

Spring 2022
Edition

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LAWYERS

SAFETY IN THE WORKPLACE

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Safety in the Workplace - WHS Quarterly

Our Spring 2022 edition includes:

- Positive Duty to Celebrate Safely - Managing the Festive Season & Remembering Celebrations for all the Right Reasons; and
- Australia's First Industrial Manslaughter Conviction.



Positive Duty to Celebrate Safely - Managing the Festive Season

and Ensuring Celebrations are Remembered for all the Right Reasons

Introduction

As Christmas draws nearer, so to do Christmas parties and other functions. Whilst hosting a work party of similar festive celebration can be a great way to reward employees, it can also be a source of anxiety for employers who are unsure of their obligations. Therefore, now is a crucial time to ensure that all end of year events promote the safety and well-being of employees.

As work functions are deemed to be a work activity, all employees are expected to continue to abide by workplace policies, standards of behaviour and codes of conduct. This means that any unlawful behaviour which occurs at a work function, such as sexual harassment or unlawful discrimination, can be the subject of a workplace complaint or litigation. Likewise, employees can be subject to disciplinary action, including but not limited to termination, if they engage in unlawful or unacceptable behaviour at a work function.

Positive Duty to Prevent Sexual Harassment in the Workplace

The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* implements recommendations from Sex Discrimination Commissioner Kate Jenkins' *Respect@Work* report. This includes amending the *Sex Discrimination Act 1984* (Cth) to introduce a positive duty on employers to take reasonable and proportionate measures to eliminate unlawful sex discrimination as far as reasonably practicable.

Now, more than ever, the prevention of unlawful discrimination and sexual harassment in the workplace, including at work functions, is not only the right thing to do, by also a commercial necessity due to the hefty fines that could be imposed upon employers for not implementing such positive duties. The *Respect@Work* report found that workplace sexual harassment cost the Australian economy approximately \$3.8 billion in 2018.

It is recommended that the following steps be considered to ensure a balance between reduced risks and an enjoyable time for both employers and employees:

Prior to the Event

- Clearly outline the Christmas party plans, including the venue details, specific start and finish times, as well as any transportation arrangements.
- Ensure that the relevant policies are up to date and employees are educated on these.

- Conduct training for employees about appropriate workplace conduct – for example, providing examples of what constitutes unlawful, discriminatory or inappropriate behaviour.
- Remind staff of the standards of behaviour expected and the consequences of failing to meet those standards.

During the Event

- Ensure responsible service of alcohol.
- The provision of food and non-alcoholic beverages.
- Appoint someone, for example a senior manager to monitor hazards and deal with any problems or issues during the event. The designated person should be sober.

After the Event

- Exercise a duty of care to ensure that employees can get home safely.
- Communicate to employees that any activities or contributed celebrations after the finish time, are not endorsed or the responsibility of the employer.
- Having a clear finish time will ensure that responsibility ends at a certain time.

Takeaway

Although undertaking extra steps when planning a Christmas celebration may seem tedious, taking the time to ensure that employees are aware and understand their responsibilities and expectations will minimise potential risks while still ensuring that everyone remembers the night for all the right reasons.

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



Australia's first industrial manslaughter conviction has been handed down since the new charge was legislated into the *Work Health and Safety Act 2011* (QLD) ('WHS Act').

Background

In May 2019, Barry Willis ('Mr Willis') was struck by a forklift ('the Incident') while working at Brisbane Auto Recycling Pty Limited ('the Company') as an independent contractor.

The incident occurred while Mr Willis was strapping tyres onto a tray while two forklifts were operating nearby. One of the forklifts, being operated by an unlicensed worker, reversed into Mr. Willis and crushed him against the tilt tray. Mr Willis was taken to hospital by ambulance and died from his injuries 8 days later.

Mr Willis' daughter was able to obtain the CCTV footage of the Incident and after seeing the Incident, she pressed charges against the Company and its two owners.

The two directors of the Company, 25-year-old Asadullah Hussaini ('Mr Hussaini') and 23-year-old Mohammad Ali Jan Karimi ('Mr Karimi') pled guilty to causing the death of Mr Willis and being "*negligent about causing the death,*" hence contravening section 34C of the WHS Act.

Judgement

Both Mr Hussaini and Mr Karimi were found to be uncooperative and deliberately deceptive in the aftermath of the incident. Mr Karimi misled Mr Willis' daughter, telling her that the Incident occurred because Mr Willis failed to properly secure a car to the tray, causing the car to roll and hit him.

Mr Hussaini was found to have deliberately withheld important information about the Incident that may have aided Mr Willis' treatment. District Court Judge Anthony Rafter heard Mr Hussaini told paramedics that the Incident involved a one metre fall, however, when Mr Hussaini became aware of the actual circumstances of the Incident, he did not reinform the paramedics or treating doctors. Furthermore, Mr Hussaini was found to have misled investigators about the identity of the forklift operator in an attempt to conceal the fact that the forklift operator in question was not licensed.

Judge Rafter found that the Company did not have any safety procedures in place despite the high-risk environment their workers were in, often working in close proximity to forklifts. Furthermore, the directors did not take appropriate steps to verify the qualifications of their employees. This is despite the fact that Mr Hussaini and Mr Karimi started their business in 2016, and therefore should have understood the risks and taken appropriate steps to ensure the safety of their staff. For these reasons, Mr

Hussaini and Mr Karimi's conduct was found to be reckless.

Sentencing

The maximum penalty for an offence of industrial manslaughter under the Act is \$10 million for a PCBU and a maximum jail term of 20 years imprisonment.

The court took into account factors including that the company was behind in superannuation contributions and did not have a WorkCover policy, however it had no prior convictions. Ultimately the company was fined \$3 million, and Mr Hussaini and Mr Karimi were sentenced to 10 months imprisonment for reckless conduct.

Judge Rafter SC said that the sentence imposed should make it clear to PCBUs that *“a failure to comply with obligations under the WHS Act leading to workplace fatalities will result in severe penalties”*.

Takeaway

The tragedy involving Mr Willis was likely entirely avoidable and is a lesson in what not to do when managing high risk workplaces.

This case constitutes the first conviction in Australia of its kind and paves the way for future convictions under the offence of industrial manslaughter. Currently, offences for industrial manslaughter exist 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 case is an example of how an industrial manslaughter offence may be treated by the courts.

The directors, as officers of the company, recklessly failed to exercise their duty of due diligence to ensure that the company met its work health and safety obligations and in doing so exposed workers (including Mr Willis) to a risk of death.

As part of the management of work health and safety, it is important that companies establish both safe systems of work and an incident response plan. In this case, neither was present.

Hence, it is critical for employers to implement adequate safety procedures and to properly verify the qualifications of all their workers in order to avoid serious injury or death to workers, as well as heavy fines or potential jail sentences. For any employer seeking advice or clarification on their workplace safety procedures, please do not hesitate to contact [Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett](#).

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

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