# Updates on NSW Work Health and Safety

**June 2021**

## Introduction

Every year the Government body, Safe Work Australia, collects data concerning work-related injuries and compiles it in their time series profile, 'Work-related Traumatic Injury Fatalities Australia'. In the preceding year, the statistics confirmed that out of the total 183 fatalities, 26 were recorded from the construction industry.

The data collected in the 2015 series, identified that around 12,600 workers' compensation claims are accepted from the construction industry each year for injuries and diseases involving one or more weeks off work. This equates to 35 serious claims each day.

In November 2017, Marie Boland, a former Executive Director of Safe Work SA was appointed by Safe Work Australia to review the model Work Health and Safety laws. These model Work Health and Safety laws currently govern every jurisdiction aside from Victoria. The final report was provided in 2018 identifying that though the model WHS laws were "largely operating as intended", there were nevertheless recommendations to "improve clarity and consistency". [1]

In light of the most recent Work-Related Traumatic Injury Fatalities data and Marie Boland's national review of the model WHS laws, NSW have introduced new offences and harsher penalties under the *Work Health and Safety Amendment (Review) Act 2020 No. 10*. In introducing the amended Act, the Hon. Scott Farlow stated that these amendments were being "expedited ahead of completion of the national process to ensure that the issues" that were identified in Boland's report "do not continue to affect NSW workplaces". [2] Despite this expedition, he nevertheless noted that "New South Wales remains committed to national harmonisation of the work health and safety laws". [3]

## Key Aspects of the Work Health and Safety Act 2011 (NSW)

*Criminal Sanction*

One of the key amendments under the *Work Health and Safety Amendment (Review) Act 2020 No. 10* is the inclusion of a note under Division 5 which states that "workplace deaths may be prosecuted as manslaughter under the *Crimes Act 1900*". By making it clear to "employers, business owners, workers and the community more broadly that anyone who causes the death of a worker through negligence can face serious criminal action", it is hoped that it will increase "duty-holders" vigilance and the "deterrent power of this most serious offence".[4]

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[1] *Review of the Model WHS Laws*, Safe Work Australia, 2019.
[2] New South Wales, *Parliamentary Debates,* Legislate Council, 4 June 2020 ('Second Reading Speech').
[3] Ibid.
[4] Ibid.

*Category 1 Offence*

Another crucial amendment concerns the Category 1 offence. Enshrined under s 31 of the *Work Health and Safety Act 2011,* the Category 1 offence is committed 'when a person who owes a work health and safety duty recklessly exposes a person to whom that duty is owed to a risk of death or serious injury or illness' and the person 'engages in conduct with gross negligence, or is reckless as to the risk to an individual of death or serious injury or illness'. [5] In response to Boland's review, which identified the difficulties in establishing the previous 'recklessness' requirement of the Category 1 offence, 'gross negligence' has now been added in as a fault element under s 31. A person is grossly negligent when their behaviour falls so short of the standard of reasonableness and "involves such a high risk of death or serious injury that it deserves criminal punishment". [6] Despite these statements implying that the Category 1 offence is only invoked when a death has occurred, death is not a requirement for prosecution, rather "regulators will be able to prosecute grossly negligent duty-holders who expose workers to a risk of death or serious injury or illness whether or not a worker is killed". [7] Described as the most serious work health and safety offence, it obviously carries the highest penalty imposed by the Act.[8] Under the penalty, which was increased by the 2020 amendment, an individual who commits a Category 1 offence is liable to up to 5 years imprisonment and/or a fine of $346,500, whilst a corporation who commits this offence is liable to a fine of $3,463,000. The amended s 31 has not only broadened the scope of the offence but it has also increased the penalty.

*"Reasonably Practicable"*

Though this standard was not amended by the recent legislation, it nevertheless is a fundamental aspect of the *Work Health and Safety Act 2011* (NSW). Under the Act, a person conducting a business or undertaking has a non-transferable duty which requires them "to eliminate risks to health and safety, so far as is reasonably practicable". [9] 'Reasonably practicable' is further defined as that "which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety" in light of relevant matters such as, the "likelihood of the hazard or the risk concerned occurring", "the degree of harm that might result from the hazard or the risk" and "what the person concerned knows, or ought reasonably to know about the hazard or the risk and ways of eliminating or minimising the risk". [10] Regard must be also had to "the availability and suitability of ways to eliminate or minimise the risk," and "the costs associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk". [11]

*Code of Practice*

Also, in August 2019, Safe Work NSW updated the NSW Code of Practice in accordance with section 274 of the *Work Health and Safety Act 2011*. The Code assists duty holders to achieve compliance with the health and safety duties in the *Work Health and Safety Act 2011* and the *Work Health and Safety Regulation 2017*. Though the Code has no legal force, it is admissible in court proceedings as evidence of what is known about a 'hazard, risk, risk assessment or risk control' and Court's may rely on this in 'determining what is reasonably practicable in the circumstances to which the code of practice relates'. [12] Furthermore, in the case of *Hetherington*, the Court acknowledged that the exercise of 'due diligence' includes taking reasonable steps to "acquire and keep

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[5] Ibid; *Work Health and Safety Act 2011* (s 31)
[6] (n 2).
[7] Ibid.
[8] Ibid.
[9] *Work Health and Safety Act 2011*, s 17.
[10] Ibid s18.
[11] Ibid s 18(d); s 18(e).
[12] *Code of Practice: Managing the Work Environment and Facilities,* August 2019.

up-to-date knowledge of work health and safety matter". Therefore, the Code is likely to be influential in court proceedings.

## Recent Case Law

*Ceerose* (*Attorney-General (NSW) v Ceerose Pty Ltd* [2019] NSWCCA

In 2016 Ceerose pleaded guilty to breaches of the *Work Health and Safety Act 2011* which resulted in the death of a labour-hire worker and a fine of $300,000 in 2016 in the NSW District Court. In an appeal to the NSW Court of Criminal Appeal in 2019, the fine was doubled to $600,000. Whilst the District Court Judge concluded that the offence 'fell in the mid-range of objective seriousness', the Court of Appeal found that the foreseeability of the extremely serious risk as well as the 'minor inconvenience' to Ceerose to take the necessary steps to avoid that risk from materialising 'demonstrated a level of disregard for proper procedures on the construction site which so exacerbated the respondent's culpability as the principal contractor, that the offending was elevated, and significantly, above the mid- range.[13]Moreover, in borrowing the elements established in the case of ***Hetherington***,[14] as the principal contractor Ceerose had "responsibility for the management and coordination of all work performed" including the "health and safety of workers contracted by it" which included the deceased. [15] By failing to "provide adequate information to the workers" about the fatal exclusion zone, Ceerose failed to ensure compliance with its health and safety duty and consequently exposed the labourer to a 'risk of death or serious injury'. [16]

## Takeaways

In light of recent amendments to the *Work Health and Safety Act 2011* (NSW) as well as case law, contractual agreements should include a work health and safety clause which specifies who is appointed as principal contractor and has control to the extent necessary to discharge duties in accordance with work health and safety legislation. The clause should also include the requirement of incident reports and consultation arrangements. These clauses should also be included in sub-contractor agreements.

Such contractual provisions will only be protective if there are in place effective management systems concerning risk and hazard assessment and effective consultation and documented processes and procedures. Senior management needs to be knowledgeable of the management systems and how compliance via their processes and procedures has been ensured.

While some of these legislative changes are only currently relevant to New South Wales, in light of Boland's 2018 review it is likely that similar changes will soon be implemented to the WHS national model.

For a more comprehensive review of manslaughter laws introduced to WHS legislation please refer to our recent newsletter 'Industrial Manslaughter.'

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[13] *Attorney-General (NSW) v Ceerose Pty Ltd* [2019] NSWCCA 35, [78].
[14] *SafeWork NSW v Neville George Hetherington* [2019] NSWDC 11.
[15] *Attorney-General (NSW) v Ceerose Pty Ltd* [2019] NSWCCA 35, [4].
[16] Ibid [33]; *SafeWork NSW v Neville George Hetherington* [2019] NSWDC 11.