NORTON ROSE FULBRIGHT

WHS Law Briefing

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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 April 2022. 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

COVID-19	The COVID-19 pandemic has continued to be a dominant focus for all organisations across Australia, requiring a fluid, dynamic and evolving risk management response to address the Delta and Omicron variants. We provide an update below on key developments since our last briefing. Of particular significance is the recent Mount Arthur coal mine decision, in which the Fair Work Commission found that a company had not properly discharged its WHS duties to consult with workers in relation to its decision to implement a mandatory vaccination policy, and was therefore unable to implement the policy without further consultation with the workforce. Two entities have also been charged by WorkSafe Victoria for breaching their safety duties in relation to COVID-19 exposure risks, including the Department of Health in respect of risks arising from the hotel quarantine programme, and an accommodation provider.
Psychological risks	Psychological risks continue to be an area of increased focus of government, regulators and Courts. Most significantly, Victoria has released draft regulations for public comment addressing specific obligations of employers in respect to psychosocial risks. Companies are in the process of taking steps to address psychological risks, for example, Rio Tinto has recently released the results an external review into its workplace culture undertaken by former Australian Sex Discrimination Commissioner Elizabeth Broderick.
Western Australia WHS Act	Western Australia has implemented the model work health and safety laws – the new WA WHS Act and supporting regulations commenced on 31 March 2022. The regulator has also released guidance material outlining that it will adopt a “supportive and educative approach" to technical or low-risk breaches of the WHS Act over the next 12 months, but only in relation to *new* duties involving significant change.
Prohibition of insurance and indemnities for WHS penalties	A number of jurisdictions around Australia (specifically, NSW, Western Australia and Victoria) have introduced a prohibition against insurance and indemnities for penalties imposed in relation to WHS offences in some jurisdictions in Australia. For further detailed analysis of this change, please see our recent article published here.

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LEGISLATIVE UPDATES

Across Australia / Commonwealth

COVID-19
Recent updates include the following:

- Safe Work Australia released updated vaccination guidance in October 2021. The guidance provides that implementation of vaccination requirements should be determined on a case by case basis, and outlines circumstances where it is "more likely" to be reasonably practicable to mandate the vaccine, e.g. where workers are interacting with people with an increased risk of having COVID-19, vulnerable persons or other people such as customers, employees or the public where there are high levels of community transmission.
- In October 2021, the AHPPC issued updated Recommendations for managing COVID-19 health risks which noted the effectiveness of vaccination against the Delta variant. It also noted various settings where COVID-19 exposure risks are increased, such as indoor or closed environments and certain work settings.
- In October 2021, ATAGI released updated clinical guidance providing strong data on vaccine effectiveness in relation to the Delta variant.
- In December 2021, the Fair Work Ombusdman released updated guidance regarding the vaccine. The guidance states that in some cases, employers may be able to require their employers to be vaccinated against COVID-19, and sets out guidance for employers in assessing whether they can mandate the vaccine.
- In December 2021, ATAGI issued a statement on the importance of booster doses of the COVID-19 vaccine to increase protection against infection with the Omicron variant, and recommended that eligibility for COVID-19 booster vaccination be expanded for adults aged 18 and older.
- In January 2022, AHPPC issued guidance to guide decision making when determining whether to place work permissions / restrictions on workers after COVID-19 exposure in food and grocery supply, manufacturing, logistics and distribution facilities, and health care settings.
- In January 2022, SafeWork NSW issued an updated Statement of regulatory intent: COVID-19. The guidance outlines that SafeWork NSW will 'generally take a supportive and educative approach to compliance' where duty holders have made genuine attempts to comply with requirements but are non-compliant due to factors outside their direct control. However, SafeWork NSW indicate that they may vary this approach as appropriate to the circumstances, particularly in cases of significant safety risks to workers or the community.
- In February 2022, ATAGI issued further advice (endorsed by National Cabinet) regarding individual COVID-19 vaccination status. The guidance moves away from the concept of being 'fully vaccinated', instead defining vaccination status as either "up to date" or "overdue". A person is considered "up to date" if they have completed all the COVID-19 doses recommended for their age and individual health needs, and will be considered "overdue" if eligible for an approved COVID-19 booster vaccination and it has been longer than six months since their last dose of their primary course. All Australians aged over 16 years and over (subject to individual factors) are currently eligible for a booster vaccination three months after their primary course of an approved COVID-19 vaccination.

In addition to the Mount Arthur coal mine decision discussed below, there have been a number of other recent Court cases in relation to COVID-19, including the following:

- There have been many unsuccessful challenges by workers of government imposed vaccination mandates. For example, in a recent case in NSW where vaccine mandates were upheld, the NSW Supreme Court determined that any consideration about the reasonableness of the orders should be undertaken by reference to the objects of the Public Health Act under which the orders are issued, which are directed exclusively at public safety.
- There have now also been cases where workers have been held not to have been unfairly dismissed as a result of not complying with government/employer imposed COVID-19 vaccination mandates.
- A case in NSW held that a worker who died of COVID-19 complications had contracted the

disease in the course of his employment, as he contracted COVID-19 while traveling to New York, which was an activity "induced and encouraged" by his employer.

Psychological risks

Psychological risks have continued to be an area of focus by governments and regulators around the country. The table below provides an update of developments in this area across Australia over the past six months.

Jurisdiction	Recent developments

Commonwealth / across Australia	• In February 2022, Rio Tinto released the results of an external review that it commissioned into its workplace culture (see the report here and media statement here). The review was carried out by former Australian Sex Discrimination Commissioner Elizabeth Broderick. The review contains many findings in relation to Rio Tinto's culture, including that bullying is systematic and experienced by almost half of survey respondents, sexual harassment and everyday sexism occur at unacceptable rates, and racism is common across a number of areas. The report outlines 26 detailed recommendations for improvement. Rio Tinto has committed to implementing all the recommendations from the report with a focus on three key areas, including a leadership commitment to creating 'safe, respectful and inclusive working environments to prevent harmful behaviours and better support people in vulnerable situations', ensuring camp and village facilities are safe and inclusive by applying operational safety and risk processes, and making it as easy and safe as possible for all people to call out unacceptable behaviours.
	• In June 2021, the Australian Human Rights Commission released the Equality across the board: Investing in workplaces that work for everyone (2021). The report collates survey and interview data from 118 ASX200 listed companies to portray how these companies are currently combatting the issue of sexual harassment and makes recommendations based on these findings. For further detail on the recommendations, see our blog article published here.
	• In July 2021, Safe Work Australia published four infographics to help PCBUs to satisfy their work health and safety duties in relation sexual harassment:
	  ○ What is workplace sexual harassment?
	  ○ The impacts of sexual harassment
	  ○ Sexual harassment: Your work health and safety duties
	  ○ Steps to prevent workplace sexual harassment
	• In September 2021, the federal government passed amendments to the Fair Work Act (**FWA**) and Sex Discrimination Act (**SDA**) in response to recommendations from the Respect@Work Report. The amendments do not include a positive duty for employers to take reasonable steps to eliminate sexual harassment, as was recommended by the Report, with the federal government stating the those amendments were unnecessary given that this duty already exits under work health and safety laws. However, a recent consultation paper released by the government discusses the pros and cons of introducing such a duty. For a summary of the changes introduced, please see our blog article here.
	• A new international Standard for protecting workers' psychological health was published in June 2021, ISO 45003:2021, Occupational health and safety management – Psychological health and safety at work – Guidelines for managing psychosocial risks. The new standard helps users satisfy the requirements of ISO 45001, according to the International Organisation for Standardisation.
	• The National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) has released a new guidance document Psychosocial risk management, to assist duty holders to meet their obligation to reduce psychosocial risks associated with offshore work, which the guidance document notes is high risk due to the workplace being isolated and physically and cognitively demanding with long hours. The guidance notes that mental health risks can not only lead to mental health injuries, but also contribute to physical risks and major accidents.
	• The Minerals Council of Australia has released various resources regarding sexual harassment, including a toolkit and Industry Code of Practice. The resources are

Jurisdiction	Recent developments
	accessible here.
Victoria	• In February 2022, public comment was opened for the proposed Occupational Health and Safety Amendment (Psychological Health) Regulations, which will provide clearer guidance to employers on their obligations to safeguard workers from mental injury. In particular, the Regulations will: ○ Promote the importance of psychological health and safety in the workplace. ○ Require employers to identify and control risks associated with psychosocial hazards so far as is reasonably practicable, including by altering the management of work, plant, systems of work, work design or work environment, using information, instruction training or any combination of those. Psychosocial hazards will be defined as any factor in the work design, or the systems of work, or the management of work, or the carrying out of the work, or personal or work-related interactions that may arise in the working environment and may cause an employee to experience one or more negative psychological responses that create a risk to their health and safety. ○ Require employers to put in place a written prevention plan if certain psychosocial hazards are identified (including aggression, violence, bullying, exposure to traumatic content or events, high job demands and sexual harassment). ○ Require certain employers to periodically report data on complaints of bullying, sexual harassment and aggression and violence to WorkSafe. Public consultation closed on 31 March 2022. The regulations and consultation page are available here. It is intended they will commence on 1 July 2022. For more details on this development, see our blog article here. We also note that the WHS Ministers across Australia agreed in 2021 that the model WHS regulations will be updated to specifically address psychosocial hazards and risks. The draft regulations in Victoria are likely to be informative in the development of the model regulations. • WorkSafe Victoria is also developing a psychological health compliance code to assist employers with meeting their duties under the OHS Act and proposed regulations. The compliance code will include information on how to identify and control risks to psychological health and, while not mandatory, duty holders that comply with the code will be taken to have complied with their duties under the OHS Act. • WorkSafe Victoria has released its first mental health strategy, the 2021-24 Mental Health Strategy. The Strategy notes that the proportion of mental health claims has grown significantly over time, and is expected to continue to grow over the next 10 years. The Strategy lists compliance and enforcement as one of WorkSafe's five focus areas for improving mental health outcomes, and outlines WorkSafe's significant investment in strengthening its compliance and enforcement capabilities.
Western Australia	• Western Australia has made three new codes addressing psychosocial risks: Psychosocial Hazards in the Workplace; Workplace Behaviour; and Violence and Aggression at Work. • Western Australia is currently undertaking a parliamentary inquiry into sexual harassment against women in the FIFO mining industry. During the inquiry, some employers have admitted to not reporting past incidents of workplace sexual harassment, and the Department of Mines, Industry Regulation and Safety (**DMIRS**) is currently considering whether companies that have admitted to not reporting past incidents should be prosecuted. A number of submissions have been made to the Inquiry that the prevalence and nature of sexual harassment in FIFO workplaces are unclear because of, among other things, the common practice of employers requiring complainants to sign non-disclosure agreements. • In December 2021, the Western Australian government launched the "Mental Awareness, Respect and Safety" program for FIFO workers in the mining sector, which will address workplace sexual harassment and assault, mental health, drug

Jurisdiction	Recent developments
	and alcohol use, and other health and safety issues. The program will enhance DMIRS enforcement processes for responding to incidents of workplace harassment and assault. • DMIRS has released guidance on family and domestic violence in the workplace. The guidance notes that working from home arrangements can place workers at greater risk of experiencing family and domestic violence, and their employers have a duty to eliminate this risk so far as is reasonably practicable. • WA has passed the Industrial Relations Legislation Amendment Bill 2021 which allows its IR Commission to issue orders to stop either bullying or sexual harassment in workplaces. These powers are based on provisions contained in the Commonwealth *Fair Work Act 2009*, and aimed at protecting Western Australian workers who are bullied or harassed but not covered by the Federal IR system. • Western Australia is also in the process of reviewing its Equal Opportunity Act, and is considering the introduction of a positive duty to eliminate discrimination. See here for further information.
ACT	• WorkSafe Act has released its first 2021-23 Strategy for Managing Work-related Psychosocial Hazards. A key objective of the strategy is enforcement of breaches in psychosocial management, and has committed to full use of its compliance tools, including issuing notices and commencing prosecutions. • The ACT is reviewing is Discrimination Act, and has sought public comments on a range of potential reforms (see here), including whether to impose a positive obligation on employers to eliminate discrimination.

Guidance material released by Safe Work Australia
A range of new guidance material has been released by Safe Work Australia, including the following:

- Updated Guide for managing the risks of working in heat to address recommended first aid changes for managing heat stroke.
- New Guide to managing the risks of elevating work platforms.
- New Guide to managing risk in construction: Concrete pumping.
- New guidance for applying for an exemptions from compliance with WHS regulations.
- New Model Code of Practice Managing the risks of respirable crystalline silica from engineered stone in the workplace (which will have legal effect in jurisdictions that approve the Code under the WHS Act).
- New guidance regarding WHS duties in respect of lung diseases.

In November 2021, Safe Work Australia also released its 23rd Comparative performance monitoring report. The Report includes a section on Work health and safety compliance and enforcement activities which provides a jurisdictional comparison of workplace interventions, inspectorate activity, safety notices, enforceable undertakings, legal proceedings and fines. The reports notes an increase in the number of enforceable undertakings accepted by regulators, in particular in NSW. Most jurisdictions saw a decrease in the number of legal proceedings finalised and successful convictions, with the exception of NSW, where they both significantly increased. There was also a large increase reported in fines issued by courts around Australia. Safe Work Australia also noted the potential impact of COVID-19 on all reporting data, which is explored in more detail here.

Safe Work Australia issues guidance on WHS duties in the contractual chain
Safe Work Australia has issued a Fact Sheet entitled WHS duties in the contractual chain. Key messages in the Fact Sheet include:

- In a contractual chain there will be multiple PCBUs who share the same WHS duties. PCBUs who share duties must each discharge their duty to the extent to which they have the capacity to influence and control the matter (whether that matter is a work activity, workers or the workplace).
- The PCBU with the most influence and control over a matter will be in the best position to manage the associated risks. Determining who this is will depend on the circumstances at the time.

- PCBUs at the top of the contractual chain can build work health and safety into contractual management and take the lead in coordinating work health and safety practices down the chain. They have important responsibilities in seeking assurance that systems to ensure worker safety are in place along the contractual chain and are functioning effectively.
- PCBUs, regardless of their place in a contractual chain, have a duty to consult, cooperate and coordinate activities with all other PCBUs who they share a duty with, so far as is reasonably practicable. This helps avoid unnecessary duplication of activities, prevent gaps in managing health and safety risks and ensure that everyone's WHS duties are met.
- PCBUs who share the same WHS duties must satisfy themselves there are safe systems of work in place that ensures worker safety and that these systems are functioning and are maintained.
- PCBUs can enter into agreements with other PCBUs to make sure duties are met so long as it does not limit or modify their WHS obligations.
- Each PCBU in the contractual chain must, so far as is reasonably practicable, consult with workers (and their representatives) who carry out work for them in the contractual chain

Due diligence obligations recommended in NOPSEMA review
In July 2021, Deloitte has tabled a report to Federal Resources and Water Minister Keith Pitt after conducting an independent operational review of NOPSEMA. The report recommends a number of changes to the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), such as the inclusion of proactive officer 'due diligence' obligations similar to those under the WHS Act, and additional investigative powers of inspectors.

Offshore legislation has passed
The Federal Government has passed the Offshore Electricity Infrastructure Bill 2021 to facilitate the development of offshore energy facilities like windfarms, appoint NOPSEMA as the "Offshore Infrastructure Regulator" overseeing WHS matters in the industry and provide for the protection of worker safety through a modified application of the Cth WHS Act. Modifications to the Cth WHS Act include removal of provisions regarding workplace entry by WHS entry permit holders due to the high risk nature of remote offshore sites.

New South Wales

New guidance for road freight transport industry
SafeWork NSW has published a new Guide to Work Health and Safety in the Road Freight Transport Industry which provides practical guidance to transport operators and supply chain businesses regarding working in and around vehicles.

Opposition bill introducing industrial manslaughter passes upper house
An opposition led bill proposing the introduction of industrial manslaughter provisions has passed the upper house in NSW. However, the bill is unlikely to receive support in the lower house, where it is yet to be debated, as industrial manslaughter provisions are not currently supported by the NSW Coalition government.

New Code of Practice for Silica
SafeWork NSW has implemented the WHS Code of Practice, Managing the risks of respirable crystalline silica from engineered stone in the workplace, which mirrors the national model WHS Code referred to above.

Queensland

New Scaffolding Code of Practice commences
The Scaffolding Code of Practice 2021, made under the Queensland WHS Act, commenced on 1 July 2021. Key changes from the outgoing 2009 scaffolding code include new requirements to:

- Have engineers sign-off on certain scaffolds;
- Provide suitable access areas for emergency stretchers;
- Conduct more frequent tests of high-stress components; and
- Provide smaller steps (no higher than 300mm) between landings (however this specific

requirement will not commence until May 2022).

In Queensland, compliance with an approved Code of Practice (or an equivalent standard of health and safety) is mandatory under the Queensland WHS Act.

South Australia

SafeWork SA releases its annual activity report
SafeWork SA has released its 2020-21 Annual Activity Report. The Report notes there has been an increased number of successful prosecutions achieved for serious breaches of work health and safety laws and enforceable undertakings entered into in response to serious workplace incidents. The Report also highlights the work that has been undertaken by the regulator in response to the ICAC review of SafeWork SA conducted in 2018. As at 30 June 2021, SafeWork SA had implemented 27 of the 39 recommendations, with work on those remaining continuing as a matter of priority.

Victoria

Legislative amendments passed in Victoria
The Victorian *Occupational Health and Safety and other Legislation Amendment Bill 2021* (VIC) passed both houses of parliament in September 2021 which introduces changes to the Victorian OHS Act. Key changes include:

- banning insurance against safety fines (commencing September 2022);
- extending the definition of "employee" and "employer" to ensure that labour-hire workers are considered employees of their hosts and that labour providers and hosts cooperate on their shared OHS responsibilities (commenced March 2022); and
- allowing health and safety representatives with entry permits to "take photographs or measurements or make sketches or recordings" of suspected safety contraventions.

Victoria has also passed the *Occupational Health and Safety Amendment (Infringements and Miscellaneous Matters) Regulations 2021* (VIC) which amends the Victorian OHS Regulations to allow inspectors to issue infringement notices to companies and individuals for certain health and safety offences (as an alternative to a prosecution). Applicable offences include:

- Working without required licences, registration, qualifications, experience or supervision;
- Using equipment or substances that are not licensed or registered;
- Unsafely removing or storing asbestos; and
- Failing to keep certain records.

For further detail on this change, read our blog article here.

Changes passed to incident reporting obligations
Victoria has introduced changes to the incident reporting obligations under the OHS Act by passing the Workplace Safety Legislation and Other Matters Amendment Bill 2021. Among other changes, the amending legislation expands the range of incidents that WorkSafe Victoria must be notified of under section 37 of the OHS Act, to cover a number of near miss safety incidents, to more closely align with the requirement to report 'dangerous incidents' under the model WHS laws, and infectious diseases and illnesses.

New silica regulations
Victoria has made the Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2021 which introduce a number of new requirements in relation to silica, including:

- licensing regime for engineered stone (which has an extremely high concentration of silicosis-causing crystalline silica);
- banning the dry cutting of engineered stone; and

- safety requirements for "high risk crystalline silica" work conducted in other industries, including the construction and earth resources sectors.

New Codes released by WorkSafe Victoria
WorkSafe Victoria has released two new compliance codes, as follows:

- Draft Compliance Code: Communicating occupational health and safety across languages, expected to be made in mid-2022, which will replace the previous 2008 Code. The draft Code provides that duties of employers to consult with workers and their representatives extends to identifying and addressing cultural and language barriers.
- Compliance Code: First aid in the workplace which replaces the previous 2008 Code. Updates to the previous Code include recommendations to consider adding asthma-relieving inhalers and epinephrine auto-injectors (Epipens) to first-aid kits and advice around training first-aid officers to assist individuals experiencing mental health crises.

Western Australia

WA WHS Laws commenced on 31 March 2022
Western Australia has finally implemented the model work health and safety legislation. The WA WHS Act was proclaimed and commenced on 31 March 2022.

As covered in previous briefings, the WA WHS Act implements the provisions of the model WHS Laws, including introducing proactive due diligence obligations for officers of organisations and horizontal consultation obligations for the first time. The new WHS Act also includes a prohibition against insurance and indemnities for WHS penalties, industrial manslaughter offences and a specific duty of care for WHS service providers such as WHS consultants.

Three sets of regulations underpinning the Act have now been finalised as follows:

- Work Health and Safety (General) Regulations 2022
- Work Health and Safety (Petroleum and Geothermal Energy Operations) Regulations 2022
- Work Health and Safety (Mines) Regulations 2022

Further resources are available on the Department of Mines, Industry Regulation and Safety here.

Three documents have also been released outlining the regulatory approach that WorkSafe and the WorkSafe Commissioner will take towards mines, petroleum sites and general industry under the WHS Act:

- Statement of regulatory intent: Implementation of Work Health and Safety legislation in Western Australia
- Compliance and enforcement policy
- Prosecution policy

These materials outline that the regulator will "adopt a supportive and educative approach" to technical or low-risk breaches for 12 months after the legislation takes effect, but only in relation to new duties, and provided that genuine attempts were made to comply with the laws. The compliance and enforcement policy and the prosecution policy will be applied in cases of serious or fatal incidents, however, without modification for the purposes of WHS implementation, because the management of critical risks at workplaces should already have been in place under previous laws.

Western Australia introduces 'debarment' regime
Western Australia has introduced a new 'debarment' regime through which organisations and agencies can be blocked from supplying goods, services or works to Western Australian agencies as a result of 'debarment conduct', which includes breaches of safety laws in WA or equivalent legislation in other states, territories or countries. The regime has been introduced through the *Procurement (Debarment of Suppliers) Regulations 2021* and commenced on 1 January 2022. The new regime is similar to the bans that can be imposed on tendering for Commonwealth government projects following breaches of safety laws under the Commonwealth's 2016 Building Code.

Australian Capital Territory

ACT moves industrial manslaughter offences to its WHS Act
Numerous jurisdictions around Australia have now implemented industrial manslaughter offences including Queensland, Victoria, Northern Territory and Western Australia (where the offences are due to commence in early 2022). The ACT has had industrial manslaughter offences in place for many years under its *Crimes Act 1900* (ACT), but has now adopted the approach followed in other jurisdictions in Australia by updating and moving the offences to the *Work Health and Safety Act 2011* (Act). The new offences address the following changes:

- Higher penalties – the maximum penalties are 20 years' jail for officers and $16.5 million for a corporation (a significant increase to the previous penalties).
- Broader set of circumstances to which offence applies – the offence will now apply where a person recklessly or negligently causes the death of a worker or another person.
- No time limit for prosecutions.

WorkSafe ACT has also recruited a dedicated family liaison officer to ensure the families of deceased workers are kept informed about any investigation or prosecution processes, and connect them to local and national support services.

Northern Territory

Northern Territory passes electrical safety laws
The Northern Territory passed new electrical safety laws, the *Electrical Safety Bill 2021* on 29 March 2022.

The new legislation includes electrical safety duties similar to those under the WHS Act, including imposing safety duties on PCBUs and due diligence obligations on officers.

The legislation also provides for enhanced requirements for safety management systems for prescribed electricity entities, new safety requirements for electrical goods through the adoption of a national scheme, a safer licensing and disciplinary regime for those who perform electrical work and appointment of an electrical safety regulator.

The new legislation will apply where electricity is transmitted or consumed, including workplaces, public places and domestic residences, and encompasses all electrical installations and equipment, as well as all persons who might affect the electrical safety of others or whose electrical safety might be impacted.

In late March 2022, Attorney General Uibo indicated the new laws are expected to commence on 1 November 2023, to allow time for the drafting of accompanying regulations.

See further information regarding electrical safety reform in the Northern Territory here and the Explanatory Statement for the new legislation here.

SIGNIFICANT CASES

Commonwealth

Fair Work Commission finds COVID-19 vaccination requirement not reasonable and lawful due to failure to meet consultation obligations

In October 2021, Mt Arthur Coal Pty Ltd (**Mt Arthur**) who employs workers at the Mt Arthur coal mine in NSW, in conjunction with its parent company BHP, announced it would impose a COVID-19 vaccination requirement as a condition of entry to site (**Site Access Requirement**) which required its workers to provide evidence of double vaccination by 31 January 2022 (or provide evidence of a medical contraindication to an approved vaccine).

The Fair Work Commission (**FWC**) was tasked with considering whether the Site Access Requirement was a lawful and reasonable direction. The case turned on whether the direction was reasonable, where the introduction of the Site Access Requirement "enlivened consultation obligations" imposed on Mt Arthur under sections 47 to 49 of the WHS Act. The Full Bench of the FWC found that the direction was not reasonable as Mt Arthur had not complied with its consultation obligations, noting that workers were not provided with information relating to the reasons, rationale and data supporting the vaccination requirement proposal, nor were they provided a copy of the risk assessment or informed of the analysis of the risk assessment.

In addition, the FWC found that workers were not consulted in a meaningful way prior to the company making the decision to implement the Site Access Requirement. This was in contrast to the consultation that occurred with workers concerning how the Site Access Requirement would be implemented, once the decision was made to do so. Further, the FWC found that worker representatives were not involved in a meaningful way in the consultation process.

The FWC noted that had Mt Arthur complied with their consultation obligations, they would have made a "strong case" that the Site Access Requirement was reasonable for a number of reasons, including because it was directed at ensuring the health and safety of those working on the mine, and was reasonable and proportional to the COVID-19 risks.

The case highlights that a COVID-19 vaccination mandate can be both lawful and reasonable, where a risk assessment informs vaccination is a reasonably practicable control measure in minimising the spread of COVID-19 at the workplace, and provided that businesses engage in an appropriate form of consultation with their workforce in accordance with the WHS Act. Such consultation should include provision of information to workers relating to the reasons, rationale and data supporting the vaccination requirement and a copy of the risk assessment. Workers also need to be consulted **before** a final decision is made to implement a COVID-19 vaccination mandate, and not simply on the implementation of the mandate.

Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal [2021] FWCFB 6059

Employer charged with recklessness acquitted on appeal

Technip Pty Ltd (**Technip**) was charged with breaches of the Commonwealth offshore legislation for allegedly recklessly performing work in a manner that was contrary to its safety case. The charge arose from a decision made by Technip management, specifically the operations manager, along with the unanimous assent of relevant workers, to amend the safety case to remove the requirement for a hyperbaric support vessel equipped with a "life support package" to remain in the vicinity of diving work being performed on an offshore vessel in case the vessel failed mechanically. The amended case included an alternative back-up plan in the event of the vessel having a mechanical failure.

The prosecution alleged that the changes to the safety case were "significant", had not been submitted to or accepted by the regulator, NOPSEMA, and that the company had been reckless as to the removal of a

control put in place to prevent injuries and fatalities.

The issue of whether or not the company had acted recklessly turned on the state of mind of the company's operations manager in approving the changes to the safety case.

At first instance, the company was acquitted, but the acquittal was overturned on appeal in the Supreme Court. The company then appealed to the appeals division of the Supreme Court.

In the appeal decision, the Court said that to prove the fault element of recklessness, the prosecution was required to establish that Technip, through the operations manager either: 1) knew or intended that work would be conducted on the *Wellservicer* contrary to the safety case; or 2) was aware of a substantial risk that work would be conducted contrary to the safety case".

The Court found that given the change was "unanimously supported by the divers and by the relevant management team", it could not be inferred that the operations manager "knew that the change increased the overall risk of harm". The Court was not also satisfied that the change itself increased the overall risk of harm to personnel. The Court therefore held that the recklessness charge had not been proven beyond reasonable doubt, and the company was acquitted of the charge.

Technip Oceania Pty Ltd v Commonwealth Director of Public Prosecutions [2021] WASCA 139

Commonwealth agency acquitted of WHS charges on appeal
In June 2021, a Commonwealth agency, the Australian Antarctic Division (**AAD**) was acquitted of WHS charges on appeal, in relation to a contractor helicopter pilot suffering fatal hypothermia injuries after being trapped in a crevasse of an Antarctic ice shelf in 2016.

Both the Commonwealth and its subcontractor, Helicopter Resources Pty Ltd (**Helicopter Resources**) were charged under the Cth WHS Act for failing to comply with their primary duty of care to ensure the health and safety of helicopter pilot workers. At first instance, the ACT Magistrate's Court found the Commonwealth guilty of two charges, but acquitted Helicopter resources. The Commonwealth appealed against its convictions on two charges and the Commonwealth WHS regulator, Comcare appealed the acquittal of Helicopter Resources.

Commonwealth appeal of its convictions
In the previous proceedings, the Magistrate had refused to allow an application by Comcare to amend its pleadings so that the allegedly reasonably practicable measures could be interpreted as alternatives. This had the effect of requiring Comcare to establish that the defendants should have implemented *all* of the proposed measures in the exact order in which they were alleged in the pleadings, including that:

- the incident site and other sites where workers were required to land a helicopter/walk on were tested and assessed to confirm there were no ice crevasses; and
- the defendants should have obtained and analysed publicly available satellite imagery to confirm if there was evidence of crevassing.

In relation to whether it was reasonably practicable for the Commonwealth to obtain and analyse publicly available satellite imagery of the site to determine if there was evidence of crevassing, his Honour found that the requirement to do this before each flight or daily "does not fit within the description of being reasonably practicable". There was expert evidence that the 'interpretation' of satellite data in these circumstances would require at least graduate-level qualifications and there was no evidence to indicate that persons with the requisite qualifications, training or experience to interpret the satellite data were present within the AAD or available 'at call' as a standard measure before each flight. Accordingly, Comcare's appeal was dismissed and the Commonwealth's appeal allowed resulting in the Commonwealth's convictions being quashed.

Comcare's appeal of Helicopter Resources conviction
The reasoning of the Court in relation to the Commonwealth convictions also applied to the case against Helicopter Resources, and thus its acquittal was also upheld.

Comcare's bringing of proceedings against Helicopter Resources is however an interesting development as it is private corporate entity (i.e. not a Commonwealth organisation) and not a 'non-Commonwealth licensee' (i.e. a company that is self-insured for the purposes of Commonwealth workers compensation legislation, and therefore subject to the Commonwealth WHS Act).

The application of the Commonwealth WHS Act to Helicopter Resources was however confirmed by the ACT Magistrates Court, and the Supreme Court did not take any issue with this finding in the appeal.

Section 12 of the Cth WHS Act provides that Act not only applies to the Commonwealth, but also extends to workers carrying out work for a business or undertaking of the Commonwealth, and to places at which work is carried out for a business or undertaking of the Commonwealth.

There are now at least five prosecutions on foot which have been brought against corporate entities (which are not 'non-Commonwealth licensees') for breaches of the Commonwealth WHS Ac, including the most recent prosecution commenced in March 2021 against International Health and Medical Services in relation to an incident at the Villawood Immigration Detention Centre.

May v Helicopter Resources; Commonwealth of Australia v May [2021] ACTSC 116

Australian Building Construction Commission imposes record tender ban following conviction of Category-2 WHS breaches

In April 2022, the Australian Building and Construction Commission (**ABCC**) imposed a record-long ban on Landmark Roofing Pty Ltd (**Landmark**) from tendering for Commonwealth Government funded work. The tender ban follows the NSW District Court findings of Landmark's Category-2 breaches under the NSW WHS Act, which arose in connection with an incident in 2019 where a worker suffered fatal injuries after falling six metres through a skylight on a re-roofing project.

Landmark had previously appealed the District Court's decision to the NSW Criminal Court of Appeal on the basis the trial judge had erred in wrongly attributing the deceased's supervisor's actions to the company. After the appeal was dismissed, Landmark applied for special leave to the High Court, which was also quashed.

In the current matter, the ABCC determined that Landmark's WHS breaches amounted to a breach of a provision of the Commonwealth Code for Tendering and Performance of Building Work 2016 (here) (**Code**), which requires Code-covered entities to comply with their WHS obligations to "the extent they apply to that entity in relation to the building work." The ABCC also found Landmark failed to comply with its notification requirements to the ABCC of actual or suspected breaches of the code, and steps proposed to rectify the breaches within specified timeframes.

The ABCC's findings were referred to Federal Attorney-General and Industrial Relations Minister, Michaelia Cash, who imposed a nine-month ban on Landmark from applying for Commonwealth funded building work from 2 May 2022 to 1 February 2023.

This is the longest ever ban ABCC has imposed on a company for breaches of the Code, and follows just one prior ban imposed for a period of one month on construction company, MCP (Aus) Pty Ltd in 2021.

New South Wales

PCBU convicted of WHS breaches in case rejecting reliance on specialist contractors

Arkwood (Gloucester) Pty Limited (**Arkwood**) has been found guilty in the District Court of NSW for breaches of the WHS Act arising from an incident where two workers sustained serious electric shock injuries after the crane they were working from came into contact with overhead powerlines. The worker that was operating the crane at the time of the incident was unlicensed.

The charge brought by SafeWork NSW alleged that Arkwood failed to take reasonably practicable measures to eliminate or minimise the risk of the crane coming into contact with energised overhead

powerlines, including failing to conduct a risk assessment, develop a Safe Work Method Statement (**SWMS**), instruct workers to undertake a joint safety assessment of the work, and ensure that a qualified dogman was present and a spotter was available to identify the location of powerlines.

Arkwood had pleaded not guilty to the charges and argued that it was entitled to rely upon the expertise and discretion of its specialist subcontractor, Highlands Cranes regarding safe operation of the crane. It also argued that it had directed Highlands to supply a crane operator and dogman for the work, and that there was nothing to put anyone from Arkwood on notice that the crane operator was unlicensed and incompetent.

Judge Russell acknowledged that where a task "demonstrably falls outside the expertise" of a PCBU, and an independent contractor appeared to be performing its work carefully and safely, "then it would ordinarily be difficult to conclude that the PCBU has breached the duties imposed upon it by the legislation".

In upholding the charge, however, the Court rejected Arkwood's claim that it could wholly rely on Highlands in relation to safe operation of the crane, finding that:

- the work undertaken in relation to the incident was within the scope of Arkwood's responsibilities;
- Arkwood workers actually checked for powerlines and recognised they posed a danger;
- whilst physical operation of the crane was left to the crane operator, Arkwood through its workers had the ability to stop any work that was being performed in an unsafe manner; and
- the measures alleged by SafeWork were reasonable practicable measures that Arkwood should have taken.

This case is another example of a recent trend in case law where Courts have narrowed the extent to which a principal is able to rely on the expertise of a specialist contractor it has engaged in relation to the performance of their safety duties.

SafeWork NSW v Arkwood (Gloucester) Pty Limited [2022] NSWDC 89

High Court dismisses application to allow appeal of imputed conduct decision

The High Court of Australia has dismissed an application for an extension of time made by Landmark Roofing Pty Ltd (**Landmark Roofing**) to seek special leave to appeal its conviction under the NSW WHS Act. Landmark Roofing was initially charged in the District Court of NSW in May 2020 for breaching its safety duties under the Act following an incident where an apprentice worker suffered fatal injuries after falling through a skylight. Both the worker and his supervisor were removing the skylight without a fall restraint system because they had not roped themselves onto the static line that was provided on the roof. Landmark Roofing was convicted and fined $400,000 in the District Court of NSW. The conviction was then upheld by the Court of Criminal Appeal.

At first instance in the District Court, it was held that Landmark Roofing had failed to meet its primary duty of care because it had failed to inspect the roof prior to commencement of the skylight removal task, there was no safety mesh under the skylight, there was no risk assessment or specific SWMS completed for the skylight removal task, no instructions were given to workers on the day of the incident regarding the brittle nature of the skylight material and the need for workers to use a fall restraint system, and there was inadequate supervision of the work.

The Court also found that there was a heightened level of risk with the skylight removal task as it was a new task and had a higher degree of risk due to the brittle nature of the material, there was a heightened level of risk because the supervisor and apprentice were both young and inexperienced, and there was a need for extra attention to be given to the apprentice, who would have known of the brittle nature of the skylight material.

In terms of the failure to provide adequate supervision, the Court found that this measure was proven because the supervisor working alongside the apprentice had failed to adequately supervise him, and the supervisor's failure was conduct that was attributable to the company under section 244 of the WHS Act. Section 244 provides that any conduct by an employee, agent or officer of the body corporate acting within the scope of their employment is also conduct engaged in by the body corporate.

Landmark Roofing had argued that the supervisor's failure to provide adequate supervision should not have been attributed to the company because he had 'deliberately disobeyed' known instructions not to work without a fall restraint system, and that such disobedience was not foreseeable having regard to his experience, training and previous conduct. For example, the supervisor had given evidence that he knew that the fall restraint system should have been used, the control was documented in a generic SWMS, and that he had been given instructions to use fall restraints at the beginning the project, four weeks prior the incident. However, this argument was rejected by the District Court and again on appeal, with reasons including that:

- Section 244 is 'clear in its terms.' It does not exclude conduct of a site supervisor who deliberately fails to follow the instructions of his superior. The question of whether the company might foresee a supervisor's disobedience does not impact upon section 244.
- It was never put to the supervisor that he was being 'deliberately disobedient.'
- The supervisor was acting within the actual or apparent scope of his employment and not 'off on a frolic of his own'. He was carrying out an authorised act in an unauthorised manner. He was authorised and instructed to perform the skylight replacement work. He was acting within the scope of his employment at all times, whether or not he chose to follow the appellant's instructions (if given) as to how he should perform the work.
- Landmark Roofing was convicted of breaching its duties on a number of bases, not merely because it was responsible for the conduct of the supervisor.
- There was evidence that the managing director had also seen workers on the roof before when they were not hooked up.

The High Court dismissed Landmark's application for an extension of time to seek special leave to appeal on the basis the application had insufficient prospects of success.

Landmark Roofing Pty Ltd v SafeWork NSW [2021] HCASL 209
Landmark Roofing Pty Ltd v SafeWork NSW [2021] NSWCCA 95
SafeWork NSW v Landmark Roofing Pty Ltd [2020] NSWDC 202

Prosecutor unsuccessfully appeals not guilty finding

In November 2019, the District Court of NSW found Hunter Quarries Pty Limited (**Hunter Quarries**) not guilty of breaches of section 19 and 32 of the NSW WHS Act. The charges related to an incident at a quarry owned and operated by Hunter Quarries where a worker was killed whilst operating an excavator on an uneven boggy slope when the excavator overturned. The NSW Resources Regulator alleged that Hunter Quarries had breached its safety duties by failing to fit the excavator with a rollover protective structure. Hunter Quarries was acquitted of the charges as the Court found the risk of death or serious injury from the excavator at the time of the incident was not reasonably foreseeable, as the worker had breached a well-known safety rule by entering the area where the incident occurred, which was an unstable no go zone, and was not performing the task that he was instructed to do.

In appealing the decision, the NSW Resources Regulator argued that the Court should have addressed the elements of an alleged offence in a specific order, instead of focusing on the foreseeability, or lack thereof, of the actions of a worker who was killed. In rejecting this argument, the NSW Court of Criminal Appeal found that upholding this argument would impose a structure of decision making that is not required by the WHS and, at least in some cases, may cause trial judges to deviate from the requirements of the statute.

The NSW Court of Criminal Appeal also determined that the reasonable foreseeability of an incident or risk can be relevant to the assessment of a section 19 breach, and relevant to whether the pleaded control measures were reasonably practicable, having regard to section 18. However, reasonable foreseeability is not determinative in determining either of these matters.

Orr v Hunter Quarries Pty Ltd [2022] NSWCCA 39

Employer found guilty of fatal WHS breaches after failing to record verbal safety instruction
The District Court of New South Wales has found construction company, Saunders Civilbuild Pty Ltd, (**Saunders**) guilty of breaching its primary duty of care to workers under the NSW WHS Act following an incident where a truck driver engaged by Saunders was fatally injured after falling from the back of a truck from which he was unloading an excavator and timber piles.

The Court found that prior to incident, Saunders had prohibited workers from accessing the back of trucks during loading as a control to mitigating the risk of falling from height. However, this control was not recorded in the relevant SWMS, nor did Saunders take any reasonably practicable steps to communicate the prohibition in its safety management system. The Court found that documenting the prohibition into the SWMS would have had a "demonstrable impact on safety".

In earlier proceedings, Saunders had also sought a permanent stay of proceedings, contending that the use of the 'and/or' conjunction in the pleadings gave rise to an inappropriately large number of alternative combinations. The pleadings included paragraphs such as: *The risk was the risk to workers, in particular Mr Williams **and/or** Mr Edwards, suffering serious injury or death as a result of falling from height whilst loading **and/or** unloading materials from the back of a truck and/or3 trailer of a heavy combination vehicle.* However, the Judge Scotting found that the large number of alternative allegations was non-problematic and rejected the application for a stay.

SafeWork NSW v Saunders Civilbuild Pty Ltd [2021] NSWDC 605
SafeWork NSW v Saunders Civilbuild Pty Ltd [2021] NSWDC 526
SafeWork NSW v Saunders Civilbuild Pty Ltd [2021] NSWDC 505

Building contractor found guilty after failing to insist on proposed safety measures rejected by principal
In February 2017, three workers from Mercon Group Pty Ltd (**Mercon**) were cutting a suspended block of concrete on a construction site when the block collapsed causing the workers to nearly fall three metres. Two of the workers were seriously injured, with the third narrowly missing injury. Mercon was subsequently charged with breaching its primary duty of care to workers under the NSW WHS Act, and plead guilty.

During sentencing, the Court heard that Mercon had initially quoted carrying out the work of cutting the concrete with the use of catch decks to minimise the falling from height risks. However, Growthbuilt Pty Ltd (**Growthbuilt**), the principal contractor, had refused to pay for the catch decks, and both parties instead opted to use joists and props to mitigate the identified fall risk. The joists and props did not provide a solid continuous surface for workers to work on however.

The Court confirmed that Mercon had breached its primary duty of care, and that Mercon should have found another way of safely performing the job, or not accepted the work. However, Growbuilt's refusal to accept the original proposed safety measures was considered to be a 'significant mitigating factor' to sentencing, and Mercon's initial fine of $120,000 was reduced to $90,000.

SafeWork NSW v Mercon Group Pty Ltd [2021] NSWDC 378

Court of Criminal Appeal quashes WHS convictions as a result of no causation
The New South Wales Court of Criminal Appeal has quashed the WHS convictions of an engineer, Ignazio Grasso and his company, Grasso Consulting Engineers Pty Ltd (**GCE**). In earlier proceedings, Grasso and GCE were found guilty of category 2 offences under the NSW WHS Act for failing to undertake computer modelling to test the accuracy of an engineer's hand calculations prior to demolishing a rooftop. The prosecution arose out of an incident where a portion of the rooftop unexpectedly collapsed and trapped a worker in a nearby excavator.

The Court of Appeal found that while it was open for the trial judge to conclude that Mr Grasso and GCE had breached their duties through omitting to perform the computer modelling, the trial judge had erred in determining risks of unexpected rooftop collapse was caused by those non-compliances. Proving causation is a necessary element of proving a safety offence, and in this case it was necessary for the

prosecutor to prove that Mr Grasso and GCE's non-compliances in relation to the computer modelling exposed workers to a risk of unexpected rooftop collapse. In relation to this issue, the Court found that the breach was not causative of the risk because of the intervening acts of other PCBUs. In particular, workers undertaking the rooftop demolition had followed a sketch prepared by another PCBU on the project, which was based on a misinterpretation of Grasso's advice.

Grasso Consulting Engineers Pty Ltd v SafeWork NSW; Grasso v SafeWork NSW [2021] NSWCCA 288

Court clarifies worker obligations under the WHS Act

The District Court of New South Wales has found site leading hand, Glen Scharfe employed by Hubtex Australian (**Hubtex**) not guilty of breaching his worker obligations under the NSW WHS Act.

Mr Scharfe was a supervisor and had directed a teenage worker to dismantle a gear box. The worker became injured in a chemical fire when performing the task after he used a brake cleaner as a degreaser on bolts of the gearbox to try and remove them, then attempted to unscrew the bottles with a rattle gun, which sparked and immediately ignited the flammable break cleaner. This was contrary to the instructions given to the worker by Mr Scharfe.

It was alleged that Mr Scharfe had breached his duty as a worker to take reasonable care of the health and safety of others, by failing to adequately supervise the worker, warn the worker the brake cleaner was highly flammable, and train him on the contents of its safety data sheet. Mr Scharfe plead guilty to the charge.

In examining the scope of the duty of workers, the Court determined that:

- A worker has a duty not to expose other persons to a risk of injury as a result of the immediate conduct of the worker.
- The PCBU's duty to ensure safety by eliminating risks so far as is reasonably practicable does not apply to a worker. A worker does not have to exercise reasonable care to eliminate or minimise all risks to another person at a workplace.
- The standard of the worker duty to exercise reasonable care is a lower standard than that owed by a PCBU. The lower standard of care reflects that a worker has less influence and control over the system of work than that of a PCBU. It is the PCBU that is responsible for implementing the system of work, providing the plant and determining the conditions in which the workers will work.

The Court went on to find that Mr Scharfe had not breached the worker duty, primarily because he had given instructions to the worker, his superiors did not expect him to stand next to the worker and watch his every move, it was not reasonable foreseeable that the worker would have used the brake cleaner as degreaser, and the teenage worker knew as a matter of fact (based on evidence given by him) that the brake cleaner was flammable. The Court also was not satisfied that the failings alleged by the prosecutor were reasonable responses to the risk, and that certain matters (e.g. training the worker on the SDS) were in the scope of Hubtex's duty as a PCBU, rather than Mr Scharfe's.

While Mr Scharfe was acquitted of breaching his duties as a worker, Hubtex was convicted and fined of a category 2 offence in relation to the same incident. The Court noted the worker's failure to comply with the instructions given to him by Mr Scharfe as a mitigating factor in sentencing, but "only to a limited degree" as Hubtex's duty of care extends to disobedient workers, and the worker was vulnerable by reason of his youth and inexperience, coupled with inadequate information and training provided by Hubtex. The Court imposed a fine on Hubtex of $124,000.

SafeWork NSW v Scharfe [2021] NSWDC 260
SafeWork NSW v Hubtex Australia Pty Ltd [2021] NSWDC 664

Safety conviction highlights safety coordination duties of principal contractor

A principal contractor of a major infrastructure project, CPB Contractors Pty Ltd (**CPB**) was found guilty of breaches of the WHS Act after a worker was seriously injured after being struck by high pressure water.

The Court heard that MGW Engineering Pty Ltd (**MGW**), trading as Forefront Services, had conducted hydrostatic pressure testing on a fire and deluge system, and left it pressurised overnight, without notifying CPB.

The next day, workers from Kenny Constructions (Aust) Pty Ltd were told the pressure test had been completed. The incident occurred when a Kenny Construction worker attempted to remove a spool pipe from the fire and deluge main pipe riser and inadvertently removed a coupling with a blank cap sealing the system, and was struck by high-pressure water.

The Court determined that the risk of an uncontrolled release of energy from stored water after the hydrostatic pressure test was known to CPB and identified in a SWMS prepared by CPB and Forefront. CPB's failings included failing to develop, document and implement a system for the coordination and scheduling of hydrostatic pressure testing in work areas where simultaneous operations were being undertaken. The Court stated that as principal contractor, CPB was responsible for coordination and scheduling of the various contractors, and monitoring that the work of subcontractors was conducted in accordance with the documented systems of work.

CPB was fined a total of $100,000, reduced to $85,000 on account of their guilty plea.

The decision highlights the core duty of principal contractors to coordinate activities between contractors, and monitor contractor activities and the implementation of safety systems by contractors.

SafeWork NSW v CPB Contractors Pty Limited [2021] NSWDC 376 (3 August 2021)

High Court confirms sentencing process for NSW Courts

The High Court of Australia handed down a decision regarding the manner in which Courts in NSW are required to apply jurisdictional limits in sentencing decisions following an offender's guilty plea. The High Court confirmed that the correct approach is for the Court to determine the sentence without any regard to any jurisdictional limit affecting the Court's sentencing power. Any relevant jurisdictional limit is then to be applied by the sentencing judge after the judge has determined the appropriate sentence for the offence.

Jong Han Park v The Queen [2021] HCA 37

Council found guilty of Category 2 offence following death of volunteer

In July 2018, a volunteer from the non-for-profit organisation Men's Shed was killed while he was volunteering for Camden Council (**Council**). The Council had engaged Men's Shed volunteers to assist with an irrigation project at an equestrian park owned by the Council. The worker was killed when he was struck by a pipe whilst carrying out the task of laying pipes for the water irrigation system. He was working without assistance or supervision from Council workers.

The incident followed a risk assessment conducted 2 years earlier, which identified that the site's management had not been complying with their WHS obligations, and had recommended among other things, the implementation of an induction program and ongoing training for volunteers. Despite the risk assessment recommendations, and further findings from an internal audit which identified a more robust volunteer process was required and that a WHS induction was needed, the Council (at the time of the incident):

- was still using volunteers who had not been trained in irrigation installation;
- had failed to complete a risk assessment;
- did not provide the required supervision; and
- did not ensure their WHS officers were sufficiently involved. In fact the Council's officers had been unaware that the Council using Men's Shed volunteers to undertake the works.

The Court described the Council as having an 'almost flagrant disregard' for the risks involved. Ultimately, the Council pleaded guilty to an offence under section 32 of the NSW WHS Act and was convicted and fined $750,000. The Court said that while the Council had policies and procedures relating to the use of volunteers its failure to enforce those was systemic. The actions of Camden Council were '*inadequate, piecemeal and lacked urgency. Whilst a number of [Safe Work Method Statements] were developed, numerous SWMS, including a Safe Operating Procedure, for the tractor involved in the incident were not undertaken'* and there were entries on the Risk Register that had not been closed despite being provided to the Camden Council 2 years prior.

SafeWork NSW v Camden Council [2021] NSWDC 709

Queensland

Custodial sentence imposed for industrial manslaughter
The Queensland District Court has sentenced a business owner, Jeffrey Owen, to 5 years imprisonment (suspended after 18 months) after he was found guilty of industrial manslaughter. In July 2019, Owen was using a forklift to unload a heavy generator from a flatbed truck at his business in Gympie when the generator fell from the tines and fatally crushed his friend who was helping with the task. This is the first time an individual has been prosecuted, convicted and jailed for industrial manslaughter since the offence was introduced in 2017, and the longest jail sentence ever imposed on an individual under work health and safety laws in Australia.

Owen was charged with industrial manslaughter under section 34C of the Queensland WHS Act, as a person conducting a business or undertaking (as opposed to a "senior officer"). The Prosecutor submitted that Owen caused his friend's death by negligently operating the forklift, because Owen was not licensed to drive a forklift, the forklift was overloaded at the time of the incident, and the business had no documented health and safety procedures, particularly for using a forklift to unload heavy equipment.

Owen's defence argued that the deceased worker was not employed or contracted by Owen and therefore could not be considered a worker "carrying out work" for a PCBU under the WHS laws. Defence counsel argued the man was "helping a friend", as opposed to performing work. However, the argument was unsuccessful, as Mr Owen was convicted by the jury.

In sentencing, the Judge found that Owen's sentence should reflect an appropriate punishment, general and personal deterrence and denunciation, taking into account Owen's personal circumstances and remorse.

Company director given suspended sentence following successful reckless conduct prosecution
Cordwell Resources Pty Ltd and company director Brian Cordwell were convicted and fined in October 2021 after entering a guilty plea to reckless conduct offences under the Queensland WHS Act. The company was fined $500,000 and Mr Cordwell was sentenced to imprisonment for six months, wholly suspended.

The prosecution arose out of an incident in 2019 where a worker suffered head lacerations after Mr Cordwell instructed the worker and a colleague to get into the bucket of a wheel loader (which are not designed to lift workers) and use it as a work platform to make repairs to plant, contrary to the company's procedures. While the workers were doing the repairs, the bucket began to tip forward. One worker sustained minor injuries as he jumped onto the frame of the plant being repaired, while the other worker's head was trapped between the plant and the back of the bucket.

The company had documents requiring working from height to be conducted from a cherry picker or scaffolding with harnesses, and prohibiting workers from riding in machinery or attachments because of the associated crush risks. Judge Long found the director engaged in reckless conduct both without reasonable excuse, and with a degree of planning and reflection, as opposed to in the spur of the moment.

There is an ongoing trend of company directors being issued suspended sentences in relation to reckless conduct offences, which is reflected in this case.

Industrial manslaughter charges laid
A PCBU in Queensland has been the first entity prosecuted under the industrial manslaughter provisions of the state's *Electrical Safety Act 2002* (**ES Act**). The charges arise from an incident where a worker was electrocuted after a crane allegedly touched or came in close proximity to overhead power lines. The PCBU, MSF Sugar Pty Ltd, has also been charged with a category-2 breach of the ES Act.

Two further PCBUs and a business director have also been charged with industrial manslaughter offences under the Qld WHS Act in relation to two separate incident involving worker deaths.

These cases demonstrate the increasing commonality of industrial manslaughter prosecutions in Australia.

Prison sentence imposed on Queensland company director

A prison sentence has been imposed on company director of Illawarra Enterprises (Qld) Pty Ltd, Michael Walsh over recklessly disregarding safety concerns raised by a worker just before another worker sustained serious impalement injuries in relation to the concerns raised. Michael Walsh has sentenced in the District Court to four month's jail, wholly suspended for 12 months.

Walsh and his company, Illawarra Enterprises were charged with Category 1 offences under the QLD WHS Act after the worker sustained injuries at a construction site in 2018. Illawarra Enterprises was engaged by Val Eco to lay blocks at a construction site which hosted a steep incline and multiple excavation areas around the block-laying area. The injured worker was travelling up a pathway around a trench, when part of it gave way causing him to fall into the trench and be impaled on a steel bar. A Workplace Health and Safety Queensland investigation found that just prior to the incident, his co-worker had slipped on the same path, nearly falling into the trench, and had reported to Walsh that the task was dangerous.

In addition to Walsh, Illawarra Enterprises was also convicted and fined $300,000 in relation to the incident. The Court found that Walsh disregarded the worker's concerns just prior to the incident and took no action to mitigate or minimise the risk identified. In doing so, the Court held Walsh and Illawarra both engaged in conduct that exposed individuals to a risk of death or serious injury, and were reckless as to the risk.

Val Eco was also found guilty and convicted over the incident for a Category 2 offence, and was fined $110,000 in 2019.

WHS improvement notices upheld following challenge

The Queensland Industrial Relations Commission (**IRC**) has upheld two improvement notices issued to Watpac Construction Pty Ltd (**Watpac**), which alleged that Watpac had failed to provide sufficient lighting and failed to manage a build-up of wastewater and debris at a construction site.

In challenging the validity of the notices, Watpac argued that it had complied with all applicable WHS provisions, and that subcontractors it had engaged were responsible for undertaking the measures set out in the notices. In particular, it argued its contractor KLN was responsible for installing access and emergency lighting, and another contractor (YBR) was responsible for the rubbish and waste removal.

In upholding the notices, the IRC found Watpac could not delegate its duties as the site's principal contractor and as a PCBU through its subcontracts with KLN and YBR. In particular, the Court confirmed that no matter what contractual obligations or collateral duties of other entities might exist, Watpac remained a duty holder with respect to the requirement to provide sufficient lighting and in relation to waste removal.

The IRC also rejected Watpac's argument that the inspector who issued the lighting related notice did not hold reasonable belief that Watpac was not complying with the WHS Regulation because the inspector (who directed Watpac to a code of practice which specified lux levels) could not have determined lux levels in the area as he did not have a lux level and such levels could not be seen by the naked eye. The IRC stated that the relevant functions of an inspector ought not to be impeded by unnecessarily onerous obligations requiring them to 'go down every dry gully' searching for possible evidence to consider before they can reach a conclusion that a contravention of the WHS Act is occurring.

Further, the IRC stated that the extent of investigation necessary will depend on the circumstances of each case and will require an inspector to weigh the seriousness of the risk observed, against the delay and effort required to make further investigative enquiries, in order to achieve a reasonable and balanced

approach. Often this will occur in circumstances where the urgency to manage the perceived risk, as a matter of practicality, will take precedence over conducting of exhaustive enquiries.

Watpac Construction Pty Ltd v The Regulator (under the Work Health and Safety Act) [2021] QIRC 375 (4 November 2021)

Victoria

WorkSafe Victoria lays charges in relation to COVID-19 hotel quarantine programme breaches
WorkSafe Victoria has laid 58 charges against Victoria's Department of Health for alleged breaches of the OHS Act in relation to the state's COVID-19 hotel quarantine programme.

WorkSafe charged the Department with:

- 17 breaches of section 21 of the OHS Act, alleging it failed to provide and maintain, so far as was reasonably practicable, a working environment that was safe and without risks to the health of its employees while it was responsible for overseeing and coordinating Victoria's first hotel quarantine program for the COVID-19 pandemic in March, April, May, June and July last year; and
- 41 breaches of section 23, alleging it failed to ensure, so far as was reasonably practicable, that persons other than employees were not exposed to risks to their health and safety arising from the conduct of its quarantine undertaking.

The allegations include that the Department exposed hotel quarantine employees and security guards to risks of contracting COVID-19 from returned travellers or contaminated surfaces by failing to:

- appoint people with infection prevention and control (**IPC**) expertise to be stationed at hotels it was utilising for the program;
- provide security guards with face-to-face infection prevention control training by a person with expertise in IPC prior to them commencing work;
- provide written instruction for the use of PPE; and
- update written instructions relating to the wearing of masks at several of the hotels.

There is a maximum penalty of $1.48 million per charge.

WorkSafe Victoria has also laid charges against an accommodation provider used to accommodate homeless persons as part of the state government's pandemic response strategy. The provider has been charged as a person with management or control of the workplace, for failing to have in place a COVID-19 safe plan, require contractors to sign in when entering the facility and requiring persons entering the premises to wear a mask.

WorkSafe Victoria has also indicated that there are a number of other investigations related to COVID-19 risks that are ongoing.

Company fined for contractor fatigue management failures
The Royal Automobile Club of Victoria (**RACV**) has been convicted and fined $475,000 for failing to ensure its contractors were properly managing fatigue risks.

An employee of one of the RACV's roadside assistance service contractor companies, YJ Auto Repairs Pty Ltd, suffered fatal injuries after a road accident during a period where he had been on call for 89 hours and had been working for 17 hours straight.

RACV did not require YJ Auto Repairs to provide training on fatigue or have safe systems of work in place to manage fatigue risks and it was routine for YJ Auto Repairs' workers to work 96-hour on-call shifts over four days and nights. The Court found it was reasonably practicable for RACV to provide contractors with information on the risk of fatigue and suggest they implement policies and procedures to minimise associated risks.

The contractor, YJ Auto Repairs is also facing charges in relation to the incident.

Department convicted of safety breaches in relation to workplace violence
Victoria's Department of Justice and Community Safety was convicted for breaches of the OHS Act as a result of two violent incidents that occurred within its youth justice programmes which resulted in youth justice workers being seriously injured. In one incident, a worker was struck in the head by a child with guitar, and in the other incident, a child poured hot water on the worker's face. There were a number of rules in place to prevent these incidents (i.e. restrictions on the child's use of the guitar outside his bedroom due to previous violent behaviour, and restrictions on the use of hot drinks outside the kitchen). However, employees were not made aware of these procedures, and the rules were not enforced. The Department was fined $100,000, plus $16,207 in costs as a result of the conviction.

Western Australia

First gross negligence conviction set aside
Resource Recovery Solutions Pty Ltd (**RRS**) has had its gross negligence conviction diminished to a general safety duty charge after previously becoming the first entity to be found guilty of gross negligence breaches under the Western Australian *Occupational Safety and Health Act 1984* (**OSH Act**).

RRS was convicted over charges related to an incident where a worker's arm was dragged into an unguarded pinch point on a machine at RRS's Bayswater waste recycling facility. RRS appealed against the magistrate's findings on nine grounds of which the Supreme Court upheld three.

The key ground successfully argued by RRS was that it could not be established beyond reasonable doubt that RRS had "actual knowledge" that failing to implement the reasonably practicable measures identified by the prosecution (proper instructions and training, and direct supervision) was likely to cause a death or serious harm on the machine. RRS argued, and the Court accepted that the prosecution's particulars did not address the matter of RRS's state of knowledge regarding alleged practical measures of training and supervision. The Court emphasized that the prosecution is" bound by its particulars" and a finding of fact cannot be made based on a case that is a different to a case that is particularised, and where the person charged has not had an opportunity to meet that different case.

Accordingly, the employer's conviction for the offence of gross negligence was set aside and replaced with a "general duty charge" pursuant to section 19A(2) of the OSH Act.

Resource Recovery Solutions Pty Ltd v Ayton [2021] WASC 443

High safety fine imposed as higher penalties take effect in WA
An employer has been fined $450,000 for breaching the states OHS Act in relation to an incident where a worker was seriously injured after he fell seven meters from a roof and landed on a concrete floor. This is one of the first cases finalised after Western Australia's maximum WHS penalties were increased significantly in 2018.

The company had identified the fall hazards associated with the roofing work and approved a range of control measures, which included using fall prevention or restraint systems near open penetrations. However, the workers were not instructed to use a fall injury prevention system prior to undertaking work on the day of this incident despite all necessary equipment being on site along with a licensed rigger with specific expertise in creating these systems.

Australian Capital Territory

Principal contractor fined in relation to Canberra hospital fatality
The principal contractor of the University of Canberra Hospital construction project has been convicted and fined $150,000 after pleading guilty to a category 2 offence. The prosecution relates to a fatal incident that occurred in August 2016, involving a mobile crane that was carrying a 10.3 tonne generator overturning and crushed a nearby worker.

In convicting the company, the Court found the most serious part of the offence was its failure (through its

site representatives) to require the completion of a site-specific risk assessment before the crane lift was performed.

The Chief Magistrate discussed the interaction of WHS duties of principal contractors and the specialist skills of their subcontractors. In particular, the Magistrate stated that while it was 'entirely reasonable' for the principal contractor to rely on the crane operator employees to carry out the specialist assessments they were trained and retained for in relation to the crane, the principal contractor is subject to separate obligation to follow its own safety processes, such as the cross-checking processes in relation to ensure that a site-specific risk assessment was in place. This obligation does not depend on the specialist skill being exercised by the subcontractor but rather on the safety system instituted by the principal.

The case emphasizes the need for principal contractors to ensure 100% compliance with principal contractor instituted systems on construction projects, such as cross-checking that correct safety documentation is in place, audits and inspections. Specifically, principal contractors should ensure that there is compliance with the principal contractor instituted systems set out in the project work health and safety management plan.

Northern Territory

Multiple recklessness charges brought against company and COO
NT WorkSafe has laid a total of 38 charges against a mine operator, OM (Manganese) Ltd (**OM Ltd**) and its chief operating officer under the NT WHS Act. The charges follow an incident at the mine where a superintendent was inspecting a pit wall which gave way and buried him, causing fatal injuries. The supervisor had entered the pit after other workers who had entered the area reported seeing sediment slipping from the wall earlier in the day. At the time of the incident, two other workers were nearby but escaped injury. A total of nine workers entered the pit on that day.

The details of the charges are as follows:

- OM Ltd – 24 charges, including 7 recklessness charges, for breaching its primary duty of care to workers. OM Ltd faces a total maximum penalty of $35 million.
- Chief Operating Officer – 14 charges, including 7 recklessness charges, for breaches of the officer due diligence obligation. The COO faces a maximum penalty of $21 million, or 5 years imprisonment or both.

Tasmania

Appeal court confirms PCBU safety breach
The Supreme Court of Tasmania has confirmed that a PCBU breached its primary duty of care under the Tasmanian WHS Act following an incident where a worker who stepped underneath an electric rise-and-fall platform (**RFP**) at an abattoir was injured.

After pleading 'not guilty, the PCBU was convicted of category 2 breaches in the Magistrates Court for failing to implement additional controls in relation to the RFP including clearly marking an exclusion zone below the RFP, creating a written SOP for cleaning around the RFP, installing signage warning of the dangers of being under the RFP, and implementing isolation measures for the RFP when workers cleaned underneath it.

The company then appealed to the Supreme Court where it contended that it had taken all reasonably practicable measures in relation the RFP. In particular, the company argued that it had followed the advice of a safety consultant to fit the RFP with a loud siren, as it was operating in a loud environment, among other controls. The consultant gave evidence to the Magistrate that given the loud siren and other implemented controls, he couldn't envisage anyone going under the RFP. The Magistrate found that the consultant's belief was misplaced, stressing the abattoir was a crowded, noisy and busy working environment, and that the PCBU was required to take into account the potential for employee

disobedience, lack of attention or inadvertence. Additional controls might have provided a sufficient reminder to him not to enter the danger zone, she found.

The Supreme Court confirmed the findings of the Magistrate, with the exception of the finding in relation to implementation of isolation procedures. The Court found that the term isolation procedures was a "vague one", the prosecutor did not explain what the procedures should have looked like, and the Magistrate did not provide adequate reasons for her decision on the issue, it was found.

Greenham Tasmania Pty Ltd v Director of Public Prosecutions [2021] TASSC 51