NORTON ROSE FULBRIGHT

WHS Law Briefing

September 2020

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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 2020. Please contact our national WHS team contacts if you would like to discuss any of the matters in this briefing. We welcome your feedback.

Key issues and trends

COVID-19	Organisations have adapted to new ways of working and Safe Work Australia and WHS Regulators have been rapidly releasing checklists, fact sheets, template risk assessments and other resources for business and industries, which you can access here. Whilst these resource are broadly described as "guidance material", PCBUs have a duty under WHS laws to be aware of these resources and take reasonably practicable steps to implement them within their business.
Continued introduction of workplace manslaughter offences	To date in 2020, Queensland has seen its first conviction, and the first individual charged, under its new industrial manslaughter provisions; industrial manslaughter provisions have been introduced in the Queensland resources sector and Victoria's new workplace manslaughter offences have commenced operation. The cases decided during 2020 suggest a trend in suspending jail sentences for industrial manslaughter, recklessness and gross negligence offences, meaning the offender is not required to serve time in jail unless they commit another offence within a specified period. This is a change from the initial recklessness convictions we saw in 2018 and 2019 in which offenders were required to serve part of their sentence.
Prosecutions of principals and principal contractors	A trend in WHS prosecutions over the last 18 months has been an intensification of WHS prosecutions against principal contractors and principals, ie the head contractor and the party commissioning the works, 'the client.' It seems that the regulators are testing the scope of the principal contractor role and the degree to which the precedent case law applies regarding reliance on subcontractors, including specialist subcontractors, and what is a specialist subcontractor. There are four examples of prosecutions of principal contractors outlined in this briefing.
Sexual Harassment Inquiry	In March 2020, the Respect@Work – National Inquiry into Sexual Harassment in Australian Workplaces recommended the model WHS Regulation be amended to deal with psychological health (this is consistent with an earlier recommendation by the Boland Review) and that WHS ministers develop a Code of Practice on sexual harassment. As discussed in this briefing, since the publication of that report, WHS Regulators in Victoria, Western Australia and New South Wales have released draft guides and codes of practice on violence, aggression, harassment and psychological health and are inviting public comment.

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Legislative updates

Across Australia / Commonwealth

Consultation continues on Heavy Vehicle National Law review

The National Transport Commission is reviewing the Heavy Vehicle National Law and has called for submissions on a consultation Regulation Impact Statement (**RIS**) which outlines reform options for the future Heavy Vehicle National Law. Consultation will continue until November 2020, with the National Transport Commission looking to finalise and present options to ministers in May 2021.

Asbestos notice changes to Model WHS Act and Code of Practice

The model *Work Health and Safety Act 2011* (**Model WHS Act**) and model Code of Practice, How to manage and control asbestos in the workplace, have been amended to make it mandatory for regulators to issue a "prohibited asbestos notice" if they believe asbestos is present at a workplace. The notice will detail the measures that must be taken to deal with the prohibited asbestos, and those that fail to comply face fines of up to $500,000.

Delay to harmonised chemical classification system

Safe Work Australia members have postponed the start date of the Globally Harmonised System of Classification and labelling of Chemicals (**GHS-7**) to 1 January 2021 because of the impact of the COVID-19 pandemic on Australian businesses. Special transition arrangements have been put in place for importers and manufacturers who were ready to use GHS-7 from 1 July 2020.

Hazardous chemicals health monitoring guides published

SafeWork Australia has released 30 guides on hazardous chemicals that require or might require health monitoring under the *Work Health and Safety Regulations 2011* (**Model WHS Regulations**), including arsenic, asbestos, lead, pesticides, silica, styrene and uranium. The guides are available on Safe Work Australia's health monitoring page.

New silica exposure standards

The Commonwealth Government has made the *Work Health and Safety Amendment (Silica Workplace Exposure Standards) Regulations 2020* to halve the exposure threshold for crystalline silica in workplaces under the Commonwealth's jurisdiction.

Updates to the Wiring Rules

AS/NZS 3000:2018, Electrical Installations, known as the Wiring Rules, were updated on 2 April 2020. The update includes a major change to section 7.8 *Standards for specific electrical installations*. This section now references AS/NZS 5139 Electrical Installations-Safety of battery systems for use with power conversion equipment.

Australian Capital Territory

New rights for entry permit holders, asbestos fines

WHS entry permit holders are now permitted to take photographs, films, or audio, video or other recordings of suspected safety contraventions at ACT workplaces, under new provisions implemented by the *Employment and Workplace Safety Legislation Amendment Bill 2020*. Other amendments under the Bill, including introduction of $500,000 prohibited asbestos fines, will commence by July 2021.

Labour hire licensing legislation passes

The *Labour Hire Licensing Bill 2020* has passed ACT Parliament, requiring labour-hire providers to apply for a licence, satisfy a "suitable person" test and demonstrate a history of, and ongoing, compliance with workplace laws, including the *Work Health and Safety Act 2011* (**ACT Act**).

New silica exposure standards

The ACT Government's new workplace exposure standard for crystalline silica of 0.05mg per cubic metre commenced on 1 July 2020. Employers have been urged to adopt even tighter limits than the new exposure standard.

New South Wales

NSW introduces new 'gross negligence' fault element

The *Work Health and Safety Amendment (Review) Bill 2020* has passed the NSW Parliament. The Bill introduces an alternative fault element of "gross negligence" for a Category 1 offence under the NSW Act (the alternative, and existing fault element is "recklessness"); clarifies that an individual person may be both a worker and a PCBU; includes a note to clarify that the death of a person at work may also constitute manslaughter under the *Crimes Act 1900*; introduces provisions regarding training for health and safety representatives; extends the period of time in which a person can ask the regulator to start a prosecution in relation to certain workplace incidents; requires Regulators to provide updates on the progress of investigations when requested; introduces a penalty unit system to keep penalties in line with the consumer price index, and creates an offence of entering into, providing or benefiting from insurance or indemnity arrangements in relation to the payment of penalties for offences under the NSW Act.

First draft mental health Code of Practice

SafeWork NSW has published a *draft Code of Practice for managing risks to psychological health*. There is not presently a Code of Practice on psychological health in any Australian state or territory. The draft Code provides detailed information on how to manage risks to psychological health in the workplace and, if adopted, will apply to all NSW workplaces and industries. SafeWork NSW has also published an Explanatory Paper seeking feedback on the draft code and submissions can be made until 31 October 2020.

New respiratory equipment requirement for work with silica

The *Work Health and Safety Amendment (Silica) Regulation 2020* have been made by the NSW Government, prohibiting PCBUs from directing or allowing workers to use power tools to cut manufactured stone containing crystalline silica without compliant respiratory protective equipment.

Replacement 'formwork' Code of Practice

The new Formwork Code of Practice commenced, replacing the 1998 Code for formwork and falsework. The new Code includes information on measures required under the *Work Health and Safety Regulation 2017* (**NSW Regulation**), and is to be read in conjunction with the Construction Work Code of Practice.

New coal dust and silica exposure standard

The NSW Government's new workplace exposure standard for coal dust will be reduced to 1.5mg per cubic metre on 1 February 2021. Lower exposure thresholds for diesel particulate matter in NSW mines and petroleum workplaces (0.1 milligrams per cubic metre of air) and crystalline silica (0.05mg per cubic metre) were introduced in February and June 2020 respectively.

Information sharing proposed in new Bill

The NSW Government has introduced the *Work Health and Safety Amendment (Information Exchange) Bill 2020* to Parliament which, if passed, would authorise the Secretary of the Ministry of Health to provide information to SafeWork NSW or the Resources Regulator where the Secretary believes this is necessary to allow the regulators to exercise their functions. This will override restrictions on the provision of information otherwise imposed by existing legislation.

Amendment Regulation introduces additional on the spot fines

The *Work Health and Safety Amendment (Miscellaneous) Regulation 2020* (**Amendment Regulation**) commenced in August, converting monetary amounts in newer provisions of the NSW Regulation to penalty units, to ensure consistency with other clauses in the NSW Regulation (which were converted to penalty units earlier this year). The Amendment Regulation also prescribes offences of failing to minimise the risks associated with falling objects and failing to safely manage or control workplace scaffolds as penalty notices offences, attracting on-the-spot fines, and clarifies the meaning of regulated traffic control work.

Victoria

Workplace manslaughter offences commence

Two new criminal offences of workplace manslaughter have commenced under the *Occupational Health and Safety Act 2004* (**VIC Act**). The offences capture negligent conduct which involves a breach of an OHS duty and causes the death of an employee or member of the public. The maximum penalty for these offences when introduced were $16.5 million for bodies corporate, and jail terms of up to 20 years for company offices, although the maximum jail term has now been increased to 25 years.

'Lead' guidebook published

WorkSafe Victoria has released new guidance *Lead: A guidebook for workplaces* replacing the former code of practice. The guidebook supports amendments to the VIC Act which commenced on 5 June 2020 changing the definition of lead-risk work, lowering the airborne lead exposure standard and updating requirements for the frequency of biological monitoring.

Engineered stone and silica work licensing system announced

Victoria announced a safety licensing system for employers using engineered stone with high concentrations of silicosis-causing crystalline silica. The Government also made a Compliance Code on managing exposure to silica in engineered stone, and urged companies to adopt a lower exposure threshold for respirable silica than the new national standard.

Violence and sexual harassment guide released

WorkSafe Victoria has released a guide for employers on preventing and responding to work-related gendered violence and work-related sexual harassment.

Electrical line worker licencing system enacted

The Victorian Government has enacted a safety licensing system for electrical line workers.

Northern Territory

New silica exposure standard

The Northern Territory halved the exposure standard for crystalline silica on July 1 to an eight-hour time-weighted average of 0.05mg per cubic metre.

On the spot fines expanded under amendment to NT Regulations

The *Work Health and Safety (National Uniform Legislation) Regulations 2011* (**NT Regulation**) have been amended to include 21 new infringement notice offences involving on-the-spot fines of $720 for individuals and $3,600 for bodies corporate. The infringement notices can be issued for breaches of the *Work Health and Safety (National Uniform Legislation) Act 2011* (**NT Act**) and NT Regulation relating to incident notification, authorised work, displaying issued notices, general workplace management, confined spaces work, managing the risk of falls, construction work, and asbestos.

Queensland

Industrial manslaughter offences for resources sector

The *Mineral and Energy Resources and Other Legislation Amendment Bill 2020* has passed the Queensland Parliament, adding industrial manslaughter provisions to the safety laws applying to the resources sector amongst other changes. A summary of the changes brought about by this bill and when they commence is available here.

New penalties for assaulting inspectors

The *Community Services Industry (Portable Long Service Leave) Bill 2019* reduces Work Health and Safety Queensland (**WHSQ**) inspectors' powers to resolve right-of-entry disputes at sites, but increases penalties for assaulting inspectors and hindering entry permit holders.

New electrical Codes of Practice

Three new electrical safety Codes of Practice as well as tougher methane monitoring rules for underground mines commenced.

Independent resources authority enacted

The *Resources Safety and Health Act 2020* was enacted on 19 March 2020. The Act sees the introduction of a new independent regulatory authority focused on the safety and health of resources workers in Queensland. NRFA has published an article about this development here.

New silica exposure standard

Queensland reduced the resources industry's exposure threshold for respirable coal dust from 2.5mg per cubic metre to 1.5mg on 1 September 2020, and the threshold for respirable crystalline silica was halved from an eight-hour time-weighted average of 0.1mg per cubic metre to 0.05mg on 1 July 2020.

South Australia

Labour hire licensing scheme narrowed

South Australia lowered its workplace exposure limit for respirable crystalline silica – an eight-hour time-weighted average of 0.05mg per cubic metre – on 1 July 2020.

'Mine manager' requirement proposed in draft regulation

The South Australian Government's *Labour Hire Licensing (Miscellaneous) Amendment Bill 2020* has passed Parliament, narrowing the scope of its labour-hire licensing scheme, removing the need for a number of labour-hire operators currently licensed under the scheme to hold a licence.

New silica exposure standard

South Australia has published the draft *Work Health and Safety (Mine Manager) Variation Regulations 2020*, which require mines where mining operations are carried out to appoint a "competent" person as mine manager (as defined in the draft regulations). The draft regulations are now being reviewed in light of submissions received before 11 September 2020.

Western Australia

Harmonised WHS Law works its way through Parliament

Western Australia's *Work Health and Safety Bill 2019* passed through the Legislative Assembly on 20 February 2020 and was then referred to the Standing Committee on Uniform Legislation and Statutes Review and the Standing Committee on Legislation for further consideration. The Standing Committees issued reports on 12 May 2020 and 11 August 2020. The latest report concluded that the objectives of modernisation and consolidation would be satisfied, although noted that satisfaction of harmonisation was complicated because 'no harmonised approach exists to industrial manslaughter provisions in Australia.' The Second Reading Debate for the Bill commenced on 15 September 2020 in the Legislative Council.

Draft 'violence' Code of Practice

WA's Commission for Occupational Safety and Health has published a draft Code of Practice on Violence and Aggression at Work and has invited public comment until 23 September 2020. A separate Code of Practice on Bullying and Harassment is being developed and will also be released for consultation in the future.

Workplace bullying regime proposed in new Bill

The *Industrial Relations Legislation Amendment Bill 2020* has been introduced into WA parliament, which seeks to overhaul WA's industrial relations system and establish an anti-workplace bullying regime. Information about the proposed legislation is available here.

Guidelines for buildings near electrical assets published

The Western Australian Government has made the Guidelines for the safety of buildings near network operator electrical assets under the *State Electricity Act 1945*, which complement and must be read with the *Occupational Safety and health Act 1984* (**WA Act**) and *Occupational Safety and Health Regulations 1996* (**WA Regulations**) and network safety laws.

Musculoskeletal safety framework released

WorkSafe WA has released the *Western Australian framework for the prevention and management of work-related musculoskeletal disorders 2020-2025*, and *Western Australian strategy for the prevention and management of work-related musculoskeletal disorders, 2020-2025*.

Significant Cases

Western Australia

WA's first gross negligence conviction

Repeat offender Resource Recovery Solutions Pty Ltd (**RRS**) is the first offender to be found guilty of breaching its general health and safety duties in circumstances of gross negligence – the most serious offence under the WA Act.

The charges related to a January 2016 incident where a worker's arm was amputated whilst manually removing items from conveyor belts and clearing jams.

RRS faces a maximum fine of **$500,000** because the offence occurred before the penalties were increased. If the offence occurred today, the maximum penalty (for a repeat offender) would be around $3.5 million.

Record penalties possible following gross negligence charges

Two employers have been charged by WorkSafe WA with breaches of section 19 "Duties of employers" of the WA Act for negligently failing to provide and maintain a safe working environment and causing the death of an employee plumber through that failure. The charges relate to a fatality at a Mosman Park site, which occurred when a water main burst and filled a trench with water and sand, drowning a worker.

Vivian Plumbing and Civil faces a maximum level-4 penalty (gross negligence) of **$2.7 million** for a first offence. Construction company Badge Constructions (WA) Pty Ltd, charged as the principal that engaged Vivian Plumbing and Civil, faces a level-3 penalty of up to **$2 million**.

These are the first cases initiated by WorkSafe WA following the significant increase in penalties under the WA Act implemented on 3 October 2018. For example, the penalty for a first time level-4 offence jumped from $500,000 to $2.7 million with these changes.

Court of Appeal increases employer's WHS fine to $110k, "rogue" supervisor did not mitigate culpability

An employer's safety fine has been nearly quadrupled to **$110,000**, with the Court of Appeal rejecting the employer's submission that its culpability was mitigated by the misconduct of a "rogue" supervisor, who seriously injured a non-employee: *AYTON -v- CITY OF ARMADALE* [2020] WASCA 39 (1 April 2020).

In the Magistrates Court, the employer was fined $30,000, from a maximum penalty of $400,000, for breaching section 21(2) of the WA Act in failing to ensure, so far as was reasonably practicable, the health and safety of a non-employee. The Magistrate found the employer's culpability was mitigated by the fact that the supervisor was a *"rogue employee"* with *"little or no regard"* for safety, who repeatedly defied directives and job safety analyses requiring the facility to separate pedestrians and public vehicles from front-end loaders.

WorkSafe WA appealed against the $30,000 fine, arguing it was manifestly inadequate, but in late 2018, Supreme Court Justice Kenneth Martin upheld the initial penalty.

WorkSafe WA appealed a second time to the Court of Appeal, and was successful. The Court of Appeal rejected the employer's attempts to downplay its culpability by focusing on the supervisor's failure to comply with safety procedures, and said this submission *"seeks to deflect attention"* from the fact that the employer held the relevant safety duty and that it acted *"through its officers and employees."* The Court of Appeal said the supervisor's failure to comply with the safety procedures was not a one off, and that *"to the contrary, the respondent admitted, in*

substance, to an ongoing and serious failure of supervision and enforcement of its own procedures at the facility and, in particular, to a failure to address any inadequacies in [the supervisor's] compliance with those procedures."

The Court of Appeal concluded the penalty imposed by the Magistrates Court was manifestly inadequate, and imposed a penalty of $110,000.

Victoria

Victorian principal contractor convicted and fined over subcontractor fatality

Victorian principal contractor, Seascape Constructions Pty Ltd (**Seascape**) pleaded guilty on 28 July 2020 to breaching section 23(1) of the VIC Act after it failed to prepare a safe work method statement or ensure that one was prepared before allowing a subcontractor to perform work at height, who then fell 3.1m and suffered fatal injuries in June 2017: *DPP v Seascape Constructions Pty Ltd* [2020] VCC 1132 (28 July 2020).

Seascape was convicted and fined **$850,000** for breaching section 23(1) of the VIC Act.

In sentencing Seascape, the Victorian County Court commented that "It is no answer for the Company to say that there was a registered builder on site… or that because it had advertised for carpenters who could work unsupervised and had undergone OH&S induction, that the defendant company had absolved itself from the need to put appropriate measures in place or to at least ensure that these had been taken by sub-contractors." Rather, the Court said "the law requires that a company who employs sub-contractors to actively supervise and monitor them and to ensure that their workplace is safe, and that OH&S measures are met."

Court dismisses appeal over workplace fatality, describes principles relevant to control and 'subsisting risk'

The Victorian Court of Appeal has highlighted that an employer's duties to implement sufficient controls applies to all subsisting risks, regardless of how unlikely they are to occur: *Keilor Melton Quarries v The Queen* [2020] VSCA 169 (23 June 2020)

Keilor Melton Quarries (**KMQ**) was convicted and fined **$230,000** in 2018 after a County Court jury found it guilty of breaching section 26 of the VIC Act relating to its duty to manage and control the workplace. The Court found KMQ had breached this duty after a truck driver had reversed up the edge of a stockpile, flipped over and sustained fatal injuries.

KMQ appealed the County Court's decision on the basis that:

1. it did not have control of the quarry's daily operations; and
2. it was not necessary to adopt safety measures, as trucks had not been permitted or required to dump stockpile material within the area since December 2015 and therefore there was no subsisting risk.

In dismissing the appeal, the Court cited appellate courts' authority that when determining whether an employer controlled a contractor's work, *"it is sufficient for this purpose if the employer had a right to control the particular matter or activity giving rise to the risk, whether or not control was in fact being exercised".*

The Court concluded that as KMQ had the sole authority to operate the quarry, it was *"unambiguously clear"* that KMQ had control of the relevant operations and *"could not relinquish control… [or] put itself in a position where it was disabled from exercising control over the operations".*

The Court also found that the fatality of the truck driver *"demonstrated with awful clarity, that there was a subsisting risk"* at the quarry, with trucks having easy access to an unprotected edge and reminded the defendant that safety duties extended to protecting workers from their own inattention or carelessness.

Reckless conduct charges follow string of chemical fires

Graham Leslie White has been charged with dozens of offences, including section 32 of the VIC Act "Duty not to recklessly endanger persons at workplaces" and section 31C "Aggravated offence" under the *Dangerous Goods Act 1985*. The reckless endangerment and aggravated offence provisions both carry maximum penalties for individuals of **five years' imprisonment** or nearly **$300,000**.

The charges relate to warehouses Mr White occupied in various Melbourne, one of which erupted in a major chemical fire in 2018. WorkSafe Victoria alleged he failed to take reasonable precautions to prevent fires or explosions at the four sites. Mr White's breaches were uncovered by investigations into reports of dangerous chemical stockpiles in early 2019.

Supreme Court fines company $1.5m for 10 WHS breaches, Hazelwood fire

Hazelwood Power Corporation Pty Ltd (**HPC**) has been fined a total of **$1.56 million** –just 12 per cent of the maximum available penalty – for 10 OHS breaches relating to the devastating Hazelwood coal mine fire, after the Victorian Supreme Court found the fire didn't result from the company's safety contraventions: *Director of Public Prosecutions v Hazelwood Power Corporation Pty Ltd* (Sentence) [2020] VSC 278 (19 May 2020)

In November 2019, a Supreme Court jury found HPC guilty of: five breaches of section 21 of the VIC Act, in failing to provide its employees with a safe working environment; and five breaches of section 23, in failing to ensure the safety of non-employees. The jury found that HPC, which pleaded not guilty, failed to perform an adequate risk assessment, and failed to ensure there were sufficient staff numbers and expertise to instantly fight fires that might take hold in and around the mine on the weekend of 8 and 9 February 2014, despite the presence of nearby bushfires and tree plantations, and a forecast of very high temperatures and strong winds.

However, in sentencing HPC for the 10 offences, Justice Keogh said he was not satisfied beyond reasonable doubt that the northern batters fire resulted from any of the breaches of which HPC was found guilty. His Honour noted it was the first time multiple extreme fire danger days had been declared in Victoria, and said HPC could do little to control the outcome of the actions of arsonists linked to the neighbouring bushfires.

He noted that each of the 10 charges carried a maximum fine of 9,000 penalty units, equating to $1,299,240 per charge at the time of the offences, but many elements of the charges overlapped and it was important to ensure HPC was not punished more than once for each element.

The final $1.56 million penalty was made up of **10 fines ranging from $10,000 to $450,000**.

Queensland

Prosecutions commenced and guilty plea entered in relation to Dreamworld fatalities

Ardent Leisure Ltd, the company which owns Dreamworld theme park, has been charged with three category-2 breaches of its WHS duty to "other persons" following the deaths of four patrons in October 2016. The charges follow a coronial inquiry into the tragedy finding that there had been a 30-year failure to identify and control risks on Dreamworld's Thunder River Rapids Ride (**TRRR**).

Ardent could be fined up to a total of $4.5 million for the three charges which relate to its failure to ensure, as far as reasonably practicable, that the health and safety of other persons was not put at risk by:

- Providing and maintaining safe plant and structures;
- Providing and maintaining safe systems of work; or
- Providing the information, training, instruction and supervision that was necessary to protect all persons from safety risks arising from the Dreamworld undertaking.

The disaster at Dreamworld was one of two tragedies with triggered a major review of Queensland's WHS scheme and the introduction of industrial manslaughter laws and the establishment of the office of the WHS Prosecutor.

The coronial inquest into the Dreamworld fatalities found in February 2019 that the theme park relied on "frighteningly unsophisticated" safety systems which failed to adapt to previous incident on the TRRR. The TRRR's *"obvious hazards"* included a large gap and pinch point at the end of the conveyor system, "easily identifiable to a competent person".

Special Counsel Nicki Milionis and Senior Associate Tanya Puri from NRF's Melbourne office discussed the safety findings of the coronial inquest and their implications in a webinar on 23 March 2020.

Australia's first industrial manslaughter conviction, reckless directors

Brisbane Auto Recycling Pty Ltd has been convicted and fined **$3 million** in the Queensland District Court after pleading guilty to causing the death of a worker and being negligent in doing so, pursuant to section 34C "industrial manslaughter" of the QLD Act: *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113 (11 June 2020).

Brisbane Auto Recycling's two directors were also convicted and sentenced to 10 months' imprisonment, wholly suspended for 20 months, after pleading guilty to a Reckless Conduct - Category 1 offence.

One of the directors lied to the victim's daughter about the cause of the incident, and resisted providing CCTV footage of the incident. The other subsequently misled investigators as to the identity of the forklift driver.

Judge Rafter found that the PCBU did not have any safety systems or traffic management plan for its worksite. Several forklifts operated in the area. The fatality was caused by an unlicensed driver crushing the worker against the tilt tray. The directors *"knew of the potential consequences of the risk, which were catastrophic"*. Nor was the directors' offending momentary or isolated.

Judge Rafter concluded that *"by their pleas of guilty Mr Hussaini and Mr Karimi accept that they knew of the risk to the safety of their workers, but consciously disregarded that risk".*

Employers reminded to ensure health and safety duty is owed to the careless just as much as to the careful

In July 2020, MCG Quarries Pty Ltd (**MCG Quarries**) executive officer and director, William James McDonald unsuccessfully claimed on appeal that his conviction and sentence should be quashed because he could not have eliminated the relevant risk through the control measures identified by the prosecution: *McDonald v Bell* [2020] ICQ 007.

In 2019, Mr McDonald was convicted and sentenced to 18 months imprisonment with a six-month non-parole period in relation to an incident in 2012 involving a young worker who suffered fatal crush injuries by an unguarded conveyor on a fixed crushing plant.

On appeal in the Industrial Court of Queensland, Mr McDonald argued that the deceased knowingly exposed himself to the obvious risk of injury or death by *"reaching into the nip point"* and that the Industrial Magistrate erred in finding that the risk could have been minimised by installing a guard in the area. Further, Mr McDonald submitted that the applicable Australian Standard for quarrying operations allowed such guards to be of a *"lift-off"* design without an interlock device, meaning the guard would have constituted a lower order administrative control that workers could easily bypass.

Justice Glenn Parton found Mr McDonald's submissions wrongly conflated the risk-based approach of WHS laws with *"an outcome-based standard which might apply under different circumstances."*

The Court reminded employers that their health and safety duty is owed to the *"careless, just as much as to the careful."* It must take reasonably practicable steps to ensure the health and safety of *"the careless, the inattentive, the tired, the clumsy and unskilful"* and dismissed Mr McDonald's argument explaining that *"to take* [Mr McDonald's] *argument to its illogical end would mean there would be little point in installing any safety measures because a 'rogue' employee could, if determined to do so, evade almost any safety scheme".*

The Court also found that Mr McDonald was wrongly convicted of one of the four charges against him, namely that he had committed an offence against section 241 of the *Mining and Quarrying Safety and Health Act 1999* by failing to ensure that MCG Quarries had complied with its obligations to audit and review the effectiveness and implementation of the operator's safety and health management system.

In light of this, the Court reduced Mr McDonald's penalties sentencing him to **12 months imprisonment for each of the three charges that were upheld, however on a wholly suspended basis** provided he not commit another serious offence within the suspended term of imprisonment.

Court of Appeal reinstates penalty; confirms "continuing duty"

The Court of Appeal reinstated a PCBU's category 3 WHS penalty, and confirmed that PCBU's have a *"continuing duty"* to ensure the safety of workers and others affected by their business or undertaking: *Williamson v Betterlay Brick and Block Laying Pty Ltd* [2020] QCA 52 (27 March 2020).

In 2014, the PCBU was convicted and fined **$35,000** for breaching its primary duty of care under the WHS Act, in failing to insert the necessary steel reinforcing into a wall and creating the risk of it falling without warning.

This conviction was overturned by the District Court on the basis that the prosecutor failed to prove its case beyond reasonable doubt, in that the relevant offending conduct was not proved to have occurred on 2 December 2014, being the date stated in the complaint. Judge Richards said the offending conduct occurred on 28 November 2014, when the wall was core filled without the insertion of steel reinforcement, and not on 2 December 2014, when the wall collapsed.

WHSQ appealed against the District Court's decision, arguing that sections 19 and 33 of the WHS Act imposed a *"continuing duty"* requiring PCBUs to take reasonably practicable steps to minimise the risk of injury that their work might pose to others.

The Court of Appeal accepted WHSQ's argument, and found the relevant health and safety risk arose on the day the wall was completed, but the PCBU's duty to ensure the safety of others *"did not cease on that day".* Rather, *"it continued to have a duty to ensure the safety of others was not put at risk from failing, to the extent reasonably practicable, to construct a structurally sound wall by inserting reinforcement".*

The Court set aside the District Court decision and reinstated the PCBU's conviction and $35,000 fine.

District Court overturns conviction of manufacturer

The District Court has allowed an appeal by a manufacturer against its conviction for breaching section 23 of the QLD Act.

The prosecution case hinged on the evidence of an expert witness, a professor in civil engineering who analysed a four metre panel. It was alleged by WHSQ and the expert that the panel had not been manufactured to the required thickness.

District Court Judge Horneman-Wren expressed reservations as to the accuracy of the expert's panel measurements, noting that the panel was removed from the construction site and stored in a skip bin after the incident and extensively damaged when removed from the bin to allow for the expert's examination. His Honour

also dismissed the expert's claims about the manufacturing processes, noting the expert only witnessed two panels being manufactured, and the purportedly incorrect method was only applied to one of them. *"The expert's reasoning commences with a hypothesis: the panel failed because it was too thin. He then uses what he saw on the visit to the manufacturing plant to prove his hypothesis by inferring that the failed panel would have been too thin... [based on] the screeding method which he observed on one panel,"* his Honour said.

New South Wales

Principal contractor convicted, failed to verify contractor had SWMS

Principal Contractor Effective Building and Construction Pty Ltd (**EBC**) has been convicted and fined $60,000 for breaching sections 19(1) and 32 of the NSW Act, after a wall collapsed killing a worker at a construction worksite: *SafeWork NSW v Wang; SafeWork NSW v Effective Building and Construction Pty Ltd; SafeWork NSW v NSW Bricklaying Pty Ltd* [2020] NSWDC 260 (22 May 2020).

A subcontractor, NSW Bricklaying Pty Ltd, and the officer of another entity, WZY Developments Pty Ltd, were also convicted and fined in relation to the incident.

EBC was principal contractor for the worksite at all times, but had engaged WZY Developments Pty Ltd and WZY's director to manage and control the day-to-day activities at the site and engage suitably qualified contractors to perform the necessary work to complete the project. The director engaged NSW Bricklaying to build the brick wall which collapsed on the day of the incident. Subsequent investigations revealed the wall was inadequately braced.

The Court heard that EBC asked WZY to collect Safe Work Method Statements from the contractors that it engaged on the site, but it did not do so. EBC did not verify that it had done so. Neither EBC nor WZY provided supervision to NSW Bricklaying to ensure the wall was adequately braced, and there was no risk assessment undertaken by EBC, WZY or NSW Bricklaying.

In sentencing EBC, the Court noted that EBC did not have actual knowledge of the risk posed by the partition wall and that it had engaged WZY and its director, who it believed to be competent to act as a supervisor of the work at the site. EBC undertook some inspections in an effort to verify that the work at the site was being undertaken competently. However, EBC did not ensure that WZY had complied with the directions that it had given it relating to a collection of SWMSs or other steps to ensure that supervision was being provided to conduct the work safely.

In concluding that EBC's offence was of "some objective gravity", Scotting DCJ said *"EBC could have taken more relatively simple, convenient and inexpensive steps to supervise WZY more closely. It relied almost entirely on WZY to undertake its role as principal contractor. WZY and Mr Wang fell well short of complying with the obligations of competent principal contractor."*

PCBU fined $400k over death, no reduction due to threatened sanctions from the ABCC

Landmark Roofing Pty Limited was found guilty of breaching sections 19 and 32 of the NSW Act after a 20 year old apprentice plumber fell six metres through a brittle skylight and later died.

Landmark informed the Court the Australian Building and Construction Commission (**ABCC**) was requiring Landmark to outline measures taken or being taken to prevent future reoccurrence, otherwise a formal sanction or formal warning could be imposed. If Landmark received a sanction from the ABCC, it would be blocked from tendering for Commonwealth-funded building work, which accounts for 50- 70% of Landmark's business.

The Court said ABCC's investigation did not reduce the penalty to be imposed against Landmark, as *"ABCC might be satisfied"* by Landmark's response and there was no definite evidence there would be adverse financial consequences to Landmark.

Worker and PCBU convicted, equally culpable

A project manager was charged and pleaded guilty to breaching the worker's duty pursuant to s 28(b) of the NSW Act, which required him to take reasonable care that his acts and omissions did not adversely affect the health and safety of another person.

The charges followed a fall from height incident which resulted in traumatic injuries.

The Court heard the project manager relied on inadequate verbal instructions to prevent workers from accessing unprotected areas. He was fined **$15,000** and ordered to pay the prosecutor's **costs** in the amount of **$25,000**.

The PCBU was also convicted of a Category 2 offence and fined **$150,000**. In concluding that both defendants were equally culpable, Judge David Russell explained this is a factor that assists in determining the real culpability of a defendant for the offence charge, but that it was not relevant in the sense of reducing the culpability of any one party in a proportionate way in an overall penalty.

Worker convicted following tragic nitrous oxide death

Christopher Turner was convicted and has been fined **$100,000** after pleading guilty to a breach of the worker's duty to take reasonable care for the health and safety of other persons, after the death of one baby and serious injury of another at Bankstown-Lidcombe Hospital in 2016: *SafeWork NSW v Christopher Turner* [2020] NSWDC 180 (8 May 2020).

Judge Russell found Mr Turner failed to properly test newly installed outlets and ports on equipment used to administer medical gases, and failed to conduct testing in the presence of hospital staff.

SafeWork commenced prosecutions against five parties, however three of those cases were discontinued, including the case against South Western Sydney Local Health District which entered an enforceable undertaking with SafeWork as an alternative to prosecution.

In April the District Court found the case against BOC Limited had not been proved to the required criminal standard and BOC was found not guilty. *SafeWork NSW v BOC Limited* [2020] NSWDC 156 (30 April 2020).

PCBU fined $450k for impaling death, criticised for attempting to pass blame

NSW District Court Judge Wendy Strathdee has sentenced Sapform Pty Ltd to a fine of **$450,000** for breaching sections 19(1) and 32 of the NSW Act: *R v Sapform Pty Ltd* [2020] NSWDC 86 (3 April 2020).

The principal contractor for the site, KNT Constructions Pty Limited had already been fined **$450,000** for breaching sections 19(1) and 32 of the NSW Act.

The incident involved a worker subcontracted by Sapform to install formwork at a Ryde construction site. He was killed when he fell three metres from the second storey deck and was impaled on a metal starter bard protruding from the first storey.

Judge Strathdee heard that the principal contractor was responsible for erecting a perimeter scaffold while Sapform was required to install any necessary additional fall protection like handrails, catch decks and temporary penetration infills.

The fall risk created by the lack of rails or edge protection was *"glaringly"* obvious and Judge Strathdee held it was impossible to believe that *"even a perfunctory inspection and risk assessment would not have revealed this risk".* Her Honour noted Sapform's sole director's evidence sought to pass the blame onto the deceased worker, claiming he would not have fallen if he had followed the standard work sequence. The director also claimed the

site foreman would have identified the risk if he supervised the worker properly. Judge Strathdee *"completely"* rejected those submissions. Judge Strathdee said that trying to pass blame *"does not to my mind sound like a defendant that is unlikely to re-offend"* and that it needed to be deterred through a significant fine.

Worker killed by partner at home; Court confirms death occurred in the course of employment

In *Workers Compensation Nominal Insurer v Hill* [2020] NSWCA 54 (31 March 2020), the NSW Court of Appeal found that a woman was in the course of employment when she was killed by her partner at home, and upheld a decision awarding nearly **$450,000** in death benefits to her children. Justices Basten and Payne, and Acting Justice Simpson found that while it was possible the worker was killed before her official 9am start time, her past practice of taking work calls as early as 7am showed it was likely she had started work when she died. The WHS implications of this decision are discussed in our podcast, available here.

Tasmania

Reckless crane driver given suspended prison sentence

Crane driver Glenn Alec Gault has plead guilty to a Category 1 – Reckless conduct offence against the Tasmanian *Work Health and Safety Act 2012*, after he overrode a crane's safety systems at a building site, which caused the boom to collapse and seriously injure a construction worker.

Mr Gault was sentenced to six months' jail, wholly suspended for 18 months on the condition he not commit another offence. The maximum penalty for this offence is $300,000 and five years' jail.

A WorkSafe Tasmania investigation found that prior to the April 2017 incident, the crane's safety systems were manually overridden on more than 100 occasions.

Mr Gault's employer Pfeiffer Cranes was also fined $50,000 in relation to the incident for failing to provide any information, training and instruction necessary to protect all persons from safety risks arising from work carried out for its business.