how to work safely been successful?
- Are workers actively involved in identifying hazards and possible control measures?
- Are workers openly raising health and safety concerns and reporting problems promptly?
- Are the frequency and severity of health and safety incidents reducing over time?
- If new legislation or new information becomes available, does it indicate current controls may no longer be the most effective?

Example: Checking whether staff illness rates and sick days have decreased since implementing new office hygiene and cleaning measures to avoid contagious illnesses spreading.

5. Keep Records

Record keeping demonstrates what you have done to comply with the WHS Act and WHS Regulations. It also helps facilitate improvement when undertaking subsequent risk management activities, including reviewing your control measures.

A background image of a construction site with several tall cranes and partially completed skyscrapers under a clear blue sky.

SAFETY IN THE WORKPLACE

Example: Keep dated written records of safety meetings held with employees, including what was discussed and the next steps that must be taken.

Benefits of Risk Management for Employers

The effective systematic management of risks will not only help companies and individual officers avoid WHS prosecution, but it will also help to:

- Prevent and reduce the number and severity of workplace injuries and illnesses and their associated costs and reduction in productivity;
- Promote and improve employee safety, health, wellbeing and capacity to work; and
- Foster innovation and improve the quality and productivity of work.

We hope this “How To” segment has provided you with some insight into the steps can be taken to effectively reduce risk and help avoid a Work Health and Safety prosecution.

For further information, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.



NSW Rejects Industrial Manslaughter Laws

The NSW Liberal Government has recently rejected the introduction of new industrial manslaughter laws, with the NSW Minister for Better Regulation, Kevin Anderson claiming the new laws “sound tough but are little more than a catchy title”.

The rejection came as somewhat of a surprise given Queensland and the ACT have already adopted industrial manslaughter laws, while Victoria, Western Australia and the Northern Territory have also committed to their introduction.

There have been two reviews at a national level that have recommended the introduction of industrial manslaughter law across Australia. The Senate Inquiry into Industrial Deaths undertaken in 2018 and the Marie Boland review of the model WHS laws that concluded earlier this year.

SAFETY IN THE WORKPLACE

Mr Anderson said that the NSW Government had considered the approach taken in other states and alluded to the difficulty in bringing a successful prosecution under the new laws.

The NSW government will instead focus on introducing laws as soon as possible to improve “risky work practices”, with Mr Anderson stating, “we shouldn’t have to wait until someone dies before taking action”.

In response, National Construction Secretary, David Noonan said the industrial manslaughter model used by Queensland since 2017 was “pretty good” but agreed courts struggled to get “the level of proof necessary to get a conviction”.

Safe Work Australia reports that, as of 7 November, there have been 138 Australian workers killed at work in 2019.

The Work, Health and Safety sphere is constantly evolving. If you have any questions about whether your workplace is meeting its obligations and following best practice, please don’t hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.



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.