WHS Briefing 2019

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 of the second quarter of 2019. Please contact our national WHS team contacts if you would like to discuss any of the matters in this briefing. We welcome your feedback.

Katherine Morris
Sydney
+61 414 095 944
Email Katherine

Nicki Milionis
Melbourne
+61 414 883 607
Email Nicki

Samantha Maddern
Perth
+61 434 563 700
Email Samantha

Peta Willoughby
Brisbane
+61 419 948 527
Email Peta

Key issues and trends

Health and safety prosecutions resulting in imprisonment of individuals	Recent prosecutions in 2019 have resulted in individuals being imprisoned for reckless conduct safety offences. In this briefing we examine the MCG Quarries case which resulted in its director being sentenced to a term of imprisonment, and the Gary Lavin appeal proceedings which resulted in his custodial sentence being set aside. He was also later acquitted on a re-trial.
Upcoming changes in legislation	Changes to WHS law are on the horizon with Victoria and the Northern Territory progressing with industrial manslaughter laws. Western Australia has finally introduced a mirror WHS Bill, which includes industrial manslaughter provisions. NSW is also progressing a gross negligence offence. In addition, the National Transport Commission (NTC) is conducting a review of the Heavy Vehicle National Law (**HVNL**) and has announced plans to replace the HVNL with an entirely new law that improves safety. The Productivity Commission is also conducting a review of national transport laws.
Industrial manslaughter	In terms of industrial manslaughter offences, regulators have articulated that determining a breach of the offence will involve an assessment of whether the organisation or individual has failed to establish a "culture of compliance" with respect to safety matters. This appears to be a new legal test which is different to the tests for "reasonably practicable" and "due diligence", which are the tests which most organisation's safety management system would currently address.
Marie Boland's review of the model health and safety laws	Safe Work Australia released a Consultation Regulation Impact Statement in June 2019 in response to Marie Boland's review of the model health and safety laws (released earlier this year). Marie Boland's report included recommendations to introduce industrial manslaughter laws, expand category 1 offences to include gross negligence and introduce regulations dealing with psychological health.
Psychological risks	A number of safety regulators, including SafeWork NSW, WorkSafe ACT, and WorkSafe Vic, have issued guidelines regarding satisfying the primary duty under the health and safety legislation in relation to mental health risks. Further, regulators have been investigating incidents in which workers have taken their own lives, including where there has not been any bullying. In addition, there has been a recent trend of regulators bringing prosecutions against individuals in respect of bullying. The Productivity Commission has released a report on mental health which recommends amendments to the WHS laws to address psychological health and safety.

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Across Australia

Safe Work Australia's Consultation Regulation Impact Statement for Marie Boland Review

In February 2019, Marie Boland delivered her report following an independent review of the model Work Health and Safety Laws (**Report**). On 24 June 2019, Safe Work Australia released a **Consultation Regulation Impact Statement** (**RIS**) seeking feedback on the possible impacts of implementing all 34 of the recommendations contained in the Report.

The Consultation RIS covers all 34 recommendations in the Report. However, Safe Work Australia has expressed interest in gathering feedback on 12 of those recommendations that have "*more than a minor impact"* on stakeholders, or that require further information and analysis. Those recommendations include introducing regulations dealing with psychological health, expanding Category 1 offences to include gross negligence and introducing an industrial manslaughter offence.

Safe Work Australia makes some interesting comments around these recommendations including that:

- The recommendations regarding psychological health will address concerns about the lack of express provisions on psychological risks and lead organisations to take more active measures to address those risks and improve safety outcomes.
- Prescriptive regulations may have an adverse impact on businesses who are effectively managing psychological risks in more innovative ways other than what is prescribed.
- There are limited ways of measuring the impact of including gross negligence as an element of the Category 1 offence and industrial manslaughter provisions.
- If industrial manslaughter laws are not introduced, this will not respond to the concerns raised in Marie Boland's report (i.e. community concerns that this offence is required, and the need to maintain harmonisation).
- There is an inconsistency in the proposed offences framework in that recklessness carries a greater level of culpability than industrial manslaughter. If a higher penalty level is imposed for industrial manslaughter based on gross negligence, compared to the current Category 1 offence involving recklessness, this will mean that the maximum penalty for each offence may not reflect the subjective culpability of the duty holder in breaching the WHS laws.
- On the other hand, this structure may be seen as appropriate given that the industrial manslaughter offence is focussed on the most serious outcome from a breach of the health and safety duties – work-related death.

Please see our workplace blog article **here** for more information.

The consultation period closed on 5 August 2019, and the feedback will be presented to WHS ministers by the end of 2019.

Update on implementation of industrial manslaughter laws and new tests of "culture of compliance"

Currently, the ACT and Queensland remain the only states with industrial manslaughter laws in operation. Victoria and the Northern Territory have passed industrial manslaughter provisions (see below). Western Australia has included industrial manslaughter provisions in its mirror WHS Bill (see below). A bill has been introduced into the South Australia parliament by the Greens party, however it is unlikely to be passed (see below for details).

While the Australia Labor Party promised to introduce industrial manslaughter laws within its first year of government if it was successful in the 2019 federal election, the Coalition retained power and does not have any current plans to introduce industrial manslaughter provisions.

Any further developments in this area are likely to stem from the recommendation in the Marie Boland report that industrial manslaughter laws be introduced, which is currently going through a process of consultation (see above). Industrial manslaughter offences were also recommended by the Senate Inquiry into Industrial Deaths in 2018, however, the Coalition members of the Inquiry disagreed with this recommendation. This Inquiry occurred prior to the Marie Boland review, however, and so it will be interesting to see how the federal government responds to that recommendation once the consultation process regarding her Report is finalised.

Regulators have also recently articulated that determining a breach of industrial manslaughters will involve an assessment of whether the organisation has failed to establish a "culture of compliance" with respect to safety matters. Specifically, regulators have stated that industrial manslaughter offences: "*would allow for direct liability of a body corporate (or other entity) without pinpointing individual fault. Whether a death occurs because of one person's negligence or because of the negligence of many people, the question remains the same: was the body corporate negligent? This would provide for corporate criminal responsibility where an organisation's unwritten rules, policies, work practices or conduct implicitly authorise non-compliance, or fail to create a culture of compliance, with its responsibilities and duties, and a death results from this negligent conduct.*"

This appears to be a new legal test which is different to the tests for "reasonably practicable" and "due diligence", which are the tests which most organisation's safety management system would currently address.

Organisations should be prepared for the scope of regulatory investigations for industrial manslaughter offences to include issues of safety culture. To prepare for these types of investigations, organisations should have a plan in place for how it will satisfy the new legal test of "culture of compliance". The plan should address the types of behaviours / actions that demonstrate a culture of compliance that the organisation will implement, and the organisation should regularly reviews it performance against the actions and behaviours documented in the plan.

Heavy vehicle national law review

The National Transport Commission is currently undertaking a review of the Heavy Vehicle National Law (**HVNL**), and has stated that it plans to replace the HVNL with an entirely new law that improves safety, is less prescriptive and is fully harmonised. As part of the review, the NTC has released a Terms of Reference, HVNL Review Approach document, and four out of eight issue papers to enable interested parties to make submissions.

The **Terms of Reference** and **HVNL Review Approach** document establish the purpose of the review as assessing the effectiveness of the current HVNL, creating a risk-based approach to regulate fatigue and increasing the use of technology in regulating heavy vehicles.

The issue papers released so far have addressed the following topics:

- Issue Paper 1: this paper identifies issues with the highly prescriptive nature of the current laws, and emphasizes the aspirations of a new HNVL that will promote more risk-based regulation.
- Issue Paper 2: this paper addresses driver fatigue, and identifies poor management of fatigue risks under the current HVNL (for example, the "work and rest" approach doesn't have the flexibility to accommodate sophisticated fatigue management systems and practices, even though they may be more effective).
- Issue Paper 3: this paper proposes a simpler and more transparent decision making system for permits and notices.
- Issues Paper 4: this paper addresses heavy vehicle drivers and seeks responses on what the future HVNL can do to regulate safe people and practices (e.g. competency requirements, fitness for duty standards, a national licensing regime).
- Issues Paper 5: Vehicle standards and safety.
- Issues Paper 6: Assurance models.
- Issues Paper 7: Effective enforcement

Extensive consultation is planned to take place regarding these issues papers with the aim of drafting new legislation between November 2020 and November 2021.

Please see our workplace blog article **here** for more information.

National transport regulatory reform

The Productivity Commission (**PC**) has been **tasked** with determining the safety and economic benefits of past national transport reforms, including the decision to establish three transport regulators (the Office of the National Rail Safety Regulator, the National Heavy Vehicle Regulator and the National Marine Safety Regulator). The PC will also examine opportunities for further harmonising the national transport safety regulations.

An issues paper was released in May, with submissions closing in June.

A draft **report** was released for feedback in November 2019 which includes a variety of recommendations including:

- Moving from "tick the box" compliance to risk based safety management systems;
- Easy access to technologies to improve safety; and
- Review of jurisdictional variations in the Heavy Vehicle National Law and Rail Safety National Law with the aim of reducing regulatory inconsistency.

The final report will be provided to the government in April next year.

Mental health inquiry

The Productivity Commission also released a **report** in October 2019 following its inquiry into mental health. The report includes a number of workplace related recommendations including:

- Amending the model WHS laws within the next two years to ensure they address psychological health and safety similarly to physical health and safety (this is similar to what has been recommended by the Marie Boland report in terms of addressing psychological risks in the WHS Regulations).
- Safe Work Australia work with WHS authorities to develop Codes of Practice on dealing with psychological health risks.

Australia transitioning to new edition of GHS

Safe Work Australia (SWA) has announced plans to transition from the third to the **seventh edition of the Globally Harmonised System of Classification and Labelling of Chemicals (GHS).**

The seventh revised edition of the GHS includes new hazard communication requirements for safety data sheets, new definitions for certain chemicals and revised criteria for categorisation of flammable gasses, among other changes.

Safe Work Australia commenced its consultation with key stakeholders on the plan to adopt GHS 7 in July 2019.

Uber findings prompt call for legislative change

The Fair Work Ombudsman has declared that Uber Australia Pty Ltd and its drivers do **not** have an 'employment relationship' which suggests the business or similar gig economies will not be compelled to provide WHS or worker's compensation protections without legislative change.

Fair Work Ombudsman Sarah Parker said that for an employment relationship to exist, "the courts have determined that there must be, at a minimum, an obligation for an employee to perform work when it is demanded by the employer."

Ms Parker said her investigation found that "Uber Australia drivers are not subject to any formal operational obligation to perform work. Uber Australia drivers have control over whether, when, and for how long they perform work, on any given day or on any given week."

A key factor in the Ombudsman's assessment of the commercial arrangement was that that Uber does not require drivers to perform work at particular times. Ms Parker explained that for an employment relationship to exist, there must be an obligation for an employee to perform work when it is demanded by the employer.

The FWO has indicated it will continue to assess allegations of non-compliance on a “case-by-case” basis given that a range of business models are utilised in the Australian gig economy.

Governor-General confirms WHS Minister

Outgoing Governor-General Peter Cosgrove made an **Administrative Arrangements Order** on 29 May 2019 confirming Federal Attorney-General Christian Porter as Australia’s incumbent WHS and worker’s compensation Minister, following the success of the coalition government in the recent federal election.

The Attorney-General will oversee the federal Work, Health and Safety Act 2011, Safe Work Australia Act 2008 and Safety, Rehabilitation and Compensation Act 1988. The Attorney-General’s Department will handle law and justice, work health and safety, rehabilitation and compensation and workplace relations policy development.

AS/NZS 4801 re-classified in light of 45001

Standards Australia (**SA**) has classified AS/NZS 4801:2001, Occupational health and safety management systems as "available superseded", meaning it has been formally superseded by another Standard but is being maintained because it is referenced in safety laws and codes.

SA said it is up to government authorities to determine whether available superseded Standards like AS/NZS 4801 should continue to be referenced in legislation.

The reason for this change is that AS/NZS ISO 45001:2018, Occupational health and safety management systems – Requirements with guidance for use "is the most current Standard for safety management systems, and should be considered by organisations wishing to maintain a contemporary safety management system".

The International Organisation for Standardisation (ISO) published the new Standard in March last year, providing an "easy-to-use framework" that "concentrates on the interaction between an organisation and its business environment", instead of focusing on specific hazards and "internal issues".

Exposure standards to remain mandatory

The majority of Australia’s WHS ministers have agreed to maintain the mandatory status of exposure standards and to change the name of exposure standards to “workplace exposure limits” to make it clear that the thresholds cannot be exceeded.

Safe Work Australia released a **regulatory impact statement** in November 2019 with recommendations for updating the exposure standards under the WHS laws.

New drug testing rules commencing under RSNL

The Office of the National Rail Safety Regulator's testing provider is permitted to test rail safety workers' urine for drugs and alcohol from 1 July, under changes to the Rail Safety National Law and Regulations.

Previously, urine testing was only available in NSW.

The changes apply to every state and territory except Western Australia, where they still need to progress through Parliament. See this **fact sheet** on the amendments.

New guide released for vehicles as a workplace

A new **Vehicles as a Workplace** guide has been released which has been developed by Austroads and WHS regulators.

The guide outlines the entities that have road-related WHS duties, the vehicles an organisation is likely to have WHS responsibilities for, and a detailed process for identifying road traffic hazards and developing effective controls to eliminate or minimise the risks.

Additional powers for NOPSEMA safety inspectors in Amendment Bill

The Federal Government has passed the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2019 which will commence on a day to be fixed by proclamation. The Bill expands the powers of NOPSEMA safety inspectors to enter offshore facilities, take possession of documents and require people to answer questions. The Bill also extends the abrogation of privileged against self-incrimination to more entities.

Other changes include prohibiting NOPSEMA from accepting an enforceable undertaking where the alleged contravention contributed to or might have contributed to a death, the accused has previously been convicted of a fatality related offence or has 2 or more prior convictions in the last 10 years.

Federal government commits fraud to labour hire registration scheme with WHS compliance test

The Federal Government has, in its 2019-20 budget, committed $26.8 million over four years to establish a labour-hire registration scheme with WHS-compliance tests.

The scheme will make it mandatory for labour-hire operators in high-risk areas to register with the Federal Government.

Western Australia

Western Australia introduces mirror WHS Bill

After being flagged in the State budget more than seven years ago, Western Australia finally introduced a mirror **Work Health and Safety Bill 2019** to parliament on 27 November 2019.

As with the national model WHS laws, the Bill includes a primary duty of care requiring PCBUs to ensure, so far as is reasonably practicable, the health and safety of workers and others who might be affected by their undertakings, due diligence duties for officers, WHS consultation and issue resolution provisions and protections against discrimination.

The Bill also introduces two industrial manslaughter offences. These offences apply to PCBUs who fail to comply with their health and safety duties where that failure causes the death of an individual. Where a PCBU commits this offence, officers will also be liable where the PCBU's conduct is attributable to any neglect on the part of the officer or is engaged in with the officer's consent or connivance.

There are two categories of offences provided for – the first category carries a maximum penalty of 20 years' jail and $5 million for officers, and $10 million for bodies corporate and applies where the PCBU or officer engages in the conduct knowing that it is likely to cause the death of an individual and in disregard of that likelihood. The second category applies where there has simply been a breach of duty (with no requirement to establish knowledge that the conduct was likely to cause a death) and carries a maximum penalty of 10 years' jail and $2.5 million officers, and $5 million for bodies corporate.

The proposed industrial manslaughter offences are different to the approaches that have been followed in other jurisdictions, including most recently Victoria and the NT, in that they do not include a requirement for negligent conduct, but rather a failure to comply with a health and safety duty which causes a death. The proposed offences also carry significant monetary penalties for officers which have not been introduced in other jurisdictions.

Other key reforms included in the Bill, include prohibiting insurance against WHS fines, similar to what is proposed in New South Wales (see below), and which was recommended by the Marie Boland Report.

Further, the Bill introduces a specific duty of care for providers of WHS services, requiring them to take appropriate care ensure, so far as is reasonably practicable, that the health and safety of persons isn't put at risk by the provision of the service. A number of exceptions are provided for the definition of "WHS services", including services provided by HSRs, HSCs, emergency services and services covered by legal professional privilege. This duty of care only applies to services that are provided from one PCBU to another, and does not cover services provided internally to PCBU.

If passed, most of the WHS Bill will commence on a day fixed by proclamation.

In August 2019, when confirming the government's plan to introduce industrial manslaughter laws, the Western Australian Industrial Relations Minister and Premier also announced an additional 24 full time equivalent staff to be allocated to WorkSafe WA, including an additional 21 inspectors.

Code of Practice released for FIFO workers

A new Code of Practice, **Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors** has been released which provides guidance on applying risk management processes to avoid or minimise harm from psychosocial hazards and risk factors, and developing response strategies for workers exposed to these hazards or suffering work-related stress.

Australian Capital Territory

Legislative changes introduced in ACT

- The ACT Government has passed the **WHS Amendment Bill** to enhance the independence and scrutiny of WorkSafe ACT. The Bill establishes a single accountability governance model and new Office of the Work Health and Safety Commissioner; the Office will trade as WorkSafe ACT and its regulatory functions will sit with a WHS Commissioner. This was a key recommendation of last year's independent review of the Capital Territory's work safety compliance infrastructure, policies and procedures, which made 27 recommendations that were supported by the Government.
- The ACT also passed the ***Courts (Fair Work and Work Safety) Legislation Amendment Act 2019*** to ensure corporations charged with category 1 offences can be tried in the Supreme Court where appropriate. This was a result of recent Industrial Court proceedings involving reckless conduct charges which highlighted that corporations charged with reckless conduct can avoid being committed to trial in the Supreme Court.

Anti-fatigue cameras activated

- Automatic number plate recognition cameras have been activated in the ACT to crack down on heavy vehicle operators that breach load and fatigue regulations.
- Data from the cameras will feed into the National Heavy Vehicle Regulator's National Compliance and Information System to allow authorities to better detect risky behaviour and unsafe practices and narrow their focus for compliance efforts.

Psychological health officer appointed in the ACT

The ACT has appointed a dedicated psychological health officer, who will work closely with workplaces to ensure they are equipped with the right tools and resources to promote mental wellbeing and minimise bullying, occupational violence and work-related stress. The psychological health officer will facilitate information sessions and online resources to help employers minimise psychological injuries and promote injury management and safety performance.

Double enforcement and regulatory activity over last financial year

WorkSafe ACT has substantially increased its proactive site inspection and enforcement activities over the last financial year. Minister for Employment and Workplace Rachel Stephen-Smith **announced** that over the 2018-2019 financial year that WorkSafe ACT had issued:

- 360 Improvement Notices (up from 170 from 2017-2018);
- 220 Prohibition Notices (up from 77 in 2017-2018);
- 26 Infringement Notices (up from 23 in 2017-2018);
- 13 Non-Disturbance Notices (up from 1 in 2017-2018); and

- 5 Enforceable Undertakings (up from 2).

Ms Stephen-Smith said with major capital projects and developments across Canberra, WorkSafe ACT inspectors conducted nearly 4000 workplace inspections and visits over the last 12 months.

This increase follows recommendations made in an independent review of WorkSafe ACT's practices that it should conduct more proactive enforcement activities and workplace visits.

Queensland

New safety regulator for resources sector

Queensland has introduced the **Resources Safety and Health Queensland Bill 2019** which proposes to transfer the regulatory functions of the Department of Natural Resources, Mines and Energy to a new statutory body, Resources Safety and Health Queensland (RSHQ).

RSHQ will comprise of inspectorates for coal mines, mineral mines and quarries, explosives, and petroleum and gas.

The Bill also requires the Work Health and Safety Prosecutor (a role established in March 2019) to prosecute "serious" breaches of the resources safety Acts – the *Coal Mining Safety and Health Act 1999*, *Mining and Quarrying Safety and Health Act 1999*, *Explosives Act 1999* and *Petroleum and Gas (Production and Safety) Act 2004*).

It defines a "serious offence" as a contravention that: causes multiple deaths, death or grievous bodily harm, or bodily harm; involves exposure to a substance that is likely to cause death or grievous bodily harm; or another offence prescribed by regulations.

The WHS prosecutor will have sole responsibility for prosecuting serious offences under the resources safety Acts. Other offences may be prosecuted by the WHS prosecutor or the CEO of RSHQ.

The proposed changes were driven by the re-identification of deadly dust disease coal workers' pneumoconiosis (or black lung) in the State in 2015 and six mining and quarrying fatalities within a recent 12-month period.

Queensland Government to ban combustible cladding

The Queensland Development Code has been amended to effectively ban the approval of any new building work applications for:

- aluminium composite panels with a polyethylene core of greater than 30 per cent by mass used as external cladding, external insulation or façade on any building; or
- expanded polystyrene product used in any external wall insulation and finish (rendered) system on class 2 – 9 buildings of type A or B construction.
- However, the ban does not extend to aluminium composite panel with a core greater than 30 per cent by mass where:
- used as part of a structure that is not the building (i.e. as a sign); or
- retained as part of an alternative solution, prepared by a registered fire engineer, as part of cladding rectification work.

Other proposals discussed at the Council meeting include requiring certifiers to declare that combustible cladding hasn't been used, and that there hasn't been any product substitution during the construction process.

The other key solution to help certifiers proposed by the Queensland Government during the industry meeting, was to allow certifiers to remain licensed while they are holding professional indemnity (PI) insurance featuring cladding related exclusions.

Following the Ministerial Construction Council, Minister De Brenni called on federal Minister for Industry, Science and Technology, Karen Andrews to urgently address the combustible cladding issue at a national level.

New electrical safety requirements for solar farm implemented but then successfully challenged

In May 2019 the Queensland introduced a new code of practice and electrical safety regulations applicable to solar farms.

Under the ***Electrical Safety (Solar Farms) Amendment Regulation* 2019 (Qld)**, and **Construction and Operation of Solar Farms Code of Practice 2019**, only licensed electricians were permitted to locate, mount, fix or remove extra-low voltage photovoltaic (PV) modules on solar farms on projects larger than 100kW.

The code of practice (for which compliance is still mandatory) provides guidance to ensure safety at solar farms throughout their lifecycle, including at the design, construction, operation and maintenance and de-commissioning stages.

However, the new legal requirements regarding licenced electricians was successfully challenged in the Supreme Court by a major solar farm developer, who claimed that they were inconsistent with the *State Electrical Safety Act 2002* (Qld) and would cost more than $2.6 million in additional compliance costs. In a decision handed down in May 2019, the Supreme Court agreed that new requirements were inconsistent with the licensing provisions of the *State Electrical Safety Act 2002* (Qld), which only applied to electrical equipment, and also found that PV modules didn't meet the definition of "electrical equipment".

The Queensland government appealed the ruling, but the successful challenge to the laws was upheld by the Court of Appeal in June 2019.

Queensland's Industrial Relations Minister said the Government accepted the Court of Appeal's decision, but described it as a "technical legal ruling [that] does not deal with the substantive safety reasoning behind the making of the solar farms regulation".

Minister Grace said her department was "considering the full extent of the decision, including whether legislative changes are required", and noted electrical safety laws hadn't kept pace with emerging technologies.

Following this decision, in July 2019 the Queensland government made the ***Electrical Safety Amendment Regulation (No. 1) 2019*** to omit the provision that only allowed licensed electricians to mount, fix or remove extra-low-voltage PV modules on solar farms.

The Code of Practice remains in effect but was updated in September 2019 to remove references to the licensing requirements – the most recent code can be accessed **here.**

Gas safety laws pass

A Bill aligning Queensland's work safety laws for the gas industry with the State's WHS and mine safety Acts has passed Parliament with technical amendments.

The ***Land, Explosives and Other Legislation Amendment Bill 2018*** amends the Petroleum and Gas (Production and Safety) Act 2004 to clarify that site safety managers of operating plants aren't required to take more than "all reasonable steps" to comply with safety duties or management systems and the duty to "keep risk to acceptable level" can apply to people who aren't physically present at the relevant site, among other changes.

Silica Code of Practice introduced

Queensland introduced a **code of practice on preventing exposure to silica dust in the stone benchtop industry**, being the first Australian jurisdiction to do so. The Code commenced in October 2019.

New South Wales

New South Wales responds to Marie Boland Review recommendations

New South Wales has introduced a **WHS Amendment Bill** in response to the recommendations of the Marie Boland report issued earlier this year. The changes, if passed, will commence on the day they receive royal assent.

The WHS Amendment Bill proposes to:

- increase maximum penalties (with the maximum penalty for category 1 offences to increase from $3 million to $3.46 million);
- create a penalty unit system to ensure maximum penalties increase every year to reflect changes to the consumer price index;
- prohibit insurance against safety fines for offences under the WHS Act (this offence will also apply to officers) – however this provision will not apply to insurance policies that are in force before the commencement of the Bill where any payment made does not relate to an incident that occurred after the commencement of the Bill;
- clarify that in certain circumstances, the death of a person at work can constitute manslaughter under the NSW *Crimes Act 1990*, with a maximum penalty of 25 years' imprisonment; and
- add "gross negligence" as a fault element to the existing category 1 offence.

In the Bill's second reading speech, the Minister for Better Regulation and Innovation noted that any changes to the model Act following the Marie Boland review won't be progressed until well into next year, and having regard to the critical issues identified by Marie Boland, New South Wales "cannot afford to wait until a decision is made to amend the model Act to address these issues."

Codes of Practice varied and introduced

In September 2019, the NSW government varied 23 WHS codes of practice. A full list of the codes is available **here.** In August 2019, NSW also released a draft **WHS code for formwork and falsework for consultation** (to replace the existing 1998 code).

Amendments to WHS Regulations

The NSW government has made the **Work Health and Safety Amendment (Miscellaneous) Regulation 2019.**

The amended regulations allow PCBUs to be handed on-the-spot fines of up to $6,000 for failing to notify SafeWork NSW immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred, and $3,000 for failing to display a copy of an improvement, prohibition or non-disturbance notice issued by SafeWork in a prominent place at or near the relevant workplace.

The amended regulations also add 12 statutes to the list of Acts for which the confidentially requirements do not apply when the regulator obtains information or documents or exercises power under the Act, which include work safety Acts in all Australian jurisdictions, workers' comp laws, the Rail Safety National Law and the Crimes Act. The additions include heavy vehicle and marine safety laws, fair trading legislation and the Building Products (Safety) Act.

Victoria

Victoria progressing with workplace manslaughter provisions

The current Victorian government announced in 2018 that it will introduce a workplace manslaughter offence with employers potentially facing up to $16 million fines and individuals up to 20 years jail. The Workplace Manslaughter Bill was introduced to Parliament on 29 October 2019 and had its second reading on 30 October 2019. It passed without amendment on 27 November 2019.

The Act provides for new offences of workplace manslaughter to capture negligent conduct which causes the death of an employee or member of the public. The offences apply to organisations/self-employed persons as well as officers. The offence will come into operation on a day to be proclaimed or on 1 July 2010 at the latest.

The explanatory memorandum to the Act provides that the workplace manslaughter

offence is intended to allow for "*direct liability of a body corporate (or other entity) where the organisation's unwritten rules, policies, work practices or conduct implicitly authorised non-compliance, or failed to create a culture of compliance, with its duties, and a death resulted from this negligent conduct.*"

The offence also allows for the conduct of individuals within an organisation to be attributable to the organisation, including the aggregate conduct of multiple people, and regardless of the individual's level of authority within the organisation. This is to address the gap in the common law that currently makes it difficult for corporations to be held criminally liable for workplace manslaughter.

In the second reading speech for the Act, the Victorian Minister for Workplace Safety noted that WorkSafe Victoria will take carriage of investigations for workplace manslaughter offences, with support from Victoria police as needed, and that WorkSafe Victoria will employ up to 40 new inspectors over the next four years as part of the "More Inspectors. More Inspections" campaign.

The two year limitations period for commencing prosecutions will not apply to the workplace manslaughter offences.

The Act also enshrines in legislation the Workplace Incidents Consultative Committee to provide a public voice to injured workers and the families of workplace fatalities and serious incidents.

For further detail on the Act, see our **blog post.**

Workplace manslaughter and "crime scene" package announced

The current Victoria government has also announced a $10 million response package to support implementation of the new workplace manslaughter Bill. The response package includes:

- Recruiting five new investigators for WorkSafe Victoria and rolling out a comprehensive training program for first-responder inspectors.
- Sites of workplace fatalities to be locked down and treated as crime scenes to prevent duty holders from concealing evidence.
- Establishing clear protocols for notifying families as soon as possible after a workplace death or serious injury.
- Engaging two additional dedicated WorkSafe Victoria liaison officers to provide support to families during fatality investigations and legal processes.
- A $4 million families fund to provide financial assistance to families who have lost loved ones at work.

Victorian Government implements reckless conduct offence with long jail terms for dangerous goods

The Victorian Government has passed a Bill where duty holders that engage in reckless conduct during the manufacture, transport and storage of dangerous goods will face a fine of $6.4 million or a custodial sentence of up to 10 years. The laws will commence upon royal asset.

The ***Dangerous Goods Amendment (Penalty Reform) Bill 2019*** **(Vic)** introduces a new offence of reckless conduct for stockpiling of dangerous goods with maximum penalties of more than $6.4 million for bodies corporate, and 10 years' jail for individual offenders.

The Bill also increases the maximum fines for the offence of endangering the health and safety of a person property or environment existing under the *Dangerous Goods Act 1985,* from $806,000 to $3.2 million for corporations and from $161,000 to $290,000 for individuals, and the maximum jail term for the offence will also increase from four to five years.

The changes were prompted by a review of the penalties available under the *Dangerous Goods Act 1985* (Vic) following the discovery of hazardous waste stockpiles contained in warehouses in the northern suburbs of Melbourne.

$600M combustible cladding rectification package announced

Victorian Premier Daniel Andrews and Minister for Planning Richard Wynne **announced** on 16 July 2019 a $600 million package to rectify buildings state-wide with combustible cladding.

The program will be overseen by a new agency**, Cladding Safety Victoria,** which will manage funding and work with owners during the rectification process. The Victorian Government will directly fund half the rectification works and will introduce changes to the building permit levy to raise the other $300 million over the next five years.

The establishment of a dedicated cladding agency and rectification of buildings with high risk-cladding was recommended by the Victorian Cladding Taskforce (see below).

The government will also review the state Building Act to identify what legislative change is required to strengthen the system against combustible cladding to better protect consumers.

Work is to begin straight away and Cladding Safety Victoria will commence contacting owners' corporations and property owners, starting with the buildings that pose the greatest safety risk.

Victorian Cladding Taskforce report released

The Victorian Cladding Taskforce's final **report** was released on 16 July 2019, which contains a timeline and comparison of steps taken to address combustible cladding in each jurisdiction to date.

Among other recommendations, the Taskforce have confirmed an earlier recommendation in their interim report that the Victorian Government should consider introducing a statutory duty of care on building practitioners to protect occupants and consumers, similar to existing WHS and environmental protection legislation.

New OHS infringement notices for Victoria

Victoria's 2019-2020 budget released in May, includes a $16.6 million package to expand the specialist capacity of WorkSafe Victoria inspectors around the state, and allows the regulator to introduce infringement notice offences.

The infringement notice offences would be an on-the-spot fine and are likely to apply to OHS breaches such as failing to allow a health and safety representative the requisite access to certain information, notify the regulator of asbestos removal work, or keep a SWMS for the duration of high-risk construction work.

Labour-hire scheme commences in Vic with safety test

From 30 October 2019, Victorian labour-hire providers are required to obtain a licence under the new State's Labour Hire Licensing Scheme.

To obtain and keep a licence, labour-hire firms must pass a "fit and proper person test", which involves demonstrating long-term compliance with workplace laws including Victoria's OHS Act.

New electrical safety regulations

Energy Safe Victoria has called for submissions on a **regulatory impact** statement for the **proposed Electricity Safety General Regulations 2019,** which include clauses from the model WHS Regulations. The proposed regulations will replace the 2009 regulations that are due to sunset on 8 December 2019. They largely remake the regulations, but with several significant changes.

The Victorian government has also introduced an **Amendment Bill** to establish a new licensing system with mandatory minimum qualifications for electrical line works.

Rail safety functions transferred to ONRSR

The Victorian Government has passed a **Bill** to transfer all remaining rail safety regulatory functions from Transport Safety Victoria to the Office of the National Rail Safety Regulator, making ONRSR the sole rail safety regulator for the Victorian rail transport industry.

South Australia

Greens introduce bill regarding industrial manslaughter

In May 2019, the South Australian Greens introduced a WHS Amendment Bill to create an offence of industrial manslaughter. The Bill mirrors a Bill introduced in 2015 also by the Greens party which was not successfully passed. The Bill provides for jail terms of up to 20 years for company officers or employers for reckless conduct causing death. The Bill is unlikely to be passed with a Liberal Government currently in power.

SA amendment bill introduced addressing scissor lifts

PCBUs in South Australia could face fines of up to $30,000 for allowing scissor lifts or elevated work platforms to be operated without a spotter. The ***Work Health and Safety (Scissor Lift Control) Amendment Bill 2019* (SA)** requires a competent safety observer in emergency procedures and activating the scissor lift lowering mechanism to be present at all times when a scissor lift is in operation. It also requires that each lift used at a workplace to be of the same make and model and have the same operating controls.

The Bill follows a 2018 state coronial inquest into one of the two scissor lift fatalities that occurred at the Royal Adelaide Hospital construction site. The inquest found that the fatality occurred while using a scissor lift alone, and involved performing a task that required the lift to be positioned in such a way that the rescuer could not access the lowering level.

Following the inquest, the Coroner recommended the Council of Australian Governments pursue the standardisation of the controls on scissor lift, and that they should only be used where a spotter is available.

Dangerous goods regulations amended

The South Australian Government has made the ***Dangerous Substances (Dangerous Goods Transport) Variation Regulations 2019***, which makes technical changes to the duties of dangerous goods sellers, suppliers, packers, consignors, loaders and drivers, as well as prime contractors, rail operators and owners of cargo transport units involved in carrying dangerous goods.

Liberal government fails to repeal labour-hire scheme with WHS test

South Australia's Consumer and Business Services department has announced that labour-hire providers must apply for a licence by 31 August 2019, after the State Liberal Government's ***Labour Hire Licensing Repeal Bill 2018*** failed to pass through the Legislative Council.

The scheme, yet to be enforced, was introduced by the previous Labor Government and requires labour-hire companies to pass a "fit and proper person" test, which includes demonstrating a history of compliance with WHS laws.

Regulator confirms anti-corruption cameras

SafeWork SA has confirmed that WHS inspectors will use body-worn cameras and work in pairs during certain workplace visits in order to discourage “bribery or attempts of persuasion by PCBUs”. This measure was recommended in the ICAC evaluation of SafeWork SA completed earlier this year. SafeWork SA confirmed the adoption of this strategy in its **Annual Activity Report,** which also confirms that the majority of the 39 ICAC recommendations will be adopted in full. SafeWork SA is developing a framework for determining the site visits that will require inspectors to work in pairs, and will trial the use of body cameras over a three month period.

Eight WHS Codes of Practice approved

In April 2019, the South Australian Government approved nine recently-varied model WHS Codes of Practice as Codes under the State WHS Act. They are:

- **Abrasive Blasting;**
- **First Aid in the Workplace;**

- **How to Manage Work Health and Safety Risks;**
- **Managing Risks of Hazardous Chemicals in the Workplace;**
- **Managing Risks of Plant in the Workplace;**
- **Managing the Work Environment and Facilities;**
- **Preparation of Safety Data Sheets for Hazardous Chemicals;**
- **Welding Processes; and**
- **Work Health and Safety Consultation, Cooperation and Coordination**

Northern Territory

Industrial manslaughter laws passed in NT

In August 2019, the Northern Territory government released its response to Tim Lyon's Best Practice Review of Work Health and Safety. In its response, the NT government gave full or in-principle support for 23 of the 27 recommendations and agreed to introduce industrial manslaughter laws with life imprisonment for company officers within a year.

The NT government also committed to reviewing WorkSafe NT's systems and processes, with a particular focus on appropriate use of infringement notices as a compliance tool. This is in reply to Tim Lyons's recommendation that NT WorkSafe re-balance its priorities in favour of "hard compliance".

However, the NT government has not currently agreed to the following changes that were recommended:

- Creating a new independent statutory office headed by a Director of Workplace Health and Safety Prosecutions
- Restoring the mandatory status of Codes of Practice that existed under the Territory's old workplace safety laws, but stated it will work towards adopting all model Codes of Practice as soon as possible

Following this commitment, in September 2019, the NT government introduced an **Amendment Bill** to introduce a new offence of industrial manslaughter to the WHS Act. The Bill was passed on 27 November 2019 and will commence on the day fixed by Gazette notice.

The Bill provides for a new offence of reckless or negligent conduct causing the death of a person to whom a duty is owed, and applies to organisations and senior officers.

The offence carries a maximum penalty of life imprisonment for senior officers and $10 million for organisations.

The limitations period for WHS offences does not apply to the industrial manslaughter offence.

The regulator is required to obtain the consent of the DPP before commencing proceedings, and the Bill also provides a mechanism for families and other interested parties affected by a fatality to request the regulator to initiate a prosecution and obtain information about the status of the investigation and any potential prosecution.

If a Court is not satisfied beyond reasonable doubt that a person is guilty of the industrial manslaughter offence, the Court can find the person guilty of the alternative offence, and there is no limitations period for such a finding.

Tasmania

A **report** regarding a review of WHS laws and enforcement in Tasmania was released in August and makes 46 recommendations. The report stresses effective enforcement of the WHS Act, including successful and well-publicised prosecutions, as a key element to promoting compliance and risk management by duty holders. The WorkCover Tasmania board provided its response in August and declared its support for or noted all 46 recommendations.

Significant cases

Across Australia

Importer fined $175K for asbestos breaches

The District Court of Western Australia has convicted and imposed fines on a multi-national energy corporation, which has significant assets in WA, for importing gaskets containing asbestos, even though the court found it was inadvertent.

The company was convicted of two breaches of section 233(1)(b) of the *Customs Act* 1901 (Cth) for importing a prohibited item, chrysotile asbestos, contained in a condensate metering skid and two storage tanks in 2012 and 2013. The company was fined $175,000.

Australian Border Force (**ABF**) Superintendent Clinton Sims explained it was every importer's responsibility to ensure that their imported goods contain no asbestos, and that liability is not excused due to a lack of awareness.

The ABF reminds importers to be aware of the increased risk of goods containing asbestos when sourced from countries with asbestos producing industries. It also reminds importers not to assume that goods labelled as 'asbestos free' are in fact free of asbestos, or that testing of goods undertaken overseas and certified 'asbestos free' meets Australia's stringent import requirements.

Key learnings

Importers need to have processes in place to ensure that they do not inadvertently import products containing asbestos.

Importers should:

- ensure that contractual obligations with suppliers specify nil asbestos content;
- carry out sampling and testing for asbestos content prior to shipping goods to Australia; and
- carry out regular risk assessment and quality assurances processes in relation to its importer products.

NSW Enforceable Undertaking targets WHS culture

A multi-state PCBU, Delta Pty Ltd has committed nearly $1 million to safety measures including creating a steering committee that oversees safety at a national level, after a falling concrete beam nearly caused a collapse on a major construction site.

In November 2017, Delta Ltd was using eight-tonne excavators to deconstruct a concrete encased beam and three supporting columns on the tenth storey of a construction site in Circular Quay, Sydney when the beam fell likely due to one of the excavators losing control. The beam struck and damaged the external scaffolding and could have caused it to collapse. No workers or members of the public were injured.

SafeWork NSW alleged the PCBU breached sections 19(1) and 32 of the NSW WHS Act in failing to ensure, so far as is reasonably practicable, the health and safety of workers.

SafeWork NSW accepted Delta's application to enter into an Enforceable Undertaking (EU), where the PCBU had committed to spending $47,150 on establishing a national steering committee of state and territory managers to "provide ongoing governance and oversight" of its quality safety environment and WHS systems.

Delta's most significant commitment in the EU was spending $569,850 studying workforce safety practices, communication methods and training needs, and carrying out safety surveys to inform an implement communication and training strategies for improving safety culture.

Key learnings

The regulator's acceptance of this EU is consistent with the regulator's recent focus on safety culture issues and in particular, the need to organisation's to have in place a "culture of compliance" to prevent workplace deaths (see discussion above).

Facilities Management Company found guilty of breaching WHS laws regarding subcontractor fall from height

The District Court of NSW has held that while a facilities management company (the Principal) was entitled to rely on an expert contractor Building Maintenance Unit Services (**subcontractor**) to set up and service a building maintenance unit (**BMU**), but the Principal wasn't entitled to rely on the subcontractor to inform (or prompt) the Principal of the requirement to undertake a mandatory major inspection of the BMU which could have prevented a serious safety incident. Further, Judge Scotting held that even if the subcontractor was contractually obliged to notify the Principal of the need for the major inspection, the Principal could not rely on that obligation to discharge it of the duties it owed under the Act. Accordingly, the Principal was found guilty of breaching the WHS Act.

Two Sydney managers employed by the Principal knew in March 2015 that enquiries about the major inspection had been made and were unresolved, and they didn't need technical expertise to determine whether such an inspection had been undertaken, he found.

Two workers sustained serious injuries when the load bearing bolts in the BMU failed (due to recurring cyclical loading) outside 20 Bridge Street, Sydney (Exchange Centre). The workers fell 30m before hitting the awning above the street.

The BMU was overdue for a 10 year major inspection required under Australian standards when the incident occurred.

Key learnings

This is a development in the law of the reliance on specialist contractors, i.e. the argument that an owner or manager can rely on the specialist expertise of a contractor and should not be responsible or liable under WHS law for a risk that arises in the scope of the specialist subcontractor's activities. Essentially, the court said that argument doesn't apply when understanding or awareness of the risk that caused the incident does not require that specialist expertise. Appeal Court judgments on this issue were distinguished.

In practical terms, owners, managers and head contractors must be conscious of subcontractor work that does not require specialist expertise (as part of their scope of services), as the owner or manager has a heighted exposure to liability under the WHS Act for these matters and would need a comprehensive system for monitoring and auditing maintenance subcontractors' fulfilment of their duties on matters that do not require specialist expertise (or the owner or manager could do this itself).

Enforceable undertaking entered in case involving duty to 'other persons'

A car dealership and repairer has entered into a $200,000 enforceable undertaking in lieu of prosecution in relation to charges brought against the company for failing to ensure that the health and safety of 'other persons' was not put at risk from work carried out as part of the business.

The charges relate to a fatal incident involving a customer's employee. The operator of a horse stud took a horse float to the company's premises to have the hydraulic tailgate repaired. During the repair work, the oil level in the hydraulic system became dangerously low, but the company returned the vehicle to the operator without testing the tailgate. The next day, the tailgate fell on and killed an employee of the horse stud after the hydraulic stem failed.

The company previously applied for the proceedings to be dismissed or permanently stayed, arguing that the horse stud employee was not an 'other person' without the meaning of the Act. It argued that the duty to others was required to be geographically and temporally connected to the PCBU's workplace, and limited to persons such as workplace visitors and passers-by, and should not be a duty owed for an indeterminate time to "the world at large".

However, the NSW District Court rejected this argument in April last year, with Judge Scotting finding that the legislature deliberately chose to remove the geographical limitations from the previous OHS Acts, and that rather than being a duty owed to the "world at large", the duty owed to other persons was "limited by their proximity to a risk created by the work carried out as part of the business or undertaking." Judge Scotting said that the duty may be considered "onerous" but is not beyond the stated objects of the act.

The terms of the EU include appointing a WHS co-ordinator, reviewing and updating the company's WHS management system, introducing a safety culture program and reviewing and amending the company's workshop safe work procedures.

Key learnings

This case demonstrates the potentially broad reaching nature of the duty owed by PCBUs to "other persons" under the WHS Act. It does not necessarily have geographical or temporal limitations, but requires the other person to have "proximity" to the risk created by the PCBU.

Company acquitted of charges after risk was not foreseeable

A quarry owner has successfully defended charges brought against it in relation to incident involving a worker who was crushed to death in an excavator roll-over.

Charges were brought against the company for afiling to provide a rollover protective structure (**ROPS**) and implement adequate procedures to eliminate or minimise the risk of the excavator overturning.

At the time of the incident, the worker had been operating the excavator in a 'no-go' zone, at 45 degrees across a slope which was unstable, rocky and boggy and was slewing its fully extended boom with a bucket which contained a large rock. The worker had not been given instructions to take the excavator into the no-go zone area to do any work, but had instead been given instructions to do other tasks in other areas.

The District Court found that the quarry owner did not know and could not know that the deceased worker was going to take the excavator where he did and operate it in the fashion that he did – the Court made this finding based on a variety of reasons, including that:

- The worker had been given instructions for different tasks
- These instructions were corroborated by the toolbox talk meeting minutes and evidence of workers who attended the toolbox talk
- Workers were expected to perform the tasks given to them, and not to perform any extra tasks without notifying the quarry supervisor (which had not occurred)
- The deceased worker was seen as an obedient employee in terms of following directions and observing safe work practices

The deceased worker breached numerous safety procedures and existing practices (of which he had been trained), including by entering the 'no-go' zone, working across the slope rather than facing up the slope, slewing the turntable with the boom extended, operating the excavator on unstable and rocky ground, dropping rocks of the edge of a highwall and operating the exactor above a highwall without the area below being bunded off.

The District Court also found that it was not reasonably foreseeable to the defendant that the deceased worker would have operated the excavator in the fashion he did on the day of the accident, stating that "*While a person conducting a business or undertaking must guard against the possibility that an employee may be careless or inadvertent in carrying out a task, there is a line to be drawn between such behaviour and the deliberate and unforeseeable flouting of rules in the workplace and the training given to employees*."

The Court was fortified in its conclusions by the fact that numerous inspectors had visited the quarry from time to time and never saw a problem with the way in which excavators at the quarry were operated, and that there had been no prior occasions where anyone had seen the excavator operated in breach of procedures the way it had been done on the day of the incident.

Further, the Court found that for the everyday operation of the excavator, which was on flat and stable surfaces and in accordance with guidelines and training, there was no risk of the excavator overturning, and thus there was no need for the defendant to take additional steps to ensure safety within the meaning of the Act.

Key learnings

This case is significant as it demonstrates the qualified nature of the duties owed by a PCBU – PCBUs are not required to guard against risks that are not foreseeable including the "*unforeseeable flouting of rules in the workplace and the training given to employees*" **Orr v Hunter Quarries Pty Limited [2019] NSWDC 634 (8 November 2019)**

Queensland

First industrial manslaughter prosecution

The first prosecution for industrial manslaughter has been brought in Queensland. The charges were brought against a recycling company in Brisbane following the death of a worker who was struck by a reversing forklift at a wrecking yard. It is alleged that the company caused the death of the worker by failing to effectively

separate pedestrians from mobile plant and failing to effectively supervisor workers, including the operators of mobile plant. The company faces a possible fine of up to $10 million.

Two company directors have also been charged with reckless conduct offences.

Key learnings

This is another example of the recent trend of prosecutions being brought for more serious types of offences, and against multiple individuals. It is also significant as it is the first industrial manslaughter prosecution in Australia.

Company director's conviction over roofer's death quashed on appeal

In May 2019, the Queensland Court of Appeal found a judge who jailed company director, Gary Lavin for a category 1 offence under the Queensland WHS Act, failed to direct the jury to consider whether Mr Lavin had a "reasonable excuse" for not installing a safety rail.

Mr Lavin and his company, Multi-Run Roofing Pty Ltd were previously found guilty, by a jury of breaching section 31 (reckless conduct – category 1) of the WHS Act in relation to the death of a roofer in 2014. The jury found Mr Lavin and his company failed to supply safety railings for roofing work, despite being paid to do so and instead relied on harnesses and mobile scissor lifts for edge protection. Mr Lavin was sentenced to 12 months in prison (suspended after four), and his company was fined $1 million.

Queensland Court of Appeal Justices Philip McMurdo, Debra Mullins and Peter Davis found that the jury had not been properly directed on the issue of whether Mr Lavin had a "reasonable excuse" for not complying with his duties. The Court set aside Gary Lavin's conviction and ordered a retrial

In particular, the court found that Judge Cash erred in instructing the jury that any excuse for not installing the railing must be "measured against" what is reasonably practicable in the circumstances.

The Court found this was a misdirection because the relevant question was not whether installing the railing was reasonably practicable, but if Mr Lavin had a "reasonable excuse" for not installing the railing. The question of whether or not he had a reasonable excuse required consideration of a number of factors, including the alternative measures which he directed to be put in place (the harnesses and the use of the scissor lifts), not just whether it was reasonably practicable to install the railing, and the jury should have been instructed to consider whether implementation of the alternative measure amounted to a reasonable excuse for not implementing the railing.

In November 2019, Mr Lavin was found not guilty by jury, following a re-trial. During the re-trial, Mr Lavin's barrister argued that another roofer, Michael Pairama, was responsible for the deceased worker's safety and not Mr Pairama. The credibility of Mr Pairama's evidence was also called into question, after he admitted to lying to the police in circumstances where he placed a harness near the deceased worker after he fell and told the police that he had removed the harness after the worker fell.

Key learnings

In determining whether or a company or officer has engaged in reckless conduct, alternative safety measures put in place by the company or officer are relevant to determining whether a breach of the duty has occurred.

***R v Lavin* [2019] QCA 109**

Importer convicted of safety breaches

An importer and its director have been fined $1.2 million for multiple category 2 safety breaches, after they failed to ensure their products complied with Australian Standards, and a woman was electrocuted.

A Queensland woman was killed in 2017 when she touched a submersible pump in her backyard well.

The online business that imported and sold the pump, Pump Factory Pty Ltd (Pump), was charged with breaches of electrical safety duties and importer duties under the Queensland Electrical Safety Act 2002.

Its sole director, Zoran Kacavenda, was charged with breaching his duties as an officer.

Pump and Mr Kacavenda both pleaded guilty, and were fined $1 million and $200,000 respectively in the Townsville Magistrates Court.

The Court heard that in early 2016, Pump Factory purchased hundreds of submersible

water pumps from a Chinese manufacturer, before selling them online to Australians under its own name. A State Electrical Safety Office investigation found the pumps were of substandard quality and poorly designed, allowing internal wires to tangle, rip out of their connections and touch the metal body of the pump, the Court heard.

Pump Factory and Kacavenda failed to ensure the imported pumps were electrically safe or complied with the relevant Australian Standards, it found.

Key learnings

Importers of electrical goods for sale in Australia must ensure they meet Australian Standards and are tested to be electrically safe.

Quarry manager jailed followed death of worker

The managing director of MCG Quarries, William McDonald, has been sentenced in the Brisbane Magistrates Court to 18 months imprisonment with a non-parole period of six month, after being convicted of breaches of Queensland mining safety legislation involving reckless conduct. He has appealed his conviction.

In the same proceedings, the site senior executive of MCG Quarries, Tony Addinsall, was fined $35,000 without conviction, and MCG Quarries was fined $400,000.

The proceedings related to an incident involving a 21 year old worker who suffered fatal crush injuries after he became entangled in a running conveyor belt whilst working alone at a MCG quarry in central Queensland in 2012. The conveyor was uncommissioned and did not have a safety guard fitted.

It was alleged that the three Defendants had failed to ensure the provision of a safety guard, conduct regular plant inspections or establish written procedures for carrying out maintenance on the equipment.

The Defendants argued that they had not known there was anything wrong with the conveyor belt's design and were not aware a guarding audit was required. The Defendants argued it had been a lack of diligence, not recklessness.

In sentencing the three Defendants, Magistrate Hay found that:

- Mr McDonald had rushed to get the quarry into operation, against the advice of experienced workers.
- Mr McDonald was was personally aware the plant was operating before commissioning had been completed.
- Had the appropriate safety measures in place it was very likely that the incident would not have occurred.

The company that manufactured the conveyor belt, Global Crushers and Spares, was also convicted in 2017 of failing to discharge their health and safety obligations for not installing guard panels.

Key learnings

This case is the third case involving a jail sentence being imposed an officer for breaches of their statutory safety duties. The sentence reflects the trend in the increasing severity of penalties being handed out by courts for statutory health and safety offences.

Prohibition Notice quashed for not addressing a particular activity

A large construction company has successfully had a prohibition notice overturned in the Queensland Industrial Relations Commission (**QIRC**).

The prohibition notice was issued in May 2018 and required the company to stop the activity of "Performing construction work where it is reasonably likely that an object could fall" on a construction project.

As a basis for issuing the notice, the inspector relied upon the previous history of incidents involving falling objects at the project, and that an object had fallen on site on the morning of the inspector's visit.

The construction company argued that most of the previous incidents had involved objects falling into an exclusion zone that were not reportable, and that various controls had been implemented in response to the previous incidents, which the inspector was not aware of.

The QIRC agreed that the inspector could not have formed the necessary reasonable belief that there was a serious risk of objects falling because the inspector did not have any

knowledge of the control measures that the company had implemented to address the prior incidents, stating that knowledge of a history of falling objects was not, in and of itself, enough to induce the reasonable belief that was required.

The QIRC also agreed that the purpose for issuing the notice was not aimed at addressing a particular activity as envisaged by the WHS Act but rather as a means of focusing the PCBU's attention on the issue of falling objects.

The QIRC found that the prohibition notice lacked particularly, because if the notice was read literally, what was required was unreasonable, and if it was not read literally, what was required was unascertainable. There was no particular construction activity identified by the inspector, which created a practical difficulty in the PCBU's ability to respond to the notice. The notice did not identify a particular activity that needed to be stopped or which required modification in the way it way it was being carried out – it did not more than identify that falling objects pose a risk to health and safety.

Key learnings

This case demonstrates what is necessary for a prohibition notice issued by an inspector to be legally valid – it must specify a particular activity that needs to be stopped or which requires modification in the way it is being carried – rather than simply identifying an issue that poses a risk to health and safety.

Multiple convictions secured for recklessness offences following bullying incident

SafeWork SA has successfully secured three convictions for recklessness offences (against a company and two workers) following a serious bullying incident involving an apprentice being squirted with flammable liquid and set alight whilst at work in March 2017.

Jeffrey Rowe was employed as site supervisor by Tad-Mar Electrical Pty Ltd when worker and leading hand Luke Chenoweth squirted flammable liquid onto 19 year old first-year apprentice Austin Courtney's right boot, and ignited it.

Although the flame quickly burnt out, Mr Chenoweth squirted more liquid into the crotch area of Mr Courtney's work pants and pinned him to the wall while flicking his cigarette lighter. After pleading with Chenoweth to not light his clothing, Mr Courtney was able to leave the room he was in, but was again followed by Mr Chenoweth, who then again sprayed flammable liquid on his shirt and ignited it.

Mr Rowe then obtained the liquid bottle from Mr Chenoweth and squirted more liquid on the victim, producing more flames.

Both Mr Rowe and Mr Chenoweth were dismissed following the incident.

Charges were laid against both Mr Rowe, Mr Chenoweth and the company for being "reckless as to the risk to Mr Courtney of death of serious injury." All three prosecutions were successful.

Mr Rowe was fined $12,000 (with a 40% reduction for an early plea of guilty). The Court found that Mr Rowe took no steps to stop Mr Chenoweth or extinguish the flames and instead sprayed more flammable liquid on the apprentice.

Mr Chenoweth was fined $21,000 (with a 40% reduction for an early guilty plea). The Court found that Mr Chenoweth was the main protagonist in the incident, squirting most of flammable liquid onto the apprentice and setting it alight.

The company was fined $15,000 (with a 40% reduction for an early guilty plea). The Court found that the company had failed to address bullying and harassment in its WHS policies and procedures.

Key learnings

These cases reinforce the importance of having in place appropriate controls for dealing with workplace bullying, including policies and procedures and provision of training.

SafeWork SA has also emphasised the need for executives, managers and supervisors to "live and breathe" policies and procedures to ensure they are "ingrained in the fabric of organisational culture".

***Martyn Campbell v Jeffrey Rowe* [2019] SAET 104**

***Campbell v Chenoweth* [2019] SAET 181 (28 August 2019)**

***Martyn Campbell v Tad-Mar Electrical Pty Ltd* [2019] SAET 225 (13 November 2019)**