

Dealing with Critical WH&S Incidents



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Overview of WHS Regime in SA

- The *Work Health and Safety Act 2012* was adopted by South Australia as part of the national harmonised WH&S scheme and took effect on 1 January 2013, replacing the previous *Occupational Health, Safety and Welfare Act 1986*
- A stronger national approach means greater certainty for businesses (particularly those operating across state borders) and over time reduce compliance costs for businesses
- The *Work Health Safety Regulations 2012* specify the way in which some duties under the Act must be met and prescribes procedural or administrative requirements to support the Act

Section 19(1) Primary duty of care

- A person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable, the health and safety of:
 - > workers engaged, or caused to be engaged, by the person; and
 - > workers whose activities in carrying out work are influenced or directed by the person;
- while the workers are at work in the business or undertaking.

Section 18 Reasonably practicable

- ❖ ***‘reasonably practicable’***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:
 - > The likelihood/probability of the hazard or the risk concerned occurring; and
 - > The degree of harm that might result from the hazard or the risk; and
 - > What the person concerned knows, or ought reasonably to know, about the hazard or the risk, and ways of eliminating or minimising the risk; and
 - > The availability and suitability of ways to eliminate or minimise the risk; and
 - > the cost associated with available ways of eliminating or minimising the risk, including whether cost is grossly disproportionate to the risk

Section 27 Duty of officers

- If a PCBU has a duty or obligation under the Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation
- This duty is a positive one which requires the officer to be proactive in taking steps to ensure compliance by the PCBU.
- The Act describes what due diligence should be exercised by an officer to ensure the PCBU complies with its WHS obligations and duties.

Duty of officers

- An officer is not just a director or a secretary, it can be a person who makes, or participates in making, decisions that affect the whole or a substantial part of the organisation's activities – section 9 *Corporations Act 2001*
- An officer may be charged with an offence under the Act whether or not the PCBU has been convicted or found guilty of an offence under the Act.

Section 28 Duties of Workers

- While at work, a worker must:
 - > Take reasonable care for his or her own health and safety; and
 - > Take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
 - > Comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the WHS Act
 - > Cooperate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to the workers

Duties

- A person may have more than one duty
 - > Example, a person may have a duty as an officer and a worker
- More than one person may have the same duty
 - > Each person retains responsibility and must discharge their duty to the extent to which the person has the capacity to influence and control the matter
- A duty cannot be transferred to another person
- You cannot contract out of a duty

Categories of offences

Category	
Category 1	A duty holder, without reasonable excuse, engaged in conduct that <u>recklessly</u> exposes a person to a risk of death or serious injury or illness
Category 2	A duty holder fails to comply with a health and safety duty that exposes a person to risk of death or serious injury or illness
Category 3	A duty holder fails to comply with a health and safety duty

Penalties

Type	Information		
	Corporation	Individual as PCBU or officer	Individual as worker or other
Category 1	\$3 million	\$600,000, five years in gaol or both	\$300,000, five years in gaol or both
Category 2	\$1.5 million	\$300,000	\$150,000
Category 3	\$500,000	\$100,000	\$50,000

In some jurisdictions (including NSW and Qld) criminal proceedings arising from WHS events are being moved from the Industrial Courts to the mainstream court system, where prison terms are handed down on a daily basis.

Case Study: Death of an employee at a bus depot



Case Study: Death of an employee at a bus depot

- Incident occurred in March 2011 when an employee caught between a saloon door and the body of a coach (under previous legislation in Queensland)
 - > Excessive force and fast closing speed
 - > GM/OHS officer, Sole Director and Company charged
 - > Agreed statement of facts, no conviction recorded and a fine of \$100,000 for first offence
 - > If under current legislation, the penalty for the Company could have been a max of \$1.5 million.

Bus is a workplace

- Section 8 of the Work Health and Safety Act 2011 (Qld) – exactly the same in SA
 - > A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work
 - > In this section, place includes –
 - A vehicle, vessel, aircraft or other mobile structure; and
 - Any waters and any installation on land, on the bed of any waters or floating on any waters

Immediate Response

- Do you have an incident management plan?
- First priority is helping those injured and preventing further immediate injuries
- Make notifications to emergency services and comply with their instructions
- Lock down the site
 - > Do not let anyone interfere with the scene until have the consent of SafeWork and the police
 - > Important to leave the area secure
 - > The bus was seized by WHSQ and the police (wasn't used for significant time)
 - > How much of the site should be closed down and for what length of time - easy to shut off a corner of the bus depot in our instance

Immediate response continued

- Identify the employees who were involved in the incident
 - > Who was first on the scene, who found the injured person, who did CPR, who called the police etc.
- Notify SafeWork SA, any relevant counterparties, your insurer, CEO/GM, and the police (if fatality)

Immediate response continued

Call your lawyer

- > You want to make sure your actions do not prejudice you moving forward
- > Legal professional privilege is important

Notify next of kin

- > Know your facts before you speak to the family

Arrange a person to deal with any media enquiries

Immediate Risk Assessment

- This is a judgement call – need to avoid speculation
- Do a risk assessment of the hazard that caused the incident (if it hadn't been done) and issue the risk warning immediately
 - > Safety alert was issued to all drivers (they had to sign for it) re the emergency safety switch
 - > Need to give requisite warning of any change in practice, procedure or just alert
 - > Provided to QBIC for general publication

Internal Investigation

- Have your lawyers investigate internally
 - > Important for legal professional privilege
- Important in order to conduct witness interviews as soon as possible
- Consider whether external expert needs to be engaged to assist the investigation team
 - > In this instance, a forensic engineer was engaged by WHSQ and another by ourselves

Internal investigation continued

- ❖ Prepare an incident report
 - > Strong argument that legal professional privilege will apply to the documents created out of such an investigation
- ❖ Approach to the report
 - > Acting on recommendations
 - > Disclosing report at later point
 - > Using findings for discipline
- ❖ Avoid creating any new documents about the incident (except for documents prepared for your lawyers)
 - > Such documents tend to involve speculation, may be incriminating and could be used later in court proceedings

Legal Professional Privilege

- Protects communications between a lawyer and a client
- Disclosure is not required if the dominant purpose of the advice is for use in existing or anticipated legal proceedings or if advice is sought in order to obtain legal advice
- The privilege is that of the client and the privilege can be expressly or impliedly waived (e.g. client discloses legal advices or reference something which betrays the confidence of it)

How to deal with your employees

- Have counselling made available
- Give strict instructions to your management staff about the following to other staff:
 - > What to say
 - > When to say it
 - > What not to say
 - > Do not speculate

How to deal with your employees continued

- You are in the midst of a Regulator's investigation – could take two years and depends on whether Coroner involved
 - > BBL charged on the last day possible
- The staff that were involved in the incident also need to be well managed
 - > Even those not directly involved will be affected

Post Incident Actions

- Provide counselling for all staff
- Fix obvious immediate issues
- Audit systems and processes
- Improve practices with learnings
- Defend prosecution or plead depending on assessment

SafeWork SA Investigation

- SafeWork SA inspectors have extensive powers to speak with witnesses and access documents
 - > Their requests can be constant and quite disruptive
 - > It is an offence for a person to refuse or fail to comply with an inspector's request without reasonable excuse
 - > However, a person may refuse to produce a document or information that is subject to legal professional privilege
- They will call the employees involved in the incident for interviews and re-interviews
 - > They will interview any employees involved in previous similar incidents at the depot or at home without your knowledge

SafeWork SA Investigation continued

- 🎯 Nominate and maintain one point of contact for all SafeWork SA enquiries, include documents and requests for interviews
 - > In the BBL case it was the HR Manager
 - > One person should be responsible for obtaining and collating all relevant documents to the incident (need to get consent of MD for release)
 - > Prepare a document register and keep it in a secure location (keep copy of everything you give)

SafeWork SA Investigation continued

Documents

- > Properly understand what is sought
- > Keep records (and copies) of what is handed over
- > Seek commitment that you will get access to it

Interviews

- > Incrimination
- > Have legal representative present
- > Understand the question
- > Only answer question asked
- > Short answer usually better

SafeWork SA Investigation continued

- They will seize and isolate the plant and equipment involved
 - > They initially took away BBL20 but then left it on our client's site not to be used
 - > Videotaped and timed the door with their forensic engineer
 - > Took a number of photos

SafeWork SA Investigation continued

- Your WHS policy is the first thing that the SafeWork SA inspector will request
 - > Are your policies/procedures up to date?
 - > Are your policies/procedures readily accessible?
 - Do the employees know where it is?
 - Do they know what it states?
 - > Do you have evidence of training in WHS of your employees?
 - Induction training, refresher training, on-the job training etc?

SafeWork SA Investigation continued

- ❖ In the BBL case they asked for
 - > WHS policy/safety alerts/drivers manual
 - > Manuals for bus doors and bus
 - > Copies of minutes of directors/management meetings
 - > Records of all training done especially re doors
 - > Employee files
 - > Details of previous WHS incidents that were similar → extremely critical in our situation

SafeWork SA investigation continued

- Have the power to issue improvement and prohibition notice to ensure compliance with work health and safety laws
- Improvement notice
 - > May issue in any circumstance where form reasonable belief of contravention
- Prohibition notice
 - > May issue where serious risk emanating from immediate or imminent exposure to hazard
- Failure to comply with notices may result in prosecution or injunction

First prosecution case of an officer under WHS Laws

- The ACT is the first jurisdiction to charge an officer for the breach of an officer's duty under the harmonised WHS laws
- In March 2012, Kenoss Contractors Pty Ltd was conducting work at a site in Turner in the ACT and Michael Booth, a 48 year old worker/truck driver was electrocuted when he tipped his truck trailer to offload gravel at a dumping station at the site and the trailer touched a power line
- A senior manager has been accused of allegedly failing to exercise due diligence under section 27 of the WHS Act to ensure Kenoss Contractors Pty Ltd complied with its work health and safety duties under the WHS Act

- The alleged failures of both Kenoss Contractors and the senior manager meant they have also been charged with a category 2 offence under section 32 of the WHS Act because their failures exposed a person to a risk of death, serious injury or illness
 - > A category 2 offence involves a failure to comply with a health and safety duty where it exposes a person to the risk of death or serious injury, without involving recklessness
 - > A category 2 offence means Kenoss Contractors Pty Ltd faced a maximum penalty of \$1.5 million
 - > A category 2 offence means the senior manager faced a maximum penalty of \$300,000

- ❖ The charges against the senior manager were dismissed, as he was not an “officer” under section 9 of the *Corporations Act 2001*
- ❖ He was project manager, participated in management meetings, made decisions
- ❖ However, prosecution did not prove beyond reasonable doubt that he had enough control or influence to meet the definition of “officer”

Kenoss Contractors Pty Ltd

- Kenoss Contractors Pty Ltd was fined \$1.1 million for breaching WHS Act
- Kenoss Contractors Pty Ltd was in liquidation so did not pay the fine
- However, Magistrate Walker said general deterrence meant strong message needed to be conveyed to employers

Effect of insurance cover

- *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22
- In July 2010, a rigger was killed by a falling beam after a fabric sling supporting the beam snapped while he was attempting to lower the beam into position
- Ferro Con (SA) Pty Ltd was a specialist steel erection business and was the employer
- Ferro Con was charged with a breach of s19(1) of the *Occupational Health, Safety and Welfare Act 1986* (previous legislation), having failed to ensure so far as was reasonably practicable that the rigger was safe while at work

Hillman v Ferro Con (SA) Pty Ltd

- Ferro Con's sole director and "responsible officer" (for the purposes of the Act), Mr Paolo Maione, was charged with a breach of section 61 of the Act, having failed to take reasonable steps to ensure Ferro Con's compliance with its statutory safety obligations. This failure contributed to Ferro Con's offence.
- Both Ferro Con and Mr Maione pleaded guilty and each defendant was fined \$200,000 and convicted.
- Magistrate Lieschke found the offences to be very serious breaches of the Act

Hillman v Ferro Con (SA) Pty Ltd

- His Honour determined that Ferro Con simply relied on the experience of workers and hoped that they would individually and collectively make the right decisions on an informal and ad hoc basis and Mr Maione failed to take an active role in checking the systems of work
- When considering an appropriate fine, his Honour took into account the fact that Ferro Con had a general company insurance policy in place which granted indemnity to a director for fines imposed for criminal conduct
- Prior to sentencing, the insurer agreed to pay any potential fine that was to be imposed on Ferro Con and/or Mr Maione

Hillman v Ferro Con (SA) Pty Ltd

- Although his Honour noted that the Act did not prohibit insuring for criminal penalties, he refused to reduce the fines against the company and the officer
- The insurance cover carried a \$10,000 excess payment which Mr Maione paid personally as the Employer was in liquidation
- By paying the excess Mr Maione ensured that he obtained the indemnity and effectively avoided the majority of the fine

Hillman v Ferro Con (SA) Pty Ltd

- Magistrate Lieschke considered the actions taken by Mr Maione to undermine the Court's sentencing powers and send a message to other employers and Responsible Officers that insurance cover for OHS offences can reduce the personal consequences of very serious offending, even if an offence has fatal consequences
- It was considered that the actions of Mr Maione dramatically outweighed any mitigating circumstances, such as showing contrition, cooperating with SafeWork SA and making early guilty pleas and accordingly, there was no reduction in penalty

Hillman v Ferro Con (SA) Pty Ltd

- His Honour stated that, while unclear, under these provisions it would still be possible for an insurer to sell such policies and grant indemnity for commercial benefit. Whether such indemnities should be outlawed is a policy consideration for Parliament to consider.
- He referred to section 272 of the new *Work Health And Safety Act 2012* which states that any term of a contract which seeks to modify the operation of the Act is void
- Employers should be aware of risks of relying on such insurance policies and the court's attitude to sentencing if such policies are used

Hillman v Ferro Con (SA) Pty Ltd

- ❖ In response to the decision, the South Australian Minister for Industrial Relations, John Rau outlined his intention to close the “loophole” in South Australia and consult the Federal Minister for Workplace Relations on the issue.
- ❖ However, John Rau indicates that closing the loophole is either:
 - > A matter for federal regulation; or
 - > May be too difficult to regulate at all as penalties are paid at the discretion of the insurer.
- ❖ The loophole therefore still currently exists

Recent Case – *Boland v Gogoll t/as SA Quality Sheds* 2015

- ❖ A worker suffered an electric shock while working from an elevated work platform on a large shed that was being constructed directly below a live 19,000 volt power line
- ❖ Worker was attempting to install 4m steel railing near a point where the power line was less than two meters above the shed
- ❖ Owner and responsible person conducting business was charged under *Work Health and Safety Act ss 19(2) and 32*

Recent Case – *Boland v Gogoll t/as SA Quality Sheds* 2015

- ❖ Employer told the workers to stay clear of the line, but no precautions were implemented
- ❖ Court found:
 - > Workers were exposed to risk of serious injury or death
 - > Defendant failed to ensure the business provided a safe system of work for the task, so far as reasonably practicable
 - > Defendant failed to undertake adequate hazard identification and risk assessment
 - > Did not provide adequate information/instruction/supervision to the workers

Recent Case – *Boland v Gogoll t/as SA Quality Sheds* 2015

- Charged with Category 2 offence
- Fined \$45,000 after reduction of 40% on account of demonstrated contrition, reparations and early guilty plea

Recent Case – *Soulio v Gambier Earth Movers Pty Ltd* 2016

- Worker was employed as a machine operator
- Right arm was amputated by an unguarded machine while he was performing his normal work duties
- Owner and responsible person conducting business was charged under *Work Health and Safety Act ss 19(2) and 32*

Recent Case – *Soulio v Gambier Earth Movers Pty Ltd* 2016

Court found:

- > Defendant failed to ensure, so far as was reasonably practicable, that it provided and maintained the screening machine in safe condition
- > Failed to ensure machine guarded by a physical barrier

Charged with a Category 2 offence

Fined \$111,000 after reduction of 40% for contrition, reparations and early guilty plea

Conclusion

- As can be seen, it is ultimately the way in which an organisation has documented and implemented its WHS systems that will come under scrutiny during an investigation
- The question is - how would you stand up to close scrutiny of its WHS systems and processes?
 - > Will your executive and board stand up?
 - > Are your WHS systems and processes actually working in practice?



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