



# SISA Update February 2021

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**Lawson**  
creating better workplaces

 **SISA**  
Self Insurers of South Australia

# COVID-19 measures



- Please ensure that you:
  - Have scanned the QR code; or have
  - Fully completed the COVID-19 register
  - Maintain 1.5m social distancing
  - Do not share utensils or consumables
  - Comply with the advice of the COVID-19 marshals
  - Use the hand sanitiser and wipes provided
  - Seek testing if you develop symptoms

# WEF report on COVID-19 mental health impact

## Ipsos survey:

- Covered 13,000 workers in 28 countries including Australia
- More than half of working adults experienced anxiety relating to their job security and stress due to changes in their working patterns
- 32% worked longer hours, 32% worked shorter hours, 30% took leave and 15% left their job
- Most countries showed more than 40% of home workers feeling isolated (45% in Australia)

# WEF report on COVID-19 mental health impact

- 46% reported reduced productivity
- People under 35, business owners, decision-makers, lower-income workers and women more likely to report negative effects
- Low-income workers and those under the age of 35 more likely to experience high levels of disruption
- COVID-19 is likely to leave a legacy of mental health problems
- The right interventions and investments can flatten the curve
- Employment programs (JobKeeper) were found to be the single most effective strategy for mitigating the adverse mental health impacts

## *Glover v Ozcare* 2021 FWC 231 - Queensland case

- Question - whether the employer's decision to make a flu vaccination an inherent requirement of the job is lawful and reasonable having regard to the worker's role
- Worker was Care Assistant, visiting private homes and providing care. Did not work in residential aged care
- The worker refused the job; employer placed her on paid leave
- Worker declined flu vaccination claiming she suffered anaphylaxis after receiving a vaccine 57 years prior
- Worker asserted she could work safely with clients by using PPE and taking other safety precautions

## *Glover v Ozcare* 2021 FWC 231

- Leave expired and worker claimed unfair dismissal
- Employer said it had not dismissed the worker - she could return to work if she received a vaccination
- Employer declined to commit to make a decision on whether or not to dismiss the worker
- Found to be unacceptable – worker could be held in limbo indefinitely
- Commissioner concluded worker had been dismissed, listed the unfair dismissal claim for determination

## Issues arising from *Glover v Ozcare*

- What course would such a case take in SA if vaccination is mandated by a direction under the Emergency Management Act? (Glover is a Qld case)
- The *SA Emergency Management (Residential Aged Care Facilities No 22)(COVID-19) Direction 2021* contains such a mandate – clause 5(1)(c)
- Unfair dismissal is a matter of Federal law. Does it override State mandates?
- The same issues will arise when COVID-19 vaccines are available and mandated by employers
- Are employers' mandates of vaccination less sustainable outside critical care environments?

## FWC Assoc Commissioner Hunt in *Glover v Ozcare*

At paragraph 126:

“In my view, each circumstance of the person’s role is important to consider, and the workplace in which they work in determining whether an employer’s decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction. Refusal of such may result in termination of employment, regardless of the employee’s reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector”.



## Mandating vaccines – OHS Alert 1/2/21

- Article by Erica Hartley, HWL Ebsworth Lawyers – ‘...whether vaccinations can be mandated in specific workplaces will require the same "reasonable and necessary" test as other workplace safety requirements’
- ‘...roles where this may be considered are likely to be ones where there is...close physical contact with customers...’
- ‘Employers will need to consider any objection by an employee on a case-by-case basis’
- Where objections have a reasonable basis, it will not be enough to say that vaccination will improve safety: it must be necessary with no other way to address the risk. This is a high bar for employers to meet...

# Updates to the WHS regulations

As of 1/1/21, the following updates were made:

- Requirement for continuous air monitoring during Class A and Class B asbestos removals
- To give effect to the 2-year transition to GHS7 and update references to the GHS
- Lasers and pressure equipment – references to AS 2397, AS 1200 and AS 4343 updated to current versions
- Diving work - update references to Australian Standards, omit a withdrawn Standard, improve clarity & correct minor errors

## From Safe Work Australia

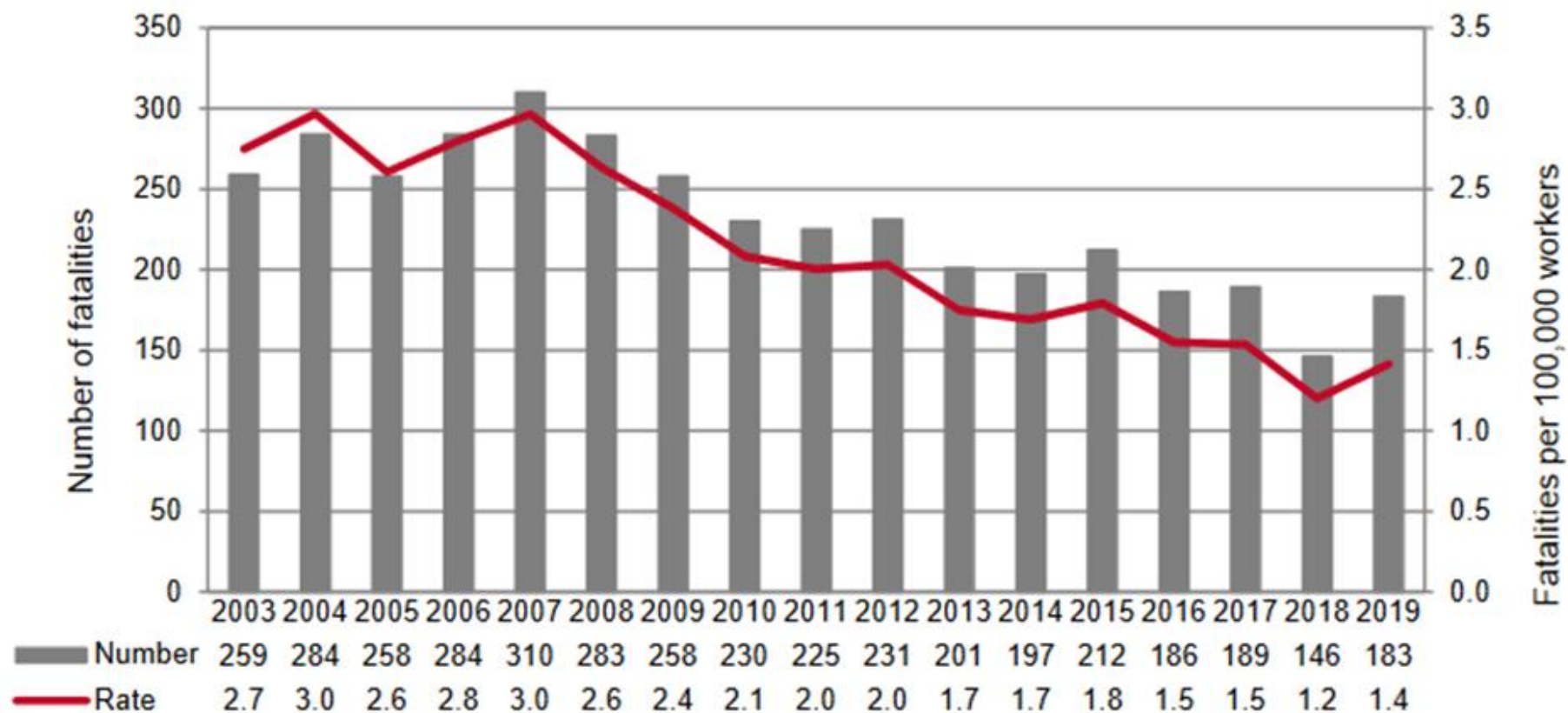
- January 2021 - published new guidance for inspecting and maintaining elevating work platforms
- January 2021 – published the 2018-19 workers compensation statistics
- December 2020 - published a table comparing the model WHS Act and the WHS Acts adopted by the jurisdictions
- January 2021 – published the Federal Government’s COVID-19 vaccine roll-out strategy

# National workers compensation statistics 2018-19

- 114,435 claims
- Highest rate of serious claims by occupation - labourers, community & personal service workers, machinery operators and drivers
- Highest rate of serious claims by industry - agriculture, forestry & fishing, manufacturing, transport, postal & warehousing
- Rate of serious claims per million hours worked decreased by 26% from 2008-09 to 2017-18
- Median time lost for a serious claim increased by 24% from 2008-09 to 2017-18

# National workers compensation statistics 2018-19

Figure 1: Worker fatalities: number of fatalities and fatality rate, 2003 to 2019



## Recent SAET cases

- *Formosa v RTWSA* [2020] SAET 257 – denial of liability for cost of knee replacement upheld
- *Stratton v Department for Education* [2021] SAET 5 – worker assessed as 27% WPI under GEPIC. Assessment held to lack sufficient detail to satisfy WPI requirements. Referred to IMA.
- *Cooke v RTWSA* [2020] SAET 243 – application for future surgical costs approved

## Recent SAET cases

- *WorkCover Corporation of South Australia (?) v Gregor* [2020] SAET 247 – CRPS caused by compensable shoulder injury held to be separate injury – question of incapacity remains open
- *Oakley (RTWSA) v Mumford* [2020] SAET 248 – worker convicted of misrepresenting incapacity. Ordered to pay \$18,500 costs plus Victims of Crime levy and court costs; 2-year good behaviour bond

## Recent SAET cases

- *Power v RTWSA* [2020] SAET 252 – injuries from fall at work-related awards night held to be not compensable by the Full Bench
- *Lane v RTWSA* [2020] SAET 253 – worker suffers from cystic fibrosis. Compensable fracture of foot. Period of inactivity due to fracture held to have aggravated the CF and brought forward the need for lung transplant. Transplant costs compensable as there is no significance test in s.33. Worker resigned while totally incapacitated – held to not be a breach of mutuality



## Recent SAET cases

- *Hallam v RTWSA* [2021] SAET 1 – compensable right knee injury. Left knee replacement required due to exacerbation of arthritis caused by altered gait. Held to be compensable
- *Thelan v Utilities Management Pty Ltd* [2021] SAET 6 – worker injured while preparing to leave home on call-out while on a standby shift. Held to be compensable

## Recent SAET cases

- *Martyn Campbell v Lightforce Asset Pty Ltd trading as Erections (WA) and Civil and Allied Technical Construction Pty Ltd* [2021] SAET 9
- Worker part of wet lease of pile driver at the Bungala Solar Project at Port Augusta
- Pile driver was legally modified to drive longer piles but piles provided were still too long
- Worker & offsider made on-site modifications that caused the hammer to jam at the top of its travel
- Worker was killed while freeing the hammer
- First defendant fined \$500,000 before discount of 40%; second defendant fined \$750,000 before discount of 40%; no order for compensation

## Recent SAET cases

- *Pryor v RTWSA* [2021] SAET 8 – held that impairment from shoulder injury from the use of crutches should be combined
- *Smith v Central Adelaide Local Health Network* [2021] SAET 7 – worker assessed by IMA but then did not consent to the assessment being used – appeal dismissed
- *Farncombe v RTWSA* [2011] SAET 11 – held that hypertension was a result of pain & stress of compensable back injury
- *Perre v Department for Education* [2021] SAET 16 – application to set aside consent orders refused
- *Ibrahim v Department for Education* [2021] SAET 15 – application for suitable employment under s.18 refused as worker no longer incapacitated

## Recent decision by SASCFC

- *Dallimore v Return to Work Corporation of South Australia* [2020] SASCFC 115
- Deals with the correct method of rating WPI for pulmonary hypertension
- Identified an error in class 3 of table 4-6 of AMA Guides - should refer to 'moderate pulmonary hypertension (PAP 51-75 mm Hg)'
- SAET Full Bench decision set aside
- Original trial Judge's assessment of 29% WPI stands

## Recent decision by SASCFC

- *RTWSA v Moore-McQuillan* [2020] SASCFC 119
- Serial litigant since 1990 with extreme antagonism towards WorkCover/RTWSA and propensity for violence and obscene language towards the Bench – labelled by the SASC as vexatious in 2016; ordered to not initiate proceedings without permission
- RTWSA appealed a Full Bench decision upholding appeals on a range of claims
- FC held that the respondent was unable to demonstrate any causal link between his claimed psychiatric injuries and employment
- FC held that the Full Bench reached its conclusion on the basis of bare allegations made by the respondent without properly considering the structure of the Judge's reasons, the evidence that was before the trial Judge and the claims actually pursued by the respondent at trial

# Legislation

- *Work Health & Safety (Industrial Manslaughter) Amendment Bill 2020* - still in 2nd reading in Upper House
- *Automated External Defibrillators (Public Access) Bill 2020* – passed Upper House, will be defeated in Lower House
- *Return to Work (Post Traumatic Stress Disorder) Amendment Bill 2020* - still in 2nd reading in Upper House Return to Work
- *Return to Work (COVID-19) Amendment Bill 2020* – Greens Bill, still in 2nd reading in Upper House
- *Return to Work (COVID-19 Injury) Amendment Bill 2020* – Labor Bill – passed Upper House, still in 2nd reading in Lower House, will be defeated in Lower House

## Other news

- Royal District Nursing Service ceased to be a deemed Crown entity under the RTW Regulations on 27<sup>th</sup> January 2021
- Now a private sector SI as Silver Chain Group Ltd

# Questions?

