

WHS Law Briefing

August 2023



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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 August 2023. 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

National WHS strategy	Safe Work Australia has released the Australian Work Health and Safety Strategy 2023-2033 agreed to by all jurisdictions, setting the agenda for Australia's response to key WHS challenges over the next 10 years. Areas of focus include, among other things, psychosocial risks, the rise of artificial intelligence, hybrid working and climate-related risks.
Psychosocial risks	Queensland, Western Australia, Tasmania, the Northern Territory and the Commonwealth have now joined New South Wales, with their regulations for the management of psychosocial risks now being in force. The Northern Territory's regulations commenced on 1 July 2023. The Commonwealth and Northern Territory diverged slightly from the model WHS Regulations by not excluding the operation of the hierarchy of controls for the management of psychosocial risks. South Australia, Victoria and the Australian Capital Territory are yet to enact regulations for the specific management of psychosocial risks. There have been a number of prosecutions involving psychosocial hazards arising in the context of HR investigations.
Silica dust	There is a continued focus on the regulation of crystalline silica. Companies continue to receive fines for silica-related breaches. The model WHS Regulations now expressly prohibit the uncontrolled processing of engineered stone and clarify what will be considered "controlled processing". South Australia has announced it will be adopting this prohibition and it will come into effect in September 2023. Safe Work Australia is expected to deliver a report to the WHS Ministers by the end of August 2023 that will provide recommendations regarding options to prohibit the use of either all engineered stone, engineered stone with crystalline silica concentration of 40% or more, or introducing licensing for PCBUs working with engineered stone that is not otherwise banned.
Positive duty to eliminate sexual harassment	Provisions introducing a positive duty on employers to take reasonable and proportionate measures to eliminate sexual harassment have passed in the Commonwealth, Northern Territory and Australian Capital Territory. The Northern Territory and Australian Capital Territory provisions have not yet commenced. Queensland has also acknowledged that creating a positive duty is an "important element of a proactive and preventative anti-discrimination framework".

Legislative updates

Across Australia / Commonwealth

Penalties introduced and a total ban considered re the use of engineered stone

The [Model Work Health and Safety Regulations \(Engineered Stone\) Amendment 2023](#) has introduced an express prohibition on the uncontrolled processing of engineered stone and provides clarity as to what will be considered controlled. To be considered controlled, workers must be provided with prescribed PPE and utilise a dust suppression system, that is, either local ventilation, on-tool dust extraction and/or a water delivery system that supplies a continuous feed of water. Maximum penalties for breach are \$30,000 for companies (\$6,000 for individuals).

In consideration of a ban of the use of engineered stone, Safe Work Australia is expected to deliver a report to the WHS Ministers by end of August 2023. This follows a period of consultation regarding the options to prohibit the use of either all engineered stone or engineered stone with crystalline silica concentration of 40% or more, with a further option including the introduction of licensing for PCBUs working with engineered stone that is not otherwise banned.

The report follows the WHS Ministers formally adopting the proposals recommended in Safe Work Australia's [Decision Regulation Impact Statement: Managing the risks of respirable crystalline silica at work](#).

Safe Work Australia updates the national model WHS laws

Safe Work Australia has made [amendments](#) to the national model WHS Act and WHS regulations. The amendments include the following:

- Adding a jurisdictional note and model penalties for the offence of industrial manslaughter to the model WHS Act. The model penalties are \$18 million for bodies corporate, and 20 years' jail for individuals.

- Significantly increased maximum penalties – in particular the maximum penalties for a category 1 offence (gross or reckless conduct) is now \$10.4 million for bodies corporate, \$2.1 million (or 10 years jail or both) for company officers and \$1 million for other individuals.
- Amending section 31 of the WHS Act to clarify that an officer may commit a Category 1 offence.

The amendments will not apply in a harmonised jurisdiction until they are explicitly enacted by that jurisdiction.

Safe Work Australia calls for feedback on amendments to incident notification obligations

Safe Work Australia has invited [feedback](#) on potential options to improve the coverage and operation of incident notification provisions in the model WHS laws. Most significantly, the consultation paper includes options for consideration that would capture psychological injuries, illnesses and harm, and psychosocial hazards (including workplace violence, bullying and harassment), and introduce periodic reporting (six-monthly) for certain incidents where immediate notification is not required.

Safe Work Australia releases guidance regarding working from home

Safe Work Australia has released new four new documents which provide practical guidance to PCBUs and workers regarding managing risks associated with working from home. The documents are available on Safe Work Australia's working from home [webpage](#) and include:

- [PCBU information sheet: working from home](#)
- [Worker information sheet: working from home](#)
- [Working from home checklist](#)
- [Setting up your workstation infographic](#)

Commonwealth bans insurance for WHS penalties

The [Work Health and Safety Amendment Act 2023](#) introduces a number of key changes to the Commonwealth WHS Act. Of particular note, the WHS Act will be amended to:

- prohibit insurance contracts covering monetary penalties imposed by the Act; and
- include negligence as a fault element for the category-1 offence of reckless conduct.

Commonwealth makes regulations to address psychosocial risks

The [Work Health and Safety Regulations 2011](#) have been amended to include provisions for the management of psychosocial risks. The provisions commenced in April 2023.

Unlike the model WHS Regulations, the Commonwealth has prescribed the use of the hierarchy of controls for psychosocial risk management. This approach was also adopted by Queensland and the NT. Comcare has produced guidance regarding the changes [here](#).

Positive duties passed in response to Respect@Work report

The [Anti-Discrimination and Human Rights Legislation Amendment \(Respect at Work\) Act 2022](#) introduces a positive duty on employers to take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual harassment, hostile work environments on the ground of sex and victimisation. The Act expressly provides that the new duty will not affect or limit existing duties held by duty holders under the Commonwealth or state or territory WHS Acts. The duty is now in effect but the Human Rights Commission's compliance powers do not take effect until 12 December 2023.

Concurrently, the [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022](#) is now in force and provides for an express prohibition of sexual harassment under the *Fair Work Act 2009* (Cth).

Safe Work Australia releases WHS strategy

Safe Work Australia has released the [Australian Work Health and Safety Strategy 2023-2033](#). The strategy was agreed to by all jurisdictions and sets the agenda for Australia's response to key WHS challenges over the next 10 years.

The overarching goal of the strategy is to reduce worker fatalities, injuries and illness. One of the targets in the strategy is for there to be no new cases of accelerated silicosis by 2033.

The key WHS challenges identified in the strategy for the next 10 years include:

- Psychosocial risks;
- Worker vulnerability;
- Rise of artificial intelligence (AI), automation and related technologies
- New types of work (eg gig and platform work)
- Workforce demographic shifts
- Hybrid work / work from home / flexible work arrangements
- Climate-related risk; and
- More complex supply chains.

The strategy details various compliance and enforcement activities that will be undertaken to help achieve the strategy, stating that a continued strong focus on compliance and enforcement is essential for ensuring PCBUs are meeting WHS duties.

Safe Work Australia releases guidance regarding compliance with Australian Standards

Safe Work Australia has launched a new [webpage](#) and an updated [information sheet](#) which provides guidance for duty holders on Australian and other Standards (including international Standards) and how they interact with the WHS Laws, as well as approved Codes of Practice.

The webpage refers to provisions from 17 standards which must be complied with under WHS regulations. For other Australian Standards which do not need to be conformed with, Safe Work Australia notes that Australian Standards "may still be relevant to a court when determining whether a duty holder has complied with the WHS laws"

Updates to model WHS Codes of Practice

Safe Work Australia has released a new model Code of Practice for [Tower cranes](#). It has also amended a number of Codes and guidance material to reflect the transition to the Globally Harmonised System of Classification and Labelling of Chemicals (GHS-7), as listed below. The Codes do not apply in any of the harmonised jurisdictions unless it is officially adopted by them.

There have also been various updates to Codes of Practice around Australia, as addressed in this briefing:

- the model WHS Code of Practice, [Managing risks of hazardous chemicals in the workplace](#);
- the model WHS Code, [Labelling of workplace hazardous chemicals](#);
- the model WHS Code, [Preparation of safety data sheets for hazardous chemicals](#);
- the 59-page national guide, [Classifying hazardous chemicals](#); and
- several fact sheets (available [here](#)).

Safe Work Australia releases comparative performance monitoring report

The [Comparative Performance Monitoring report](#) analyses trends in WHS and workers' compensation scheme performance across Australia and New Zealand. Of particular note, the report shows a marked increase in the number of prohibition notices being issued by WHS regulators with a total of 6,686 notices being issued for 2020-21 up from a total of 3,513 in 2016-17.

Proposed amendment to give employees a 'right to disconnect'

If it passes, the [Fair Work Amendment \(Right to Disconnect\) Bill 2023](#) (a private members Bill sponsored by the Greens) will amend the *Fair Work Act 2009* to include a statutory 'right to disconnect outside of working hours'. The proposed section 64A would provide that an employee "is not required to monitor, read or respond to emails, telephone calls or any other kind of communication from an employer outside of the employee's hours of work (including during periods of leave)". The exceptions to this would be where the employee is in receipt of an availability allowance for the period during which the communication is made, or if the reason for the contact is an emergency or a genuine welfare matter.

Review of the Federal Safety Commissioner announced

Marie Boland has been appointed to lead the review into the effectiveness of the Federal Safety Commissioner. This will also include a review of whether the WHS accreditation scheme for Commonwealth-funded construction work could be adopted for other areas of Government procurement. Public submissions for the review closed on 31 July 2023.

Federal Budget delivered

The [Federal budget](#) for 2023-24 allocates (over a four year period):

- \$10 million to address and prevent silicosis including the development of a national strategy;
- \$27.4 million "safety and fairness" package that will include \$2 million for the training of HSRs regarding psychosocial hazards; and
- \$57.3 million to "improve the culture of parliamentary workplaces for both parliamentarians and staff".

New South Wales

Change of New South Wales Government

On 25 March 2023, Labor was elected following a 12 year period in opposition, with all mainland states and territories of Australia and the Commonwealth now being led by a Labor government. Legislative changes campaigned for whilst in opposition that are likely to be introduced include:

- industrial manslaughter laws;
- increased regulation of silica, including a ban of engineered stone with concentrations of silicosis-causing crystalline silica exceeding 40%; and
- focus on improving WHS standards and entitlements for workers engaged by online gig platforms,¹ including the development of enforceable WHS Codes of Conduct.

In May 2023, a member of the Greens party put forward a parliamentary motion in the Legislative Council for a complete ban on engineered stone, however MPs voted in favour of an amendment to the motion to state that the House supports “a nationally uniform ban on manufactured stone with silica concentrations above 40 per cent”.

SafeWork NSW announces ‘anytime anywhere campaign’ to reduce fatal falls

SafeWork NSW has launched a 12 month [campaign](#) of surprise inspections to reduce fatal falls on New South Wales building sites. The announcement follows concerns raised by Judge Russell in a sentencing decision, on the alarming rise in fall from heights incidents leading to serious injury and death. Judge Russell requested that SafeWork NSW send a copy of the judgment to the Minister responsible for workplace safety. The ‘anytime, anywhere’ campaign will see inspectors on the ground visiting construction sites across the State. Inspectors will not hesitate to stop work on site, issue fines and consider prosecution against businesses and individuals breaking the law and flaunting critical safety regulations.

Interim report released in review of SafeWork NSW

Retired Supreme Court Justice Robert McDougall KC has released an [interim report](#) on his ongoing independent [review](#) of SafeWork NSW’s operations, culture and governance.

New South Wales Resources Regulator to focus on psychosocial risk management

The Department of Regional New South Wales’ [Compliance Priorities Report – January to June 2023](#) reports that inspectors will be assessing mine operators’ progress in achieving compliance with respect to managing psychosocial risks, with a particular focus on risk assessments and whether consideration has been given to SafeWork NSW’s Code of Practice for [Managing psychosocial hazards at work](#).

Review of WHS Codes of Practice

SafeWork NSW has re-made seven WHS Codes of Practice to reflect the national transition to the seventh revised edition of GHS-7. The WHS Codes of Practice are as follows: [Abrasive blasting](#), [Confined spaces](#), [How to manage and control asbestos in the workplace](#), [How to safely remove asbestos](#), [Labelling of workplace hazardous chemicals](#), [Managing noise and preventing hearing loss at work](#) and [Managing risks of hazardous chemicals in the workplace](#).

Further, SafeWork NSW has announced a review of the following Codes of Practice: [Tunnels under construction](#), [Collection of domestic waste](#), [Moving plant on construction sites](#), [Safety in forest harvesting operations](#) and [Work near overhead powerlines](#).

Guidelines published for working safely with cobots

The New South Wales Centre for Work Health and Safety has published [guidelines](#) for working safely with collaborative robots (or cobots), including safety checklists and guidelines for undertaking a risk assessment.

PCBUs to provide audiometric testing

From 1 January 2024, PCBUs will need to provide audiometric testing to workers who are required to wear PPE to control the risk of hearing loss in accordance with the New South Wales WHS Regulation. The commencement of the requirement had been postponed for over 5 years to allow PCBUs time to comply with the obligation.

¹ The gig economy uses mobile apps or websites to connect individuals providing services with consumers. Also known as the platform or app economy, the sharing economy or the on-demand workforce (Ref: [Fair Work Ombudsman](#))

Queensland

Five yearly review of the WHS Act

The Queensland Government has issued their [response](#) to the [final report](#) coming out of the five yearly review of the Queensland WHS Act. It is expected that legislation will be introduced to implement the 31 recommendations of the review by the end of 2023. The recommendations largely relate to HSRs and dispute resolution procedures.

Positive duty to eliminate discrimination and sexual harassment

The Queensland Government has issued its [final response](#) to the [Human Rights Commission Report](#) regarding its review of the *Anti-Discrimination Act 1991*, recognising that "creating a positive duty to eliminate discrimination, sexual harassment and other objectionable conduct is an important element of a proactive and preventative anti-discrimination framework".

Blood lead level thresholds now align with harmonised jurisdictions

The [Work Health and Safety Amendment Regulation 2022 \(Qld\)](#) adopts various amendments that had been made to the model WHS Regulations between 2016 and 2020, including lowering the blood lead level testing thresholds to bring Queensland in line with the other harmonised jurisdictions.

WHS Regulations and Code of Practice for psychosocial risk management commenced

The [Managing the risk of psychosocial hazards at work Code of Practice 2022](#) commenced on 1 April 2023, to coincide with the [Work Health and Safety \(Psychosocial Risks\) Amendment Regulation 2022 \(Qld\)](#) coming into force. The Code is aimed at providing clarity to duty holders on managing psychological health risks at work. Among other things the Code notes that poor organisational justice can give rise to psychosocial hazards.

Coal mining safety inquiry report released

Queensland Transport and Resources Committee has tabled their [report](#) following the parliamentary inquiry into coal mining industry safety. The inquiry had a particular focus on a review of the implementation of the

recommendations coming out of the Board of Inquiry into the Grosvenor mine explosion (**BOI recommendations**).

The Committee recommended that coal mine operators be required to report on their implementation of the BOI recommendations by 30 June 2023 (which included that employers should implement leading rather than lag indicators to measure safety performance and executive incentives). The Committee also recommended a 25% increase in unannounced regulator inspections and that legislative protections against safety reprisals should be implemented.

The regulator, Resources Health and Safety Queensland (**RHSQ**) released its [response](#) to the Committee's findings in February 2023. RHSQ stated that they currently aim for 10-20% of inspections to be unannounced and that they will undertake an objective analysis to critically assess whether the current rate of unannounced inspections should be retained. RHSQ also stated that they would report on activities responding to the Committee's recommendations in their annual report (which is usually released in September).

Review of the Electrical Safety Act

The Government has published a [discussion paper](#) and called for feedback on the recommendations in the [final report](#) coming out of the review into the *Electrical Safety Act 2002*. The recommendations include aligning the Electrical Safety Act requirements with the Queensland WHS Act, including compliance with codes of practice, provisions regarding HSRs and consultation between duty holders.

Updates to WHS Codes of Practice

Queensland has amended 10 WHS Codes of Practice to reflect the national transition to GHS-7 and recent amendments to the Queensland WHS Regulation. The WHS Codes of Practices are as follows: [Abrasive blasting](#), [Confined spaces](#), [How to manage and control asbestos in the workplace](#), [How to safely remove asbestos](#), [Labelling of workplace hazardous chemicals](#), [Managing noise and preventing hearing loss at work](#), [Managing risks of hazardous chemicals in the workplace](#), [Preparation of safety data sheets for hazardous chemicals](#), [Spray painting and powder coating](#), and [Welding processes](#).

In addition, Queensland's [Managing risks in stevedoring Code of Practice 2023](#) commenced on 31 March 2023. This code was remade without any changes to the Managing risks in stevedoring Code of Practice 2018.

As noted above, the [Managing the risk of psychosocial hazards at work Code of Practice 2022](#) commenced on 1 April 2023.

South Australia

South Australia progresses industrial manslaughter offences

South Australia has introduced the [Work Health and Safety \(Industrial Manslaughter\) Amendment Bill 2023](#). The bill introduces a new offence of industrial manslaughter, which applies to PCBUs and officers that engage in reckless or grossly negligent conduct that breaches their health and safety duties and the conduct causes a death. Officers will face a maximum penalty of 20 years' imprisonment, while companies will be exposed to maximum fines of \$18 million.

The South Australian Labor government has also committed to implementing a psychosocial hazards at work reform program and committed \$9.2 million over four years to replace SafeWork SA's current case management system

SafeWork SA inspectors to target workplaces requiring an asbestos register

In May 2023, SafeWork SA announced that they will again be checking whether the person with management and control of the workplace has identified and is managing asbestos in buildings built prior to 31 December 2003, and that asbestos registers have been reviewed/ revised prior to demolition or refurbishment commencing. SafeWork SA issued 130 improvement and prohibition notices following a similar campaign last year.

The [Managing respirable crystalline silica dust exposure in construction and manufacturing of construction elements Code of Practice 2022](#) commenced on 1 May 2023. This code of practice establishes minimum, enforceable standards for duty holders in the construction industry and in manufacturing businesses.

The [Managing respirable dust hazards in coal-fired power stations Code of Practice](#) was updated to address the recently amended exposure standard for respirable coal dust.

South Australia Government responds to independent review into SafeWork SA

The South Australian Government has published their [preliminary response](#) to the [report](#) coming out of the 'root and branch' review into the effectiveness of SafeWork SA's enforcement functions. 4 of the 39 recommendations have been rejected, including in relation to changes to entry rules for HSRs.

Review of Bill proposing ban of work exposing persons to crystalline silica dust

The South Australia Government [announced](#) on 1 August 2023 that it will be adopting the provisions in model WHS regulations which prohibit the uncontrolled processing of engineered stone products. The new regulations will come into effect from 1 September 2023.

A private members bill, the [Work Health and Safety \(Crystalline Silica Dust\) Amendment Bill 2022](#) was introduced to the Legislative Committee in December 2022 which proposes to prohibit work that exposes a person to silica dust. The bill was referred to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation for review and recommendations. Submissions closed on 21 April 2023 and will be made publicly available unless otherwise determined by the Committee.

Victoria

123 companies and directors fined in 2022

WorkSafe Victoria released an overview of the [statistics](#) of prosecutions and fines imposed for 2022, outlining that two thirds of the prosecutions related to construction and manufacturing.

Penalty unit increased

The value of penalty units in Victoria has increased from \$184.92 to \$192.31 for 2023-24, meaning that the maximum penalty for offences under the WHS Act have increased.

Western Australia

Western Australia adopts model psychosocial risk management provisions

Western Australia has amended the [Work Health and Safety \(General\) Regulations 2022](#) (WA WHS General Regulations) and [Work Health and Safety \(Mines\) Regulations 2022](#) (WA WHS Mines Regulations) to adopt the model WHS Regulations for the management of psychosocial risks.

Commencement date of various WHS Regulations delayed

The Western Australian Government has extended the commencement date of regulations regarding material hoists, concrete placing booms, asbestos clearing inspections, asbestos-related air monitoring and training of asbestos removal workers to March 2024. The commencement date of regulations regarding reach stackers and risk of falls in high-risk construction work has been extended to 30 March 2025.

Workers to elect HSRs under current WHS Act

Transitional arrangements for HSRs have expired meaning that workers will need to start negotiating to determine work groups and elect HSRs under the Western Australia WHS Act if they have not already done so.

Updates to WHS Codes of Practice

A new [Demolition work](#) Code of Practice has been introduced that better aligns with Western Australia's WHS General Regulations and WHS Mines Regulations.

For example, the maximum penalty for workplace manslaughter, the most serious offence in Victoria, has increased from \$18.5 million to \$19.2 million.

Code of practice remade

The Victorian Government has remade the [Code of Practice for Worksite Safety – Traffic Management](#), under the State *Road Management Act 2004*.

The Code replaces the model version of the Code of Practice that was one of 23 model Codes adopted by Western Australia last year.

The [Styrene](#) Code of Practice has been revoked (note that some of its contents are now covered by the [Managing risks of hazardous chemicals in the workplace](#) Code of Practice).

WorkSafe WA to audit mobile cranes

WorkSafe WA announced that it will be inspecting crane businesses and operators to check whether major inspections have been completed in accordance with the WA WHS General Regulations.

Review of WorkSafe WA's capacity to prevent and respond to assault and harassment in the mining industry

PricewaterhouseCoopers have released their [report](#) following their review commissioned in response to the parliamentary inquiry into sexual harassment of women in the fly-in-fly-out sector, finding that the "vast majority" of instances of sexual assault are not reported by affected persons and are not reported by employers to the Regulator.

Australian Capital Territory

New incident notification duties commence

The amendments to section 35 of the WHS Act commenced on 9 June 2023 meaning that PCBUs in the Australian Capital Territory now have a duty to report actual or suspected sexual assault to WorkSafe ACT as a notifiable incident.

Government response to review of WHS Act

WorkSafe ACT has published a [response](#) to the [final report](#) following the independent review into the conduct of WHS prosecutions in the Australian Capital Territory undertaken by Marie Boland in 2022. Rejecting the recommendation to establish an in-house prosecution team on the basis of costs and the possibility of 'capture', WorkSafe ACT has reported their support of a 'refined hybrid' model that would allow the WHS Commissioner to engage external counsel to provide prosecution advice and to progress prosecutions, without the need for approval of the Australian Capital Territory Solicitor-General, thus promoting "a quicker and more consistent approach to prosecutorial decision making".

Substantial on-the-spot fines for WHS breaches

The [Magistrates Court \(Work Health and Safety Infringement Notices\) Regulation 2011](#) has added more than 30 WHS offences to the existing list of breaches that attract infringement notices, including \$20,000 on-the-spot fines for breaches of section 43 of the WHS Act that provides for requirements for authorisation of work (\$4,000 for individuals).

Australian Capital Territory passes positive duty regarding sexual harassment

The Australian Capital Territory has passed the [Discrimination Amendment Act 2023](#) which imposes a positive duty on organisations, businesses and individuals with organisational management responsibility (such as CEOs) to take reasonable and proportionate steps to eliminate discrimination, sexual harassment and unlawful vilification. The Act commences in April 2024. The positive duty obligations will commence 12 months after the commencement of the Act for public authorities and individuals with organisational management of public authorities, and three years after the commencement day for other duty holders.

WHS Codes of Practice updated for GHS-7 regime

The Australian Capital Territory has approved 10 WHS Codes of Practice which have been updated to reflect the national transition to GHS-7: [Abrasive blasting](#), [Welding processes](#), [Confined spaces](#), [Spray painting and powder coating](#), [Preparation of safety data sheets for hazardous chemicals](#), [Managing risks of hazardous chemicals in the Workplace](#), [Managing noise and preventing hearing loss at work](#), [Labelling of workplace hazardous chemicals](#), [How to safely remove asbestos](#), and [How to manage and control asbestos in the workplace](#).

WorkSafe ACT alerts PCBUs to their obligations re HSRs

WorkSafe ACT issued a [safety alert](#) reminding PCBUs of their obligations to HSRs including providing them with relevant safety information a timely manner.

Workers to complete silica training by 1 July

Australian Capital Territory Work Health and Safety Commissioner has warned that regulatory action will be taken if workers who are required to complete a nationally accredited course for the prevention of exposure to crystalline silica in accordance with the WHS Regulation have not done so by 1 July 2023. WorkSafe ACT provides a table of the [specified occupations](#).

Silica notices issued

WorkSafe ACT has released a [safety alert](#) stating it has inspected over 47 workplaces and issued a total of 52 improvement notices, 46 prohibition notices and seven infringement notices to workplaces that cut or modify engineered or natural stone. Nineteen of the notices relate to breaches regarding health monitoring.

Northern Territory

NT adopts psychosocial risk management provisions

The model WHS Regulations regarding the management of psychosocial risks were adopted by the Northern Territory. The regulations require PCBUs to apply the hierarchy of controls when managing psychosocial risks in the workplace (which is slightly different to what is required under the model WHS Regulations). The requirements commenced on 1 July 2023. Safe Work Australia's national [Code of Practice for Managing psychosocial hazards at work](#) is also to be adopted as an approved code of practice.

Positive duty to eliminate sexual harassment

The [Anti-Discrimination Amendment Act 2022 \(NT\)](#) introducing a positive duty on employers and others to "take reasonable and proportionate measures to eliminate... discrimination, sexual harassment or victimisation to the greatest extent possible" will commence on or before 1 October 2024. The duty will apply across activities prescribed by the *Anti-Discrimination Act 1992*, including education, work, accommodation, goods, services and facilities, clubs and insurance and superannuation and newly, "administration of laws and government programs". The Act also introduces new protected attributes and amends the existing prohibition of sexual harassment so that it is not restricted to an "area of activity".

Tasmania

Tasmania adopts model psychosocial risk management provisions

Tasmania has amended its [Work Health and Safety Regulations 2022](#) to adopt the model WHS Regulations regarding the management of psychosocial risks and has made Safe Work Australia's national [Code of Practice for Managing psychosocial hazards at work](#) an approved code of practice under the [Work Health and Safety Act 2012](#).

Significant cases

New South Wales

Charges brought for alleged psychosocial harm

SafeWork NSW has brought charges against an employer in New South Wales for an alleged breach of the WHS Act, by exposing two nurses at a hospital in New South Wales to a risk of physical or psychological harm through a failure to adequately manage complaints, concerns and grievances in the workplace.

Damages awarded after employer breached duty by failing to implement its own systems

The New South Wales District Court has awarded \$1.8 million in damages to a worker diagnosed with chronic post-traumatic stress disorder, a major depressive disorder and a substance abuse disorder following his work on the Royal Commission into Institutional Responses to Child Sexual Abuse that involved over 70 victims of 11 alleged perpetrators.

The worker requested that he and his team be included in his employer's WellCheck program, which was an extension of its EAP, available for workers who were exposed to a higher risk of psychological harm. While the worker's request to be included in the WellCheck program was approved by his supervisor, it was never implemented as the EAP provider did not consider the team's work to fall within the program's parameters. The EAP counsellor did not communicate this decision to the supervisor or the worker.

Without access to the WellCheck program, the worker was only provided with ad hoc counselling through the EAP.

The employer was held to have breached its duty of care for failing "to implement – or to implement properly – the very systems that the [worker]...had asked to be put in place". In particular, the Court found that:

- the supervisor was not aware of his duties and failed to follow up to ascertain whether WellChecks were being provided as he had approved; and

- there was a failure to act on "red flags" including the worker's direct request for assistance.

PCBU fined \$600,000 following worker electrocution

An electricity distributor has been fined \$600,000 (reduced by 25 per cent from \$800,000 for its early guilty plea) for breaching sections 19 and 32 of the New South Wales WHS Act by exposing workers to the risk of death or serious injury from electric shock through contact with uninsulated live low-voltage electrical apparatus. The proceedings related to an incident where a worker tasked with replacing a power pole and performing a live changeover of overhead conductors came into contact with an energised component, suffering fatal injuries. No consideration had been given by the work crew to de-energising the overhead conductors prior to the commencement of the work. Just nine weeks prior, another worker of the electricity distributor had also been electrocuted following a similar incident, suffering severe injuries.

Judge Strathdee in the New South Wales District Court heard that the electricity distributor did not have a formally documented safe work method statement for changing energised low-voltage cross arms when replacing poles, and that workers adopted various undocumented methods. She found that the measures taken by the electricity distributor following the first incident were "inadequate in the extreme". Such measures included that the company:

- issued a safety alert with the subject: 'Electric shock low voltage change over';
- initiated an investigation into the work procedure identified in the safety alert;
- established a working group to consider live LV change over practices and options for performing Live Low Voltage pole changeovers; and

- failed to consider whether the task should have been performed live at all.

Judge Strathdee found that the electricity distributor failed to take the following reasonably practicable measures to eliminate or minimise the risk:

- undertaking an appropriate risk assessment or verifying that an appropriate risk assessment had been undertaken in relation to the performance of low voltage cross arm changeovers which would have identified the risk and measures for the elimination or minimisation of the risk; and
- providing and implementing a consolidated, formal, documented safe work method statement of work for live cross arm changeovers which sets out, step by step, the sequential process to be followed by the line workers in the conduct of the task, and the relevant controls.

PCBU fined \$405,000 following death of subcontracted site manager

Coplex Construction Pty Ltd has been fined \$405,000 (reduced by 25 per cent from \$540,000 for its early guilty plea) for breaching sections 19 and 32 of the New South Wales WHS Act. The proceedings related to an incident where Coplex Constructions was the principal contractor of a site. A site manager was performing manual tasks on a roof when he stepped back into a ventilation shaft, falling 19 metres onto the basement floor below, sustaining fatal injuries.

In sentencing Coplex, Judge Russell in the New South Wales District Court heard that following the incident, Coplex had made the following changes to its safety systems and processes:

- revised its WHSEQ Manual in accordance with recommendations from SafeWork NSW;
- required Coplex employees and representatives from its contractors to attend a Working Safely at Heights course, a Scaffold Safety Workshop course and a Formwork Awareness course;
- implemented a penetration register on all projects which requires the Coplex Safety Officer to record and inspect daily all penetrations and coverings on site to ensure the ongoing safety of workers;
- increased the size of ventilation shafts so that scaffolding can be placed inside the shafts, thereby preventing a

person from falling down multiple levels of a ventilation shaft;

- implemented the Simpel quality assurance and safety system software to integrate its inductions, risk assessments and other documentation, and track worker compliance.

Judge Russell made the following findings:

the risk was known to and recognised by Coplex, and was the subject of available guidance material;

there was a significant prospect of the risk of a fall occurring when workers were moving back and forth on the roof while concentrating on the task at hand;

the potential consequences of the risk were death or serious injury;

- simple and effective steps to eliminate or minimise the risk were well known to Coplex;
- there was little or no inconvenience in such steps being implemented. Coplex had a duty to enforce the SWMS prepared by Leda, the subcontractor who employed the worker, and the power to do so;
- the death of the worker was caused by the failure of Coplex to ensure safety and two other workers were also put at risk;
- the maximum penalty for the offence is a fine of \$1,500,000, which reflects the legislature's view of the seriousness of the offence;
- there was no explanation provided by Coplex as to why the penetration was not covered or why the roof area was not inspected, before workers were allowed back upon the roof. The Coplex Site Manager was working alongside the worker when the incident occurred but did nothing to cover the penetration. The open void was there to be seen; and
- accepted the submission of counsel for Coplex that this was a one-off failure and not a systems failure.

Leda was also charged over the incident and fined \$450,000.

[SafeWork NSW v Coplex Construction Pty Ltd \[2023\] NSWDC 165 \(23 May 2023\)](#)

Employer pleads guilty to failure to prevent knowingly unlawful conduct

An employer in New South Wales has been sentenced after pleading guilty to a breach of section 19 of the WHS Act for failing to ensure the health and safety of a paramedic, by failing to properly oversee the handling of restricted drugs, including fentanyl.

The organisations agreed that it had failed in its duty of care to the paramedic by failing to ensure that the removal of drugs by paramedics was witnessed by another paramedic; conduct unannounced independent station audits; conduct regular audits of patterns of use; create trend reports of incidents; and provide specific training to managerial staff. The Court summarised the employer's breach as "a failure to take adequate steps to prevent knowingly unlawful conduct".

The employer was fined \$250,000, reduced to \$187,500 to take account of its guilty plea. Some of the key factors in the case included the following:

- The employer was aware of risks associated with the misuse of fentanyl and the potential for misuse of fentanyl by paramedics, eg they were aware of 13 recorded cases of misuse of restricted medication by paramedics in a ten year period prior to the incident, they were aware of a special report by Victoria's anti-corruption commission which detailed allegations that paramedics in Victoria engaged in various illicit practices including using drugs of dependence.
- The employer had policies and procedures regarding the handling of drugs but they were routinely not complied with.
- The employer's auditing procedures were insufficient to identify instances of potential restricted medication misuse by staff.
- Colleagues of the paramedic had observed changes in his behaviour, but this was not reported to his supervisors.
- Colleagues of the paramedic had found evidence that he had tampered with fentanyl vials, however these incidents were not reported to his supervisors.
- A previous audit had revealed discrepancies in relation the paramedic's administration practices for fentanyl,

eg that the paramedic was the highest administrator of fentanyl at his station by a significant amount, however the audit failed to identify that the discrepancies were indicative of personal medication use or addiction. Some action was taken in response to the audit (eg. reviewing records), however the audit findings were not escalated to management, as required by its auditing procedure. The paramedic was not interviewed, his personnel file was not reviewed, and his rosters were not checked to determine how frequently fentanyl was accessed before his shift began. It had been recommended that the paramedic undertake further education with a clinical training officer but this had not been completed.

- Managerial staff had not completed their three yearly certifications in respect of restricted medicines.

PCBU acquitted of reckless conduct in ruling on section 19

Astute Earthworks Pty Ltd has been acquitted of Category 1 and Category 2 charges under the New South Wales WHS Act following an incident whereby two of its alleged workers fell four metres from an excavator bucket.

The incident occurred at a construction site where Apex Building Systems Pty Ltd was the principal contractor, and had contracted Greater Civil Pty Ltd to perform demolition work. Greater Civil had then contracted Astute to provide labourers to undertake the demolition work. The proceedings concerned the basis on which the workers were engaged.

Astute successfully argued that it did not owe a duty under section 19 of the WHS Act to the workers because they were independent contractors it had previously engaged, and had referred them to Greater Civil when its owner asked for help to find labourers for the site.

Judge Scotting in the New South Wales District Court was not satisfied beyond reasonable doubt that Greater Civil had subcontracted part of the demolition work to Astute because:

- Astute referred the workers without any expectation of payment;
- Astute was not present at the site to direct or supervise the work because it was not Astute's job; and

- the workers subjectively believed Astute was in control of the work they performed at the site, but this evidence was “insufficient to reject [Astute’s evidence] in totality” because had the incident not occurred, the workers would have been paid by Greater Civil, negating their subjective beliefs, and the subjective beliefs of the workers were post-contractual conduct which can be considered to establish the existence of a contract but not its terms.

Judge Scotting also dismissed a charge under section 38 of the WHS Act over Astute’s alleged failure to immediately report the incident to SafeWork NSW stating that he was “not satisfied that the notifiable incident arose in the course of Astute’s business or undertaking”.

[SafeWork NSW v Astute Earth Works Pty Ltd \[2023\] NSWDC 131 \(1 May 2023\)](#)

Case against employer not proven beyond reasonable doubt

An employer has defeated a charge brought against it for an alleged breach of the New South Wales WHS Act arising from an incident where a supervisor walked backwards into the path of a reversing forklift resulting in a severe crush injury to the supervisor’s foot. The forklift was being driven by an unlicensed forklift driver. The company was charged with breaching the WHS Act due to various alleged failures, including an allegation of permitting unlicensed forklift drivers to operate forklifts.

The District Court of New South Wales found that the charges had not been proven beyond reasonable doubt, in particular because:

- The employer had a safety system in place which banned unlicensed driving of forklifts. The system included inductions, safety procedures and provision of awareness training to workers.
- The rules were known to the supervisors and workers.
- It was known that breaches of the rules were a disciplinary matter.
- Management and the WHS supervisor undertook regular unannounced inspections of the work area, performing visual inspections and consulting with workers.
- The supervisors “dropped the ball” in the lead up to the incident, as opposed to the safety systems of the

employer being deficient. The Court found that the evidence and demeanour of the supervisors in the witness box demonstrated that they knew they had done the wrong thing.

- The conduct of the supervisors could not be considered to be conduct of the employer as the supervisors were not acting within the scope of their employment or actual or apparent authority.

The case is a good example of circumstances where employers will not be held liable for breaches of safety procedures by their employees i.e. where there is strong evidence of the rules being in place, understood and enforced.

Chain of responsibility fines increased significantly on appeal

New South Wales Court Justice Richard Cavanagh upheld an appeal against the size of penalties imposed on De Paoli Transport Pty Ltd, its director and an employee for breaches of New South Wales’ heavy vehicle laws.

In December 2021, a magistrate imposed low level fines, finding that the lack of any road accidents by the company’s drivers was a mitigating factor.

On appeal, Justice Cavanagh found that the fines imposed were “manifestly inadequate” and increased the company’s fine from \$15,000 to \$180,000, nearly tripled the fine for the sole director to \$15,000, and increased the other employee’s fine by five times to \$15,000.

Justice Cavanagh observed the magistrate’s “failure to have any proper regard to deterrence was erroneous”, and stated that it was “difficult to understand how such minor sentences could reflect the purposes of the legislation or have due regard to any of the important sentencing principles for this type of offending”.

In determining the revised penalties, Justice Cavanagh had regard to, and accepted that, the company had some measures in place (although described as “plainly inadequate”), the contraventions were not deliberate attempts to avoid responsibilities associated with fatigue management and driver behaviour, and that the company had taken steps to remedy its failures.

[Transport for New South Wales v De Paoli Transport Pty Ltd \[2022\] NSWSC 1678 \(9 December 2022\)](#)

Director of principal contractor disqualified from holding authority for 10 years

GN Residential Construction Pty Ltd, the principal contractor of a site in Macquarie Park, was charged and found guilty of breaching sections 19 and 32 of the New South Wales WHS Act following a scaffolding collapse that resulted in the death of a worker in April 2019.

As a result, in December 2020, GN were fined \$900,000 and were issued with a project order that funded the development of the SafeWork NSW Scaffolding Industry Safety Standard.

Queensland

PCBU fails to overturn \$500,000 fine and director custodial sentence

Cordwell Resources Pty Ltd and its director, Brian Andrew Cordwell, failed to overturn on appeal WHS recklessness penalties of \$500,000 and custodial sentence.

The proceedings concerned an incident where two young workers, aged 19 and 20, were instructed by Mr Cordwell to enter a front-end loader's bucket so that they could be raised 4.5 metres high to fix a sand wash plant pipe. While the workers were elevated, the bucket unexpectedly tilted forward and one of the workers' head became trapped between the bucket and a chain on the pipe, causing injury. At first instance, District Court Judge Long fined the company \$500,000 and sentenced Mr Cordwell to six months' jail, wholly suspended for 12 months.

The company and Mr Cordwell appealed, arguing that their penalties were manifestly excessive. The company argued that its penalty was excessive given its otherwise good safety record over 27 years. Mr Cordwell argued that he should not have been given a term of imprisonment as he had no criminal history or previous WHS convictions and was remorseful.

Justices McMurdo, Bond and Boddice of the Queensland Court of Appeal rejected the company's and Mr Cordwell's appeals against their sentences. Justice Bond agreed with the remarks of Judge Long in respect of the seriousness of the offending and found no misapplication of principle. He concluded that a "modest wholly suspended sentence was within the bounds of a proper exercise of discretion

In a recent development, the New South Wales Government has announced that the state's Fair Trading's Disciplinary Action Unit has now:

- cancelled GN's contractor licence and permanently disqualified it from holding one; and
- disqualified GN's Director from holding any authority under the *Home Building Act 1989* for 10 years.

in the present case" and that \$500,000 was suitable for denouncing the company's misconduct and deterring future contraventions.

Justices McMurdo and Boddice agreed with Justice Bond's findings, although Justice McMurdo said that it had been open to Judge Long to fine Mr Cordwell instead of imposing a suspended term of imprisonment.

[*R v Cordwell; R v Cordwell Resources Pty Ltd \[2023\] QCA 26 \(7 March 2023\)*](#)

PCBU fined for failing to proactively guard against acts of carelessness or inattentiveness by specialist contractors

A cleaning company has been fined \$20,000 for breaching sections 19 and 32 of the Queensland WHS Act. The individual responsible for the day to day running of the company was also fined \$4,000 for breaching section 27 of the Queensland WHS Act.

The proceedings concerned an incident involving two subcontracted workers who were instructed to perform cleaning work on a roof. In the course of this, one of the workers fell through a skylight, landing on a tiled floor 4 metres below, suffering bruising.

Magistrate Stjernqvist in the Maroochydore Magistrates Court found that the company failed to manage the risk of a worker falling through the skylight, by failing to ensure controls were implemented at the site, such as providing edge protection or barriers and warning workers of

the skylight. Magistrate Stjernqvist also found that the individual responsible for the day to day running of the business had failed to exercise due diligence to ensure that the company had appropriate measures in place to eliminate or minimise the fall risk.

Company fined \$1.2 million for breaches of the Heavy Vehicle National Law

A company has been found guilty and convicted of breaches of the Heavy Vehicle National Law for encouraging drivers to breach the fatigue management requirements as a result of the remuneration structure paid to its drivers. Drivers were found to be paid a general hourly rate that tempted them to ignore the HVNL's fatigue requirements around rest breaks and other issues. It was

also found that the company was fully aware of truck drivers' breaches of the fatigue requirements (from time sheets submitted by drivers) but failed to take any action. The company was fined \$1.2 million for the breaches. The prosecution occurred after a driver was involved in an incident. Fatigue was excluded as the incident cause, however the subsequent investigation uncovered numerous fatigue breaches.

South Australia

PCBUs fined following death of labour hire worker

Kara Resources Pty Ltd has been fined \$455,000 (after a 30 per cent discount reduced from \$650,000 for its early guilty plea) for breaches of sections 19 and 32 of the South Australia WHS Act. Labour hire company, Taurus Recruitment Pty Ltd, was also fined \$24,000 (after a 40 per cent discount for its early guilty plea) for breaching section 46 of the South Australia WHS Act for failing to consult, cooperate and coordinate activities with Kara.

The proceedings concerned an incident where a worker sustained fatal injuries when a metal cap which had been stuck in a rock crushing machine became released and a counterbalance weight struck and pierced the worker's hard hat, skull and brain. The worker was employed by Taurus which provided labour to Kara which operated as the host employer.

In the South Australian Employment Tribunal, Deputy President Judge Rossi found that the incident could have, and should have, been avoided by a simple but firm instruction implemented as a safe work procedure and properly supervised and maintained. He observed that the risk of serious injury or death was foreseeable and significant, and that the system Kara had in place did not address the particular risk. Kara did not have a safe operating procedure for safely removing tramp metal that could not be removed by the usual methods.

In relation to Taurus, Judge Rossi found that its systems and procedures in place prior to the incident were plainly inadequate in the circumstances of the duty imposed by section 46. He observed that labour hire companies have the opportunity to independently look at the health and safety procedures that are in place and operated by the host employer. Through a process of consultation, cooperation and the coordination of activities between the two entities, deficiencies may be identified which, through complacency, assumptions as to the adequacy of safety systems in place, or otherwise, may have been overlooked by the host employer.

[*Campbell v Kara Resources Pty Ltd \(ACN 080 865 103\) and Taurus Recruitment Pty Ltd \(ACN 160 445 107\) \[2022\] SAET 153 \(25 November 2022\)*](#)

PCBU fined for WHS breaches relating to a fatal fall

Allstar Asbestos Services Pty Ltd was fined \$300,000 (reduced from \$500,000 by 40 per cent for its early guilty plea) for breaches of sections 19 and 32 of the South Australia WHS Act. This was further reduced to \$150,000 because of the company's limited financial position.

The proceedings related to a fatal incident where a worker was removing asbestos sheets to a veranda. Whilst resting on a crawl board placed over asbestos sheets and using a crowbar, a timber rafter snapped, causing the worker to fall

approximately 2.2 to 2.5 metres through an asbestos sheet and onto a concrete slab below the veranda. The worker died as a result of his injuries.

In sentencing the company, South Australian Employment Tribunal Deputy President Judge Rossi observed that:

- the danger associated with working on the asbestos sheeting to the veranda with minimal propping provided by Allstar was obvious;
- the location of the fall had obvious rotting timbers and yet was not the subject of any propping;
- the deficiencies in what was done were clear and serious;
- no fall arrest system was implemented even though the need for one was identified by Allstar prior to the incident; and
- severe and potentially fatal injuries as a result of falling from the height of the veranda to the concrete surface below were foreseeable.

Judge Rossi also noted that it is important that inspections undertaken, where work is to be performed at a height, are not cursory inspections, and that both care and attention is given to ensuring that whatever is reasonably practicable is carried out to prevent a fall from a height.

[*Campbell v Allstar Asbestos Services Pty Ltd \[2023\] SAET 6 \(10 February 2023\)*](#)

Victoria

PCBU fined \$250,000 for failing to ensure workers were supervised

A-1 Engineering (Vic) Pty Ltd has been convicted and fined \$250,000 for breaching section 21 of the Victoria WHS Act, by failing to provide the supervision needed to enable employees to perform their work in a way that was safe and without risks to health.

Recklessness acquittal quashed

The National Heavy Vehicle Regulator appealed against the dismissal of a charge against the respondent, Gregg Birrell, of engaging without reasonable excuse in conduct that exposed Glenn Blacker to a risk of death or serious injury, and being reckless as to that risk in contravention of section 26F of South Australia's Heavy Vehicle National Law. At first instance, Mr Birrell effectively conceded the other elements of the offence except recklessness, and the Magistrate found that the Regulator failed to prove beyond reasonable doubt that Mr Birrell had "acted with the realisation or foresight of the probability of the other person's exposure to the risk of death".

The Regulator appealed against the dismissal on two alternative grounds, the first being that the Magistrate erred in finding that recklessness for the purpose of section 26F(1)(c) required proof that Mr Birrell foresaw the probability of the risk.

Justice Blue in the Supreme Court of South Australia agreed with the Regulator, finding that the concept of 'risk' usually refers to a possibility, as opposed to a probability, of the adverse event occurring. He observed that "the evident purpose of section 26F ["Category 1 offence"] is to deter operators from engaging in reasonably avoidable conduct knowing that there is a risk of harm but proceeding nonetheless. The evident purpose suggests that recklessness only requires knowledge of the possibility, as opposed to probability, of such harm". Justice Blue set aside the Magistrate's orders acquitting Mr Birrell of the category 1 offence, and remitted the matter to the Magistrates Court for retrial.

[*National Heavy Vehicle Regulator v Birrell \[2023\] SASC 49 \(4 April 2023\)*](#)

The proceedings related to an incident whereby two workers were crushed by a 770 kilogram condenser in 2017, with one man being killed and the other sustaining serious injuries. The company was found not guilty of failing to provide a safe working environment, failing to provide and maintain a safe system of work, and failing to provide necessary instructions.

PCBU fined \$400,000 loses appeal

In December 2021, Midfield Meat International Pty Ltd was fined \$400,000 in the County Court, after a jury found it guilty of breaching sections 21(1) and (2)(a) of the Victoria OHS Act. The proceedings related to a 2017 incident where a lone worker was found dead in a cattle holding yard following a suspected attack by an agitated bull. The jury considered that it had been reasonably practicable for the company to provide a second worker to act as a backup and provide assistance in the case of an emergency.

Midfield appealed against its conviction on two grounds, being:

- Ground 1: the verdict of the jury was unreasonable or could not be supported having regard to the evidence.
- Ground 2: the trial judge erred in allowing certain purported admissions contained in a written statement to be admitted into evidence. Midfield argued that the statement was an opinion based on hearsay and had little or no probative value.

Midfield also appealed against its sentence on three grounds, being:

- Ground 1: the sentencing judge erred in failing to properly apply the principles when assessing the gravity of the offending as a serious breach of statutory duty, which constituted a significant departure from the standard required.
- Ground 2: the sentencing judge erred when assessing current sentencing practices, and in failing to afford the applicant procedural fairness in relation to the quantum of the fine.
- Ground 3: that the sentence imposed was manifestly excessive.

Midfield was unsuccessful in both its appeal against conviction and sentence. In relation to Ground 2 of its appeal against conviction, Justices Walker, Macaulay and Kidd noted that the issue was how much weight should be given to opinion evidence, not whether it was admissible. They found that the general manager who gave the relevant statement had the requisite specialised knowledge to permit him to give evidence which carried weight and had probative value.

They further stressed that opinion evidence is “not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted”.

In relation to Ground 1 of Midfield’s appeal against conviction, the Justices found that “it was clearly open to a jury to be satisfied beyond reasonable doubt that, despite there being occasions when having a second person would be inefficient and inconvenient, the benefit of reducing the risk of catastrophic consequences on rare occasions, and of having a general rule rather than leaving it to individual discretion, outweighed any downside in having a system incorporating the rule”.

[Midfield Meat International Pty Ltd v The King \[2023\] VSCA 106 \(11 May 2023\)](#)

Industrial manslaughter charges laid against two related companies

Nordic Elevators Pty Ltd and Nordic Elevator Services Pty Ltd have been charged with workplace manslaughter under section 39G(1) of the Victoria OHS Act by engaging in negligent conduct that caused the death of an apprentice electrician. Nordic Elevators has also been charged with breaching section 21 of the OHS Act by failing to provide employees with the necessary supervision to perform their tasks safely. The two companies face fines totalling more than \$33 million.

Director and worker charged with WHS breaches for sexual harassment

A company director and a worker in his 20s have been charged with breaching the Victoria OHS Act by allegedly sexually harassing seven workers, some as young as 14 years old. Two of the director’s companies have also been charged. The alleged harassment occurred at two hospitality outlets in Melbourne. The director has been charged with breach of section 26 of the OHS Act for failing to ensure, as far as was reasonably practicable, that a workplace was without risks to health, in relation to the seven workers. The director’s companies were also charged with breach of section 26, with one company accused of sexually harassing six workers, and the other company, four workers. The worker was charged with breach of section 25 of the OHS Act for failing to take reasonable care for the health and safety of a person who could be affected by his workplace acts or omissions.

PCBU fined \$1.5 million following death of worker

Energy Australia Yallourn Pty Ltd has been fined \$1.5 million for breaching section 21 of the Victoria OHS Act, including:

- \$700,000 for failing to provide and maintain plant that was safe and without risks to health;
- \$500,000 for failing to provide or maintain safe systems of work; and
- \$300,000 for failing to provide such information, instruction and training that was necessary to enable workers to perform their work in a way that was safe and healthy.

The proceedings concerned an incident in November 2018 when a worker was reinstalling a circuit breaker in a high-voltage switch room. An electrical arc flash event and explosion occurred when a control cable that the worker was required to connect to the circuit breaker as part of the process of racking in, made contact with live components of the circuit breaker because of a defectively attached panel. The worker suffered severe burns to 90% of his body and died in hospital from his injuries.

WorkSafe Victoria initially announced in November 2020 that it would not charge Energy Australia. However, this decision was reviewed by the State Director of Public Prosecutions in late 2021. The review was requested by a senior Mining and Energy Union official under section 131 of the OHS Act, which allows a person who “considers that the occurrence of an act, matter or thing constitutes an offence against” the Act or Regulations to ask WorkSafe to refer the matter to the DPP if the regulator has decided not to bring a prosecution in respect of the matter.

Energy Australia pleaded guilty to the charges and acknowledged that:

- it had been reasonably practicable for it to ensure any infill panels installed on high-voltage switchboards were securely affixed and not able to move or swing;
- it should have ensured the worker (and other workers) were aware it was safer to attach the control cable to the circuit breaker before performing the racking task, in accordance with its written operating procedures; and

- it should have provided, and required workers to wear, readily available arc-rated personal protective equipment, which provided thermal protection and was self-extinguishing.

[DPP v Energy Australia Yallourn Pty Ltd \[2023\] VCC 185 \(13 February 2023\)](#)

PCBU fined over silica dust safety breaches

Boral Resources (Vic) Pty Ltd has been fined \$180,000 for failing to require workers to wear respiratory protective equipment, and other omissions, at a site where an administrative employee developed silicosis. Boral was charged with six breaches of the Victoria OHS Act, and ultimately pleaded guilty to one charge.

Magistrate Burnside in the Melbourne Magistrate’s Court found that “the real failure in this case was the lack of insistence or enforcement or proper supervision to ensure that all employees actually wore the masks and wore them properly”. She further observed that “the availability [and] suitability of ways to eliminate or reduce the risk was, in my view, quite straightforward and could have been easily maintained”.

Director accused of causing company to breach WHS obligations by bullying workers

The former director of Glass Solutions Pty Ltd has been charged with two breaches of section 144 of the Victoria OHS Act for engaging in repeated and unreasonable bullying behaviour. WorkSafe Victoria has alleged that the man’s actions caused the company to contravene sections 21(1) and (2)(a) of the OHS Act, in failing to provide or maintain systems of work that were safe and without risks to health.

Western Australia

Mining entity charged for failing to produce documents concerning alleged sexual harassment

WorkSafe WA has commenced a prosecution against a mining company for failing to supply documents relating to 34 cases of alleged sexual harassment at the company's mine sites.

Retrial for crane hire business

Halifax Crane Hire Pty Ltd has been successful in an appeal to the WA Supreme Court, with Justice Forrester ordering a retrial be heard in the WA Magistrates Court before a different magistrate.

In 2017, Gran Designs WA Pty Ltd contracted Halifax Crane Hire Pty Ltd to provide a crane to lift and position precast concrete panels at a Gran Designs construction site. In the course of this work, the dogman was fatally crushed. Halifax was charged with breaching clause 4.54(8) of the WA OSH Regulations (now repealed), for failing to ensure at least two doggers or riggers with experience in using the crane were involved in using the crane. Halifax pleaded not guilty and in May 2022 it was convicted and fined \$40,000.

On appeal, Halifax argued that:

- Ground 1: the verdict of guilty was unreasonable and unsupported having regard to the incontrovertible evidence before the court that Halifax's duty was limited to the extent it had control of the construction site.

Further, that Halifax held an honest and reasonable but mistaken belief that the relevant number of crew would be involved in the use of the crane.

- Ground 2: (abandoned at the hearing of the appeal).
- Ground 3: the magistrate erred in law in finding that a failure to ensure, contrary to reg 4.54(8), was 'an absolute duty' cast upon a responsible person.

Ground 1 was dismissed. However, Ground 3 was upheld, with Justice Forrester finding that under clause 1.4 of the WA OSH Regulations, the Magistrate had been required to make findings on the "extent" of Halifax's duty to ensure adequate crew numbers were utilised, but failed to do so. Further, as an OSH duty could be limited by clause 1.4, Justice Forrester found the Magistrate did not direct herself in accordance with the clause and "thus failed to properly direct herself as to an element of the offence". The matter was therefore remitted to the Magistrates Court for retrial before a different magistrate.

[HALIFAX CRANE HIRE PTY LTD -v- AYTON \[2023\] WASC 16 \(2 February 2023\)](#)

Tasmania

PCBU fined \$500,000 for silica breaches

Heritage Stone Pty Ltd has been fined \$500,000 in the Hobart Magistrates Court for breaching section 32 of the TAS WHS Act after three workers were diagnosed with silicosis through exposure to excessive levels of crystalline silica at one of the company's premises.

The Court found that, amongst other things:

- the practices of dry cutting and dry shaping stone products created high levels of dust and had a very high concentration of crystalline silica;
- the company lacked awareness of the hazards of silica

dust at the site despite the hazard being identified on available safety data sheets and warning labels;

- the company failed to carry out air monitoring for silica dust; and
- the company did not provide its workers with the correct protective respiratory equipment.

PCBU fined \$230,000 for silica breaches

Lazenby Sand Pty Ltd has also been fined \$230,000 in the Hobart Magistrates Court for category 2 and 3 breaches of sections 32 and 33 of the TAS WHS Act after a production manager/plant operator was diagnosed with silicosis, which triggered a WorkSafe Tasmania investigation.

WorkSafe Tasmania found that:

- the worker was exposed to airborne dust, including respirable crystalline silica, while performing his tasks of feeding screens, loading and carting materials, operating and maintaining fixed and mobile plant, and dealing with customers, at Lazenby's Sandford site;
- the exposure to dust increased during dry, windy weather;
- the worker was not required to undertake a medical examination when he started working for Lazenby, and was not provided with any health monitoring until November 2019, shortly before his diagnosis; and
- the worker was not provided with any dust-related instructions or training, and Lazenby failed to provide personnel with any information – through signage or toolbox talks – on silica or dust generally.

Northern Territory

Business owner charged with industrial manslaughter

Craig Williams, trading as Rainbow Beach Constructions, has been charged with industrial manslaughter under section 34B of the Northern Territory WHS Act. The proceedings concern an incident whereby a 60 year old worker sustained fatal injuries after falling 3.2 metres through an unguarded void.

It is alleged that Mr Williams as the principal contractor recklessly ignored repeated warnings from a number of subcontractors concerned about the risk of falls from height through voids in the upper floor, after temporary scaffolding was removed and not replaced by alternative fall protection. The maximum penalty for an individual found guilty of a section 34B offence is life imprisonment.

New Zealand

Two brothers sentenced to jail in New Zealand for safety cover up

The New Zealand Police successfully prosecuted two brothers, one for making a false statement and the other for perverting the course of justice. One brother was the health and safety officer and the other a director of an industrial engineering company in New Zealand. The company was charged with and plead guilty to breaches of the NZ WHS legislation in respect of an incident where an employee sustained a severe brain injury after being overcome by fumes when using solvents to clean a boat's engine room.

During the WorkSafe investigation of the incident, the two brothers repeatedly denied that an earlier incident had occurred with a different worker the week before, and documents were destroyed to cover it up. The deception had meant that the company had been sentenced without full knowledge of the previous incident. The health and safety officer was sentenced to nine months imprisonment on 21 July and the director to 20 months imprisonment on 25 July.

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