

WHS Law Briefing

November 2022



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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 November 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

Psychosocial hazards	<p>Legal obligations for PCBUs to manage psychosocial hazards continue to come into effect. In July 2022, Safe Work Australia published the national model Code of Practice for managing psychosocial hazards at work. Since then, NSW has amended its WHS Regulation to impose obligations on PCBU's to manage psychosocial risks in accordance with the general risk management provisions of the WHS Regulation (excluding clause 36 concerning hierarchy of control measures) and QLD has amended its WHS Regulation in the same way, but with a key difference to apply the hierarchy of controls to psychosocial risks. It is a matter of time before the other harmonised jurisdictions amend their WHS Regulations in the same way.</p>
Changes to Model WHS Act	<p>Safe Work Australia has amended the national model WHS Act, Regulations and related materials to give effect to 20 of the 34 recommendations made by Marie Boland's independent review of the model WHS laws. The amendments to the model WHS Act do not apply in a jurisdiction until passed by the Parliament of the jurisdiction and enacted. This has occurred in a number of jurisdictions, including in NSW and QLD with respect to psychosocial risks (as mentioned above) and in NSW, WA and Victoria with respect to prohibiting insurance and indemnities for WHS penalties.</p>
COVID-19	<p>National Cabinet agreed to end the mandatory isolation requirements for COVID-19 cases, and each jurisdiction has implemented the changes through amendments to their public health laws. Safe Work Australia and WHS Regulators have reminded duty holders that the removal of mandatory isolation does not impact on the duties of a PCBU to do all that is reasonably practicable to minimise the risks of COVID-19 at the workplace, including asking workers to stay at home when unwell. SafeWork Australia and WHS Regulators have updated (or are in the process of updating) their guidance materials to assist duty holders to continue to manage the risks of COVID-19 in the workplace.</p>
Industrial manslaughter	<p>The new Federal Government has committed to add industrial manslaughter provisions to the national model WHS Act, and South Australia's new Labor Government has committed to adopting them. If introduced in South Australia, this will bring the state into line with ACT, NT, Queensland, Victoria and Western Australia which already have industrial manslaughter laws.</p>

Legislative updates

Across Australia / Commonwealth

Labor wins Federal election

In May 2022, the Australian Labor Party won the Federal election with WHS reforms promised including:

- stepping up the enforcement of the WHS duty to “genuinely consult with workers”;
- enabling unions and workers (or their families) affected by work incidents to initiate WHS prosecutions;
- requiring “those who conduct businesses and their officers to bear the onus of proving that they have taken reasonably practicable measures to prevent a WHS offence occurring”;
- implement all 34 recommendations from Marie Boland’s 2018-19 review of the model WHS laws including by developing harmonised industrial manslaughter provisions (by adding it to the national model WHS Act) and supporting the implementation of those recommendations in all jurisdictions. Noting that ACT, NT, Queensland, Victoria and Western Australia already have industrial manslaughter laws, while South Australia’s new Labor Government has committed to adopting them.
- fully implement all relevant recommendations from Sex Discrimination Commissioner Kate Jenkins’ Respect@Work report on the national inquiry into sexual harassment in Australian workplaces; and
- protect workers’ mental health through specific regulations targeting psychosocial hazards.

COVID-19

On 30 September 2022, National Cabinet agreed to end the mandatory isolation period for people with COVID-19, which had been shortened a month earlier from seven days to five days, on 14 October 2022. Each jurisdiction has implemented the changes through amendments to their public health laws.

The Victorian Government has implemented the [Occupational Health and Safety Amendment \(COVID-19](#)

[Vaccination Information\) Regulations 2022](#), which took effect in July 2022 and apply for 12 months. The amendment authorises employers to collect, record, hold and use coronavirus vaccination information from a “specified person”, such as an employee, “who attends or will be attending a workplace under the employer’s management”, for the purposes of determining “reasonably practicable measures to control the risks to health and safety associated with COVID-19 at that workplace”, and implementing such measures.

Safe Work Australia published much anticipated national model Code of Practice for managing psychosocial hazards at work

In July 2022, Safe Work Australia published its much anticipated national model WHS Code of Practice, entitled [“Managing psychosocial hazards at work”](#).

The 54 page Code aims to address hazards at work that may cause psychological and physical harm arising from or in relation to the design or management of work, the working environment, the plant at a workplace, or workplace interactions or behaviours. The Code provides practical guidance on:

- identifying psychosocial hazards;
- assessing and controlling the risks;
- reviewing control measures;
- recording the risk management process and outcomes; and
- conducting WHS investigations.

The Code does not have legal effect in harmonised jurisdictions until it has been approved under the WHS Act.

Safe Work Australia has also published two infographics to help PCBUs to satisfy their work health and safety duties in relation to managing psychosocial hazards:

- Managing psychosocial hazards at work
- What psychosocial hazards sound like at work

Twenty changes made to model WHS Act

The national model Work Health and Safety Act, Regulations and related materials have been amended to reflect a wide range of recommendations from Marie Boland's independent review of the laws. Boland made 34 recommendations for the harmonised laws in early 2019, and in June 2022, Safe Work Australia implemented 20 of the recommendations, updating the model WHS Act, the Act's explanatory memorandum, the model WHS Regulations, the Regulations' explanatory statement, and other documents, to reflect the recommendations. The amendments include:

- making clauses in the Regulations identifying psychosocial risks associated with psychological injury and control measures to manage them;
- adding gross negligence as a fault element to the category 1, reckless conduct offence, allowing prosecutors to prove either the fault element of gross negligence or of recklessness;
- prohibiting insurance against WHS penalties;
- clarifying that a work group is negotiated with workers who are proposed to form the group;
- allowing health and safety representatives or deputy HSRs to attend HSR courses of their choice;
- removing a provision (which was not adopted by any jurisdiction) requiring WHS permit holders to give 24 hours' notice before entering a site to investigate suspected contraventions;
- aligning the processes for issuing different types of notices under the WHS Act;
- enabling inspectors to require the production of documents and answers to questions within 30 days;
- clarifying that a WHS regulator's power to obtain information for investigations into potential breaches has extra-territorial application;
- clarifying the circumstances in which WHS regulators can share information between jurisdictions;
- making it easier to hold WHS regulators to account for the progress of their investigations;
- improving record keeping and operator training for amusement devices and passenger ropeways; and

- clarifying that compliance with Standards is not mandatory unless specified in a provision or clause.

[Implementation of WHS ministers' agreed response to the Review of the model WHS laws | Safe Work Australia](#)

Safe Work Australia flags model WHS amendments for crystalline silica

In June 2022, Safe Work Australia released consultation regulation impact statement, "[Managing the risks of respirable crystalline silica at work](#)". Under one of five regulatory and non-regulatory options examined in the regulation impact statement, PCBUs could be required to proactively identify and assess the risks of all processes involving materials containing crystalline silica. In addition to existing WHS regulations, the new risk assessment rules would require PCBUs to develop a "silica risk control plan", amongst other measures.

Comcare introduces Code of Practice on crystalline silica

The WHS Code of Practice, [Managing the Risks of Respirable Crystalline Silica from Engineered Stone in the Workplace](#), has been given effect under the Commonwealth *Work Health and Safety Act 2011*, meaning it now applies to entities regulated by Comcare. The model version of the Code was finalised by Safe Work Australia in October 2021, and has already been implemented in NSW, Tasmania and Western Australia.

Safe Work Australia clarifies contractual chain WHS duties

Safe Work Australia has released fact sheet, [WHS duties in a contractual chain](#), providing guidance on duties under the model WHS laws and examples of how contractual relationships fit within the model WHS framework. Key points include:

- WHS duties are not transferrable;
- WHS duties cannot be contracted out to another party, such as a subcontractor;
- a person can have more than one duty under the model WHS laws. For example, a self-employed person may be simultaneously a PCBU and a worker;
- duties can be shared, so more than one person can have the same duty at the same time. For example, a

contractor and subcontractors, as PCBUs, will have the same duty to ensure access to first aid facilities at a workplace; and

- you must consult, cooperate and coordinate on WHS matters with other duty holders when working as part of a contractual chain.

Safe Work Australia releases guide on industrial rope access systems

Safe Work Australia has published the [Guide to managing risks of industrial rope access systems](#), outlining how to apply the hierarchy of controls when managing the risk of falls.

Launch of Respect@Work website

The Australian Human Rights Commission and the Respect@Work Council have recently launched the [Respect@Work | Respect@Work \(respectatwork.gov.au\)](#) website containing a wide range of helpful resources.

Amendments made to 2016 Building Code

In July 2022, the Federal Government amended the [Code for the tendering and Performance of Building Work 2016](#), transferring many of the Australian Building and Construction Commission's powers to WHS regulators. This amendment aligns with the Labour Government's 2022 Federal Election promise to abolish the ABCC. Employment and Workplace Relations Minister, Tony Burke, has said that the ABCC, which enforces the 2016 Code, is a "totally unnecessary body" and foreshadowed that the Labour Government intends to introduce legislation to abolish it by the end of 2022.

New Respect@Work Bill introduced

On 27 September 2022, the Federal Government has introduced the [Anti-Discrimination and Human Rights Legislation Amendment \(Respect at Work\) Bill 2022](#) which, if passed, will implement seven of the 55 recommendations from the [Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces](#). Amongst other things, the Bill introduces an express prohibition on conduct that results in an offensive, intimidating and humiliating environment for people of one sex, and imposes a positive duty on employers to take reasonable and proportionate measures to eliminate unlawful discrimination and sexual harassment.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill introduced

The [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Bill 2022](#) was introduced to Parliament on 27 October. If passed, the Bill will make a number of amendments to the *Fair Work Act 2009* (the FW Act) and related legislation, including to explicitly prohibit sexual harassment under the FW Act. The Bill prohibits this conduct "in connection with work" and the ban will "apply broadly to protect workers, prospective workers and persons conducting businesses or undertakings". The Bill also proposes to abolish the ABCC, with the Fair Work Ombudsman being the workplace relations regulator for the building and construction industry.

Time to transition to GHS-7 has nearly expired

Safe Work Australia has reminded duty holders that the two-year transition from the third to the [seventh revised edition](#) of the Globally Harmonised System of Classification and Labelling of Chemicals is nearly over. From 1 January 2023, entities that manufacture, import, supply or use hazardous chemicals must use the seventh edition – GHS 7 – to classify chemicals and prepare chemical labels and safety data sheets, subject to some exceptions. Information and guidance is available on SWA's [GHS 7 transition webpage](#).

Getting injured workers back to work

Safe Work Australia has published a guide for supervisors in small and medium businesses to help them get injured workers back to work. The guide "[Managing the relationship with an injured or ill worker during return to work: A guide for supervisors in small and medium businesses](#)" provides practical advice for when the worker is first injured or falls ill; while they are away from work; as they prepare to return to work; and when they do return.

Feedback sought on Regulations relating to Major Hazard Facilities

Safe Work Australia has called for feedback on a proposal to amend the national WHS Regulations relating to Major Hazard Facilities (MHF). In particular, stakeholder feedback has been sought on options to support improved application of MHF laws and consistency across jurisdictions. Information about the consultation process is available on [Safe Work Australia's website](#).

Exposure threshold for respirable coal dust halved

Safe Work Australia has amended its [Workplace Exposure Standards for Airborne Contaminants](#) to tighten the workplace exposure threshold for respirable coal dust (containing less than five per cent quartz). The limit was

halved from an eight-hour time-weighted average of 3mg per cubic metre of air to 1.5mg per cubic metre. The revised limit will take effect in a jurisdiction when it is implemented there. Some jurisdictions already implemented the lower threshold in 2020 when agreement was initially reached regarding the new threshold.

New South Wales

New WHS psychosocial risk management Amendment Regulation

In September 2022, the NSW Government made the [Work Health and Safety Amendment Regulation 2022](#).

The amendment introduces a requirement that PCBU's manage psychosocial risks in accordance with the risk management provisions of the NSW WHS Regulation (excluding clause 36 concerning hierarchy of control measures) and specifies factors that a PCBU must have regard to when determining which controls to implement.

The amendment also introduces further changes, including clarifying that compliance with provisions of Australian Standards is not mandatory unless specified in a WHS clause; and expanding record keeping and operator training requirements for amusement devices and passenger ropeways.

Most of the new changes commenced on 1 October 2022.

Bill passes enabling criminal checks of safety representatives

In May 2022, the [Work Health and Safety \(Mines and Petroleum Sites\) Amendment Bill 2022](#) passed, creating a penalty unit system to allow maximum fines for breaches to increase with inflation and enabling nationwide criminal record checks of nominated safety and health representatives.

Review of Dust Diseases Scheme final report tabled

In June 2022, [Report No. 80 - Standing Committee on Law and Justice - 2021 Review of the Dust Diseases Scheme](#) was tabled, providing 12 recommendations, including banning engineered stone products if the industry's WHS standards didn't improve.

New regulations for food delivery platforms and workers

The NSW Government has made the [Work Health and Safety Amendment \(Food Delivery Riders\) Regulation 2022](#). Under the regulation:

- From 1 July 2022, food delivery booking providers will be required to provide riders with certain high-vis personal protective equipment (unless the rider is able to use high-vis PPE made available to the rider by another food delivery booking provider).
- From 1 January 2023, food delivery booking providers will be required to provide riders with induction training and a training verification record. Record-keeping requirements with respect to PPE and training will also apply from this date.

Construction industry trials Australian first "Culture Standard"

An Australian first "culture standard" is being trialled at two major construction sites in the greater Sydney area - the Mulgoa Road upgrade and the Wentworth Point High School development. The sites will be required to:

- ensure no pornographic or offensive materials are present;
- ensure appropriate amenities are available, including female toilets with sanitary bins and change rooms; provide onsite mental health first-aiders;
- identify and disclose gender pay gaps across roles;
- implement plans to reduce these pay gaps;
- set clear targets for the appointment of women; and
- establish a Monday-to-Friday working program (or cap the working week at five days where a Monday-to-Friday regime isn't viable).

NSW Government agrees to safety recommendations from independent bullying and sexual harassment review

In August 2022, the [Leading for Change: Independent Review of Bullying, Sexual Harassment and Sexual Misconduct in NSW Parliamentary Workplaces in 2022](#) was released. The Report made a number of safety recommendations, which included explicitly prohibiting such misconduct, addressing diversity issues, addressing barriers to reporting, CCTV cameras in common areas, training programs, and tackling the link between workplace alcohol accessibility and “aggressive and predatory behaviour”.

WHS changes and criminal checks commencing

In August 2022, amendments to the [Work Health and Safety \(Mines and Petroleum Sites Act\) 2013](#) (NSW) commenced, including provisions enabling nationwide criminal record checks of industry safety and health representatives (who are nominated by the CFMMEU to represent work groups, review safety management systems and participate in investigations at coal mines) which passed Parliament despite warnings they place “no limits” on a minister’s powers to veto an elected representative.

Other changes include introduction of a penalty unit system to enable the maximum penalties under the Act to increase in line with the consumer price index; ensuring the chair of the Mining and Petroleum Competence Board is independent of the entities that can nominate board members; and enabling the service of documents on a person or a body corporate by email.

WHS Regulation remade with new diesel rules

In September 2022, the [Work Health and Safety \(Mines and Petroleum Sites\) Regulation 2022](#) (NSW) commenced, replacing the sunseting 2014 Regulation of the same name with a range of reforms. Changes include extending the duty to engage a licensed person to test samples of diesel engine exhaust emissions every six months to all types of underground mines, instead of just coal mines; and expanding the definition of “notifiable high potential incident” to capture exceedances of exposure thresholds for diesel particulate matter, dust, carbon dioxide and other substances.

EPA publishes new truck fire prevention manual

The NSW Environment Protection Authority (EPA) has published the [Preventing Fires – Truck Inspection Manual](#), designed to provide truck drivers with the ability to identify and correct faults causing potentially deadly heavy vehicle fires.

New laws to protect frontline workers

New laws have taken effect in NSW aimed at deterring violent conduct against frontline workers across a range of sectors. The changes to the *Crimes Act 1900* and other legislation create new aggravated and unaggravated offences related to certain acts against frontline workers, with maximum penalties ranging from 12 months’ jail and \$2,200, to 14 years in jail.

Additional offences attract on the spot fines

The NSW Government has made the [Work Health and Safety Amendment \(Penalty Notices\) Regulation 2022](#) to increase the number of offences that attract on-the-spot fines. The additional offences now attracting on the spot fines relate to management of electrical risks and asbestos.

Queensland

Review of QLD WHS Act commences

In July 2022, the five yearly review of the QLD WHS Act commenced, led by three independent reviewers and assisted by leading academics in WHS regulation. The review is to consider the overall effectiveness of the key components of the Act in achieving the objective of the Act, including:

- considering and reporting on any need for amendments to ensure:
 - provisions relating to health and safety representatives are effective and operating as intended;
 - workers are appropriately represented and assisted in the workplace for the purpose of health and safety matters;
 - the effectiveness of the legislative framework for review and stay provisions with enforcement notices under the WHS Act; and
 - provisions relating to the issue and dispute resolution are effective and operating as intended.
- any other matter relating to the Act's overall effectiveness.

Psychosocial risks amendment regulation

The Queensland Government has made the [Work Health and Safety \(Psychosocial Risks\) Amendment Regulation 2022](#) to expressly require PCBU's to tackle psychosocial risks through the risk management provisions of the State *Work Health and Safety Regulation 2011*.

The changes are similar to the national model WHS Regulations, as adopted by NSW in September, but with a key difference to apply the hierarchy of controls to psychosocial risks, pursuant to clause [36](#) of the WHS Regulation.

Amendment made to WHS Consultation, Cooperation and Coordination Code

Workplace Health and Safety Queensland has revised the [Work health and safety consultation, cooperation and coordination](#) Code of Practice to align with changes to the national model made by Safe Work Australia. The revised Code clarifies PCBU's consultation duties and includes hypothetical examples of consultation and coordination processes, to aid compliance.

New stair-height rule commences under WHS Scaffolding Code

In July 2021, Workplace Health and Safety Queensland issued a revised [Scaffolding Code of Practice](#) which includes a prescribed maximum height for certain scaffold stairs. Under the revised Code, the step height from a scaffold stair module to a work platform must be no more than 300mm where there is a change in direction between landings. Commencement of the new stair-height rule was delayed by 12 months to allow PCBU's time to transition. The new stair-height rule commenced in July 2022.

Protections against workplace harassment strengthened in Qld

In October 2022, the [Industrial Relations and Other Legislation Amendment Bill 2022](#) passed (with a range of technical amendments), increasing the State Industrial Relations Commission's powers around sexual or gender-based harassment, and facilitating the summary dismissal of harassers. Under the amendments:

- this form of harassment as an "industrial matter", enabling the IRC to conciliate, arbitrate and make interlocutory orders or interim injunctions in harassment cases;
- casual workers are provided access to 10 days of paid domestic and family violence leave per year;
- gender pay equity is promoted in collective bargaining negotiations;
- working conditions and protections are enhanced for independent courier drivers; and
- rules around representation provided by registered organisations for employers and workers are clarified.

South Australia

Greens announces plans to re-introduce industrial manslaughter Bill

In May 2022, the South Australian Greens announced plans to ensure the State Labour Government acts on its pre-election promise to legislate industrial manslaughter by re-introducing an industrial manslaughter bill. The Greens have been pushing to add industrial manslaughter provisions to the State WHS Act for some time. Most recently, through the *Work Health and Safety (Industrial Manslaughter) Amendment Bill 2020*.

New crystalline silica dust bill introduced

In June 2022, the South Australian Greens introduced the [Work Health and Safety \(Crystalline Silica Dust\) Amendment Bill 2022](#). If passed, the bill will prohibit PCBU's from carrying out, or directing or allowing a worker to carry out, "work that exposes a person to crystalline silica dust", with fines of up to \$1.5 million for bodies corporate and \$300,000 for individuals who breach the provision.

Report flags WHS amendments concerning prosecution procedures and information disclosures

An independent inquiry into SafeWork's post-inquest investigation into the murder of a nurse has released its [Report](#) which found that the investigation was "comprehensive and thorough". The Report has also flagged amendments to the SA WHS Act amendments

around prosecution procedures and information disclosures, given these matters caused considerable distress to the nurse's family.

SA Government announces review of SafeWork

In September 2022, State Industrial Relations and Public Sector Minister, Kyam Maher, announced an independent review of SafeWork. Former WorkSafe Victoria executive director, John Merritt, has been appointed to undertake the review. He has been tasked with inquiring into and making recommendations on matters including:

- the effectiveness of SafeWork's compliance and enforcement functions, including complaints, inspections, investigations, prosecutions and witness and family support;
- appropriate measures to ensure workers and their representatives (like health and safety reps), and the families of deceased workers, have "a genuine voice in the complaints, investigation, and enforcement process";
- the engagement between SafeWork and other government agencies to monitor and improve workplace health and safety; and
- any other matters that might arise during the review.

The final report is scheduled to be provided on 31 December 2022.

Victoria

OHS insurance bans commence

Victoria's ban on insurance against safety penalties has taken full effect, meaning employers can now be fined up to 1,500 penalty units – currently equating to nearly \$280,000 – for entering into or receiving a benefit from an insurance contract that purportedly covers monetary penalties under the *State Occupational Health and Safety Act 2004*, *Dangerous Goods Act 1985* or *Equipment (Public Safety) Act 1994*.

Compliance Code on communicating OHS across languages released

WorkSafe Victoria has released the 2022 [Compliance Code: Communicating occupational health and safety across](#)

[languages](#), stressing employers have an OHS duty to ensure all their workers understand their safety messages, and such comprehension is crucial to preventing injuries and illnesses.

New crystalline silica regulations commence

In November 2021, the Victorian Government made the [Occupational Health and Safety Amendment \(Crystalline Silica\) Regulations 2021](#). New laws took effect in May 2022 under the Regulations, requiring businesses across a range of industries – including construction, quarrying and tunnelling – to provide special training to employees and information to job applicants who might engage in "high-risk crystalline silica work".

Other new provisions require manufacturers and suppliers of products containing crystalline silica to provide statements outlining the percentage of the hazardous substance in their products, along with information on safely handling them and exposure controls.

Western Australia

Chamber of Minerals and Energy releases alcohol guideline

The Western Australian Chamber of Minerals and Energy has released the [Safe and Respectful Behaviours – Industry Alcohol Guideline](#) which applies to company-owned or operated resources sector accommodation sites in Western Australia.

WHS regulations subject to early changes to remove certain licensing requirements

The *Work Health and Safety (General) Regulations 2022*, which commenced in March 2022, were amended in June 2022 after consultation with industry stakeholders. The changes modify the new requirement for operators of earthmoving machinery to hold a high-risk work licence (HRWL) for crane operation where the equipment is used as a crane, by removing this rule where the machinery has a rated safe working load of three tonnes or less.

Stop-workplace-harassment regime commences

In June 2022, Western Australia's Industrial Relations Commission's power under the *Industrial Relations Legislation Amendment Act 2021* to issue stop orders to stop workplace bullying and sexual harassment commenced.

Special WHS inquiry triggered by 12th agricultural fatality

Following the 12th death in the agricultural industry in 12 months, a WHS inquiry was announced in June 2022 into agricultural fatalities. WorkSafe WA Commissioner Darren Kavanagh has said that "the culture in the

Revised Compliance Code for silica coming into effect

The Victorian Government has issued the 2022 Compliance Code, [Managing exposure to crystalline silica: Engineered stone](#), which supersedes the 2020 version of this Code. The new Code will come into effect on 15 November 2022.

agriculture industry seems to allow fatal incidents to occur at significantly higher rates than any other industry, with farm production appearing to be put before the safety of families and workers". The inquiry will aim to establish how to make changes in safety in the industry, and a report will be generated with recommendations on investigations and enforcement for consideration by the State Government.

Introduction of twenty-three new WHS Codes

In July 2022, [23 national model WHS Codes of Practice](#) were made under the new WA OHS Act which commenced in March this year, while [14 of the State's Codes](#) were revoked.

Western Australian Government tables Response to Enough is Enough Report

In September 2022, the Western Australian Government tabled its [Response](#) to the 24 recommendations made in the '[Enough is Enough](#)' Report following the Western Australian parliamentary inquiry into sexual harassment against women in the FIFO mining industry. The Response states that the Government supports or supports in principle all the recommendations aimed at it. The Western Australian Government has said that a new Code of Practice for mining and construction accommodation is to be developed and consideration given to a new Code of practice for regional and remote workplace accommodation across other industry sectors.

Australian Capital Territory

WHS Legislation Amendment Bill introduced

The Workplace Legislation Amendment Bill was introduced in June 2022, which proposes changes to the ACT WHS Act, *Workers Compensation Act 1951* and *Long Service Leave (Portable Schemes) Act 2009*. The amendments involve the implementation of about a dozen of Marie Boland's 34 recommendations from her 2018-19 independent review of the national model WHS laws, including:

- banning PCBU's from entering into insurance contracts to cover WHS penalties; and
- defining "sexual assault" as a notifiable incident in section 35 of the ACT WHS Act, requiring PCBU's to notify WorkSafe ACT of "an incident or a suspected incident that exposes a worker or any other person at the workplace to sexual assault".

WHS Prosecutions Recommendations released

In July 2022, independent reviewer, Marie Boland, delivered the [Final Report – Conduct of WHS Prosecutions in the ACT](#) to the WHS Commissioner. Ms Boland made 12 recommendations, including a requirement for briefs of evidence to be assessed within 120 days, a requirement for 90% of prosecutions to result in conviction, and the establishment of a WorkSafe ACT in-house prosecution team.

New Code of Practice for tower cranes

The ACT has become the second jurisdiction in Australia to implement a [Tower Crane WHS Code of Practice](#). The first Australian jurisdiction was Queensland, which implemented its Code of Practice concerning tower cranes in 2006 (this was remade in 2017 to reflect the QLD WHS Act).

The 77 page ACT Code commenced on 8 September 2022, and provides guidance on safe design, planning and coordinating tower crane operations, minimising the risk of injury from collision, erecting and dismantling cranes, commissioning and operating the plant, training and supervision, inspections and tests, and other issues.

New silica regulations

As part of the Territory's Silica Dust Action Plan, the ACT has passed the [Work Health and Safety Amendment Regulation 2022 \(No 1\)](#) which introduced a number of new

requirements in relation to silica. Amendments included a new chapter on silica dust work, a ban on uncontrolled dry cutting of silica-containing materials unless an exception under the Regulation applies, and a duty on PCBU's to train workers about crystalline silica awareness.

The uncontrolled dry cutting ban commenced for work with engineered stone products on 14 July 2022, and for work with other silica-containing materials on 17 October 2022. WorkSafe ACT has said that PCBU's must ensure that all workers engaged in high risk silica crystalline work are trained from 1 July 2023.

The ACT Government has also made the [Work Health and Safety Amendment Regulation 2022 \(No 2\)](#) and [Work Health and Safety Amendment Regulation 2022 \(No 3\)](#) to address industry concerns around the requirement to use water to suppress dust under the ban on the uncontrolled dry cutting of silica-containing materials across all industries. Changes brought about by the new legislative instruments include:

- allowing the use of alternative water suppression technologies in certain circumstances; and
- creating a mechanism by which processes and products (aside from engineered stone) that are not suitable for wet controls can be managed using best practice dry controls, but only after a thorough and consultative risk assessment eliminates the use of wet controls.

WorkSafe ACT issues Safety Alerts

- On 4 August 2022, WorkSafe ACT issued Safety Alert, [Apprentice training and supervision: Working at heights](#) after observing an increasing number of apprentices who had not received the correct induction and supervision, and were being exposed to the risks of working at heights. The Regulator said in the Safety Alert that:
 - PCBU's must ensure that workers are suitably trained, equipped, and supervised.
 - Direct supervision means supervision at all times on a one-on-one basis. The supervisor must be able to see or hear the apprentice while on the construction site and provide specific and constant guidance to the Australian Apprentice.

- General supervision means being under instruction and direction for tasks being performed. The supervisor must remain on the same work site as the Australian Apprentice and regularly communicate with the apprentice (this cannot be done via phone). Supervision should be at a maximum ratio of one supervisor to five apprentices.
- First and second year apprentices typically require direct supervision.
- The Australian Apprentice should only move from direct supervision to general supervision for those skills where they have demonstrated competence.
- On 12 September 2022, WorkSafe ACT issued Safety Alert, [Inspection and testing of electrical equipment at the workplace](#), following report of an incident where a worker received an electric shock from a faulty laptop charger cord and charging station. The Regulator reminded PCBU's that they must ensure electrical equipment is regularly tested and tagged by a competent person.

Northern Territory

Digital white cards introduced

The Northern Territory Government has amended clause 320 of the NT WHS (National Uniform Legislation) Regulations to facilitate the introduction of digital "white cards" (construction induction training cards) and photographic identifiers on the documents.

Positive anti-harassment duty introduced in NT

The Northern Territory Government has introduced an [Amendment Bill](#) creating a positive duty for employers and others to prevent and eliminate discrimination, sexual harassment and victimisation "to the greatest extent possible". The positive duty in the Bill applies to various "areas of activities" including: education; work; accommodation; goods, services and facilities; clubs; insurance and superannuation; and the administration of laws and government programs.

Tasmania

In August 2022, the [Report into Workplace Culture in the Tasmanian Ministerial and Parliamentary Services](#) was published. Anti-Discrimination Commissioner, Sarah Bolt, found that it is evident that discrimination, sexual harassment and bullying is occurring in the Tasmanian Ministerial and Parliamentary Services workplace and when it does, the impacts can be profound and life-changing. Fourteen recommendations were made, designed to ensure the Tasmanian Ministerial and Parliamentary Services workplace is better equipped to promote a more positive and respectful workplace culture.

The findings made were similar to those in recent independent reviews of Commonwealth parliamentary workplaces, the parliamentary workplaces of NSW and South Australia, and Victoria's court workplaces and legal profession.

Significant cases

Commonwealth

Commonwealth Department charged with multiple WHS breaches

A Commonwealth Government Department has been charged with one category 2 offence and two category 3 offences for contravening its primary duty of care under section 19(1) of the Cth WHS Act by failing to manage risks to psychological health and safety. If convicted, the Department could face a fine of up to \$2.5 million.

Contractor licensed under Comcare scheme charged following fatal crush injury

A contractor licensed under the Comcare scheme has been charged with breaching section 32 of the Cth WHS Act, following an incident in July 2020 when a worker was fatally crushed during an unloading operation. It is alleged that the contractor failed to provide and maintain a safe system of work, and to provide adequate information and training to staff. If convicted, the contractor could face a fine of up to \$1.5 million.

High Court finds a government employer was duty-bound to proactively implement its policies aimed at protecting the mental health of workers

The High Court of Australia has upheld an appeal, quashing a decision of the Victorian Court of Appeal, and reinstating the decision of the trial judge in the Supreme Court of Victoria finding that an employer was duty bound to proactively implement protective measures identified in its Vicarious Trauma Policy as a solicitor's tasks were "inherently and obviously dangerous to the psychiatric health"

The High Court unanimously upheld the employee's appeal and found that the Court of Appeal erred in concluding there was a lack of causation between the employer's failure to implement the Vicarious Trauma Policy and the employee's PTSD. The High Court restored the Trial Judge's finding that the employee would have cooperated with attempts to rotate her out of the unit she was working in, as shown by her willingness at the relevant time to be

assessed by a psychologist and liaise with her employer on her future role, and expert evidence that the vast majority of people diagnosed with work-related psychiatric injuries accept and act on the advice of their clinicians.

The High Court found that "it was clear from the terms of the VT policy that the [employer] had a lively appreciation of the serious risk to [the employee's] mental health posed by her work within the [unit]No further warning signs were necessary to oblige the [employer] to take reasonable steps to safeguard [the employee's] mental health."

[Kozarov v Victoria \[2022\] HCA 12](#)

Employers' WHS duties to truck drivers and the public extend beyond licensing

The Supreme Court of South Australia has set aside six out of eight WHS convictions against waste management company, Cleanaway Operations Pty Ltd (**Cleanaway**). In earlier proceedings, Cleanaway was found guilty in the Magistrates Court of eight counts of offences under section 32 of the Cth WHS Act concerning its duty to ensure, so far as is reasonably practicable, the health and safety of its workers, and of other persons, who may be put at risk from the work carried out as part of its business or undertaking.

The prosecutions arose out of an incident wherein an employee of Cleanaway was driving a vacuum truck downhill of a freeway when it suffered a catastrophic brake failure, killing two people and seriously injuring two others (including the driver). The driver had been assessed by a training organisation as competent to hold a driver's licence for heavy vehicles, but his competence had not been internally assessed.

At first instance, the Magistrates Court returned guilty verdicts for all eight charges. The essential factual finding made by the Magistrate on which the convictions rested was that Cleanaway failed to ensure that the driver of the vacuum truck was competent to select the proper gearing for the vacuum truck on his descent along the freeway.

On appeal, the Supreme Court of South Australia found that the prosecution's case was "too expansive", upholding only one conviction relating to a breach of duty owed to employees, and one conviction relating to a breach of duty owed to other persons. The relevant breach was found to be Cleanaway's failure to minimise the risk of a collision between a vacuum truck operated by the driver down the freeway and other road users. The Supreme Court found that if Cleanaway had properly implemented its in-house process for assessing the competency of its drivers, deficiencies in the subject driver could have been identified and addressed.

This decision highlights that an employer's WHS duties concerning operators of heavy vehicles, and members of the public these vehicles encounter, extend further than ensuring drivers are properly licensed.

[Cleanaway Operations Pty Ltd V Philip Hanel \[2022\] SASC 52](#)

New South Wales

Fair Work Commission finds employer denied of opportunity by employee

The Fair Work Commission has found that an employee failing to disclose pre-existing anxiety and other medical conditions denied his employer the opportunity to properly assess his suitability for employment, as well as the ability to ensure that it had adequate plans in place to ensure both the safety of the worker and those around him.

The proceedings related to an unfair dismissal claim brought by a security guard against his employer, Securecorp NSW Pty Ltd (Securecorp), alleging that his employment was unfairly terminated. Commissioner Sarah McKinnon found that the dismissal was not harsh, unjust or unreasonable.

[Joel Harris v Securecorp NSW Pty Ltd \[2022\] FWC 2781](#)

PCBU fined \$150,000 plus costs after guilty finding in District Court

As reported in our last WHS briefing, Arkwood (Gloucester) Pty Limited (**Arkwood**) was 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.

Arkwood has been fined \$150,000, plus \$102,000 in prosecution costs. In sentencing the PCBU, Judge David Russell said Arkwood could have prevented the electric shocks through "simple and well-known steps", and found its level of culpability was in the "mid range". Judge Russell accepted Arkwood's submission that its offence was

an "uncharacteristic aberration", noting it had no prior convictions in its 30-year history. Judge Russell also noted Arkwood's charitable and community work and its genuine remorse.

After the incident, Arkwood implemented several changes to improve its safety policies including: the development of a crane compliance form; a quality assurance procedure for centrifuge operations; an updated safe work method statement; and a new crane training program. Judge Russell described Arkwood's post-incident behaviour as "exemplary", but stated that the penalty imposed for the offence must match the seriousness of the crime and provide general deterrence.

PCBU handed record long ban from tendering for Commonwealth funded work

As reported in our last WHS briefing, Landmark Roofing Pty Ltd (**Landmark Roofing**) unsuccessfully sought to seek special leave from the High Court to appeal its conviction under the NSW WHS Act.

The Australian Building and Construction Commission (ABCC) determined that Landmark's breaches of the NSW WHS Act constituted a breach of a provision of the *Commonwealth Code for the Tendering and Performance of Building Work 2016* requiring Code-covered entities to comply with WHS laws "to the extent that they apply to the entity in relation to building work". The ABCC also found Landmark failed to comply with the requirement to notify it of an actual or suspected breach of the Code, and the steps proposed to rectify the breach, within the prescribed timeframes.

The matter was referred to Federal Attorney-General and Industrial Relations Minister Michaelia Cash, who imposed a nine-month sanction on Landmark, blocking it from seeking Commonwealth-funded building work from 2 May 2022 to 1 February 2023.

Worker previously fined \$100,000 for WHS breaches charged with manslaughter

In 2020, Christopher Turner was convicted and fined \$100,000, after pleading guilty to breaches of sections 28 and 32 of the NSW WHS Act. In 2015, Turner was engaged to install, test and commission gas delivery lines to an operating theatre at Bankstown-Lidcombe Hospital. Turner mistakenly connected a nitrous oxide pipe to the oxygen outlet in the neonatal resuscitation unit, failed to conduct the necessary cross-connection and gas purity and identification tests, and falsely documented that he had completed the tests. In June 2016, a newborn baby girl suffered severe brain damage after being administered nitrous oxide from the oxygen outlet. In July 2016, a newborn boy died in the same circumstances.

In 2021, an inquest into the death of the newborn boy commenced. The matter was referred to the NSW Office of the Director of Public Prosecutions who provided advice to police. In August 2022, Turner was arrested and charged with manslaughter by criminal negligence and causing grievous bodily harm by negligent act or omission, under the *Crimes Act 1900*. He faces a maximum penalty of 25 years' jail.

[SafeWork NSW v Christopher Turner \[2020\] NSWDC 180](#)

Forklift driver charged with manslaughter

Following establishment of a special "strike force" to investigate an incident in February 2021 wherein a man died after being pinned between a forklift and a truck, the operator of the forklift has been charged with manslaughter under the *Crimes Act 1900*. The operator faces a maximum penalty of 25 years' jail.

PCBU pleads guilty to recklessness resulting in the death of a teenage worker

Synergy Scaffolding Services Pty Ltd (**Synergy**) has pleaded guilty to recklessly breaching section 31 of the NSW WHS Act. The charges relate to an incident in early 2019 where an 18 year old formwork apprentice died

when he was working under a 13 level high scaffold which collapsed. Through its plea, Synergy admitted to engaging, without reasonable excuse, in conduct that exposed an individual to whom it owed a health and safety duty to a risk of death or serious injury, and being reckless as to that risk.

The scaffolding was erected by Synergy at a GN Residential Construction Pty Ltd (**GN**) project. GN was charged and fined \$900,000 in the District Court in 2020. The Court also ordered GN to establish, coordinate and fund a special working group of technical specialists and others to develop the [Scaffolding Industry Safety Standard](#) which was published in April this year.

The case against Synergy is the third case of its kind in NSW. Only two other NSW PCBU's have pleaded guilty to reckless conduct since the offence came into effect with the WHS Act in January 2012.

PCBU that "dismissed" powerline warnings fined over a labourer's electric-shock death

Riverwall Constructions Pty Ltd (**Riverwall**) has been fined \$600,000 (after a 25 per cent discount for its guilty plea), and ordered to fund the development and production of an animated safety video for SafeWork NSW, in the NSW District Court for breaches of sections 19 and 32 of the NSW WHS Act.

The proceedings relate to an incident in February 2019 where a worker suffered a fatal electric shock, and another suffered serious burns, when constructing a roof and a handrail came into contact with live overhead wires.

The Court found that Riverwall's site's manager had "his attention drawn by contractors not only to the existence of the powerlines, but also to the danger they posed to workers", but "these blunt warnings were dismissed in a most offhanded way". The Court also found that Riverwall could have easily contacted Endeavour Energy to have the powerlines de-energised, and that its own SWMS should have identified the powerlines risk, included an actual assessment of the distance of the powerlines from the site, and identified and included control measures for the dismantling of the roof's edge protection.

[SafeWork NSW v Riverwall Constructions Pty Ltd \[2022\] NSWDC 408](#)

High Court upholds WHS acquittals

The High Court has rejected an application by SafeWork NSW for special leave to appeal against a decision in 2021 by the NSW Court of Criminal Appeal.

In March 2016, roof structures unexpectedly collapsed on an excavator, trapping the operator in the cabin. Grasso Consulting Engineers Pty Ltd (**GCE**) and its sole director, engineer Ignazio Grasso, were found guilty in the District Court of, and fined \$230,000 for, breaching section 32 of the NSW WHS Act by failing to create a computer model to test the accuracy and validity of their "hand calculations" for the demolition of the roof.

Their convictions were quashed by the Court of Criminal Appeal, finding that the District Court erred in ruling that their computer modelling omission was the cause of the excavator operator and his spotter being exposed to the risk of death or serious injury.

The High Court refused to hear the matter, ordering the applicants to pay costs.

[SafeWork NSW v Grasso; SafeWork NSW v Grasso Consulting Engineers Pty Ltd \[2022\]](#)

PCBU fined over two incidents at the same site

Akkari Group Pty Ltd (**Akkari**) has been fined \$900,000 (after a 25 per cent discount for its plea of guilty) for two incidents, occurring in May 2018 and May 2019, at a construction site in Gosford.

The first incident involved a subcontractor suffering a crush injury, including a dislocated femur, hip fractures and leg abrasions, when an unsupported excavated wall collapsed. The second incident occurred when three subcontractors were required to jump and grab onto mesh and reinforcement steel to avoid falling when a transfer slab collapsed and sunk into formwork below.

In sentencing the two incidents contemporaneously, the Court observed that the fact that Akkari had received engineering advice approximately one year prior to the 2019 incident, at the time of the 2018 incident, and took very few steps in accordance with that advice, minimised the leniency that might ordinarily be afforded to it. The Court further considered that Akkari's conduct exemplified 'flagrant disregard for the safety of its workers, and anyone else on the work site.'

[SafeWork NSW v Akkari Group Pty Ltd \[2022\] NSWDC 196](#)

[SafeWork NSW v Akkari Group Pty Ltd \[2022\] NSWDC 197](#)

PCBUs fined a total of \$475,000 following 4.5 metre fall incident at worksite

Deicorp Pty Ltd (**Deicorp**) has been fined \$400,000 (after a 20 per cent discount for its plea of guilty) and Form Group Pty Ltd (**Form Group**) \$75,000 (after a 25 per cent discount for its plea of guilty after) following an incident where a labourer lifted a secured piece of plywood covering and fell approximately 4.5 metres to the concrete basement floor below. Deicorp was the principal contractor in the development of the site and had subcontracted Form Group to supply, install and dismantle formwork at the site.

In sentencing Deicorp, Judge Strathdee observed that the risk was both obvious and serious, and could have been overcome simply and straightforwardly. Judge Strathdee observed that general deterrence "must be a significant feature of the sentence imposed upon Deicorp" to direct the industry's attention to "the consequences of inattention and the need for greater concentration on the potential risks of death or serious injury associated with working in the building and construction industry". Judge Strathdee also took into account two prior convictions of the company in 2016 of a similar nature, noting that the company would consequently be afforded no leniency.

In sentencing Form Group, Judge Scotting found that the risk was known to Form Group and that adequate precautions, which would have been relatively simple and involved little inconvenience or expense, were not taken.

[SafeWork NSW v Deicorp Pty Ltd \[2022\] NSWDC 194](#)

[SafeWork NSW v Form Group NSW Pty Ltd \[2022\] NSWDC 176](#)

Saunders Civilbuild Pty Ltd fined \$375,000 for fatal WHS breaches after failing to record verbal safety instruction

In 2021, the District Court of New South Wales 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.

On 18 May 2022, Saunders was ordered to pay a fine of \$375,000 in relation to the incident.

[SafeWork NSW v Saunders Civilbuild Pty Ltd \(No 2\) \[2022\] NSWDC 163](#)

Queensland

PCBU fined \$250k after manslaughter charge downgraded

Orko Fertilizers Pty Ltd, trading as Queensland Organics, has been fined \$250,000 after pleading guilty to an alternative charge under section 32 of the QLD WHS Act. The company was initially charged with the industrial manslaughter of a worker, whose role required him to perform manual tasks within touching distance of an unguarded conveyor. However, the charge was eventually downgraded.

The Magistrate found the “necessary and vital steps” that could have prevented the risk were “not elaborate or onerous”. As shown by Work Health and Safety Queensland, these steps included preventing workers from touching bags on the moving conveyor, installing guarding and creating exclusion zones. Queensland Organics had also failed to conduct a risk assessment for the bagging room work or implemented any safe operating procedures for the conveyor belt. The Magistrate declined to record a conviction against after considering the company’s contrition and other factors.

Queensland Organics’ CEO, Tom Boss, was also charged and fined \$60,000 for failing to exercise due diligence to ensure his company complied with its safety duties.

Court rejects PCBU’s claim that it was a consumer of electricity and therefore did not have a duty

The District Court has rejected Ghost Gully Produce Pty Ltd’s (GGP) claim that it was not responsible for an electrical shock incident as it was a consumer of electricity, and consequently did not have an electrical safety duty.

The prosecution arose out of an incident in 2018 where a scaffolder attended GGP’s produce farm to install edge protection on the roof. The scaffolder suffered an electric shock, severe burns and PTSD after a pole he was holding came into contact with overhead powerlines. The

scaffolder’s employer, Oz Roof Rail Pty Ltd, pleaded guilty to charges and was fined \$75,000.

In the Magistrates Court, GGP was found guilty of breaching sections 40C of the *Electrical Safety Act 2022* for failing to comply with its electrical safety duty under section 30 of the Act, and was fined \$80,000. The Court observed that GGP could not “sit back and rely solely on the expertise of contractors” and found that the company failed to implement reasonable practicable measures to eliminate the electrical risk.

On appeal, the prosecutor argued that the fine imposed by the Magistrates Court did not reflect the aggravating factors present in the case. GGP also appealed against the decision of the Magistrates Court, arguing that it was not subject to any duty under the *Electrical Safety Act* as a consumer of electricity.

The District Court rejected this argument, highlighting that section 30(2)(c) of the Act provides that a duty “where a person’s business or undertaking includes the performance of work, whether or not it is electrical work”. The Court found that the Magistrate was correct in concluding that GGP involved the scaffolder working near exposed parts and therefore had a duty to ensure the work was electrically safe. GGP’s breach was said to be “a failure to warn of or otherwise manage a risk that they knew existed”. The District Court increased the fine to \$100,000.

[Ghost Gully Produce Pty Ltd v Guilfoyle \[2022\] QDC 75](#)

Court of Appeal rejects PCBU’s appeal against electrical safety conviction

Paradise Outdoor Building Company Pty Ltd (**Paradise**) has had its second appeal dismissed. In the Magistrates Court in 2019, Paradise was convicted of breaching section 40C of the *Electrical Safety Act 2002* and fined \$250,000. An appeal to the District Court in 2020 was dismissed, following which Paradise appealed to the Court of Appeal.

The conviction relates to an incident in July 2016 wherein an employee of Paradise suffered an electric shock and serious injuries when an aluminium sail track came in contact with overhead power lines in the course of changing a billboard skin.

The four grounds of the appeal concerned whether the respondent proved beyond reasonable doubt that Paradise had breached its electrical safety duty, and that the alleged breach exposed the workers to a risk of death or serious injury.

The Court of Appeal found no error in the rulings of the lower Courts and upheld all findings. The Court maintained that Paradise had failed to ensure the electrical safety of its workers, failed to do what was reasonably practicable to eliminate the known risks, and exposed its workers to the risk of serious injury or death.

The Court observed a number of control measures Paradise could reasonably have implemented to eliminate the risk, including:

- contacting Ergon to de-energise or raise the power lines (which it did after the incident at a modest cost of \$4,500);

- isolating or earthing the line;
- re-routing the line away from the work area;
- moving the sign;
- managing and supervising the work to ensure exclusion zone distances were strictly maintained; and
- providing necessary training to any workers who would be working near the exclusion zone.

[Paradise Outdoor Building Company Pty Ltd v Steward \[2020\] QDC 346](#)

[Paradise Outdoor Building Company Pty Ltd v Steward \[2022\] QCA 118](#)

Jury returns guilty verdict in recklessness case

A jury has found a worker guilty of an offence against section 31 (Reckless conduct – category 1) of the QLD WHS Act, after he threw a six-kilogram object from an elevated work platform seriously injuring an apprentice. The worker was sentenced to four months' jail, wholly suspended for an operational period of four months, after the Court heard he threw the block in a "moment of madness" and was otherwise known to be a safe worker.

South Australia

Two PCBU's convicted and fined a total of \$950,000 over the crush death of a worker

Dial A Tow Australia (DAT) and AHRNS Handling Equipment Pty Ltd (AHRNS) have been convicted and fined a total of \$950,000 over the death of a worker who was crushed between a headboard and retracting tipping tray in March 2018. The worker was a trainee of DAT, and the tipping tray was designed by AHRNS.

The South Australian Employment Tribunal found DAT guilty of contravening sections 19 and 32 of the SA WHS Act in March this year, while AHRNS entered a plea of guilty to breaching sections 25 and 32 of the Act.

In sentencing the DAT and AHRNS, Deputy President Judge Anthony Rossi reprimanded both PCBU's for failing to adopt high-level controls to address the crushing risk created by a modified tip tray. He found that both DAT and AHRNS could have adopted an engineering measure that "stopped the tray from moving once it reached the proximity of the headboard and required the operator to return the tray top to its resting position manually". Judge Rossi acknowledged AHRNS had addressed the crushing risk "to some extent", but rejected its submission that it was entitled to assume that during the training of a new operator, the trainer would ensure the trainee adhered to safe working methods.

DAT was handed a \$600,000 penalty and AHRNS a \$500,000 fine (reduced by 30 per cent to \$350,000 for its early plea).

Victoria

Court of Appeal quashes employer's OHS penalty relating to injuries sustained by an 88-year-old man on a walk

In 2018, St Vincent's Care Services Ltd (SVCS) was charged with breaching section 23 of the VIC OHS Act. The charges concerned an incident where a resident left the aged care facility to go for a walk and sustained injuries after walking into a construction site and falling into a ditch. The County Court found that SVCS had breached its duty by failing to monitor and enforce the use of its sign-out-sign-in register for residents.

On Appeal, SVCS argued that "residents leaving the facility" was not conduct within the scope of its undertaking for the purposes of section 23, but stressed that even if it was, the risk arose from the construction activities on the site where the resident was injured. The DPP argued the Act required employers to proactively take all reasonably practicable measures to ensure health and safety at workplaces and during the conduct of undertakings, and SVCS's undertaking involved knowing the whereabouts of residents under its care.

In acquitting SVCS, the Court of Appeal found that there was "a real paucity of evidence about the nature and extent of the risk for which the prosecution contended, such that we have real doubts both as to the actual existence of the risk alleged, and whether it arose from the [employer's] undertaking". The Court also rejected the notion that a sign-out register was a reasonably practicable measure that would have eliminated or reduced the relevant risk.

Western Australia

As reported in our previous WHS briefing, Resource Recovery Solutions Pty Ltd 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*. The company has since been sentenced and fined \$230,000 under the amended charges.

First Workplace Manslaughter charge in Victoria

WorkSafe Victoria has charged a company director of a stonemasonry business with workplace manslaughter, after a forklift he was operating tipped over causing fatal crush injuries to another worker. The offence of workplace manslaughter came into effect on 1 July 2020. The maximum penalty for individuals is 25 years' jail, and for body corporates is nearly \$18.5 million.

[St Vincent's Care Services Ltd v The Queen \[2022\] VSCA 186](#)

Company found guilty of and sentenced for OHS discrimination

Transdev Melbourne Pty Ltd (Transdev) has been fined \$30,000 (from a maximum available penalty of about \$403,000), with no conviction recorded, after having been found guilty by a jury of one count of discrimination against an employee under section 76 of the VIC OHS Act. It was found that Transdev had detrimentally altered the position of a worker by issuing him with a first and final warning after he had raised multiple safety concerns with WorkSafe Victoria and refused to drive a bus because of a defective door indicator panel.

Transdev were found not guilty in relation to a second discrimination charge.

[DPP v Transdev Melbourne Pty Ltd \[2022\] VCC 1370](#)

The Court also found that the company's managing director was guilty of the same offence because the company's offence occurred as a result of his neglect. The Court found that he had an office at the waste recycling facility and was usually there five days a week, meaning he was in a position to make necessary changes at the site. The company's director was fined \$70,000.

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