

CREATING A STRONG HEALTH AND SAFETY CULTURE



Neil Foster's research into Work Health and Safety has been cited in a Commonwealth Parliament Senate Committee Report leading to an amendment to legislation protecting Australian workers.

More than 140 Australians die and 110,000 are injured every year in workplace accidents. Not only are these losses devastating for victims' loved ones, the economic costs of workplace injury and accidents are believed to be in the vicinity of \$60 billion annually.

Research has shown that one of the key drivers to improve the safety in company workplaces is the attention paid to the matter by senior management. Another more concerning issue is the purchasing of insurance against workplace criminal penalties by companies, which minimises the impact on personal liability and organisational adherence to workplace safety compliance.

The problem

Criminal penalties imposed on companies for workplace injuries, as a result of failed systems and precautions that should have been put in place by management, can sometimes be treated as a 'cost of doing business.' There is a problem with companies purchasing insurance against workplace criminal penalties, despite this technically being illegal (as it is contrary to public policy to allow someone to contract out of a penalty for criminal activity).

The problem is, that the people most seriously affected by these void insurance contracts (injured workers affected by slack safety policies, and their families) are not parties to the contract and have no say in whether they are entered into or enforced. In 2018, the Commonwealth Parliament's Senate Education and Employment References Committee handed down *They never came home – the*



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framework surrounding the prevention investigation and prosecution of industrial deaths in Australia Report, which provided important context to policy and legislation reform discussion. Associate Professor Neil Foster provided a written submission to the Inquiry as well as giving expert evidence and was cited extensively in the inquiries final Report. The Committee recommended consistently with Neil Foster's submissions.

Foster's research into personal liability identified a significant barrier to ensuring that company officers faced serious personal consequences for safety breaches – the fact that many companies purchase insurance against workplace criminal penalties imposed on their managers.

Foster's research supported the Committee's recommendation that Safe Work Australia work with Commonwealth and Territory governments to:

- Amend the model of WHS laws to make it unlawful to insure against a fine, investigation costs or defence costs where they apply to an alleged breach of WHS legislation
- Pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS law process.

There was a major, separate, review of the operation of the workplace safety laws conducted by Marie Boland. The Boland Review cites the previously delivered Senate Report, citing the Senate Committee's conclusion. The conclusion supported Neil Foster's submissions, and recommended urgent reform to the Work Health Safety legislation to make it clear that insurance against criminal penalties are unenforceable and illegal. The Commonwealth Government response to the Senate Report supported the recommendations in principle.

Research impact

In November 2019, the NSW government introduced the *Work Health Safety Amendment (Review) Bill* into the legislative assembly for the purpose of implementing the recommendations of the Senate Inquiry and the Boland Report. The amending legislation passed in NSW Parliament and came into operation as the *Work Health and*

Milestones

2004: The Personal Liability of Company Officers for Company Breach of Workplace Health and Safety Duties (February 2004). Thesis accepted for award of degree of Masters of Laws at the University of Newcastle.

2012: Journal Article titled 'You Can't Do That! Directors Insuring Against Criminal WHS Penalties' published by the Insurance Law Journal.

2018: Cited in the Commonwealth Parliament's Senate Education & Employment References Committee "*They Never Came Home the Framework Surrounding the Prevention, Investigation & Prosecution of Industrial Deaths in Australia.*" Recommendation 21, 5.108 – 5.111.

2019: The NSW Government Introduced the WHS Amendment (Review) Bill into the legislative assembly.

2020: The Amending legislation passed the NSW Parliament & came into operation as the WHS Amendment (Review) Act 2020 & commenced operation on June 10, 2020.

2021: Appointed Member of Editorial Executive for Wolters Kluwer Journal of Health, Safety and Environment.

Safety Amendment (Review) Act 2020 and commenced operation on 10 June 2020.

Associate Professor Neil Foster of the University of Newcastle Law School aimed to influence policy through legal analysis and recommendations for Parliamentary change. Foster's Master of Laws research and publication of the 2012 paper 'You Can't Do That! Directors Insuring against Criminal WHS Penalties' in the Insurance Law Journal demonstrated a need for policy change and provided a basis for submission to the Inquiry.

Associate Professor Neil Foster's research has contributed to the development of policy, which has benefit for the general health and safety of workplace culture through a change in professional standards and behaviour. It is now a criminal offence for a company to provide insurance or an indemnity payment against criminal penalties under the Act, under sections 272A and 272B.

To learn more about this research program:

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