

# WHS Law Briefing

February 2024



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**Welcome to our WHS Law Briefing.** This briefing identifies key issues and emerging trends in WHS law, and details the significant legislative and case law developments to date in February 2024. Please contact our national WHS team contacts 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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<b>Engineered stone and respirable crystalline silica</b>	A prohibition on the use, supply and manufacture of engineered stone will commence in the majority of jurisdictions from 1 July 2024. In New South Wales, a 6 month campaign targeting exposure to respirable crystalline silica ( <b>RCS</b> ) has been launched and a silica worker register will be established. In the Australian Capital Territory, a new Code of Practice: Managing the Risks of Airborne Crystalline Silica (Silica Dust) has been approved. Safe Work Australia has been requested to prepare (by the end of February 2024) an outline of agreed policy parameters for amendments to the national model WHS Regulations on crystalline silica processes across all industries, including additional training requirements, a requirement to conduct air monitoring, and reporting workplace exposure standard exceedances to the relevant regulator.
<b>Industrial manslaughter</b>	The Federal and South Australian Parliaments have passed legislation to introduce an offence of industrial manslaughter in mid 2024, and the NSW Government has announced its intention to introduce a Bill for an industrial manslaughter offence in the first half of 2024. Industrial manslaughter offences have already been introduced into the work health and safety laws of all other states and territories, except Tasmania.
<b>Psychosocial risks</b>	Express provisions for the management of psychosocial risks have now been included in the WHS Regulations in all states and territories, except Victoria, however WorkSafe Victoria is nevertheless investigating and prosecuting duty holders in relation to psychosocial hazards under the primary health and safety duty. Work Health and Safety Regulators around Australia have responded by resourcing specialised inspectors, publishing mandatory codes of practice concerning the management of psychosocial risks, conducting investigations and commencing prosecutions, including in connection with HR processes (organisational justice, procedural fairness and welfare considerations), work design/systems of work, and allegations of sexual harassment and bullying.
<b>Sexual harassment</b>	Safe Work Australia has published a national model WHS Code of Practice, Sexual and gender-based harassment and the Australian Human Rights Commission has published practical guidelines and resources to assist duty holders to comply with the positive duty under the <i>Sex Discrimination Act 1984</i> (Cth) in respect of preventing sexual harassment. The AHRC's powers to investigate and enforce compliance with the positive duty commenced on 12 December 2023.

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# Legislative updates

## Across Australia / Commonwealth

### Changes to the Commonwealth WHS Act

Changes to the *Work Health and Safety Act 2011* (Cth) (**Commonwealth WHS Act**) introduced by the *Work Health and Safety Amendment Act 2023* (Cth) (**Amendment Act**) came into effect on 21 September 2023 and include:

- broadening the Category 1 offence to include negligence as a fault element;
- prohibiting insurance coverage or a grant of indemnity for monetary penalties imposed under the Commonwealth WHS Act;
- enhancing inspector powers;
- extending the deadline for a person to request a prosecution, and strengthening requirements for Comcare to provide progress updates; and
- allowing Health and Safety Representatives to choose their own Comcare-approved training course.

The Amendment Act also inserts new powers in the *Safe Work Australia Act 2008* (Cth) which enable Safe Work Australia to obtain information from work health and safety regulators.

Further changes to the Commonwealth WHS Act passed through Parliament in December 2023, including:

- significantly increased penalties (particularly for Category 1 offences, which have increased from \$3 million to \$15 million for a body corporate, from \$600,000 to \$3 million for a PCBU or an officer, and from \$300,000 to \$1.5 million for any other person);
- the introduction of an industrial manslaughter offence, which will commence on 1 July 2024; and
- establishing a Family and Injured Workers Advisory Committee by the end of 2024 to advise the Minister and Comcare on the support needs of those affected by a serious workplace incident and help inform on relevant Comcare policies, practices and strategies.

Comcare has published a summary of the changes to the Commonwealth WHS Act [here](#).

The latter changes are part of the Federal Government's industrial relations reforms, which are now split between the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (which received Royal Assent on 14 December 2023) and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (Cth) (**No. 2 Closing Loopholes Bill**) (passed by Parliament on 12 February 2024 and expect to receive Royal Assent shortly). Provisions of the No. 2 Closing Loopholes Bill amending the *Fair Work Act 2009* (Cth) to provide employees with a 'right to disconnect' from work are expected to commence 6 months after the day it receives Royal Assent or 12 months after Royal Assent for small business employers.

### Changes to the Commonwealth WHS Regulations

The *Work Health and Safety Amendment (Information Sharing and Other Measures) Regulations 2023* (Cth) has made a number of changes to the *Work Health and Safety Regulations 2011* (Cth), including:

- to explicitly ban the uncontrolled processing of engineered stone products (in accordance with the changes to the national model WHS Regulations in May 2023);
- to enable Comcare to share information with various other safety regulators for the purposes of administering or enforcing WHS, rail safety, heavy vehicle and sex discrimination laws; and
- to update references to Australian Standards.

### WHS ministers unanimously agree to ban engineered stone

On 13 December 2023, federal, state and territory workplace relations and WHS ministers unanimously [agreed](#) to Safe Work Australia's recommendation to prohibit the use, supply and manufacture of engineered

stone, with the majority of jurisdictions to commence the prohibition from 1 July 2024. The decision was made after careful consideration of the [Safe Work Australia Decision Regulatory Impact Statement](#) which found there was no safe level of silica in engineered stone. It is reported that Safe Work Australia is close to completing draft amendments to the national model WHS Regulations giving effect to the prohibition and outlining arrangements for working with previously installed engineered stone.

Ministers also noted the Commonwealth's intention to put in place a complementary customs prohibition on engineered stone to provide an additional layer of enforcement and deterrence at the border.

More information is available on Safe Work Australia's [Prohibition of engineered stone webpage](#).

### Updates to Model Code of Practice: Managing the risks of respirable crystalline silica from engineered stone in the workplace

In November 2023, the [Model Code of Practice: Managing the risks of respirable crystalline silica from engineered stone in the workplace](#) was updated to include the definition of engineered stone and guidance regarding the duty to prevent uncontrolled processing of engineered stone, added to the national model WHS Regulations in May 2023.

### AHRC powers to enforce positive duty commence

The AHRC's powers to investigate and enforce compliance with the positive duty under the *Sex Discrimination Act 1984* (Cth) commenced on 12 December 2023. The positive duty requires PCBUs and employers to take reasonable and proportionate measures to eliminate, as far as possible, the following unlawful behaviour from occurring:

- discrimination on the grounds of sex in a work context
- sexual harassment in connection with work
- sex-based harassment in connection with work
- conduct creating a workplace environment that is hostile on the grounds of sex
- related acts of victimisation.

The AHRC has released a number of [practical guidelines](#) and resources to help duty holders to satisfy this duty, including the [Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984](#) (Cth).

### Unlawful discrimination cost protection bill introduced to Parliament

The Federal Government has introduced the [Australian Human Rights Commission Amendment \(Costs Protection\) Bill 2023](#) (Cth) (the **Bill**) to Parliament, being the final legislative reform driven by recommendations from the landmark Respect@Work report. If passed, the Bill will remove a deterrent to workers bringing unlawful discrimination proceedings in the federal courts. The provision proposed in the Bill would prevent a court from ordering an applicant to pay the respondent's costs except where:

- the applicant had acted vexatiously or unreasonably; or
- the respondent has been successful on all grounds, the respondent does not have a significant power advantage over the applicant and the respondent does not have significant financial or other resources, relative to the applicant.

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee who held a public hearing on 31 January 2024 following receipt of 35 submissions from interested stakeholders. The Senate Committee's report is available [here](#). More information regarding the Bill is available [here](#).

### New Codes, guidance material and fact sheets published by Safe Work Australia

Safe Work Australia has released the new [national model WHS Code of Practice, Sexual and gender-based harassment](#), which is designed to be read and applied alongside the existing [national model WHS Code of Practice, Managing psychosocial hazards at work](#).

Safe Work Australia has also published new guidance material on "[Asbestos registers at the workplace](#)", as well as a new [Fact Sheet: Prevention of vehicle roll-aways and safe immobilisation](#), which supports the national model WHS Code of Practice, [Managing the risks of plant in the workplace](#), also updated in December 2023.

Safe Work Australia's [WHS consultation checklist](#) has also been updated, and the revised checklist has been incorporated into the national model WHS Code of Practice, [Work health and safety consultation, cooperation and coordination](#).

Safe Work Australia has also published two case studies (relating to [outsourcing](#) and [franchising](#)) to help PCBUs involved in outsourcing and franchising arrangements comply with their WHS obligations to consult, cooperate and coordinate activities with other duty holders, and has released "[Know Your Duties](#)" tools for the construction industry, agriculture industry and duty holders that engage labour hire workers, as well as a [return-to-work guide and template](#).

Safe Work Australia has also made hundreds of updates to the Hazardous Chemical Information System (HCIS), an internet advisory service that assists businesses to find information on chemicals that have been classified in accordance with the [Globally Harmonized System of Classification and Labelling of Chemicals](#) (GHS). Whilst the changes are not yet listed as "[Recent HCIS Update](#)" on Safe Work Australia's website, they can be identified when searching for updates since August 2023 using the [Advanced Search Function](#).

## New South Wales

### Amendments to *Work Health and Safety Act 2011* (NSW)

The [Work Health and Safety Amendment Act 2023](#) (NSW) has passed NSW Parliament, introducing a number of changes to the *Work Health and Safety Act* (NSW) (NSW *WHS Act*), including:

- prohibiting insurance for penalties imposed under the NSW *WHS Act*;
- introducing imputation of conduct of a PCBU's officers and agents to the PCBU;
- from 1 July 2024, increasing penalties, including a significant increase to the Category 1 offence for an officer to more than \$2 million or 10 years' imprisonment or both, and for a PCBU to more than \$10 million;
- enabling the establishment of a silica worker register to monitor the health of workers exposed to crystalline silica dust;

### Workplace exposure standard for welding fumes lowered

On 18 January 2024, Australia's WHS ministers voted to immediately reduce the workplace exposure standard for carcinogenic "welding fumes (not otherwise classified)" from an eight-hour time-weighted average of five milligrams per cubic metre of air, to one milligram. Safe Work Australia has amended its [Workplace exposure standards for airborne contaminants](#) to reflect this change, as well as other changes relating to respiratory protective equipment (see Safe Work Australia's summary of the changes [here](#)).

### Interactive data website launched

Safe Work Australia has launched its [interactive data website](#) which provides access to national WHS and workers' compensation data by industry and topic.

Safe Work Australia [insights website](#) has also been updated with [key WHS statistics report for 2023](#); [WHS outcomes for apprentices and trainees \(2023\)](#) and [Returning to work during COVID-19 Snapshot \(2023\)](#).

- clarifying that an officer can commit a Category 1 offence, the most serious WHS offence, by removing the ambiguity regarding section 31 of the Act;
- enabling the WHS Regulator to ensure prohibited asbestos is removed permanently from workplaces. Prohibited asbestos means asbestos or ACM, fixed or installed in a workplace on or after 31 December 2001; and
- miscellaneous amendments to address ambiguities, clarify intent and remove superseded or obsolete requirements.

The provisions regarding the silica worker register require PCBUs to give SafeWork NSW information for inclusion on the silica worker register "in accordance with the regulations". The regulations have not yet been published.

## Industrial manslaughter offence to be introduced

The NSW Government has [announced](#) that it intends to introduce a Bill to Parliament for an industrial manslaughter offence in the first half of 2024. The industrial manslaughter provisions added to the national model WHS laws in 2023 contained recommended maximum penalties of \$18 million for bodies corporate and 20 years' jail for individuals.

## Respect at Work Strategy released

SafeWork NSW has published its four-year [Respect at Work Strategy: preventing sexual harassment](#) for October 2023 – October 2027 outlining four strategic outcomes to secure safe and respectful workplaces for workers in New South Wales: educate, capability, action and effective regulation. The Strategy will be led by its Respect at Work Taskforce with a focus on high-risk worker groups and the hospitality, retail, health care and social assistance industries.

## Silica dust campaign launched

In December 2023, the New South Wales Government [launched](#) a six-month campaign targeting exposure to silica dust in the construction and tunnelling industry. SafeWork NSW reported "While manufactured stone is the leading cause of silicosis, workers can also be exposed to silica dust during tunnelling, demolition and excavation work, or from uncontrolled cutting, grinding and drilling of common building materials including bricks, concrete, sandstone and tiles. SafeWork NSW inspectors will target these areas to prevent a false sense of security ahead of the coming ban on manufactured stone in NSW."

## Review of Workers Compensation Scheme published

The NSW Standing Committee on Law and Justice has published a [report](#) into its "2023 Review of the Workers Compensation Scheme". The recommendations in the report include that "SafeWork NSW, in consultation with industry and union stakeholders undertake an enforcement campaign targeting workplaces that have high incidents of psychological injury to ensure they have in place a psychosocial hazard risk assessment." The NSW Government's response to the inquiry is due by 5 March 2024.

## Transformation of SafeWork NSW

The NSW Government has [announced](#) that Trent Curtin, former acting deputy commissioner of Fire and Rescue NSW, has been appointed as acting head of SafeWork NSW to "beef up compliance and lead the transformation of SafeWork NSW", including assisting with the response to the [Independent Review](#) into SafeWork NSW undertaken by retired Supreme Court Justice Robert McDougall KC.

## Pre-WHS Act Codes of Practice under review

Codes of Practice that were developed prior to the introduction of the NSW WHS Act are being reviewed by SafeWork NSW. SafeWork NSW [invited feedback](#) to make sure the codes of practice are still relevant, easy to understand and support current and evolving work practices and technologies, and will provide an update on the progress and outcome of the review during 2024.

## Industrial Relations Amendment Act passed Parliament

The [Industrial Relations Amendment Act 2023](#) (NSW) has passed Parliament. Amongst other changes, the Act will re-establish the NSW Industrial Court and amend the NSW WHS Act to enable certain safety offences to be heard before the re-established Industrial Court.

## SafeWork NSW launches planning tool for extreme weather

SafeWork NSW has launched "[SeasonalSAFE](#)", a planning tool for helping workers stay safe in extreme weather conditions.

## Queensland

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### Amendment Bill introduced to Parliament

The [Work Health and Safety and Other Legislation Amendment Bill 2023](#) (Qld) has been introduced to the Queensland Parliament. If passed, the Bill will implement recommendations from the recent independent review of Queensland's *Work Health and Safety Act 2011* (**Queensland WHS Act**) and mirror some changes made to the national model WHS laws, including provisions concerning:

- the ability of workers and their representatives to be consulted on WHS matters;
- election processes for HSRs and workgroups and the right of HSRs to choose their own training provider;
- the rights of entry permit holders;
- extending Category 1 offence dealing with reckless conduct to also include negligent conduct;
- a streamlined dispute resolution process; and
- the removal of some proceedings from the Magistrates Court to the Queensland Industrial Relations Commission.

For more information see the Government's media statement [here](#).

### Review of *Electrical Safety Act 2002* (Qld)

The Queensland Government has published the [Queensland Government Response to the Review of Queensland's Electrical Safety Act 2002](#), responding to the 83 recommendations contained in the [Review of Queensland's Electrical Safety Act 2002 – Final Report](#). The recommendations aim to improve electrical safety in Queensland, and particularly to ensure the *Electrical Safety Act 2002* (Qld) keeps pace with new and emerging technology. The Government's Response provides 'support in principle' to some of the recommendations, but notes that many of the recommendations will require significant research, analysis and consultation prior to full consideration of implementation given the complexity of their application.

### Independent review of Workplace Health and Safety Queensland commenced

The Queensland Government has commissioned an independent review of Workplace Health and Safety Queensland (**WHSQ**), which commenced on 25 January 2024. The review will consider:

- the WHSQ inspectorate, including resourcing, training, accountability, decision-making consistency, and enforcement and compliance capacity;
- policies and procedures to ensure the inspectorate is supported and meets stakeholder and community expectations of transparency, accountability, timeliness and consistency;
- the interaction between WHSQ's policy teams and the inspectorate to ensure policy is implemented in practice;
- ensuring regular and robust proactive external engagement occurs with stakeholders and the community; and
- transparency and accountability of data and decision-making.

A report on the review's findings is anticipated to be delivered to the Minister by mid 2024.

### Amusement Devices WHS Code made in Queensland

The [Amusement Devices Code of Practice 2023](#) commenced on 1 February 2024 as an approved code of practice under section 274 of the Queensland WHS Act. The Code acts as a practical guide on how to manage health and safety risks associated with an amusement device at a workplace. The introduction of the Code was prompted by the Dreamworld tragedy in 2016 where four individuals died at the Dreamworld theme park.

### Amendment Regulation to improve lead risk controls

The [Mining and Quarrying Safety and Health \(Lead\) Amendment Regulation 2023](#) (Qld) commenced on 1 September 2023 and operates to improve the risk control of lead and lead health surveillance of workers at mineral mines. Significantly, the amendment reduces



the allowable blood levels and airborne exposure standards for workers in alignment with current Safe Work Australia standards. It also provides for information from workers' health surveillance reports to be provided to the Chief Inspector through an approved form, without a worker's consent. This is based on a similar approach in the national Model WHS Regulation where a regulator may obtain a worker's health monitoring report without their consent.

## South Australia

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### Industrial manslaughter offence has passed Parliament

The South Australian Parliament has passed the [\*Work Health and Safety \(Industrial Manslaughter\) Amendment Act 2023\*](#) (SA) (**Amendment Act**), which introduces an offence of industrial manslaughter to the *Work Health and Safety Act 2012* (SA), on a date to be fixed by proclamation. SafeWork SA has [indicated](#) this is likely to be in mid 2024. The maximum penalty for an offence of industrial manslaughter will be 20 years' imprisonment for company officers and \$18 million for bodies corporate.

The Amendment Act also adds gross negligence as a fault element to the Category 1 offence, mirroring a change that has been made to the national model WHS Act.

### Psychosocial risk regulations and other amendments commence

The [\*Work Health and Safety Regulations 2012\*](#) (SA) have been amended to include provisions for the management of psychosocial risks. Unlike the model WHS Regulations, South Australia has prescribed the use of the hierarchy of controls for psychosocial risk management following the approach adopted by the Commonwealth, Queensland, the Northern Territory and most recently the ACT.

The new provisions, introduced by the [\*Work Health and Safety \(Psychosocial Risks\) Amendment Regulations 2023\*](#) (SA) commenced on 25 December 2023.

### Prohibition on uncontrolled processing of engineered stone commences

The [\*Work Health and Safety \(Engineered Stone\) Amendment Regulations 2023\*](#) (SA) came into operation on 1 September 2023 in South Australia, expressly prohibiting the uncontrolled processing of engineered stone products.

The new provisions mirror recent changes made by Safe Work Australia to the [national model WHS Regulations](#).

### Feedback sought on draft Review Recommendations Amendment Bill

The South Australian Government has invited feedback from stakeholders on the draft [\*Work Health and Safety \(Review Recommendations\) Amendment Bill 2024\*](#) (SA). The draft Bill has been published following an Independent Review into the practices and processes of SafeWork SA and the public consultation regarding that process.

The draft Bill implements law reform recommendations from the Independent Review, including in relation to civil dispute resolution processes for work health and safety matters, right of entry, and to improve fairness for victims and families affected by serious workplace accidents. Fact sheets on the draft Bill have been published by SafeWork SA [here](#).

### New guidance on family and domestic violence

New guidance material has been published on [SafeWork SA's website](#) about the management of health and safety risks associated with family and domestic violence in the workplace.

### New funding for WHS protections under Gayle's Law

The South Australian Government has invested \$5.2 million over four years to improve safety for health workers, nurses and medical officers in far northwest South Australia. This includes the expansion of the 'On Call Support Worker Program' that trains second responders who accompany health practitioners during after-hours callouts, strengthening the health and safety protections provided under Gayle's Law.

[Gayle's Law](#), named after the murdered remote-area nurse Gayle Woodford, requires health practitioners in remote areas of South Australia to be accompanied by a second responder when attending out-of-hours or unscheduled callouts.

The new funding has also provided for the construction of purpose-built housing with appropriate safety precautions in the remote Umuwa community.

## Victoria

### New telehandler high risk work licence to be available

The [Occupational Health and Safety Amendment \(Telehandlers\) Regulations 2024](#) (Vic) introduced on 30 January 2024 will establish a new non-slewing telehandler high risk work licence. Workers will be able to apply for the licence from 1 July 2024, once the new training package is available through registered training organisations.

## Western Australia

### Changes taking effect on 30 March 2024

On 30 March 2024, two years after the commencement of the *Work Health and Safety Act 2020* (WA), a number of transitional arrangements will end and new requirements will commence under the *Work Health and Safety (General) Regulations 2022* (WA). The arrangements ending include provisions regarding licences, plant registration and rollover protection on tractors. The new requirements commencing include asbestos removal requirements and audiometric testing. For more information see this [information sheet](#) published by WorkSafe WA.

### Technical changes and corrections to Regulations

The [Work Health and Safety Regulations Amendment Regulations \(No. 2\) 2023](#) (WA) has taken effect, making a number of technical changes and corrections to the *Work Health and Safety (General) Regulations 2022* (WA) and *Work Health and Safety (Mines) Regulations 2022* (WA). A summary of the changes is available [here](#).

### Amusement devices regulations

On 25 December 2023 amendments to the [Work Health and Safety Regulations 2012](#) (SA) relating to amusement devices came into effect. The new regulations have been adopted from the national model WHS Regulations and include new provisions for improved record keeping and operator training for amusement devices and passenger ropeways.

### Transport of Dangerous Goods by Road and Rail

The latest edition of the Australian Code for the Transport of Dangerous Goods by Road and Rail, Edition 7.8, commenced in Victoria on 1 October 2023. Duty holders can elect to continue complying with the previous version until it becomes mandatory on 1 April 2024. The National Transport Commission has published a [fact sheet](#) outlining the differences between edition 7.7 and edition 7.8.

### Revised Crystalline Silica Code of Practice

The WHS Code of Practice, [Managing the risks of respirable crystalline silica from engineered stone in the workplace](#) has been revised to clarify requirements around using power tools and respiratory protective equipment when working with highly hazardous engineered stone products.

### Workers Compensation Amendment Act passed

The [Workers Compensation and Injury Management Amendment Act](#) (WA) has passed the WA Parliament, with a target commencement date of 1 July 2024. Information regarding the new Act and the next steps for its implementation is available [here](#).

### Transport of ammonium nitrate explosion risk goods

The State Department of Mines, Industry Regulation and Safety has published an [investigation report](#) concerning a tanker trailer explosion, containing recommendations including the development of an industry led national code of practice to provide detailed guidance on the safe transport of ammonium nitrate explosion risk goods.

## Australian Capital Territory

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### Psychosocial risks regulations and new Code of Practice

The [Work Health and Safety Regulation 2011](#) (ACT) (**ACT WHS Regulation**) has been amended to include provisions that explicitly require the management of psychosocial risks. The provisions commenced on 27 November 2023. Unlike the model WHS Regulations, the ACT has prescribed the use of the hierarchy of controls for psychosocial risk management. This approach was also adopted by the Commonwealth, Queensland, the NT and most recently South Australia.

The ACT's [Work Health and Safety \(Managing Psychosocial Hazards at Work Code of Practice\) Approval 2023](#) also came into effect on 27 November 2023.

### Changes to Codes of Practice

The ACT's [Work Health and Safety \(Managing the Risks of Airborne Crystalline Silica \(Silica Dust\) in the Workplace Code of Practice](#) commenced on 15 November 2023 and supports amendments to the Work Health and Safety Regulation 2011 introduced in 2022.

The WHS Code of Practice, [Work Health and Safety Consultation, Cooperation and Coordination](#) has also been revised, with amendments reflecting recent changes to the national model version of the Code, and a new WHS Code of Practice, [Sex Work](#), will take effect on 4 February 2024.

## Northern Territory

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### Changes to Work Health and Safety (National Uniform Legislation) Regulations 2011

Amendments to the *Work Health and Safety (National Uniform Legislation) Regulations 2011* (NT) took effect on 22 December 2023. The amendments include a new duty to prevent uncontrolled processing of engineered stone, make it an offence to not have specified controls in place for working with engineered stone, and updates references to the newest editions of various Australian Standards. Further information can be found on the [summary of amendments page](#).

### Bill clarifies that WHS Act applies to ACT Legislative Assembly

The [Work Health and Safety Amendment Act 2022](#) (ACT) has created a new provision in the *Work Health and Safety Act 2011* (ACT) (**ACT WHS Act**) to remove any doubt that work carried out by a member of the Legislative Assembly in the exercise of the member's functions, and work carried out by other people to support the member in the exercise of the member's functions, is work carried out in an undertaking for the purposes of the ACT WHS Act.

### Bill introduced to increase WHS penalties

If passed, the [Workplace Legislation Amendment Bill 2024](#) (ACT) will, among other things, more than triple the fines under the ACT WHS Act for Category 1 offences of negligence or recklessness from \$3 million to \$10.43 million for bodies corporate and from \$600,000 and to \$2.09 million for officers or individual PCBUs. The maximum term of imprisonment for Category 1 offences will also be doubled from 5 years to 10 years for officers, individual PCBUs and other individuals. All other monetary penalties under the ACT WHS Act and Regulation will increase by 39.03%.

### New and updated Codes of Practice and guides

The Northern Territory Government has made a [new WHS Code of Practice for tower cranes](#), published a [draft WHS Code of Practice for Managing psychosocial hazards at work](#) (which differs from the model Code of Practice by including detailed sections on the hierarchy of controls and encouraging duty holders to utilise a free psychosocial risk assessment tool), updated the WHS Code of Practice for Work health and safety consultation, cooperation and coordination, and has made changes to 10 existing WHS Codes of Practice to reflect Australia's recent transition to the seventh revised edition of the Globally Harmonised

System of Classification and Labelling of Chemicals. The 10 existing Codes are: Abrasive Blasting; Confined spaces; How to manage and control asbestos in the workplace; How to safely remove asbestos; Labelling of workplace hazardous chemicals; Managing noise and preventing hearing loss at work; Managing risks of hazardous chemicals in the workplace; Preparation of safety data sheets for hazardous chemicals; Spray painting and powder coating; Welding processes.

NT has also published a new [Guide to Fatigue Management for Heavy Vehicle Drivers](#).

## Commencement of Electrical Safety Laws postponed to 2024

The commencement date for the Northern Territory's [Electrical Safety Act 2022](#) (NT), which imposes WHS-style electrical safety duties on PCBUs and company officers, has been postponed to 1 July 2024 to allow for the development of accompanying regulations. The delay was facilitated by the [Electricity Legislation Amendment Act 2023](#) (NT) which makes a number of changes to the new electrical safety laws.

## Tasmania

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### Work Health and Safety Amendment Bill 2023 introduced to Parliament

The [Work Health and Safety Amendment Bill 2023](#) (Tas) has been introduced to the Tasmanian Parliament to adopt changes made to the national model WHS laws, including those banning insurance for monetary penalties under the *Work Health and Safety Act 2012* (Tas), and adding gross negligence as a fault element to the reckless-conduct offence. A [fact sheet](#) on the Bill has been published on the Tasmanian Parliament website.

### Mandatory jail time proposed for violence against frontline workers

If passed, the draft [Sentencing Amendment \(Presumptive Sentencing for Assaults on Frontline Workers\) Bill 2024](#) would introduce a requirement that a court to sentence a minimum 6 months imprisonment where the person has caused serious bodily harm to a 'frontline worker' (with few exceptions). 'Frontline workers' are defined to include child safety officers, correctional services officers, retail, hospitality and transport workers and health and safety officers (which includes emergency services officers including police officers, health workers and inspectors appointed under the TAS WHS Act). The Bill is available for [comment](#) until 29 March 2024.

# Significant cases

## Commonwealth

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### Psychosocial hazard case studies

Comcare has published [four psychosocial hazard case studies](#) based on Comcare regulatory activity in response to incidents involving psychosocial hazards and risks at workplaces in the Commonwealth jurisdiction.

The first case study (Poor organisational change management) relates to an Australian Public Service agency which failed to consult with contractors ahead of implementing a new performance management system, which included ratings which determined the number and frequency of work assessments. Workers engaged through labour hire organisations complained this system had negative effects on their mental health. A Comcare inspection found it was foreseeable that the new system would impact the psychological health and safety of workers (particularly labour hire workers), and that the agency's actions contravened the *Work Health and Safety Act 2011* (Cth) (**Commonwealth WHS Act**) (both in relation to the failure to manage psychosocial risks in the rollout of the system, and the failure to consult with workers and their HSRs on a change that may affect their health and safety). The organisation was directed to develop a corrective action plan to ensure there was a process/system in place to identify and manage psychological hazards associated with organisational change that could affect workers' health and safety, and that all workers and their HSRs were included in consultation on the change.

The second case study (Work demands) relates to an Australia Public Service agency that was experiencing high workloads and staff shortages in one of its key frontline business areas over a period of at least a year. Staff reported workloads that were excessive and unsafe, with obvious negative impacts on workers' mental health. Whilst the agency advised that it had plans to implement controls to manage these psychosocial risks over a period of several months (including increasing staff numbers and streamlining workflows and roles), a Comcare inspection found the organisation was contravening work health and

safety laws by failing to adequately address immediate psychosocial risks associated with workload management. The agency developed and implemented a corrective action plan which detailed measures to manage and control the immediate risks, including engaging with HSRs, closer monitoring of workloads and a range of workplace wellbeing activities.

The third case study concerned complaints of bullying and harassment (although the Comcare inspection did not identify a specific contravention of work health and safety laws) and the fourth case study concerns combined hazards (a reminder that psychosocial hazards often don't occur in isolation, with workers likely to be exposed to a combination of hazards).

### Employer "needed to do more" to meet WHS duty to prevent workplace sexual harassment

The Fair Work Commission has found that an employer had a valid reason to dismiss a worker for his inappropriate sexual jokes and comments, but warned that the employer needed to do more to meet its positive work health and safety duty to prevent harassment, including:

- a program of training for managers and employees; and
- "letting go of the notion that an employer can only act on alleged misconduct if there is a 'formal complaint'" noting that the case had "uncovered a workplace culture that does not encourage reporting".

This decision is a reminder of the positive duty to manage psychosocial hazards, including sexual harassment, under work health and safety regulations and codes of practice around Australia, and follows a trend of increased focus on these positive WHS duties by regulatory bodies.

[Lindsay Swift v Highland Pine Products Pty Ltd \[2023\] FWC 1997 \(10 August 2023\)](#)

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## New South Wales

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### National operations manager sentenced to three years imprisonment

In April 2020, a truck driver engaged by Connect Logistics Pty Ltd, crashed into two police cars on a Melbourne Freeway, causing the death of four police officers. The driver, who is currently serving an 18-year prison sentence, had fallen asleep while driving and was affected by drugs.

An investigation by the National Heavy Vehicle Regulator revealed fatigue-related breaches in more than 40% of the company's driving shifts in the 7 months preceding the incident, hundreds of which were checked and endorsed by senior managers of the company, including the national operations manager.

The Sydney-based national operations manager has been found guilty of a category 1 recklessness offence for failing to fulfil his primary duty as an operator under the NSW Heavy Vehicle National Law relating to his failure to ensure proper fatigue management systems were in place and complied with by workers. On 24 January 2024, he was sentenced to 3 years' imprisonment (with a non-parole period of 12 months).

Connect Logistics was also found guilty of a category 1 recklessness offence under the NSW Heavy Vehicle National Law for failing to implement systems to properly manage its truck drivers' fatigue and fitness for duty, fined a record \$2.31 million and barred from operating for 12 months.

The managing director of Connect Logistics was also charged and fined \$22,500 for failing to exercise due diligence to ensure the company was complying with its safety duties, the Magistrate noting that a director cannot avoid their WHS duties by putting "his hands over his ear and his eyes".

In Victoria, the Director of Public Prosecutions has also brought proceedings under the Victorian HVNL against the truck driver's direct supervisor, who has plead guilty to the recklessness charges, but is yet to be sentenced.

The National Heavy Vehicle Regulator published an [update](#) on the case on 23 January 2024.

### Word of mouth training inadequate for 'novel situation'

An employer has been found guilty of offences under the *Work Health and Safety Act 2011* (NSW) (**NSW WHS Act**), after the District Court rejected its claims that the cause of a worker's exposure to a risk of serious injury or death was her deliberate decision to undertake a task in a manner that she knew to be unsafe. The charge related to a worker who was inserting a probe into hay bales to test their moisture level, when two bales fell from a partially constructed stack of bales onto her, causing serious injury.

The Court heard evidence, and accepted, that a general practice had been developed that would have been effective in minimising the risks of falling bales, however the general practice had been passed on through word of mouth and demonstration over a long period of time. The exact content of any worker's training on the general practice could not be easily ascertained.

Judge Scotting rejected the proposition that the worker made a deliberate decision to test the bales in a manner that she knew to be unsafe or that was contrary to her training and found that when presented with a novel situation on the day of the incident (where some bales were placed in a different position than they would normally be), the worker had not been properly trained.

[SafeWork NSW v JBS Australia Pty Ltd \(No 3\) \[2023\] NSWDC 382](#)

### Court confirms that a SWMS better minimises risk than a verbal direction

The NSW Court of Criminal Appeal has rejected a company's appeal against a \$375,000 fine imposed in relation to an incident where a subcontracted driver died after falling from a truck while unloading piles.

A verbal ban had been issued in relation to the fall-from-height risk, but this was not incorporated into the SWMS until after the incident. Referring to the standard of 'reasonable practicability', the company, Saunders Civilbuild Pty Ltd, submitted that the primary judge erred in fact and law in that the evidence did not prove that adding the verbal direction to the SWMS would have better minimised the risk.

Dismissing the company's appeal, the Court found that the company's own safety management system recognised that written safety systems were integral to its safe work methods for workers including subcontractors and that these were required to be read, discussed and acknowledged prior to the commencement of work. The Court found that the addition to the SWMS was not merely recording a verbal direction, but that it placed the direction in the context of a detailed written safety procedure, correlating the hazard and the risk of death or serious injury associated with the hazard.

[\*Saunders Civilbuild Pty Ltd v SafeWork New South Wales\* \[2023\] NSWCCA 261](#)

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### **Offenders deserved maximum available WHS penalties**

A NSW District Court judge has found the offences of a reckless PCBU and a worker deserved the maximum available penalties under the NSW WHS Act at the relevant time, being \$3 million for the PCBU (reduced by 25% for its guilty plea, and then by 10% for its 'dire financial circumstances' to \$2,025,000) and \$150,000 for the worker (before applying the same discounts to reduce the fine to \$101,250). The PCBU and worker were also ordered to pay a total of \$78,000 in costs. The fines related to the death of a worker who was dragged into a woodchipper, and whose death went unnoticed because the PCBU's systems were "so haphazard".

[\*SafeWork NSW v A1 Arbor Tree Services Pty Ltd and Anor\* \[2023\] NSWDC 256](#)

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## **Queensland**

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### **\$1.2 million fine for Heavy Vehicle National Law breaches**

A company has been fined \$1.2 million for 37 breaches of the Heavy Vehicle National Law, after its remuneration structure (which paid drivers a "generous hourly rate") encouraged drivers to disregard the Heavy Vehicle National Law fatigue related requirements. Magistrate Young said "[i]t is relevant to the culpability of the defendant that in paying the drivers in such a way the defendant needed to

### **Employer not guilty as the prosecutor failed to prove alleged risk**

An employer has been found not guilty of offences against the NSW WHS Act with the District Court finding that the prosecutor had failed to prove the risk as alleged in the Summons (being that a small hole in the vehicle's exhaust flex pipe was the cause of an underground fire, or could cause such a fire).

[\*Andrew John McColm v Tritton Resources Pty Ltd\* \[2023\] NSWDC 270](#)

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### **Director with no involvement fined**

The sole director of Quattro Constructions Pty Ltd was charged with breaching his due diligence duties in relation to an incident where a teenage apprentice sustained serious injuries after falling 12 metres at a NSW construction site. While appointed as sole director, the defendant, a truck driver and yard manager, had "zero involvement" with Quattro Construction's management or the operation of its business which was one of a group of companies operated by the defendant's cousin.

The Court found that by acting as a director "in name only", the defendant did not take reasonable steps to ensure that he was complying with his duties under the NSW WHS Act and imposed a fine of \$160,000 (reduced to \$120,000 for an early guilty plea).

[\*SafeWork NSW v Casella\* \[2023\] NSWDC 503p](#)

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be proactive in avoiding circumstances of the drivers not complying with the fatigue regulations to increase their take home pay. As the opportunity and temptation to the drivers was obvious, the company needed to be diligent in overseeing the obvious risk."

[\*Department of Transport and Main Roads v NM & AA Foley Contracting Pty Ltd\* \[2023\] QMC 5](#)

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## Facilities manager convicted and fined

A facilities manager of a commercial high-rise building has been found personally liable for breaching the *Work Health and Safety Act 2011* (Qld) (**Queensland WHS Act**) in relation to the death of an 80-year old man that occurred as a result of the visitor becoming trapped in a disused stairwell of the building.

The Brisbane Magistrates Court heard that the door to the disused stairwell was located next to the door to the male toilets, had an automatic locking device meaning that once a person entered they could not get out, that there had been three previous occasions where individuals had been trapped in the stairwell and that the facilities manager was aware of two of these occasions but had done nothing to remedy the hazard nor had he reported the entrapments to his employer.

Finding that the incident was a foreseeable event with catastrophic consequences, the Court imposed a fine of \$30,000 (without conviction), taking into account the facility manager's early guilty plea, significant remorse and good character.

## South Australia

### Appeal against WHS conviction rejected

A PCBU's appeal against its WHS conviction, on the basis that the prosecutor did not prove beyond reasonable doubt that the installation of a pressure sensor was a reasonably practicable measure that would have ameliorated the risk created by a crush zone, has been rejected.

Dial A Tow Australia Pty Ltd was charged with offences against the *Work Health and Safety Act 2012* (SA) (**South Australia WHS Act**) after a worker was fatally crushed between a tow truck's retracting tilt tray and the headboard while he was putting tools away. The truck was designed differently to traditional tow trucks, and its toolboxes were fixed to the cabin rather than the tilt tray.

The company was found guilty at first instance, with the Magistrate accepting that it was reasonably practicable for it to have adopted an engineering measure, incorporating pressure sensors that stopped the tilt tray when a person

## Fines imposed following drowning deaths found not to be excessive

Huckleberry Australia Pty Ltd appealed against the \$250,000 fine for breaches of the Queensland WHS Act in relation to the deaths of two overseas students. The appellant was providing a guided tour of K'gari (Fraser Island) when the two students died by drowning in a lake. Huckleberry had not undertaken a written risk assessment until after the fatalities.

Finding that the fine imposed by the primary judge was not excessive, the District Court Judge found that:

- while the appellant was not engaged to supervise the children, they were aware of the Queensland Education Department's prohibition on swimming during public school excursions and had a proactive duty to alert those with the supervisory responsibility to the dangers of swimming; and
- the appropriate safeguards were simple and easily implemented as highlighted by the risk assessment undertaken following the incident.

*Huckleberry Australia Pty Ltd v Guilfoyle* [2023] QDC 208

was in the crush zone. The company appealed, submitting that the designer and manufacturer of the truck (who was also prosecuted and plead guilty to offences against the South Australia WHS Act) was the appropriate expert to consider any modifications to the truck.

In dismissing the appeal, the majority judges held that had Dial A Tow sought the view of an engineer, as it ought reasonably to have done, an engineering solution would have been suggested and ought to have been implemented. His Honour Deputy President Judge Gilchrist dissented, saying that he would have allowed the appeal.

*Dial A Tow Australia Pty Ltd v Campbell* [2023] SAET 49



## Victoria

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### Continuing HR process may be 'recklessly engaging in conduct'

WorkSafe Victoria has charged the Victorian Building Authority with a breach of section 32 of the *Occupational Health and Safety Act 2004* (Vic) (**Victoria OHS Act**) alleging that they recklessly engaged in conduct that placed another person at a workplace in danger of serious injury by refusing to transfer an inspector to a different supervisor and continuing performance and redundancy processes despite being aware that this may have placed the inspector at risk of psychological injury. The charges follow the death by suicide of the inspector. The Authority also faces a second charge for failing to provide and maintain an adequate system of work to reduce the risk of workplace related stress and psychological injury, including anxiety and depression. For more information, see [an alert](#) published by WorkSafe Victoria.

### Court Services Victoria fined over a toxic workplace culture at Coroners Court

Court Services Victoria has been convicted and fined \$379,157 after pleading guilty to an offence against the Victoria OHS Act relating to a toxic workplace culture at the Coroners Court of Victoria that contributed to the suicide of a lawyer and numerous other workers taking stress leave.

The Court heard that from at least December 2015 to September 2018, workers at the Coroners Court were at risk from exposure to traumatic materials, role conflict, high workloads and work demands, poor workplace relationships and inappropriate workplace behaviours. During this period, workers made numerous complaints, including allegations of bullying, favouritism and cronyism, verbal abuse, derogatory comments, intimidation, invasions of privacy and perceived threats to future progression. For more information, see [an alert](#) published by WorkSafe Victoria.

### Record recklessness penalty

Dennis Jones Engineering Pty Ltd has been found guilty of reckless endangerment under the Victoria OHS Act and fined \$2.1 million following an incident that resulted in an apprentice sustaining serious head injuries. The director of the company, who was supervising at the time and had directed the apprentice to undertake the work in an unsafe manner, has also been convicted, for failing to provide and

maintain safe systems of work where the contravention was attributable to his failure to take reasonable care. The director has been fined \$140,000, sentenced to perform 600 hours of unpaid community work and is prohibited from leaving Victoria without permission for a period of 5 years.

[DPP v Jones & Anor \[2023\] VCC 2054](#)

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### Silica fine increased on appeal

The State Director of Public Prosecutions successfully appealed against the \$7,000 fine (without conviction) imposed on Miter Square Pty Ltd for multiple breaches of provisions of the Victoria OHS Act relating to the required processes for working with engineered stone.

The Victorian County Court was presented with expert evidence regarding the seriousness of the offence and increased the fine to \$28,000, noting that the fine should have been \$45,000 to \$50,000, but that they were constrained to the degree of the first instance decision.

### Company failed to follow own drug and alcohol guidelines

A glass factory worker committed suicide after being terminated in relation to suspected intoxication at work. In a meeting with HR, on the day that he was dismissed, the worker acknowledged that he had alcohol dependency issues and offered to submit to breathalyser checks before each shift. The HR Manager provided that the decision to terminate was based on a concern that the workers' actions could cause a workplace fatality exposing the company to industrial manslaughter charges. The decision was made despite the company being made aware, through a union delegate, that the worker had expressed thoughts of suicide in relation to possible loss of employment.

The Coroner found that the employer's decision to terminate was contrary to the company's enterprise agreement and that had the alternatives set out in the agreement been followed, including offer of a referral program for assistance with drug and alcohol problems, "the death would very likely have been prevented". WorkSafe Victoria conducted an investigation but did not lay any charges in relation to the incident.

[Finding Into Death Without Inquest of Anuruddha Bandara Abeysinghe](#)

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## Western Australia

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### Enforceable undertaking in lieu of prosecution for failure to provide information

A large mining entity, the first duty holder to be charged under the *Work Health and Safety Act 2020 (WA)* (**Western Australia WHS Act**), has entered into an enforceable undertaking containing \$1.47 million worth of commitments in lieu of prosecution for alleged failures to comply with a requirement to provide documents and to answer questions in relation to its operations, without reasonable excuse, contrary to section 171(7) of the Western Australia WHS Act. The entity has denied the charges.

The commitments contained in the undertaking align with recommendations from the [‘Enough is Enough’ parliamentary inquiry into sexual harassment against women in the fly-in-fly-out mining sector](#) and include developing and implementing a psychosocial assurance standard that contractors and subcontractors must satisfy. The standard will include minimum training and induction requirements and set out best practice rules for the management of psychosocial hazards, for PCBUs seeking to provide work under service contracts. Enforceable undertakings are published on the Western Australian Government website.

## Tasmania

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### Operator of jumping castle charged

The operator of an inflatable jumping castle that six children were using when they tragically sustained fatal injuries has been charged with a Category 2 offence against the *Work Health and Safety Act 2012 (Tas)* (**Tasmania WHS Act**) and could be fined up to \$1.5 million if convicted.

A coronial inquiry has also commenced in relation to the incident. However, the Supreme Court has made orders restraining the State Coroner from obtaining applicable WorkSafe documentation until the expiration of the limitation period for prosecutions, or the conclusion of any criminal proceedings brought, under the Tasmania WHS Act.

[Pearce v Coroner Olivia McTaggart \[2023\] TASSC 37](#)

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## New Zealand

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### White Island manager not just a passive landowner

A volcanic eruption on Whakaari/White Island in 2019 caused the death of 22 tourists and workers. WorkSafe NZ conducted an investigation and as a result charged 13 defendants including the company that managed the island. Whakaari Management entered into licence agreements to enable tour operators to access the island for the purpose of conducting walking tours.

While Whakaari Management submitted that they did not manage or control any workplace on Whakaari, the Court found that the company was more than a “passive landowner”. The Court rejected Whakaari Management’s submission that it was unnecessary for them to undertake their own risk assessment finding that Whakaari

Management’s risk was fundamentally different from that of an individual tour operator and stressed that WHS duties were not transferrable.

Whakaari Management was found guilty of breaching their duty as a PCBU who manages or controls a workplace by failing to undertake necessary risk assessments. The charge alleging that the company held and breached a primary duty of care to tourists and workers on the island was dismissed.

[WorkSafe New Zealand v Whakaari Management Limited \[2023\] NZDC 23224](#)

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