NORTON ROSE FULBRIGHT

# WHS Law Briefing

August 2024

# Contents

**Welcome to our WHS Law Briefing. This Briefing identifies key issues and emerging trends in WHS Law, and details significant legislative and case law developments to date in August 2024. Please contact our national WHS team if you would like to discuss any of the matters in this briefing or would like any source materials which have not been included. We welcome your feedback.**

# Key issues and trends

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|---|---|
| **Industrial manslaughter** | There have been a number of developments in relation to industrial manslaughter offences across Australia. Most notably, New South Wales has now passed legislation to introduce the offence to its WHS Act. The industrial manslaughter offence that has been adopted in New South Wales includes specific provisions concerning communication systems for conveying information about fatal risks. These provisions require careful consideration of how any potentially fatal risks are identified, communicated and mitigated through an organisation's processes. In particular, we recommend that the WHS sections of board reports specifically address fatal risks and controls, in particular in the sections of the report dealing with understanding risks and resourcing matters. |
| **Psychosocial risks** | Psychosocial risks continue to be an area of focus. Regulators have released a range of guidance material regarding psychosocial hazards and risks, and in particular, the role of work re-design. There continue to be prosecutions involving alleged psychosocial hazards and risks.<br><br>Following the release of the national model WHS Code of Practice, Sexual and gender-based harassment by Safe Work Australia in December 2023, the Code has now been adopted in four jurisdictions: New South Wales, Tasmania, the Australian Capital Territory and the Northern Territory. |
| **Ban of engineered stone products** | On 1 July 2024, Australia became the first jurisdiction in the world to implement a ban on the use, manufacture and supply of engineered stone benchtops, panels and slabs. There are limited exceptions, including to permit certain processing of legacy items, however the work must be controlled, and the regulator must be notified before the work is carried out. Since the commencement of the ban, a number of safety regulators around Australia have warned that inspectors will be proactively ensuring that duty holders are adhering to the new regulations and taking enforcement action where non-compliance is identified. The Ministers responsible for WHS around Australia have also agreed to implement tougher regulations for crystalline silica processes more generally in September 2024. |

# Legislative updates

## Commonwealth / National

### Changes to Commonwealth WHS Act

The provisions for the offence of industrial manslaughter, which were inserted into the *Work Health and Safety Act 2011* (Cth) by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), took effect on 1 July 2024. The Commonwealth offence carries a maximum penalty of $18 million for bodies corporate or the Commonwealth[1], and 25 years' jail for individuals, reflecting the manslaughter penalties in the Commonwealth Criminal Code.

The maximum monetary penalties for other offences under the Commonwealth WHS Act have also been increased for the 2024-2025 financial year as a result of the *Work Health and Safety (Public Notification of Indexed Penalty Amounts) Notifiable Instrument 2024*. For example, the maximum monetary penalty for a category 1 offence is now $16.6 million for a body corporate and $3.3 million for an officer.

Across Australia, there have been a range of other developments in relation to industrial manslaughter offences, which are summarised in the table below.

| Jurisdiction | Status update |
|---|---|
| Commonwealth | The industrial manslaughter offence provisions previously inserted in the Commonwealth WHS Act took effect on 1 July 2024. |
| New South Wales | New South Wales has now passed legislation to introduce the industrial manslaughter offence into the New South Wales WHS Act – see our update below regarding this. |
| Queensland | Queensland has passed legislation to enhance its existing industrial manslaughter offence – see our update below regarding this. |
| South Australia | The industrial manslaughter offence provisions previously inserted in the South Australia WHS Act took effect on 1 July 2024. |
| Australian Capital Territory | The Australian Capital Territory has passed legislation to enhance its existing industrial manslaughter offence – see our update below regarding this. |
| Tasmania | Tasmania has introduced a bill to insert an industrial manslaughter offence to its WHS Act – see our update below regarding this. |

### Changes to incident notification obligations confirmed by Safe Work Australia

Safe Work Australia has confirmed that the Ministers responsible for work health and safety around Australia have agreed to adopt changes that it has recommended be made to the model WHS Act in relation to incident reporting.

The changes include requiring PCBUs to notify the regulator of the following:

- A work-related (or suspected work-related) suicide or attempted suicide of a worker, as well as the suicide or attempted suicide of other persons in specific settings.
- Violent incidents arising out of the conduct of the business or undertaking that may not result in a serious physical injury or illness but expose a worker or other person to a serious risk to their psychological health and safety.
- Dangerous incidents involving the fall of a person, electrical hazards and mobile plant.
- Serious head injuries, serious crush injuries and serious bone fractures.

1 The Commonwealth WHS Act applies to the Commonwealth, public authorities (such as Commonwealth companies) and their officers and contractors. It also applies to national self-insured licensees under Commonwealth workers' compensation legislation.

- Serious work-related injuries and illnesses that are not already notifiable but result in a worker being absent (or likely absent) for 15 or more consecutive calendar days due to psychological or physical injury, illness or harm arising out of the conduct of the business or undertaking.

Safe Work Australia has confirmed that it is planning to finalise the amendments to the model WHS Act by early 2025. It will then be up to each jurisdiction to implement the changes in their WHS Act to give the changes legal effect.

## Commencement of nation-wide ban on engineered stone

On 1 July 2024, Australia became the first jurisdiction in the world to implement a ban on the use, manufacture and supply of certain engineered stone products.

The Commonwealth, State and Territory Ministers responsible for work health and safety (WHS) first agreed to the ban in December 2023. Provisions to insert the ban into the model WHS regulations were then agreed to in May 2024.

Each jurisdiction has now adopted the provisions (with minor variations between jurisdictions) into their work health and safety regulations, and the provisions commenced on 1 July 2024.

Key aspects of the ban include the following:

- A PCBU must not carry out, or direct or allow a worker to carry out, work that involves the manufacture, supply, processing or installation of engineered stone benchtops, panels and slabs.
- There are limited exceptions, including to permit certain processing of legacy engineered stone benchtops, panels and slabs, however the work must be controlled, and the regulator must be notified before the work is carried out. "Controlled" means that certain control measures must be used, including either an effective water delivery system, on-tool dust extraction system or local exhaust ventilation system, as well as the provision of certain respiratory protection equipment.
- Processing work carried out in relation to other types of engineered stone products that are not benchtops, panels or slabs, as well as sintered stone and porcelain products, is permitted, but must be controlled.
- In all jurisdictions except Victoria, Queensland and the Australian Capital Territory, a transitional period applies whereby prohibited work can be carried out if it relates to a contract entered into on or before 31 December 2023 and the work is controlled.
- The safety regulators are able to exempt a type of engineered stone product from the application of the ban. An exemption granted in one jurisdiction will have application in all other jurisdictions except Victoria.

See the Engineered stone prohibition: Guidance for PCBUs and Safe Work Australia's engineered stone webpage for further information on the ban.

Since the commencement of the ban, a number of safety regulators around Australia have warned that inspectors will be proactively ensuring that duty holders are adhering to the new regulations and taking enforcement action where non-compliance is identified.

The federal government has also committed $32.1 million over two years in its 2024-25 budget to enforcing a planned prohibition against importing the banned engineered stone products.

The Ministers responsible for WHS around Australia have also agreed to implement tougher regulations by 1 September 2024 for crystalline silica processes more generally (including requirements in relation to a silica risk control plan, training, air and health monitoring and reporting requirements), similar to those already in force in Victoria. Western Australia has already adopted these provisions, which will come into force on 1 September 2024.

## Amendments to offshore safety legislation

The Commonwealth Government has amended the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGSA). The Amendment Act aims to:

- Impose training requirements on HSRs (including a requirement to complete a 12-month refresher course).
- Empower HSRs by enabling them to request the operator of the facility to review (and if necessary, revise) safety management documents for the facility, and enabling them to be a member of the facility's health and safety committee.

- Protect workers from safety-based discrimination by banning discriminatory conduct (such as termination of an employee) for a prohibited reason (such as a worker raising complaints about WHS matters or assisting a safety inspection).

The main amendments will commence in June 2025 (unless proclaimed earlier).

### Review of SRC Act

The Federal Government has commissioned an independent review of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The Terms of Reference for the review include whether national self-insured licensees (known as "non-Commonwealth licensees") should continue to have coverage under the Commonwealth WHS Act in light of the substantive national harmonisation of work health and safety law. The then Workplace Relations Minister Tony Burke announced that while the review is underway, applications to join the scheme will only be considered from companies that are members of a corporate group in which most employees are already covered by the scheme.

### Changes to Heavy Vehicle National Law

As the host state of the Heavy Vehicle National Law (HVNL), Queensland has made the *Heavy Vehicle National Legislation Amendment Regulation 2024* to amend the HVNL regulations to align with changes to dimension requirements for heavy vehicles in the Australian Design Rules. The regulations commenced in April 2024. The explanatory notes for the amended regulations state that Northern Territory and Western Australia will need to undertake their own concurrent amendment processes, as they have not yet adopted the HVNL.

## New South Wales

### New South Wales introduces industrial manslaughter offence and increases penalties for on-the-spot fines

The *Work Health and Safety Amendment (Industrial Manslaughter) Act 2024* (NSW) has passed the NSW Parliament, and inserts the offence of industrial manslaughter into the Work Health and Safety Act 2011 (NSW). The offence applies where a PCBU or officer engages in conduct with gross negligence that results in the death of a worker or another individual to whom a duty is owed. There is no limitation period for the offence. The Act also establishes significant maximum penalties for breach – 25 years' imprisonment for an individual or a $20 million penalty for a corporation.

Some of the significant features of the offence in New South Wales include that:

- Gross negligence may be established on the part of a body corporate, despite no individual person within the body corporate having engaged in conduct with gross negligence, if the body corporate has engaged in conduct with gross negligence **when viewed as a whole**, determined by aggregating the conduct of multiple individuals.
- Engaging in gross negligence by a body corporate may be evidenced by the fact that the conduct was substantially attributed to:
  - Inadequate corporate management, control or supervision.
  - Failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

The above provisions require careful consideration of how any potentially fatal risks are identified, communicated and mitigated through an organisation's processes. In particular, we recommend that the WHS sections of board reports which address risk understanding and resourcing, specifically address fatal risks.

The offence will commence on a day to be appointed by proclamation.

New South Wales also made the *Work Health and Safety Amendment (Penalty Notices) Regulation 2024* (NSW) to increase the amounts payable for on the spot WHS fines by 25%, and to increase the number of WHS offences that can attract penalty notices from nearly to 200 to nearly 300. The added offences include offences related to the work environment and workplace facilities, first aid, plant and structures and hazardous chemicals.

## SafeWork NSW approves Code of Practice on Sexual Harassment

SafeWork NSW has approved the Sexual and gender-based harassment Code of Practice. This follows the release of the national model WHS Code of Practice, Sexual and gender-based harassment by Safe Work Australia in December 2023. The Code is intended to be read and applied in conjunction with the SafeWork NSW Managing psychosocial hazards at work Code of Practice.

Some of the key points addressed in the Code include the following:

- The Code addresses a range of harassment behaviours based on gender and sex that create a risk of harm at work. Appendix A provides definitions and descriptions of certain behaviours to help duty holders recognise and understand them, e.g. sexual harassment, gendered violence. However, the Code makes it clear that the WHS laws require PCBUs to manage **all** WHS risks, even where the behaviour is not specifically described in the Code or may not meet definitions and thresholds set by other legal frameworks. In addition, even where a matter is being investigated by police, the WHS risks must still be addressed by the PCBU.
- The Code states that PCBUs must consider how sexual and gender-based harassment will interact with other psychosocial hazards, and that intersectional harassment can increase both the likelihood of sexual and gender-based harassment occurring and the potential severity of harm.
- The Code refers to the positive duty imposed on organisations to prevent sexual harassment (and other related unlawful conduct) under the *Sex Discrimination Act 1984* (Cth) (SDA), and states that these duties operate concurrently with (and in addition to) the WHS duties in relation to sexual harassment. The Code emphasizes that complying with the SDA requirements alone will not necessarily ensure compliance with the WHS duties.
- The Code provides guidance on risk identification processes for sexual harassment, such as worker consultation, collecting and reviewing data (e.g. previous incidents), considering workforce structure, demographics and culture, considering and observing work tasks, the design of work, the work environment etc.
- The Code provides guidance on consulting with workers in relation to sexual harassment risks, including ensuring the accessibility of consultation mechanisms (such as through focus group discussions, culturally safe consultation mechanisms, private and confidential individual discussions, anonymous surveys etc.).
- The Code provides detailed guidance on various ways of controlling risks, including work design, systems of work, trauma-informed training etc.
- The Code also provides guidance on investigating and reporting reports of sexual harassment (and related behaviours) including that:
  - There should be a range of accessible ways to report harassment, and multiple points of contact for reporting. Reporting mechanisms should protect the privacy of workers and allow for anonymous reporting where possible.
  - A WHS investigation should focus on protecting workers and others from harm by identifying whether there is a risk of sexual or gender-based harassment that has not been controlled so far as is reasonably practicable, and whether there are more effective control measures available. A WHS investigation may occur in parallel with other investigations such as a disciplinary investigation. A WHS investigation may itself introduce WHS risks which must be eliminated or controlled (e.g. ensuring the investigation is fair, transparent and timely).
  - A trauma informed approach to the investigation will support worker trust and participation. A trauma-informed approach involves recognising and acknowledging that a worker's experience of trauma may impact how the worker interacts with investigation systems and processes – for example, trauma may impact how a worker responds or recalls events and can describe them to an investigator.
  - The investigator should be impartial, have skills and knowledge to identify sexual and gender-based harassment, assess the risk and recommend appropriate controls, have expertise and knowledge to conduct investigations in a trauma informed way, and be likely to have the confidence of the parties involved.

— Confidentiality clauses in settlement agreements should be avoided, except where required to protect the harassed person. Where used, they should be as limited as possible in scope and duration.

## SafeWork NSW releases guidance on work design

SafeWork NSW has published a new Guide on Designing Work to Manage Psychosocial Risks which provides detailed and practical guidance for duty holders about using work design to manage psychosocial hazards and risks. The Guide notes that many psychosocial hazards and risks arise from the same underlying causes or work systems issues, and that work design can address the underlying root causes contributing to psychosocial hazards (as opposed to other control measures, which often rely on human behaviours). As a result, the Guide states that duty holders can most effectively and efficiently eliminate or minimise psychosocial hazards and risks by improving the design of the work, workplace, and systems of work.

The Guide advocates using a 'system thinking' approach to work design. This approach involves identifying and understanding the dynamic relationship between key parts of the work system, and how these parts and relationships may create psychosocial hazards and risks, and support or erode the effectiveness of workplace controls. These insights can then be used to "design out" the underlying causes and to "design in" solutions. There are different techniques for doing this which are set out in the Guide (for example, the 'Five Whys' root cause analysis discovery technique). The Guide also provides examples of different types of work design solutions, such as improving job to person fit, task rotation, and workload planning and review systems.

The Guide also refers to the Psychosocial Hazard Work Re-Design Tool developed by the Centre for Work Health and Safety as a practical tool to assist with applying the information in the guide. The Tool is accompanied by a range of supporting materials including audit case studies, activities to complete, worked examples and reading materials.

## Launch of SafeWork NSW Psychosocial Health and Safety Strategy 2024-2026

In May 2024, SafeWork NSW launched its Psychological Health and Safety Strategy 2024-2026 (Strategy) which outlines the steps SafeWork NSW will take to build capability and enforce compliance with WHS obligations to provide psychologically healthy and safe workplaces.

The Strategy highlights that psychological injuries are continuing to rise in number and severity, and that the average cost and time off work for psychological injuries is more than triple the cost and time associated with physical injuries. The cost to NSW of unsafe psychological workplaces is conservatively estimated to be $2.8 billion.

A key focus area of the Strategy is compliance monitoring and enforcement. The Strategy provides that workplaces have had access to the information and tools they need to provide a psychologically healthy and safe workplace for some time, and that SafeWork NSW will now be increasing its focus on compliance. In particular, there will be increased regulatory action against high-risk and large businesses and government agencies (with high-risk industries including public administration and safety; education and training and health care and social assistance). Specifically, SafeWork NSW has set targets of:

- Increasing planned inspector compliance visits by 25% per year between 2023 to 2026.
- Inspectors completing a Psychosocial WHS Check for every visit to an organisation with 200 or more workers.

The Strategy further provides that where organisations have not taken appropriate action in consultation with workers to comply with WHS legislation, SafeWork NSW will take regulatory action (eg improvement notices, prohibition notices or formal regulator warnings) and may prosecute workplaces that repeatedly do not comply or who have seriously breached WHS laws.

Other key aspects of the Strategy include the following:

- The Strategy emphasizes that work design is a key way for workplaces to manage psychosocial hazards and risks. The Strategy also indicates that businesses are expected to have moved beyond a reactive approach (responding to incidents after they have occurred) and

should now be taking proactive, effective action that is focussed on harm prevention and early intervention.

- SafeWork NSW has indicated that it will explore how to best assist at risk workers, including young workers, culturally and linguistically diverse workers, Aboriginal and Torres Strait Islander peoples and workers with lived experience of mental ill health.
- There is a continuing focus on education and resources – the Strategy outlines that SafeWork NSW will continue to add to its hub of practical tools and resources to help businesses to comply with their WHS obligations, including on the topic of good work design, and will also provide new tools for inspectors to further build capability across the inspectorate.

## Additional funding to implement engineered stone ban

The New South Wales Government has committed $2.5 million in its 2024-25 budget to bolster regulatory enforcement of the ban on the use, supply and manufacture of engineered stone, which took effect on 1 July 2024 (see above). The funding will be used for more SafeWork NSW inspectors, additional program staff to provide education tools and support, and development of new notification systems for businesses. The increased funding will mean more inspectors carrying out site visits and issuing penalties to any non-compliant operators.

## Maximum penalties for asbestos contraventions increased

The New South Wales Parliament has passed the *Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Act 2024* (NSW) which substantially increases the maximum monetary penalties available under the *Protection of the Environment Operations Act 1997* (NSW) for serious asbestos-related contraventions. The amendments will double the maximum penalties for wilful contraventions to $10 million for corporations and $2 million for individuals. The maximum penalty for other offences will also increase significantly, with various offences involving asbestos waste now carrying a maximum penalty of $4 million for corporations. In the Second Reading Speeches in both houses of parliament, the need for increased penalties was attributed to addressing gaps in the legislation (ie that penalties reflect the potential for serious harm), as well as the "alarming" recent discovery of asbestos-contaminated mulch in New South Wales.

## Reforms ahead for SafeWork NSW

In February 2024, former Supreme Court Justice Robert McDougall KC released his final report following his independent review of SafeWork NSW which was completed in December 2023. The report includes a list of 46 recommendations aimed at improving SafeWork NSW's performance and functions. The New South Wales Work Health and Safety Minister Sophie Cotsis has endorsed the recommendations, in particular the recommendations to:

- transform SafeWork NSW into a standalone regulator;
- require SafeWork NSW to keep people affected by workplace incidents, like seriously injured workers and the families of deceased employees, informed of the progress of investigations and prosecutions;
- formalise data collection to better inform compliance and enforcement decisions; and
- train more inspectors specifically in relation to psychosocial hazards (or employ more trained inspectors).

In February 2024, the New South Wales Auditor General also released the results of a Performance Audit regarding the effectiveness of SafeWork NSW in exercising its compliance functions. The report identifies a range of deficiencies in relation to SafeWork NSW's performance of its functions, which carry similar themes to those identified in Mr McDougall's independent review. The audit also revealed that the Auditor General has referred the regulator to the New South Wales Independent Commission Against Corruption for potential maladministration regarding the regulator's decision to develop and promote a silica monitoring system despite "known concerns" about its efficacy. The audit makes 10 recommendations to improve SafeWork NSW's performance of its functions, including improvements to its strategic planning and data collection processes.

## Industrial Court commences, with jurisdiction to hear WHS matters

On 1 July 2024, the New South Wales Industrial Court commenced its operations, with jurisdiction to hear work health and safety matters in New South Wales, including

proceedings in relation to summary offences under the WHS Act. The Industrial Court was abolished in 2016, and previously had jurisdiction in relation to work health and safety offences (until around 2011). The Industrial Court was then restored by amendment legislation in December 2023, with the aim of improving safety by providing for specialised work health and safety judges. As indictable offences, proceedings for Category 1 work health and safety offences and industrial manslaughter offences will be outside the jurisdiction of the Court and will continue to be heard in the District Court of New South Wales.

# Queensland

## Changes to the *Work Health and Safety Act 2011* (Qld)

Queensland Parliament has passed the *Work Health and Safety and Other Legislation Amendment Act 2024* (Qld) which brings about several substantial changes to the State's WHS Act. The changes include prohibiting insurance and indemnities for WHS penalties (as has now been adopted by many other jurisdictions around Australia), bolstering the framework for health and safety representatives (HSRs), increasing the powers and obligations of Workplace Health and Safety Queensland (WHSQ) (including allowing WHSQ to give copies of notices to HSRs and requiring WHSQ to provide written updates to persons who have requested a prosecution be brought), enhancing the prohibition of discriminatory conduct for a safety reason, and clarifying the powers of WHS entry permit holders.

There is a phased commencement for the changes. Further information on the changes (including commencement dates) can be found on WHSQ's webpage.

## Queensland mandating written sexual harassment prevention plans

The Queensland government has announced that from September 2024, employers will be required to proactively manage risks of sexual harassment, including by implementing a written sexual harassment prevention plan to protect workers from early 2025. The plans will be required to state identified risks, their associated control measures, consultation undertaken to develop the plan, how complaints can be made and the process for investigating complaints, including how relevant parties will be informed of results. The announcement confirms that the Office of Industrial Relations is developing extensive guidance materials to support employers to meet these new obligations.

## Modernisation of electrical safety regime and expansion of industrial manslaughter offence

The *Electrical Safety and Other Legislation Amendment Bill 2024* (Qld) has been introduced in Queensland Parliament which makes substantial changes to the State's electrical safety and WHS legislation. The purpose of the Bill is to give effect to recommendations arising from various recent reviews carried out in Queensland.

The key changes proposed by the Bill include the following changes to Queensland's Electrical Safety Act (ES Act):

- Amending the definition of 'electrical equipment' to include 'prescribed electrical equipment', being extra low voltage electrical equipment that is prescribed by regulations and that may place a person or property at electrical risk. Prescribed electrical equipment will therefore be subject to the electrical safety duties under ES Act. The purpose of this amendment is to allow the government to be more responsive to electrical risks presented by new and emerging technology. The Bill also introduces new exclusions to ensure that certain tasks relating to prescribed electrical equipment do not require an electrical licence.
- Amending the definition of 'electrical installations' to include a group of permanently connected electrical equipment that generates electricity (such as smaller solar farms which do not meet current power generation requirements to fall within the definition), as well as group of permanently connected electrical equipment that is powered by a battery or other storage technology.
- Amending the definition of in-scope electrical equipment (i.e. household electrical equipment subject to the Electrical Equipment Safety System (EESS) framework) so that it is more flexible (rather than prescribing a voltage range), to allow the government to respond to technological changes.

- Aligning the powers of electrical inspectors in relation to the production of documents and answering questions to those under Queensland's WHS Act
- More accurately reflecting the standing of the Work Health and Safety Prosecutor to bring prosecutions under the ES Act.
- Clarifying the disciplinary powers of the Electrical Licensing Committee.

The Bill also proposes the following changes to Queensland's WHS Act:

- Expanding the scope of the industrial manslaughter offence so that it applies where a person negligently causes the death of another individual (such as bystanders), i.e. it is not limited to the death of a worker.
- Introducing alternative verdicts to industrial manslaughter and category 1 offences (as there is no provision for this currently in the WHS Act).
- Clarifying that multiple parties in a contractual chain can be charged with industrial manslaughter.
- Including negligence (in addition to recklessness) as a fault element of the Category 1 offence.
- Allowing HSRs and entry permit holders to take photos, videos, measurements and conduct tests in fulfilling their roles under the WHS Act.

The Bill has been referred to the Clean Economy Jobs, Resources and Transport Committee for further detailed consideration. The Committee's report is due in August 2024.

## Changes passed to Queensland resources legislation

Queensland has passed the *Resources Safety and Health Legislation Amendment Act 2024* (Qld) which makes changes to Queensland's resources, coal mine, explosives, mining and quarrying and petroleum and gas safety legislation. The changes have been informed by recent inquiries and reviews. The amendments include a requirement for certain organisations to address "critical controls" in their safety management systems and when managing safety risks, aimed at facilitating growth in "high reliability organisation behaviour" in the resources sector.

Other changes include increased competency requirements for critical roles, increased training requirements, mandated continual professional development requirements, and enhanced rules around information sharing, incident notification and reporting. The changes will commence over the next five years. Further information on the changes can be found at Resources Safety and Health Queensland's website here.

## Queensland regulator targets construction sites and asbestos

WHSQ has announced that a compliance blitz of construction sites by WHSQ inspectors will occur between July and September 2024, with a focus on scaffolding and working near overhead powerlines.

The regulator has also announced that inspectors will be conducting asbestos management compliance audits, auditing businesses operating from buildings constructed before 1990 and those likely containing asbestos to ensure compliance with asbestos regulations. The audit will run until 31 October, focusing on the requirement for asbestos registers and management plans.

## Queensland budget provides additional funding for safety compliance and enforcement

Queensland has allocated around $97 million across five years in its 2024-25 budget to fund a range of new positions, including 40 new WHSQ inspectors, nine new electrical safety inspectors, specialist advisors to provide support in relation to psychosocial hazards and two new prosecutors for the Office of the Work Health and Safety Prosecutor.

## Solar Code remade

Queensland's 2024 Code of Practice, Construction and operation of solar farms, has commenced, replacing the 2019 Code of the same name without any new requirements.

# South Australia

## Commencement of South Australia's industrial manslaughter laws

South Australia's industrial manslaughter laws, introduced by the *Work Health and Safety (Industrial Manslaughter) Amendment Act 2023* (SA) which passed through Parliament in July 2023 have come into force, following a Proclamation by the Governor of South Australia. The laws took effect on 1 July 2024.

## Implementation of SafeWork SA review

The *Work Health and Safety (Review Recommendations) Amendment Act 2024* (SA) has passed in South Australian Parliament. This legislation implements a number of recommendations of the review of SafeWork SA in 2022-2023. The key changes introduced by the Act include:

- Prohibiting the insurance and indemnification of penalties under the WHS Act.
- Expanding the jurisdiction of the South Australian Employment Tribunal (SAET) to deal with disputes about WHS matters between a PCBU / worker / HSR / union, including by ordering conciliation, mediation or arbitration.
- Formalising the establishment and functions of the SafeWork SA Advisory Committee, which was created shortly after the release of the 2022-2023 review to assist SafeWork SA in performing its functions.
- Allowing WHS entry permit holders to take measurements, tests, photos and videos directly related to suspected WHS contraventions at workplaces (with a number of safeguards in place).
- Removing the requirement for WHS entry permit holders to provide a written report to SafeWork after exercising their entry rights (however, entry permit holders are still required to notify SafeWork SA in advance of their entry, a provision which is unique to South Australia).
- Amending limitation period provisions to allow time for a person to request the Director of Public Prosecutions to review a decision by SafeWork SA not to bring a prosecution. This is in response to a recent example where a family member was only informed of SafeWork SA's decision not to prosecute shortly before the limitation period expired, which meant that there was no time for the review to be requested or undertaken.

## SafeWork SA introduces cautionary expiations

SafeWork SA announced that it has introduced the use of cautionary expiations as an additional compliance and monitoring tool. A cautionary expiation does not involve a monetary penalty but can be used as a formal reminder to businesses and individuals to improve safety and support more severe penalties if breaches continue to occur.

# Victoria

## New class of high-risk work license for telehandlers

The *Occupational Health and Safety Amendment (Telehandlers) Regulations 2024* (Vic) has introduced a new class of high-risk work license for certain non-slewing telehandlers. The regulations took effect on 1 July 2024. The changes aim to improve safety by giving the operators of non-slewing telehandlers with a rated capacity of more than three tonnes the choice of completing tailored training to obtain the new telehandler licence, or completing a non-slewing mobile crane course and applying for the existing non-slewing crane licence. Further information on the new licence category is available at WorkSafe Victoria's website.

## Review of sentencing practices

In February 2024, Victoria's Sentencing Advisory Council (SAC) released a consultation paper as part of its review of the sentencing practices of OHS offences, which were last independently reviewed in 2004. The paper poses 19 questions in relation to sentencing that will be considered by the SAC as part of its review, including whether a company's size should affect the fine, and whether there is a need for penalties to be increased. The SAC notes that in order to achieve the purposes of sentencing, a fine needs to have a 'real sting' and arguably the only way to achieve that sting is for larger companies to receive larger fines. Submissions on the paper closed on 31 May 2024, and the SAC is due to provide its final report and recommendations to the Victorian Government by 31 December 2024.

### COVID prosecutions withdrawn

A number of prosecutions of alleged COVID-related breaches arising from Victoria's hotel quarantine program have been discontinued after witness evidence was ruled inadmissible by the County Court of Victoria because it had been provided to the COVID-19 Hotel Quarantine Inquiry. This is due to a provision in the *Inquiries Act 2014* (Vic) that evidence provided to a Board of Inquiry by a person is inadmissible against the person in any other proceedings. This development has prompted WorkSafe Victoria to consider whether to make recommendations to the Victorian Government that the *Occupational Health and Safety Act 2004* (Vic) and the *Inquiries Act 2014* (Vic) be amended.

### Changes to incident notification obligations commence

Changes to the *Occupational Health and Safety Regulations 2017 and Equipment (Public Safety) Regulations 2017* have come into effect, meaning that Victorian employers are now required to notify the regulator of incidents involving the collapse, overturning, failure or malfunction of, or damage to, prescribed plant, including pressure equipment, equipment that lifts or moves persons or equipment, earth moving equipment, scaffolds, temporary access equipment, explosive powered tools and turbines, among others. Further detail on the changes can be found on WorkSafe Victoria's website here.

### Guidance on forklifts released

WorkSafe Victoria has released a Forklift safety guidebook. The guidance highlights the need to separate forklifts from people on the ground, and outlines ways to reduce collision risks such as traffic management systems, physical barriers, exclusion zones and signage. The guide also recommends retrofitting various safety enhancing features where not already fitted, such as sequential interlocking seatbelts, perimeter zone warning lights, visibility assistance such as cameras and proximity devices that detect pedestrians and automatically power mobile plant down to low speed. When releasing the guide in May 2024, WorkSafe Victoria indicated that inspectors will be targeting forklift safety in a state-wide inspection program, with a particular focus on the manufacturing, postal and warehousing sectors, where the majority of forklift-related deaths and injuries occur.

## Western Australia

### Western Australia enhances its adoption of the Rail Safety National Law

Western Australia has passed the *Rail Safety National Law Application Act 2024* (WA) to enhance its adoption of the Rail Safety National Law (RSNL) by moving from a "mirror legislation" to "applied law" approach.

As set out in the explanatory notes to the Bill, the RSNL was initially adopted in Western Australia by mirror legislation, meaning that any amendments made to the RSNL in its home legislation (South Australia) needed to be "mirrored" by amending the WA legislation. By comparison, other jurisdictions in Australia adopted an applied law approach, to automatically apply the RSNL (and RSNL regulations) to their jurisdiction when any amendments come into operation in South Australia. The explanatory note provides that the mirror legislation approach has resulted in Western Australia "falling out of step" with the RSNL, with eight legislative amendment packages passed by South Australia yet to be adopted in WA.

The relevant provisions are to commence on a day fixed by proclamation. ONRSR has noted in an update on the passage of the legislation that it will come into effect in the second half of 2024.

# Australian Capital Territory

## Amendments made to the WHS Act

The Australian Capital Territory passed the *Workplace Legislation Amendment Act 2024* (ACT) on 20 April 2024. The Act amends the *Work Health and Safety Act 2011* (ACT) and its Regulations by increasing the maximum monetary penalties applicable to various offences, including industrial manslaughter and category 1, 2 and 3 offences. The maximum penalty for an industrial manslaughter offence is now $18 million for a body corporate. The maximum penalty for a category 1 offence (involving negligence or recklessness) has been raised significantly to over $10 million for a body corporate and over $2 million (and/or 10 years jail) for officers.

Other changes made by the Amendment Act include:

- Clarifying that officers can commit a category 1 offence.
- Providing that negligence (which is an element of industrial manslaughter and category 1 offences) of a body corporate may be evidenced by inadequate corporate management or supervision, or failure to provide adequate systems for conveying relevant information to relevant people.
- Setting out how offences involving a body corporate's state of mind other than negligence can be proven (e.g. recklessness, which is an of industrial manslaughter and category 1 offences). One way that this can be proven is by showing the existence of a corporate culture that directed, encouraged, tolerated or led to the conduct constituting the offence.
- Providing that negligence of a body corporate may be evidenced where body corporate's conduct is viewed as a whole, determining by aggregating the conduct of more than one person.

The amendments will commence in August 2024.

## Updated WHS Codes of Practice

The Australian Capital Territory has made the WHS Code of Practice, Sexual and gender-based harassment. The Code of Practice largely follows the national Code, with some differences including referring to the Australian Territory Capital requirement that actual and potential sexual assaults be reported to the regulator as a notifiable incident, as well as duties under the Territory and Commonwealth discrimination legislation. The new Code will commence on 11 November 2024, at which time the existing Code of Practice Preventing and responding to bullying, will be fully revoked.

The Australian Capital Territory has also updated two of its WHS Codes of Practice, both of which commenced in May 2024:

- The Formwork Code of Practice to provide greater clarity to duty holders to understand with and comply with their duties.
- The Managing the risks of plant in the workplace Code of Practice has been updated with new information on the prevention of vehicle roll-aways and safe immobilisation.

## WorkSafe ACT issues updates regarding silica training and sexual assault

WorkSafe ACT has advised in a safety alert that 27 infringement notices have been issued to PCBUs for failing to ensure that workers completed silica awareness training, which was required to be completed by October 2023.

In a separate alert, WorkSafe ACT reminded duty holders of their obligation to notify WorkSafe ACT of actual and suspected occurrences of sexual assault, which came into force in June 2023. The regulator advised that it has been notified of over 70 incidents of workplace sexual assault, and has also issued 4 infringement notices and 3 improvement notices to PCBUs for failing to notify.

## Airborne contaminants standards

The Australian Capital Territory has adopted Safe Work Australia's Workplace Exposure Standards for Airborne Contaminants (2024) (WES) by the introduction of a new statutory instrument, the *Work Health and Safety (Workplace Exposure Standards) Declaration 2024 (No 1)* (ACT). The Declaration brings the WES into effect from 1 October 2024.

# Tasmania

## Tasmanian industrial manslaughter legislation

The *Work Health and Safety Amendment (Safer Workplaces) Bill 2024* (Tas) has been introduced in Tasmanian Parliament to insert an industrial manslaughter offence into the Tasmanian WHS Act. The proposed offence applies where a PCBU or officer engages in reckless or negligent conduct which causes the death of an individual. The offence is not subject to any limitation period. Negligent conduct involves a great falling short of the standard of care that would have been taken by a reasonable person where there is a high risk of death, serious injury or serious illness. The proposed penalties are a maximum imprisonment term of 21 years for individuals and a maximum fine of $18 million for corporations.

## Tasmania adopts new Codes

Tasmania has adopted the national model WHS Code of Practice, Sexual and gender-based harassment, a link to which can now be found at WorkSafe Tasmania's website here.

Tasmania has also adopted the national model WHS Code of Practice, Tower cranes, which can be found on WorkSafe Tasmania's website here.

# Northern Territory

## Commencement of changes to electrical licensing

On 1 July 2024 the *Electrical Safety Act 2022* and *Electrical Safety Regulations 2024* commenced in the Northern Territory. The new laws introduce new licence classes and endorsements to improve consistency with other jurisdictions. There are also new requirements in certificates of compliance, which are required to be completed for all electrical work, and copies sent to NT WorkSafe. The new laws also impose overarching electrical safety duties of care on PCBUs and officers, similar to those under general WHS Laws, as well as the electrical safety laws in Queensland. NT WorkSafe is now responsible for electrical licensing and electrical safety matters. Further information on the changes can be found on NT WorkSafe's website here.

## Codes of Practice adopted and amended

The Northern Territory has also now adopted the Sexual and gender-based harassment Code of Practice. The Northern Territory has also amended the WHS Code, Managing the risks of plant in the workplace, to include new information on the prevention of vehicle roll-aways and on safe immobilisation.

## NT WorkSafe adopts body worn cameras

Following a successful trial in 2023, NT WorkSafe has confirmed that body worn cameras (BWCs) now form part of inspectors' operational equipment. Further information on the use of BWCs by inspectors can be found on NT WorkSafe's website here.

# Significant cases

## Commonwealth

### Public sector employer charged over alleged psychosocial risks

A Commonwealth public sector organisation has been charged with alleged breaches of the WHS Laws following an incident where a worker took their own life on duty. It is alleged that the organisation breached its primary work health and safety duty to the worker, who was geographically isolated, by failing to:

- ensure regular in-person welfare checks;
- refer the worker to a formal mental health assessment; and
- ensure that a mental health assessment was not paused or delayed and that it was conducted in-person or via a video conference.

## Australian Capital Territory

### Acquittals upheld in Australian Capital Territory Court of Appeal

The Australian Capital Territory Court of Appeal has dismissed an appeal by Comcare and upheld the acquittals of the Commonwealth and Helicopter Resources Pty Ltd (Helicopter Resources). The respondents were charged under the Commonwealth WHS Act following a fatal accident which occurred in Antarctica in 2016. A helicopter landed on an ice shelf in order to deliver aviation fuel drums. The helicopter pilot stepped out onto the ice shelf and fell through the ice into a crevasse.

In 2019, the Magistrates' Court acquitted Helicopter Resources, but found the Commonwealth guilty of two out of three charges brought against it. In 2021, the Commonwealth appealed, successfully, to the Supreme Court on the grounds that the success of Comcare's case relied upon the implementation of particular safety measures in a specific order, the first of which was not reasonably practicable.

Comcare appealed to the ACT Court of Appeal, contending that both the Commonwealth and Helicopter Resources were erroneously acquitted. Finding in favour of the respondents, the Court (Mossop, McWilliam and Wheelahan JJ) found that Comcare's submission that the Commonwealth could have obtained and analysed satellite imagery of landing sites for evidence of crevassing, and only proceeded with helicopter delivery work where the risk of crevassing was likely to be minimal, was not reasonably practicable. It noted that in circumstances where extreme weather events in Antarctica could occur multiple times per day, it was not reasonably practicable for the Commonwealth to have applied the series of safety measures after every significant weather event.

In finding that Comcare's case against the Commonwealth had failed, the Court also dismissed the appeal against Helicopter Resources.

## New South Wales

### Clarification of an officer's duty to exercise due diligence

The District Court of New South Wales has clarified the content, nature and extent of an officer's duty to exercise due diligence in relation to safety matters under the *Work Health and Safety Act 2011* (NSW) (NSW WHS Act).

Following an incident at one of its depots in Tamworth, New South Wales, where a worker was seriously injured after being struck by a forklift, SafeWork NSW charged Miller Logistics Pty Ltd (Miller Logistics) with a breach of its primary health and safety duty under section 19(1) of the NSW WHS Act, contrary to section 32. It was alleged

that Miller Logistics had breached its primary duty of care by failing to mandate the separation of forklifts and pedestrians, implement a traffic management plan and train and supervise workers.

It was alleged separately that the sole director of Miller Logistics, Mitchell Doble (Mr Doble) failed to exercise due diligence (as an officer) to ensure that Miller Logistics complied with its primary duty, contrary to section 27(1) of the NSW WHS Act, by failing to "require, instruct or direct" Miller Logistics to take the above steps.

Although finding that Miller Logistics had breached its primary duty, Judge Russell SC acquitted Mr Doble of the charge brought against him, clarifying the scope of an officer's duty to exercise due diligence. Some of the key findings of the case were that:

- Although Mr Doble was the only director of Miller Logistics, that did not mean he had the same safety duties as the company itself.
- The charges against Mr Doble "did not particularise the ways in which Mr Doble failed to exercise due diligence, beyond essentially saying that he should have done something to ensure that Miller complied with its duty."
- The primary way that Mr Doble met his duties as an officer was by appointing a dedicated health and safety manager. He was not "hands off" regarding safety. He visited depots, took an active interest in safety, and was in regular contact with the health and safety manager, including bringing issues to the manager's attention. Safety was discussed and followed up at management and Board meetings. He reviewed whether matters brought to his attention were being followed up.
- The failure of the health and safety manager to mandate separation was a failure of the PCBU, and not of the officer.

Refer to our article and podcast explaining the implications of this case in detail.

*SafeWork NSW v Miller Logistics Pty Ltd; SafeWork NSW v Mitchell Doble* [2024] NSWDC 58

## Referral of question of law to Court of Criminal Appeal

The District Court of New South Wales has ordered that a discrete question of law concerning the correct operation of section 17 of the NSW WHS Act, which deals with management of risks, be referred to the Court of Criminal Appeal for resolution. Specifically, the question of law concerns whether the prosecution can continue to pursue particulars of a charge relating to risk minimisation, in circumstances where the offender has pleaded guilty to the charge based on accepting a particular that would have eliminated the pleaded risk.

In granting an application pursuant to the *Criminal Appeal Act 1912* (NSW), her Honour Judge Strathdee noted that section 17 has not been authoritatively dealt with by a superior court, and that resolution of the question requires an exercise in statutory interpretation. The determination of the question as to the operation of section 17 is likely to impact upon how the regulator will be able to plead future prosecutions, specifically as to whether control measures pleaded against defendants represent risk minimisation or elimination, and whether both alternatives can be relied upon.

## Summonses dismissed in Court of Criminal Appeal – time period for commencing proceedings

The Court of Criminal Appeal (CCA) has overturned an interlocutory decision of the District Court of New South Wales (NSWDC) in relation to the application of limitation periods under the NSW WHS Act.

SafeWork NSW (SafeWork) commenced two prosecutions against Prime Marble & Granite Pty Ltd (PMG) under s32 of the NSW WHS Act alleging that PMG breached its primary duty of care under s 19(1). The summonses, collectively, alleged that two workers employed by PMG were exposed to respirable crystalline silica dust (RCSD) over a number of years at PMG's premises in Greenacre and thereby exposed to a risk of serious injury or death.

PMG filed identical Notices of Motion in both proceedings, seeking orders that both summonses be dismissed pursuant to section 232(1)(a) of the NSW WHS Act. That section provides that proceedings for an offence against the NSW WHS Act may be brought within two years after the

offence first comes to the notice of the regulator. In the first instance decision, *SafeWork NSW v Prime Marble & Granite Pty Ltd* [2024] NSWDC 17, his Honour Judge Russell SC confirmed that the resolution of both applications involved a simple factual determination as to whether the prosecutions had been brought out of time, which involved determining when the offence came to SafeWork's attention.. His Honour determined that SafeWork had notice of the commission of the offence on 31 March 2021 (that is, within the two-year period). This was the date on which SafeWork received documents from the NSW Dust Diseases Authority (DDA) which revealed it was reasonable to conclude that the workers' exposure to RCSD during their employment with PMG was due to poor industrial hygiene practices and inadequate personal protective equipment. His Honour reasoned that due to the accumulative nature of silicosis, it was only when the DDA material was received that SafeWork became aware that the workers had developed silicosis, as a result of significant exposure to RCSD over a lengthy period. His Honour rejected a submission that air monitoring tests conducted by SafeWork inspectors at PMG's premises in 2017 and 2018 – which revealed exposure to RSCD well above the relevant Workplace Exposure Standards (WES) – gave SafeWork notice of the offence. Accordingly, Russell SC DCJ determined that the summonses had been filed within the time prescribed by s 232 of the WHS Act and dismissed PMG's Notices of Motion.

Although accepting that Russell SC DCJ was correct to observe that exposure to RCSD on a single day will not cause silicosis, Harrison CJ at CL (with whom Hamill and N Adams JJA agreed) stated that proof of exposure to RSCD or whether such exposure had caused serious injury or death was beside the point for the purposes of determining whether time had begun to run, for the purposes of s 232 of the WHS Act. Their Honours emphasised that the offence in s 32 is committed where there is a failure which exposes an individual to a risk of death or serious injury or illness – not where a failure causes death or serious injury or illness. Importantly, the CCA determined that knowledge of PMG's breach of the WES as a result of the testing in 2017 and 2018 must necessarily have meant that SafeWork was on notice that PMG's workers were exposed to the relevant risk more than two years before the filing of the summonses. Having made that finding, the CCA determined that the continuation of the proceedings against PMG was an abuse of process and therefore allowed the appeal, thereby dismissing the two summonses.

*Prime Marble & Granite Pty Ltd v SafeWork NSW* [2024] NSWCCA 105

## Performance of internal investigation the subject of regulatory improvement notices

An interlocutory decision has revealed that an employer has been issued with improvement notices by a regulator in relation to alleged psychosocial risks created by the employer's carriage of an internal investigation. In particular, the improvement notices allege that the employer:

- Failed to ensure that investigations regarding misconduct and performance of workers were completed in a timely and expeditious manner;
- Did not have a process and prescribed timeframes to provide formal, regular and documented updates on the progress of an investigation to workers while an investigation is underway; and
- Allocated workers with alternate duties which were not commensurate with their existing position, duties and functions.

The decision reinforces the increasing regulatory attention on internal and human resources processes as sources of psychosocial hazards, and the need for employers to properly identify and manage psychosocial risks during the implementation of such processes, through appropriate procedures and risk management documentation.

## Significant penalty issued for recklessness following cobalt dust exposure

A company in New South Wales has pleaded guilty to and been convicted of breaching its primary duty of care under section 19 of the NSW WHS Act in the District Court of New South Wales as a result of recklessly exposing workers to cobalt dust. His Honour Judge Russell SC imposed a penalty of $1.2 million.

The company carried on chemical manufacturing operations in New South Wales. Part of its operations included the manufacturing of cobalt oxide catalyst. Various failures were alleged against the company, such as failing to fix the ventilation system in the cobalt shed despite knowing it had been defective for years, and failing to act

on repeated air and biological testing that showed a worker had been exposed to dangerous levels of cobalt dusts. As a result of these failures, a worker who had worked full-time in the cobalt manufacturing shed was diagnosed with occupational asthma in 2019.

In finding that the offending conduct fell in the upper half of the mid-range, Russell SC identified that the risk of workers suffering injury or death as a result of exposure to cobalt dust was foreseeable and actually foreseen by the company, and the evidence of recklessness was 'strong.' His Honour found that the steps that were taken by the company to guard against the risk were poorly implemented and inadequate. The company's previous record of convictions was also taken into account as an aggravating factor. His Honour determined the appropriate fine, having regard to the maximum available penalty, was $1.5 million, which was reduced by 20% on account of the company's guilty plea.

## Penalty imposed for exposure to workplace violence

Marist Youth Care Ltd (MYC), a not-for-profit organisation carrying on a business providing residential care for vulnerable young persons, has pleaded guilty to breaching its primary duty of care under the NSW WHS Act after two female workers were exposed to repeated aggressive, sexualised behaviour and violence by two residents. Both workers sustained substantial psychological injury as a result. The company was convicted and fined $300,000, after applying a 25% discount to account for MYC's guilty plea.

In considering the objective seriousness of the offending, his Honour Judge Scotting considered that MYC was aware that the two residents were likely to pose a high risk of aggressive sexualised violence towards the female workers. His Honour noted that MYC accepted, by its plea, that a reasonably practicable step it could have taken to eliminate the risk would have been to have engage only male direct care workers to look after the two residents. However, his Honour suggested that this was not necessarily a simple or straightforward measure to implement because MYC was also required to consider the impact of its decision on the developmental needs of the young persons in its care. The Court also acknowledged that MYC operated a large business in a difficult industry, which was taken into account when imposing the penalty.

*SafeWork NSW v Marist Youth Care Limited* [2024] NSWDC 74

## Category 2 prosecution follows silica dust exposure

The District Court of New South Wales has imposed a penalty of $375,000 on a stonemasonry company, Edstein Creative Pty Ltd (Edstein), after it plead guilty to, and was convicted of, breaching its duties under the NSW WHS Act for exposing workers to a risk of developing silicosis.

Her Honour Judge Strathdee found that although Edstein knew the risks and hazards associated with cutting and manufacturing engineered stone and had in place systems to protect persons from exposure to respirable crystalline silica dust at its own facility, it failed to ensure that those systems were applied to its installers, resulting in an installation worker being diagnosed with silicosis.

*SafeWork NSW v Edstein Creative Pty Ltd* [2024] NSWDC 179

## Sentencing decision emphasises importance of Australian Standards and guidance material

This case involved the sentencing of a scaffolding company that plead guilty to breaching its primary duty of care to other persons under section 19 of the NSW WHS Act. The company had been engaged to install scaffolding around a residential apartment block prior to the commencement of construction works. During the construction works, the scaffolding collapsed during high winds and fell on a neighbouring building. The residents were home but were not injured. The number of ties used to secure the scaffolding was less than what was required under relevant guidance material such as Australian Standards and scaffolding guidance published by the regulator. In rejecting the company's submission that their level of culpability was reduced as the risk of collapse was "not obvious", the Court instead found that the company "should have known of the risk by reason of the guidance material". The company was convicted and fined $200,000, reduced to $150,000 on account of its guilty plea.

*SafeWork NSW v Topdeck Scaffolding Pty Limited* (2024) NSWDC 215

# Victoria

## Inaugural workplace manslaughter sentence handed down

The Supreme Court of Victoria has handed down its first sentence involving Victoria's new workplace manslaughter offences which came into force in July 2020.

LH Holding Management Pty Ltd (LH) and its sole director were charged with, and pleaded guilty to, workplace manslaughter offences after a forklift carrying a metal frame tipped over on a sloped driveway, crushing a nearby employee, who died from his injuries. The director, Mark Hanna, was driving the forklift at the time of the incident.

In reaching a sentencing decision, Justice Croucher had regard to the very brief duration of the defendants' offending conduct, highlighting that workplace manslaughter offences can occur over a relatively brief (or even momentary) period (although this case notably appears to support the position that very brief or momentary conduct may represent less serious offending than other conduct, such as long-term disregard for safety).

The Court also had regard to the dangerous way that Mr Hanna operated the forklift and the fact he did not cease operation once he saw the deceased worker in the vicinity (but accepted that Mr Hanna told him to move and believed he had moved). In sentencing Mr Hanna, the Court also had regard to the fact that he was personally responsible for the incident.

LH Holding was convicted and fined $1.3 million, which his Honour acknowledged far exceeded the company's financial capacity. This is significant because it indicates that Courts may impose higher penalties befitting more serious nature of the offences, irrespective of the financial consequences for defendants. Mr Hanna was convicted and placed on a 2-year Community Correction Order, with additional conditions that he complete 200 hours of unpaid community work and complete a course in forklift operation. Pursuant to an agreement between the parties the Court ordered LH and Mr Hanna to pay $120,000 in compensation to the deceased's sister pursuant to s 85B *Sentencing Act 1991* (Vic).

For more information, refer to our article and podcast on this case.

*R v LH Holding Management Pty Ltd & Hanna* [2024] VSC 90

## Quarry operator convicted of silica breaches

A quarry operator in Victoria has been convicted of breaches of the Victorian *Occupational Health and Safety Act 2004* and fined a total of $400,000 for failing to reduce risks posted by respirable crystalline silica dust to four workers involved in the process of filling and palletising bags of silica flour. As a result of the risk exposure, two workers have undergone health assessments, the results of which support a diagnosis of silicosis. The company pleaded guilty to the charge.

Despite various efforts by the company to control silica dust risks since 2012, a WorkSafe inspection conducted in 2019 identified that the risk control measures were inadequate; in particular, inspectors reviewed air monitoring results carried out in 2018 that indicated exposure levels above the exposure standard.

As a result of its guilty plea, the company accepted that it had failed to reduce the risk so far as was reasonably practicable by not having in place automated bagging systems between 2016 and 2020, and automated palletising systems between 2014 and 2019. These measures were determined to be reasonably practicable in view of the availability of such machines and the company having first identified the risk in 2012. The estimated total cost of the bagging plant and the palletising plant was $578,776.

# Northern Territory

## Builder to stand trial for industrial manslaughter

A builder charged with industrial manslaughter by NT WorkSafe, has been committed to stand trial in the Supreme Court of the Northern Territory. At a committal hearing in Darwin Local Court, Judge O'Loughlin considered there was sufficient evidence upon which a jury could find the contractor guilty of the offence, and noted that the issue of duty and potential breach under the NT's WHS legislation was conceded. The prosecution is set to be the first test of the Northern Territory's industrial manslaughter laws under the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT). The prosecution relates to an incident where a worker died after falling 3.2 metres through an unguarded void. It is alleged that the builder recklessly ignored repeated warnings from subcontractors on site about the risks of falls associated with voids, after temporary scaffolding was removed and not replaced with alternative fall protection.

# Queensland

## Queensland's third industrial manslaughter prosecution finalised

In the District Court of Queensland, Judge Everson SC has delivered judgment to finalise the State's third industrial manslaughter prosecution. Following a fatal incident in 2021, when a worker was struck by a mobile crane, a national company pleaded guilty to industrial manslaughter under s 34C(1) of the *Work Health and Safety Act 2011* (Qld) for failing to identify and control the risks of operating plant near pedestrian workers.

By virtue of its guilty plea, the company accepted that its plant management failures included failing to have in place a traffic management system, SWMS or safe operating procedure for the crane and procedures for exclusion zones, failing to provide training on dogger or rigger duties, failing to use spotters or a communications system between the dogger and operator, and failing to act on previous unsafe cases of crane operation.

In mitigation, his Honour accepted that an ex-gratia payment made to the deceased worker's family as well as the erection of a memorial at the site of the incident represented appropriate responses.

The company was convicted and fined $1.5 million. In imposing this fine, the Court noted that the offending conduct in the only comparator case in Queensland (involving Brisbane Auto Recycling Pty Ltd, another plant related incident involving a forklift) was far more serious, as in that case the offender had not implemented any safety management system, the forklift driver was unlicensed, and the company's two directors had attempted to cover up the circumstances behind the fatality.

## Officer acquitted of due diligence breaches

The Magistrates Court of Queensland has acquitted an officer charged with a failure to exercise due diligence contrary to s 27 of the *Work Health and Safety Act 2011* (Qld).

The defendant, who was the former managing director of a company operating a zipline course in Cape Tribulation, was charged following an incident where a patron was fatally injured, and their spouse seriously injured, when a zipline they were using failed, causing them both to fall to the ground. The incident occurred five months after the defendant had left the company. The prosecution alleged that various failures on the part of the defendant resulted in the zipline being inadequately secured, which exposed persons using the zipline to a risk of serious injury or death, including that the defendant failed to direct the operations manager of the business to secure the zipline in a way such that it would not require regular tightening.

Evidence given in the trial showed that the company's operations manager, who reported to the defendant, was substantially responsible for risk management and health and safety matters, including the installation of the zipline. Evidence was also given that the defendant and the operations manager met regularly, that information was freely exchanged between them, and that the defendant placed substantial reliance on the operations manager to address WHS risks.

In acquitting the defendant, Magistrate Priestly found that:

- the defendant could not have been expected to know about everything going on in the business at any one time;
- the operations manager was solely responsible for WHS matters; and
- It was not a reasonable step for the defendant to have directed the way in which the operations manager was required to secure the zipline, in circumstances where there was no evidence to suggest that the company's safety management system required that level of attention.

The decision also restates the difference in the nature of the duties owed by PCBUs compared to the due diligence duties owed by officers.

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