

# Industrial manslaughter legalisation in WA is imminent

As the first conviction for gross negligence under the safety legislation is made



**A business owner of a company in Western Australia is expected to serve eight months behind bars for gross negligence following the death of a 25-year-old worker and the serious injury of another. This makes him the first person to be jailed in Western Australia under workplace safety laws.**

**Under the new legislation personal responsibility for officers increases and penalties for contraventions. Is your business ready?**

Following a lengthy reform process the Work Health and Safety Act 2020 will soon become operational in Western Australia. This legislation absorbs the existing Occupational Safety and Health Act 1984 and Mines Safety and Inspection Act 1994. Corresponding regulations will be implemented across work, health and safety, mining and petroleum. The legislation largely adopts the harmonised legislation in place in most states and territories in Australia.

## **Individual liability:**

While this recent case demonstrates personal liability for officers currently exists, this is only applicable if the officer

was found guilty of gross negligence. Under the new laws, an officer must exercise positive due diligence to ensure the organisation meets their safety duties irrespective of whether there is a safety incident. Under due diligence requirements an officer is required to:

- acquire and update their knowledge of health and safety matters
- understand the operations being carried and the hazards and risks associated with the operations
- ensure there are appropriate resources and processes to eliminate or minimise health and safety risks
- ensure there are appropriate processes in place to receive and respond promptly to information regarding incidents, hazards and risks
- ensure that there are processes in place for complying with duties and legal obligations

Due diligence obligations cannot be delegated. While the reliance on information from and activities of others can be appropriate, an officer must be able to demonstrate they have processes in place to verify the credibility of the information relied upon. This can most effectively be performed through an independent third party.

## New enforcement measures:

Under the Act, there are several new enforcement measures available to regulators including industrial manslaughter, enforceable undertakings, restoration orders and adverse publicity orders, in addition to fines and imprisonment.

## Industrial manslaughter:

***Criminal offences with a maximum penalty of 20 years imprisonment, a fine of \$5M for an individual and \$10M for a body corporate***

The new legislation contains criminal offences under industrial manslaughter. To be prosecuted, there must be proof that a person (including a body corporate) engaged in conduct and was in breach of their health and safety duty. There must be knowledge that such conduct was likely to cause the death of an individual, and that the individual engaged in such conduct despite death or serious injury being a likely consequence.

***A simple offence, with a maximum penalty of 10 years' imprisonment and a fine of \$2.5M for an individual, and \$5M for a body corporate***

This offence relates to a failure to comply with a health and safety duty where such a failure caused the death of an individual. The key difference between the industrial manslaughter criminal offence and the industrial manslaughter simple offence, is that with a simple offence there is no requirement to establish that the person engaged in conduct knowing it was likely cause the death of an individual.

## Insurability:

The Act prohibits insurance from covering monetary penalties imposed under the new Work Health and Safety laws. In addition, significant penalties will apply to those insuring or indemnifying against fines under the Act, those who are insured or indemnified against fines under the Act and those paying or accepting indemnity for an offence under the Act. Legal fees (defence costs) can however still be insured/indemnified.

The maximum penalties for contravention of the above provisions are \$55,000 for individuals and \$285,000 for body corporate. However, insurance for defence costs is not prohibited and will remain an important benefit available to insured entities for prosecutions, inquiries and investigations. Any defence costs under an insurance policy will always be subject to a "misconduct clause" under D&O, statutory liability or management liability policies which excludes cover for malicious or fraudulent act including any intentional violation of any law or regulation.

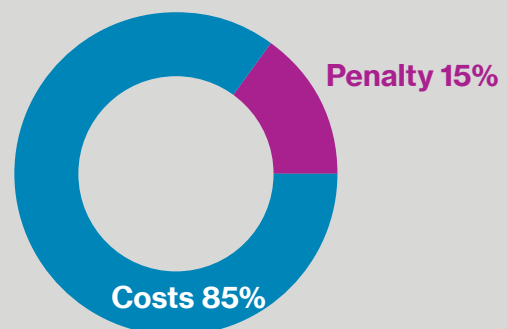
It is also important to remember that statutory liability extends past WHS; businesses are exposed to a seemingly endless number of Acts and regulations that you must comply with.

Australia's leading Statutory Liability insurer Specialised Underwriting Agency (SUA) recently conducted a review of its statutory liability portfolio, and since its inception in 1998, on average only 15% of all claims paid were for penalties; the remaining being either legal costs, enforceable undertaking costs, or prosecution costs – none of which are affected by the revised WHS Act in NSW and WA.

## Snapshot of information

- Review of over 1500 claims.
- Of large claims (over \$200k) analysed, roughly half were for WHS.
- Of the large claims, fewer than 30% received a penalty.
- On average, a penalty is only 15% of the total claim costs across all claims

\*Costs include: legal costs for incident response, investigations/inquiries; production of documents; reputation protection; enforceable undertaking costs; legal costs for prosecution defence; and prosecution costs. Prosecution costs are costs awarded against an Insured by a court, following a successful prosecution by a regulatory authority.



## Definitions:

The broad concept of “person conducting business or undertaking” will replace the definition of employer and the definition worker will be extended beyond the traditional employee/employer relationship. This will now extend to contractors, subcontractors and the employees of contractors and subcontractors. The definition of Health and safety under the new legislation expressly includes both physical and psychological health.

## Penalties

Offence	Maximum penalty individual	Maximum penalty body corporate
Category 1	5 years' imprisonment and a fine of \$680,000	\$3.5 million fine
Category 2	\$350,000 fine	\$1.8 million fine
Category 3	\$120,000 fine	\$570,000 fine

## Solution

### Training:

Do you know who the officers are within your organisation and are they ready? Due diligence obligations under the new Work Health and Safety laws cannot be delegated. Your existing corporate governance structures and processes may not meet the new due diligence requirements. It's time to get your officers on board. Willis Towers Watson can provide training to the officers within your organisation so they understand their new requirements and have effective strategies to demonstrate compliance. Follow up one on one coaching can be provided to embed learnings within your organisation.

### Gap analysis:

A gap analysis can be the first step to ensure you are meeting your new requirements. Our gap analysis aims to systematically and independently examine the current status of Work Health and Safety within an organisation. It also highlights the level of compliance with applicable legislation and identifies opportunities for improvement in your safety strategies and processes. An onsite inspection will also help verify hazards and risks associated with your operations have been identified and are adequately controlled.

Following our review, you will receive a written report identifying any gaps to meet the new legal requirements and recommendations to ensure officers within your organisation are meeting their due diligence requirements. We also help review existing auditing arrangements to understand whether they are adequate to verify, on an ongoing basis, compliance with WHS laws and effectiveness of critical controls.

### Implementation:

Conducting an audit and filing it away won't help you meet your new obligations. Willis Towers Watson can be engaged to help build systematic processes into your Work Health and Safety Management System to ensure there is documented evidence your officers are meeting their new due diligence obligations.

### Require assistance?

If you require our assistance with the new model legislation or any other Work Health & Safety issues, please contact:

#### Anna Klease

Prevention Director

M 0414 057 372

E [anna.klease@willistowerswatson.com](mailto:anna.klease@willistowerswatson.com)

#### Jimmy Garrick

Manager – Workplace Risk WA

D +61 8 9214 7420

M +61 401 135 221

E [jimmy.garrick@willistowerswatson.com](mailto:jimmy.garrick@willistowerswatson.com)

Willis Australia Limited | ABN 90 000 321 237 | AFSL No. 240600  
CKA Risk Solutions Pty Ltd | ABN 33 109 033 123 | AFSL No. 276915

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