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# WHEN THE WORST HAPPENS

**PREVENTING AND DEALING  
WITH HVAC&R WORKPLACE TRAGEDIES.**

# WHEN THE WORST HAPPENS



Don't play with fire. If you're an employee, you will rely on your employer to provide you with a safe place to work.

No one ever wants to think about it happening to us, but burying your head in the sand pretending that workplace deaths do not occur is not the answer. **Sean McGowan** reports on the processes you should have in place to keep you and your employees safe, and what to expect should the worst happen.

It's a morbid topic and one we'd rather not read about. But, the fact of the matter is that workplace accidents and deaths do happen – probably far more often than you realise.

As of the end of May, 63 Australians had sadly died at work this year, according to Safe Work Australia.

Without wanting to get into a breakdown of the industries involved (check it out for yourself at [www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)), seven of those deaths have been recorded in the construction industry.

So yes, it does happen.

If you're an employee, you will rely on your employer to provide a safe place to work.

And while that's an obvious prerequisite for any employer, the challenge of achieving this might surprise.

## STARTS WITH THE CONTRACT

"When you own a business, everyone is eager to tell you what is important, and it's easy to be overwhelmed," says Melissa Kirby, lawyer and strategist to smart industrial business with Melbourne law firm Sharpe & Abel.

"And to be frank, it's easy to think that somehow you've gone into business to simply meet all your legal and regulatory obligations!"

Kirby's words will no doubt resonate with small business owners, and those intimately involved with keeping small business in business.

But beyond the overwhelming feeling of drowning in paperwork, the reality is that ensuring safety in the workplace is one of the few directors' duties that you are personally liable for and are unlikely to get insurance for as a business owner.

So the bottom line is that workplace safety means your personal assets are on the line – including your home.

Beyond the material, no one wants to be the boss responsible for a workplace death or injury under their watch.

For contractor companies like most in the HVAC&R industry, the real challenge in achieving a safe workplace is in defining what the workplace is.

"The workplace can be an office, a greenfield site, a brownfield site, and everything in between," says Kirby.

"Most of the companies that work in HVAC&R do not have a lot of influence over the design and set up of these workplaces. So it can be very difficult to ensure that a workplace is appropriate for installation, maintenance or remediation work."

Kirby says there are a few things that contractor companies can do to themselves, their employees and subcontractors, and their business. The first step is the contract.

"A well-negotiated contract with risks appropriately apportioned to the right party can not only allow business owners to keep their workers safe, but also keep their businesses solvent and profitable," she says.

"Not taking on unnecessary risks can save quite a bit of money in our experience."

According to Kirby, if you have a big job such as government contract, you may want to negotiate a seat at the design table into your contract.

"However, this does mean you will need to devote significant resources, as meetings are generally once a month at least so it isn't feasible for all contracts."

Another thing that contractors should ensure is that the contract allows for them to delay or terminate without damages being imposed, should the site not comply with the Work Health & Safety (WHS) Act and codes such as the Safe Design of Structures Code.

"In many contracts, there will be a clause that states that you've made your own inquiries and that you take the site 'as is,'" says Kirby. "For contracting businesses in building services, we always recommend negotiating a modification to this obligation."

For building services companies like those in HVAC&R, the site may have changed significantly between the time the contract was signed, and when the work actually commences.

"You want to be able to have some recourse – like an extension of time, a variation or the right to suspend or even terminate – if the site is not safe for your workers."

## WORK HEALTH AND SAFETY

A full list of state and territory WHS regulators can be found on the Safe Work Australia website [www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)

These include state regulators you will no doubt be familiar with, such as Safe Work NSW, WorkSafe Victoria, Workplace Health and Safety Queensland, and SafeWork SA.

There are also other less well-known regulators that have jurisdiction over other areas, such as Mine Safety in New South Wales and the Department of Mines and Petroleum in Western Australia.

## BUSINESS RISK ASSESSMENT

For some HVAC&R businesses, particularly smaller ones with fewer resources available to them, a business risk assessment is a valuable tool. It can help you avoid the unthinkable – a death in the workplace.

“A business risk assessment is a tool that we structured using AS/NZ ISO 31000:2009 Risk Management as guidance and taking into account the fact that the communities that we serve are all highly technical and complex,” says Sharpe & Abel lawyer Melissa Kirby.

She says it was put together because companies need to prioritise their resources.

The business risk assessment allows a business to look at its compliance obligations strategically and spend money on the areas that present the most risk.

“It essentially takes an order-of-magnitude approach. This does not mean that you don’t have to comply with law – it simply means that a business can spend money on the areas that matter most.”

For more information, go to – [www.sharpeandabel.com](http://www.sharpeandabel.com)

## AFTER DEATH

Should you be in the unfortunate situation of having an employee or subcontractor die in your workplace, there are a few things that a business owner needs to do.

Your first point of contact should be the state or territory’s work health and safety regulator (see sidebar). Usually, the regulator will provide you with support and guidance when such an incident occurs.

As the scene of the death may need to be examined, you should also make sure that the site is not disturbed. This may mean a disruption to business.

Business owners in most jurisdictions will also have a duty to report the death to their insurer.

“All Australian jurisdictions have mandatory workers compensation insurance, and the insurers must be informed, usually within 48 hours,” says Kirby.

Business owners will also find it useful to contact a lawyer to guide them through the process, and protect their rights.

In most circumstances, what will follow after a workplace death is a coronial enquiry carried out by the jurisdictional courts, which will investigate the death. These usually take many months to complete. A business owner may need to give evidence in the coronial inquiry.

“It’s important for HVAC&R business owners to understand that each jurisdiction is different and that the circumstances of each death will be different too,” says Kirby.

“In an ideal situation, if your business is well-managed you should never have to learn firsthand what the legal process is in the event of a workplace death – and that’s the best outcome.”

## ORGANISATIONAL RESILIENCE

What most businesses will not realise is just how many resources a death or even an injury in the workplace will cost.

The impacts are not just monetary – there is also the time involved, the impact on staff morale, and the businesses reputation. And of course, for the business owner, their own emotional energy is impacted.

According to Kirby, it’s always difficult to make good decisions when stressed and in an unfamiliar situation – no matter the size of the business or organisation.

“Smaller HVAC&R businesses are likely to find it more difficult as the owner wears a number of hats. Diverting attention to dealing with a death in the workplace will inevitably detract from business as usual and bringing in more work,” she says.

For this reason, Kirby says it’s important to build organisational resilience into a business.

“It is possible to train an organisation how to work through these kinds of disasters and survive,” she says.

Emergency management experts, who conduct simulations of emergency situations in businesses such as workplace death or injury, can be helpful in building organisational resilience.

Think of it in the same way you do a fire drill.

“While you cannot always control the workplaces that your workers work in, you can put processes, procedures and training in place to prevent accidents and deaths from happening,” says Kirby.

“You cannot rely on the worksite keeping your workers safe – it is your responsibility. And, the cost of doing this will be far less than dealing with a death on your watch.” ■

Of course, this requires good site due diligence to be done before a contract is signed and before starting on a job.

After all, just negotiating it into a contract doesn’t necessarily make a site safe.

## SAFETY IN DESIGN

The HVAC&R industry is full of codes – some mandatory, many voluntary.

The Safe Design of Structures Code of Practice and all other codes that have been approved under the Work Health & Safety Act 2011 (WHS Act) are not law, and therefore voluntary.

However, in workplace health and safety, they are relied upon by the court for two things.

The first is to inform the court about what is known about a particular risk or hazard.

The second allows the court to see what is “reasonably practicable in the circumstances.”

“Under the WHS Act, a person conducting a business or undertaking (PCBU) has a duty to do what is reasonably practicable to ensure the health and safety of workers,” says Kirby.

“If there is a code about those circumstances – like the Safe Design of Structures Code of Practice – then the court can look at that to figure out what is ‘reasonably practicable.’”

If there’s one code you should follow, it’s this one.

## A TRAGEDY IN THE WORKPLACE

### Safe Work New South Wales v Austral Hydroponics Pty Ltd[2015] NSWDC 295

Mr Lam was a refugee from Cambodia, who as a child had been imprisoned by the Khmer Rouge and sent to a forced labour camp.

After coming to Australia in 1983, he started an industrial sewing business before later starting a hydroponics business called Austral Hydroponics with the help of his friend Mr Nuon.

One day in 2013, Mr Lam asked Mr Nuon to remove some plastic sheeting from a hothouse. Unfortunately, Mr Nuon slipped and fell, resulting in injuries that caused him to lose the use of all four limbs and his torso. Mr Nuon later died from repeated pneumonia and complications as a result of his tetraplegia.

Mr Lam was left a broken man with post-traumatic stress disorder (PTSD), psychological problems, and the guilt of being responsible for the death of his friend.

Safe Work NSW brought both a civil and a criminal prosecution against Mr Lam and Austral Hydroponics. As part of its case, Safe Work pointed out that Safe Work Australia had published the Managing the Risk of Falls at Workplaces

Code of Practice (Falling Risk Code) in 2011 – two years before this accident.

### The Falling Risk Code specified that:

- risk assessments had to be conducted,
- a PCBU should provide training in respect to tasks where there is a risk of falling,
- fall prevention or arrest devices were to be used where reasonably practicable,
- where possible, such tasks are carried out on a solid construction.

Since none of these steps had been taken, the court held that this was good evidence that Mr Lam had failed to do “what is reasonably practicable under the Act.”

Sadly, Mr Lam lost his business, had a criminal record and lost his friend too.

So although a code of practice is not law, complying with the codes will help you meet your obligations under the WHS Act.

“Like health, prevention is always better than the cure,” says Melissa Kirby, lawyer and strategist to smart industrial business with Melbourne law firm Sharpe & Abel.