



# WORKPLACE RELATIONS & SAFETY

KEEPING YOU IN THE KNOW



## SAFETY UPDATE

We hope this Q1 Safety Update finds you all well as we launch into spring. In this safety update we cover safety legislative reforms and recent cases.

Psychological health has been the safety topic of interest and focus for clients recently, particularly given the proposed changes to the *Occupational Health and Safety Regulations 2017* (Victoria) (**Proposed Regulations**). We have enjoyed conducting interactive training sessions with you on this important development over the last few months. Once these proposed regulations are finalised and in operation, we expect there will be activity with site safety regulator visits to check employers' compliance with these new regulatory requirements.

If you would like more detail or have any questions on anything below, please contact us! Our contact details are listed at the end of this update.

## LEGISLATIVE AND REGULATORY PROPOSALS AND DEVELOPMENTS

### Amendments to model WHS Act

With the federal election now well and truly in the rear-view mirror, the Albanese Labor Government is expected to continue to move forward with WHS reforms .

Amendments have been made to the national model *Work Health and Safety Act 2011*, *model Work Health and Safety Regulations* and related materials to reflect a wide range of recommendations made by Marie Boland in her [Review of the model Work Health and Safety laws](#) (**Boland Report**). Safe Work Australia has implemented 20 of the Boland Report's 34 recommendations.

Some of the noteworthy changes include:

- Regulations dealing with psychological health including identification of workplace psychological hazards and determining control measures to minimise psychosocial risks. Safe Work Australia recently released a [Model Code of Practice Managing Psychosocial Hazards at Work](#).

- Prohibition on insuring against WHS penalties – this has already been implemented in other jurisdictions, for example, in NSW, WA and Victoria.
- WHS regulators can obtain information relevant to investigations of potential breaches of the WHS laws outside of their jurisdiction.
- Removing a provision requiring WHS permit holders to give 24 hours' notice before entering a site to investigate suspected contraventions.

Australia's WHS ministers did not reach the majority agreement required regarding the Boland Report's recommendation that the offence of industrial manslaughter be added to the model WHS laws. The ACT, NT, Queensland, Victoria, and WA already have industrial/workplace manslaughter offences in effect. Before the ink dried on the drafting of this update, it has just been announced that Queensland's 5 year review of its *Work Health and Safety Act 2011* is about to commence and include a review of the industrial manslaughter provisions which were the first introduced under the harmonised WHS laws.

The above changes in the model WHS laws must be adopted by the state and/or territory jurisdictions in order for the laws to take effect in those relevant jurisdictions. Keep a look out for amending legislation in the states and territories!

## WorkSafe inspectors' powers - Victoria

Under the [Workplace Safety Legislation and Other Matters Amendment Act 2022 \(Vic\)](#), WorkSafe inspectors have the power to issue a prohibition notice or give directions relating to a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

Prior to this amendment, an inspector could only issue a prohibition notice under s112 of the *Occupational Health and Safety Act 2004 (OHS Act)* if they reasonably believe an activity is or may occur that involves or will involve an "immediate risk" to the health or safety of a person. Now an Inspector may issue a prohibition notice if they reasonably believe that an activity is occurring, or may occur, at a workplace that involves or will involve a "serious risk" to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

The incident notification provisions have been amended to include a broader range of matters - an incident that exposes a person to a "serious risk" to the person's health or safety emanating from an immediate or imminent exposure.

This changes the threshold for notification from immediacy of risk and vicinity to seriousness of risk emanating from immediacy or imminence of exposure. The substituted provision more closely aligns with the dangerous incident provisions under s37 of the model Work Health and Safety Act.

## Labour hire in Victoria – extended “employer” definition applies to host employer

The *Occupational Health and Safety and Other Legislation Amendment Act 2021 (Vic)* extends the definitions of 'employer' and 'employee' under the OHS Act to capture labour hire arrangements such that a labour hire worker is an employee of the host employer, unless excluded by the regulations. Host employers owe the same duties towards labour hire workers as they do towards their direct employees under these amendments.

The labour hire provider and host employer both owe safety duties to the labour hire worker.

The Explanatory Memorandum to the *Occupational Health and Safety and Other Legislation Amendment Bill 2021* provides guidance, noting it *'is not intended to require labour hire providers and host employers to duplicate effort. Instead, it is expected that labour hire providers and host employers will work together to ensure that all duties to labour hire workers are met'*.

## Prohibition on insurance indemnity for pecuniary penalties

The following amendment comes into effect from 22 September 2022.

The [Occupational Health and Safety and Other Legislation Amendment Act 2021 \(Vic\)](#) provides that a term of a contract or other arrangement (eg contract of insurance or contract of indemnity) that purports to insure or indemnify a person for the person's liability to pay a pecuniary penalty under the OHS Act or its regulations is void to the extent that the term provides for that insurance or indemnity.

Contract terms or other arrangements which provide for insurance or indemnity for legal expenses of defending a prosecution or court ordered damages are not void.

## Psychological health - Victorian OHS Regulations

The Victorian Government's proposed *Occupational Health and Safety Amendment (Psychological Health) Regulations*, providing employers with a framework to identify psychological hazards and control risks associated with psychological hazards, were scheduled to be introduced on 1 July 2022, but have not yet been finalised.

Key aspects of the proposed regulations include:

- identify psychological hazards eg bullying, sexual harassment, aggression or violence, exposure to traumatic events or content, job demands, low job control, poor support, lack of role clarity, poor organisational change management, inadequate reward and recognition, remote or isolated work;
- control risks associated with psychological hazards eg alter management of work, plant, systems of work, work design, or workplace environment and information, instruction and training;
- review and revise risk control measures;
- requirement to have a written prevention plan for certain psychosocial hazards (aggression or violence, bullying, exposure to traumatic content or events, high job demands or sexual harassment); and
- for employers with 50 or more employees, a duty for biannual reports to WorkSafe on "reportable psychological complaints" (ie complaints involving aggression or violence, bullying or sexual harassment). These reports must be kept for five years.

Whilst we are awaiting developments on the introduction of these regulations, it is important to keep in mind that employers must so far as is reasonably practicable provide and maintain a safe work environment without risks to health (both physical and psychological). Employers have a duty to identify psychological hazards and implement appropriate control measures to manage the risks associated with psychological hazards and review and revise such measures to ensure that are effective in managing the risks.

Safe Work Australia has recently released the [Model code of practice: Managing psychosocial hazards at work](#) which provides guidance on how to manage psychosocial hazards at work.

## SAFETY GUIDANCE AND INQUIRIES

### SafeWork NSW – Scaffolding Industry Safety Standard

In 2019, a steel modular scaffold collapsed at a construction site in NSW, due to being overloaded. Two workers were crushed, one was fatally injured and another suffered permanent injuries.

In March 2022, SafeWork NSW published the [Scaffolding Industry Safety Standard](#) to provide guidance on preventing scaffold-related injuries and deaths.

### WA Inquiry into the agriculture industry

WorkSafe WA has [announced an inquiry](#) into the concerning rate of agricultural sector deaths. A report will be produced with recommendations on investigations and enforcement for consideration by the WA Government.

The Victorian Farmers Federation (VFF) recently conducted a 'Making Our Farm Families Safer' campaign which was driven by coronial findings into an incident involving a 12 year old child who died from traumatic head injuries while operating a tractor and spreader. An easy to read "[Child safety on farms](#)" guide has been released by VFF.

### Gendered violence

WorkSafe Victoria has released a [psychosocial hazard fact sheet](#) on work related gendered violence including sexual harassment to assist employers in identifying, assessing and controlling hazards and risks associated with work related gendered violence.

This fact sheet will be useful in reviewing and refreshing your workplace behaviour policies and in conducting psychological risk management.

## RECENT NOTEWORTHY CASES

### First industrial manslaughter conviction in Queensland

Mr Owen, business owner, was using a forklift to remove a generator from the back of a truck, when it fell and landed on his friend who was helping, crushing him to death. Mr Owen was charged with industrial manslaughter under the WHS Act 2011 (Qld) as a PCBU individual.

Mr Owen was not licensed to drive the forklift, the lifting capacity was not adequate for the unloading task and the business did not have any documented health and safety procedures for using the forklift to unload heavy equipment.

In March 2022, Mr Owen was sentenced to 5 years jail, suspended after 18 months of actual prison time. Mr Owen was the first person to be prosecuted, convicted, and jailed under the industrial manslaughter offences in the WHS Act 2011 (Qld).

### Insurance voided due to company director's indifference

In 2015, an apprentice plumber was carrying a piece of guttering on a scaffold put up in a "no go zone" at a building site in Victoria, when the guttering touched the overhead powerlines. He received an electric shock and suffered substantial burn injuries.

The scaffold company that assisted with erecting the scaffold in the no go zone and the apprentice's employer were charged and prosecuted for breaches of the OHS Act and fined.

The apprentice brought a claim for damages for personal injury against his employer, the builder and two scaffolding companies involved in the erection of the scaffolding.

WorkSafe sought to recover compensation and expenses paid in respect of the apprentice's WorkCover claim.

The Victorian Court of Appeal [upheld the Supreme Court decision](#) preventing the director of the scaffolding company recovering from its insurer on the basis that he knew there were risks associated with the scaffolding being close to powerlines, and likely understood the dangers this could pose to workers erecting the scaffolding and those subsequently using it. The court noted his *'attitude was one of "not my problem". He recognised the danger, raised the alarm but was indifferent to whether any action was taken to prevent the risk'*. While the conditions of the company's public liability insurance policy did not require strict compliance with Victoria's OHS Regulations, the company was required to take 'reasonable precautions' to adhere to its statutory duties, but it failed to do so.

The decision puts employers on notice that their insurance policy may not provide coverage where the insured does not take reasonable precautions to avert the risk of injury or death.

### Cyclist killed riding past work site in New Zealand

Two companies were accused of breaches of workplace health and safety laws, after a cyclist was killed riding past their site on the way to work.

In 2019, a cyclist collided with a truck while navigating a construction worksite. She fell to the ground and was subsequently run over – suffering fatal injuries. The incident occurred on a temporary road which provided several access points to the site, a major motorway extension project.

Following an investigation, WorkSafe New Zealand alleged the two companies failed to ensure the health and safety of members of the public by failing to implement an effective traffic management system along the temporary road. WorkSafe New Zealand contended that there were various reasonably practicable measures that could have been taken to mitigate risks.

The two companies avoided prosecution by [entering into enforceable undertakings](#), with commitments to spend NZ\$1.6m on safety measures and other initiatives.

Employers must consider public and other stakeholders in the analysis and management of safety risks, as obligations extend beyond the borders of the worksite where business activities may expose others to risk.

## ON THE ROAD

In August, we attended the Queensland Mine Safety Conference 2022 on the Gold Coast and gained valuable insight into the key safety issues facing this industry and other high risk work environments, including the move towards high reliability organisations and the future direction of the regulator - Resources Safety and Health Queensland.

We are happy to be back on planes and travelling to come see your sites. If you would like to have a chat about the above or anything workplace health and safety related, please get in touch!

## CONTACT US

If there are any particular areas or topics you would like us to cover in the future, please just let us know - we are keen to continue to provide you with updates on important safety developments relevant to your business.

*This update was authored by Gina Capasso and Tim Agius.*