



WA'S FIRST IMPRISONMENT FOR WORKPLACE DEATH

May 2021 heralded the first time that a director of a company has been sentenced to a term of imprisonment under Western Australian existing safety and health laws.

On 26 May 2021 the Esperance Magistrates Court sentenced a Western Australian Director to a term of imprisonment of 2 years and 2 months for the death of a young worker and the serious injury of another worker.

*The decision of the Esperance Magistrate should act as a powerful reminder to all levels of management within a business to be familiar with the operational risks of the business, especially considering the impending Work Health and Safety Act 2020 (WA) (**WHS Act**) which significantly widens the net for who within an organisation must comply with the express obligations in respect of safety.*

What Happened?

Mark Thomas Withers owned and operated MT Sheds, a small, shed building company in Esperance. In March 2020 Jake Williams and Fraser Pinchin, employees of MT Sheds were installing roof sheets on a large machinery shed, with no safety control measures in place. Mr Williams was working at a height of approximately 9 metres on the apex of the roof and Mr Pinchin was working at a height of about 7 metres on the roof's edge near the gutter line. Neither worker held a High-Risk Work Licence for the work they were performing and neither wore a safety harness. Further, Mr Williams did not hold a Construction Induction Training Certificate (white card).

A strong gust of wind lifted a roof sheet, causing both workers to fall, with Mr Williams suffering fatal injuries and Mr Pinchin suffering multiple fractures of the pelvis, hip, wrists and ribs.

Notably, the risk of strong winds in Esperance was a known risk and the Director, Mr Withers, admitted to being aware of the risks.

MT Sheds and its sole Director pleaded guilty to 7 separate charges, including charges in relation to the death of Mr Williams and the serious injuries to Mr Pinchin. Both MT Sheds and Mr Withers pleading guilty to gross negligence. Mr Withers conceded that MT Sheds' gross negligence occurred with his consent or was attributable to his neglect.



Notwithstanding Mr Withers' early guilty plea, coupled with his expression of contrition and acceptance of responsibility, the Esperance Magistrate considered culpability to be of the highest degree with the failings of the Company and its Director to be of the most egregious sort.

What was the Decision of the Esperance Magistrate?

MT Sheds was fined \$550,000 for the gross negligence offence and a further \$55,000 for the additional breaches of the *OSH Act (WA)* 1984 and its subsidiary legislation. This penalty imposed under the labour government's increased work health and safety penalties (which were introduced in October 2018) is the highest fine yet imposed in Western Australia.

Mr Withers was fined \$2,250 and sentenced to a term of imprisonment of 2 years and 2 months*, the first custodial sentence for a safety prosecution in Western Australian history.

The term of imprisonment is also the longest term of imprisonment ever imposed for a work health and safety offence in Australia. The decision evidences that Courts are increasingly responding to community and stakeholder expectations that offenders will face a custodial sentence where death or serious injury results from them allowing business to proceed in absence of appropriate safety measures.

Considerations for Employers

As stated by the WorkSafe WA Commission, Darren Kavanagh the decision of the Esperance Magistrate should be a "moment of awakening" for employers who do not prioritise health and safety.

The decision clarifies any misconception that the industrial manslaughter offence under the new work health and safety laws (soon to come into effect in Western Australia) is in any way a *new* concept for WA; there has *always* been the possibility of a custodial sentence for a serious breach of health and safety laws.

The decision is also demonstrative of the fact that Courts are more willing to impose penalties for safety contraventions that are reflective of the McGowan Government's new, higher, penalty regime.

And perhaps the decision also speaks to the determination of future safety regulators in pursuing the maximum penalties for a breach of the new industrial manslaughter provisions under the WHS Act? Under the WHS Act a conviction of an industrial manslaughter offence may result in individuals being liable for a **maximum fine of \$5 million** and or sentenced to a **maximum term of imprisonment of 20 years**. Corporations may be liable for a **maximum fine of \$10 million**.

At the very least, the decision should act as a powerful incentive for all officers and persons conducting businesses and undertakings, especially in light of the impending WHS Act, to be aware of their duties and obligations, ensure familiarity with the operational risks of their business, review systems and processes to properly manage critical risks and ensure that those systems are effective.

We recommend that all employers and officers move to ensure that they understand and are ready to meet their obligations when the WHS Act is finally introduced.

*Mr Withers is to serve eight months of the sentence immediately, with the remaining 18 months to be suspended for a period of 12 months.



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