Western Australia workplace safety update: December 2021

As 2021 draws to a close, can Western Australian businesses expect the new year to bring long awaited work health and safety law reforms into effect? And what can be learned from the recent setting aside of convictions in *Resource Recovery Solutions Pty Ltd v Ayton* [2021] WASC 443?

Western Australia's reformed work health and safety laws delayed

Businesses in Western Australia (**WA**) have been anticipating the introduction of reformed workplace health and safety laws for a number of years. These reforms will bring into effect laws that are consistent with the Model Work Health and Safety laws that are already operating within all other Australian jurisdictions (except Victoria).

The *Work Health and Safety Act 2020* (WA) (the **WHS Act**) was passed by the WA Parliament in November 2020. The WHS Act and accompanying regulations, when in effect, will consolidate and replace the existing *Occupational Safety and Health Act 1984* (WA) (**OSH Act**), the *Mines Safety and Inspection Act 1994* (WA) and various acts relating to safety in the onshore petroleum sector as well as associated regulations. The WHS Act and accompanying regulations were initially expected to come into effect in the middle of 2021.

On 15 December 2021, the Minister for Industrial Relations stated in parliamentary debates that drafting the regulations for each sector had proved to be a complex and lengthy exercise and subsequently their release had been delayed. Accordingly, it is now expected that the WHS Act and new regulations will come into effect from March 2022.

On 17 December 2021 the draft regulations for the mining and petroleum sectors, as well as the general regulations, were made available to the public (published online) for information purposes. The drafts of the supporting regulations are intended to provide all businesses operating in WA with the opportunity to prepare their workplaces to meet the requirements of the new WHS Act.

We encourage businesses to review and familiarise themselves with the draft regulations that apply to their operations, and commence making changes and improvements to safety practices where necessary. The draft regulations can be accessed here via the Department of Mines, Industry Regulation and Safety.

Supreme Court overturns convictions of gross negligence and failing to comply with an improvement notice

The Supreme Court of Western Australia (**Supreme Court**) has recently set aside convictions in the prosecution of WA company Resources Recovery Solutions Pty Ltd (the **Company**)[1].

The Supreme Court delivered its decision in the appeal on 10 December 2021, setting aside the Company's conviction of the offence of 'gross negligence' under the OSH Act. Instead, the Supreme Court substituted the conviction with a lesser charge of breaching a general safety duty, under section 19A(2) of the OSH Act. Additionally, the Supreme Court also set aside the Company's conviction of failing to comply with an improvement notice issued by an Inspector.

The incident and initial conviction

The Company operates a business that recycles materials from construction sites.

In 2016, a worker of the Company had his right arm amputated at the shoulder when it was dragged into the pinch point of a conveyor belt. The conveyor belt then had to be cut in order to free the worker's arm. It is understood that the worker had been trying to remove a rock from the conveyor whilst it was activated and moving.

In July 2020, the Company was found guilty of gross negligence and was also found guilty of failing to comply with an improvement notice pursuant to the OSH Act. It was subsequently fined A$310,000 in respect of the gross negligence charge, A$20,000 for the failure to comply with an improvement notice and ordered to pay costs of A$234,000.

Appeal of the conviction

The Company appealed the convictions on nine separate grounds, three of which were subsequently upheld by the Supreme Court.

On appeal the Supreme Court found that, in respect of the gross negligence charge, the presiding magistrate had failed to properly confine the evidence relied upon in finding, beyond reasonable doubt, that the Company:

- had actual knowledge of its contravention of the relevant sections of the OSH Act;
- had actual knowledge of the potential consequences, such as serious injury or death; and
- acted in disregard of the likelihood of causing serious harm or death to a worker (such as failing to implement reasonably practicable safety measures).

It was held that a miscarriage of justice had been occasioned in this respect and that a finding of 'actual knowledge' of the Company must relate to the specific contraventions to which the charges relate. In this case, the Company argued that the presiding magistrate had made findings about matters which were outside the scope of the prosecution's particulars.

In respect of the improvement notice, the Supreme Court found that the presiding magistrate erred in finding that the notice was valid. The Supreme Court held that the Inspector had not properly complied with the requirement in section 48(2) of the OSH Act to state their reasonable grounds for forming the opinion that the Company was contravening a provision of the OSH Act. Presiding Justice Smith stated:

> "The statement made by the inspector in the notice that it would be practicable to install adequate guarding of the items of plant referred to in the notice is a bare assertion by the inspector that he had formed an opinion about practicability, but the grounds for that opinion are not revealed".

Relevantly, Smith J also considered that 'substantial' compliance with the requirement to state reasonable grounds in an improvement notice is not sufficient for a notice to be valid and that the obligation to state the reasonable grounds for opinion is mandatory.

1 *Resource Recovery Solutions Pty Ltd v Ayton* [2021] WASC 443 (10 December 2021)

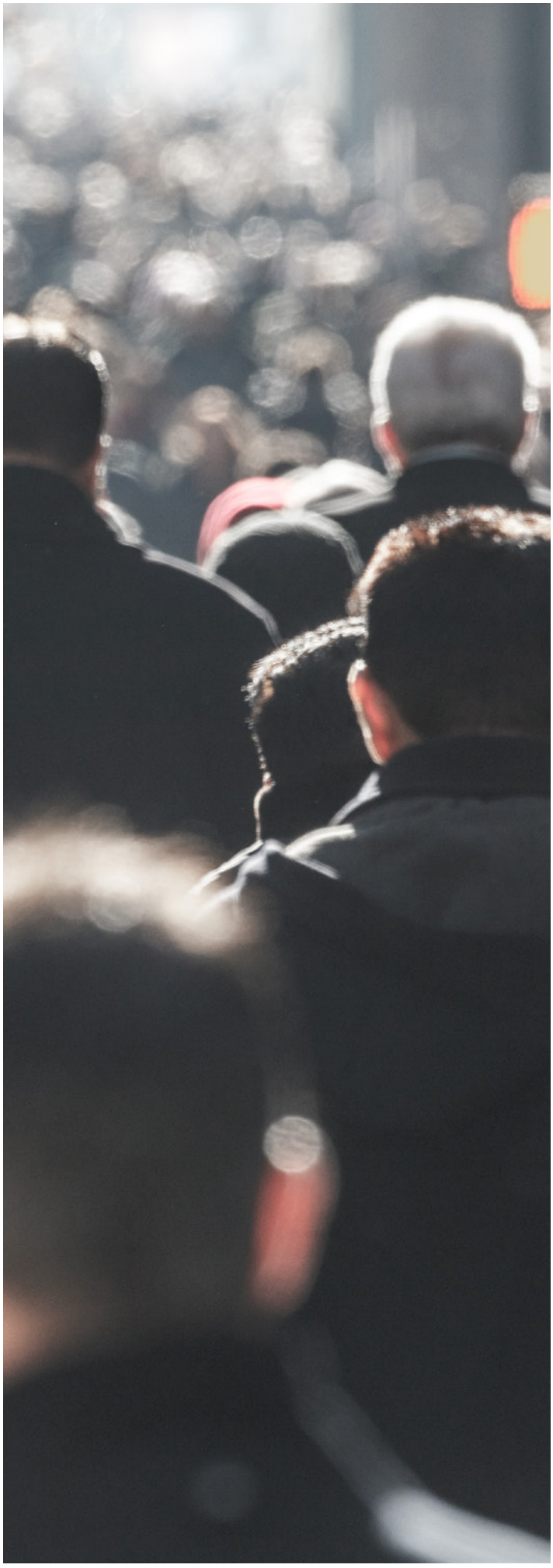
Key takeaways

The outcome of this appeal highlights several points to consider. Firstly, that an inspector must properly comply with all requirements when issuing an improvement notice, as a company should not be convicted of failing to comply with an improvement notice if that notice is not correctly expressed and / or does not satisfy each requirement under the legislative provisions.

When an improvement notice is issued, an organisation should not be afraid to seek clarification about, or challenge, the notice where there is a basis to do so. Any improvement notice may be relied on against a business, in investigations or prosecutions that may arise at a later time.

Improvement notices have proven to be a significant part of the enforcement regime in other jurisdictions where the Model Work Health and Safety Laws have been in effect for many years. The relevant provisions that allow an inspector to issue an improvement notice under the WHS Act are similar, but not identical, to the provisions under the OSH Act. Importantly, under the WHS Act, an inspector must be satisfied of various matters and the notice must properly state these details. These matters may provide a basis to challenge such notices once the WHS Act is operational.

Secondly the gross negligence decision, whilst in favour of the Company in this instance, provides a timely reminder to all WA businesses that a focus on compliance with Work Health and Safety laws should be paramount and that the Regulator will use the criminal penalty provisions to the full extent allowed. The new WHS Act is only several months away from commencement and includes the introduction of 'Industrial Manslaughter' and various other significant penalties. Accordingly all businesses should ensure they inform themselves of, and fully understand, their obligations.



CORRS
CHAMBERS
WESTGARTH

Authors

Nicholas Ellery

Partner

+61 8 9460 1615
+61 417 505 613
nicholas.ellery@corrs.com.au

Ashleigh Walsh

Associate

+61 8 9460 1681
ashleigh.walsh@corrs.com.au

Sydney
Melbourne
Brisbane
Perth
Port Moresby

corrs.com.au

WEB0029