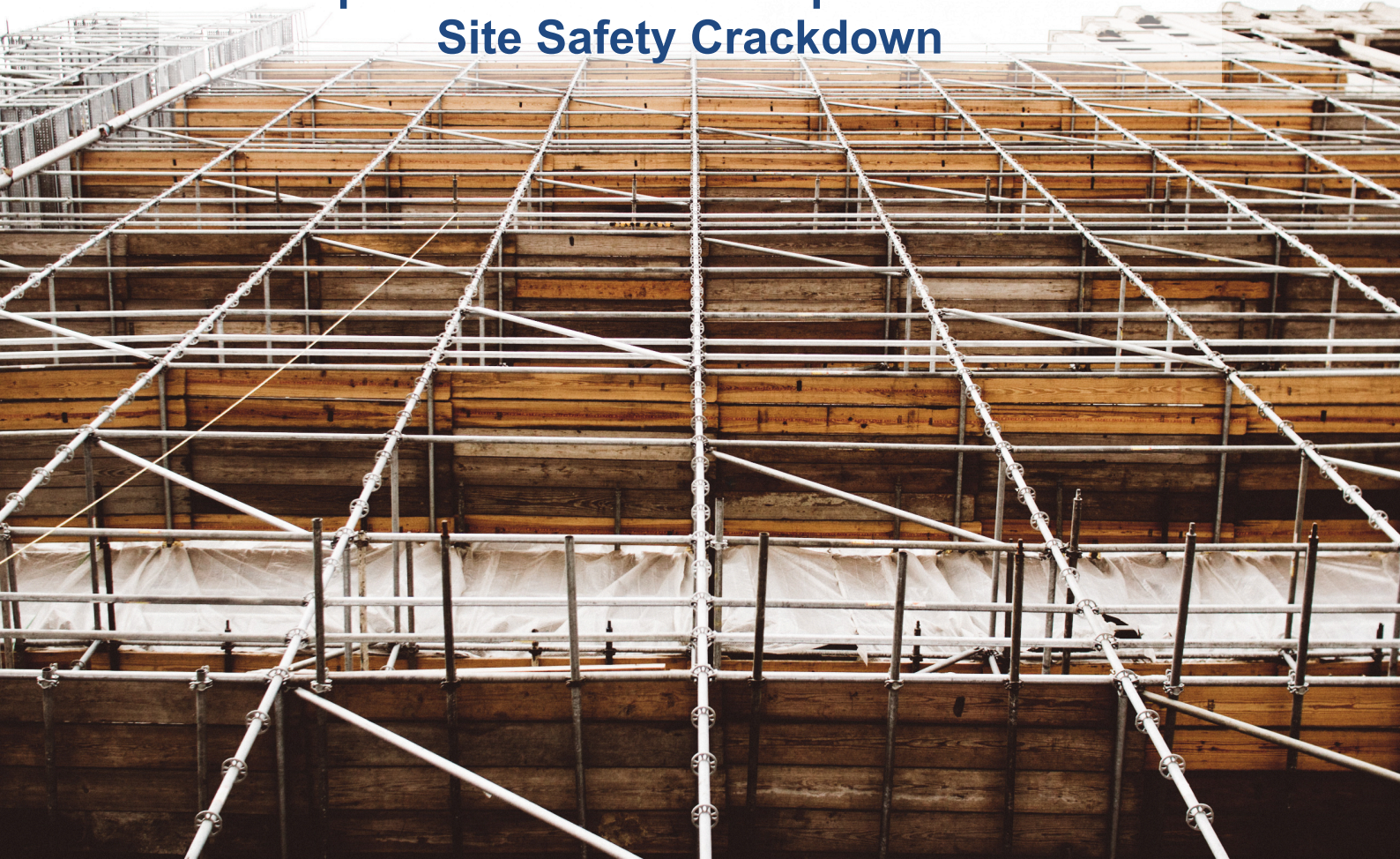


Workplace Incidents Prompt Construction Site Safety Crackdown



Introduction

In February of this year the New South Wales State Government proposed changes to the state's existing work health safety framework that would have the effect of significantly increasing pressure on employers to comply the safety requirements of the [Work Health and Safety Act 2011 \(NSW\)](#) (WHS Act).

The changes are set out in the *Work Health and Safety Amendment (Review) Bill 2020* (NSW) (Bill) which as of the date of publication has passed the lower house and is awaiting the approval of the upper house of state parliament.

The proposed changes follow a series of highly concerning deaths and serious injuries that have arisen from poor safety procedures at construction sites. Among these incidents, the tragic death of 18-year-old Christopher Cassaniti has cast light on the effectiveness of the state's existing work health and safety laws.

This article is a timely reminder for all employers, executives, or persons in control of a business or undertaking (PCBU), in the building and construction industry, to ensure they are well informed of their legal obligations and to ensure that everyone's safety is the number one priority in the workplace.

Potential Key Amendments

The central amendments to the WHS Act that the Bill proposes are as follows:

1. Addition of Gross Negligence Element

Contact

Jessica Rippon, Principal Solicitor | ✉ jripton@constructionlegal.com.au
☎ +61 2 8591 9132 • +61 421 877 932 | 🌐 www.constructionlegal.com.au

The two essential parts of an offence are the accused's conduct and their mental state – both need to be proved to reach a verdict of guilty. Two specific types of mental states are recklessness and gross negligence, with recklessness being more difficult to prove than gross negligence.

Currently under section 31 of the WHS Act, the accused commits a category 1 offence (the most serious under the WHS Act) if they, recklessly, put an individual at risk of death or serious injury or illness. The penalty for this offence is \$300,000 or 5-years imprisonment for individuals who are non-PCBUs; \$600,000 or 5-years imprisonment for PCBUs; and \$3,000,000 for body corporates. An offence under section 31 of the WHS Act currently requires that the accused was 'reckless' as to their conduct. Here recklessness means that the risk of death or serious injury was consciously acknowledged by the accused, and that the accused acted despite knowledge of the risk.

The Bill proposes to extend the offence under section 31 to include the mental state of gross negligence which is much easier to prove. Gross negligence merely requires that a reasonable person in the position of the accused would have acknowledged the risk and not the accused specifically.

The addition of the gross negligence standard will thereby substantially reduce the threshold required to establish a category 1 offence. This amendment will make it significantly easier for employers or principal contractors to be prosecuted for the maximum penalty under a category 1 offence in the WHS Act.

2. Prohibition of Insurance or Indemnity

The addition of a new section 272A will prevent employers from obtaining insurance for fines that may be imposed upon them under the WHS Act. In effect this will mean that the burden of fines imposed by the courts cannot be passed onto insurers. Furthermore, the addition of a new section 272B will hold officers of body corporates personally liable if their body corporate is found to have obtained this type of insurance.

What happens if an employer nevertheless obtains this type of insurance? We note that the proposed section 272A prohibits both the obtaining and provision of insurance against WHS fines, so it is unlikely that this type of policy will be offered by insurers. If however this type of insurance is nevertheless obtained, generally the law will render an 'illegal' contract unenforceable (legally useless). Although this area of law is complex, it is highly likely that an insurance or indemnity agreement obtained in breach of section 272A would be unenforceable, and therefore useless.

3. Increased Penalties and Inflation

The Bill substantially increases the penalty for a wide range of offences under the WHS Act. Notably the maximum penalty for a body corporate in relation to a section 31 category 1 offence will increase from \$3 million to \$3.4 million, and new provisions will increase penalties annually based on inflation.

4. Increased Inspector Powers

Existing powers conferred to SafeWork inspectors to enforce the WHS Act will broaden. In particular, inspectors will be provided with greater capacity to order workplaces that disregard safety standards to stop work, interview individuals about issues relating to safety, and demand specific documents be provided. Inspectors will also be able to readily serve documents including requests for documents and information electronically.

Workplace Safety Violations

The need for more effective workplace safety laws has been demonstrated by a recent abundance of avoidable deaths and injuries that have occurred at construction sites in New South Wales.

In April 2019, the tragic death of 18-year-old construction worker Christopher Cassaniti attracted widespread media attention and sparked the review which has led to the current proposed amendments. Mr Cassaniti had recently turned 18 when he was crushed to death by a scaffolding collapse at the construction site in Macquarie Park where he worked. The collapse was especially concerning as it was preceded by investigations by SafeWork NSW that

Contact

Jessica Rippon, Principal Solicitor | ✉ jripton@constructionlegal.com.au
☎ +61 2 8591 9132 • +61 421 877 932 | 🌐 www.constructionlegal.com.au

found numerous cases of dangerous scaffolding used on construction projects. The investigations found that 44% of the scaffolding investigated had missing parts, and 36% had been modified by an unlicensed worker. Despite SafeWork having issued numerous notices regarding unsafe scaffolding practices to construction sites across the state in the lead up to this disaster, it was clearly unable to prevent the catastrophe that led to the death of Mr Cassaniti.

The limited effectiveness of notices and warnings about unsafe work practices has also been illustrated by the death of construction worker Iremar DaSilva in 2019.

In October of 2019 the construction company Sapform Pty Ltd ('Sapform') pleaded guilty to a criminal offence contrary to section 32 of the WHS Act ([2020] NSWDC 86). Sapform was performing formwork services at a site located in Ryde when one of its workers Mr DaSilva fell from level 2 and was fatally impaled on a protruding metal bar on the floor below. Mr DaSilva's fall was a result of what was described by the court as a foreseeable, and glaringly obvious fall risk created by gaps between the deck and scaffold. In fact the risk was so foreseeable that Sapform's principal contractor Truslan Constructions Pty Ltd ('Truslan') was informed by the Construction, Forestry, Mining and Energy Union ('CFMEU') just 11 days before Mr DaSilva's fatal fall, that significant fall risks were present at the site in Ryde. Sapform was fined \$450,000.00 which included a 25% reduction to reflect its guilty plea.

In April of 2020, developer P&K Bezzina Pty Limited ('Bezzina') pleaded guilty to breaching work safety duties under sections 19 and 32 of the WHS Act when a sub-contractor was crushed by a brick wall at a residential development located in Kellyville ([2020] NSWDC 91). According to Justice Russel SC the wall collapse resulted in "very serious injuries including severe traumatic brain injury, multiple facial and cranial injuries, permanent damage to (the victim's) right eye and a transverse fracture of his left radius and ulna." Bezzina was fined \$90,000.00 as a result of this breach.

Proposed Industrial Manslaughter Laws

While the specific changes proposed in the Bill have generally received bi-partisan support, opposing ministers have described the Bill as akin to a half-measure. Notably the Bill has not adopted a new offence of 'industrial manslaughter' that was recommended by former executive director of SafeWork South Australia, Marie Boland. The Labour party has committed to introducing an industrial manslaughter charge under work health and safety laws and claims that the existing WHS Act is insufficient in addressing workplace deaths when compared to legislation in Queensland and Victoria. Industrial manslaughter offences have been introduced in all Australian jurisdictions except New South Wales, South Australia and Tasmania. The severity of punishment for deaths that occur in the workplace under industrial manslaughter laws in other states ('workplace manslaughter' in Victoria) far exceed the penalties available in New South Wales. Under industrial manslaughter legislation in the Australian Capital Territory, Queensland, Western Australia, and Victoria, employers found guilty are liable for up to 20 years imprisonment.

Conclusion

The Bill is currently with the upper house of the New South Wales government for concurrence. If the Bill is passed and enacted, it will significantly toughen the state's existing work health and safety legislation. Employers should take this opportunity to review their existing work health and safety procedures to ensure compliance with the current WHS Act and to prepare for the changes to come once the Bill is enacted.

For information regarding work health and safety procedure in the current Covid-19 pandemic, the team at Construction Legal have provided a useful guide available [here](#). For legal advice on [work health and safety](#) related matters, please [contact us here](#).

Contact

Jessica Rippon, Principal Solicitor | ✉ jripton@constructionlegal.com.au
☎ +61 2 8591 9132 • +61 421 877 932 | 🌐 www.constructionlegal.com.au