

Critical Incident Management

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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*

Section 19(1) Primary duty of care

- ❶ 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

- ❶ ***‘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

Dinko Tuna Farmers Pty Ltd V Markos [2007] SASC 166

- Upheld the decision in the Supreme Court but went through (in this circumstance) some things that should have been considered 'reasonably practicable' to an employer
- Facts:
 - > The employer was a tuna farmer
 - > He employed a deckhand aboard the ship called the Dageraad
 - > On 19 June 2002 the employee fell overboard whilst cleaning the deck
 - > He was luckily rescued by a passing ship but none of the other employees on the boat noticed he was missing until he was rescued

Dinko Tuna Farmers Pty Ltd V Markos [2007] SASC 166 continued..

Findings:

- > It was found that the employer failed to provide and maintain the following systems:
 - The employee was to wear a personal flotation device
 - The sea door on the port side of the ship was not open
 - Having at least 2 employees always in sight of each other whilst the ship was in motion
- > Further, the employer did not provide information, instruction, training and supervision as was **reasonably necessary** to ensure that the employee was safe from injury and risks to health in that the employee was not adequately supervised whilst working on board the vessel.

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.

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*
- ❖ Family businesses tend to have spouses or children registered as directors or secretaries, however, if they do not have day to day involvement then their positions should be re-considered

First prosecution case of an officer under WHS Laws

- The ACT was 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 was 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

Kenoss Contractors Pty Ltd

- The alleged failures of both Kenoss Contractors and the senior manager meant they were 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

Kenoss Contractors Pty Ltd

- ❖ The charges against the senior manager were dismissed, as he was not considered an “officer” under section 9 of the *Corporations Act 2001*
- ❖ He was a 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 a strong message needed to be conveyed to employers

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

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.

What is a workplace

- Section 8 of the Work Health and Safety Act 2012 (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

How to manage a Critical Incident

- ❖ Each critical incident will be different. However, it is important to consider and have policies and procedures in place to deal with such incidents.
- ❖ Do you have an incident management plan?

What should an incident management plan include?

This will largely depend on the company but should deal with the following:

- Helping those injured and preventing further immediate injuries
- Making notifications to emergency services and complying with their instructions
- Locking down the site

What should an incident management plan include continued.....

- Identifying 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.
- Notifying SafeWork SA, any relevant counterparties, your insurer, CEO/GM, and the police (if fatality)

What should an incident management plan include continued.....

- Calling your lawyer
 - > You want to make sure your actions do not prejudice you moving forward
 - > Legal professional privilege is important
- Arranging a person to deal with any media enquiries – engaging a PR person
- Needing to decide what to tell your staff internally in consultation with the appointed experts

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

Social media policy

- ❖ It may be important to remind staff of your internal social media policy
- ❖ If you don't have a social media policy you should consider implementing one as soon as possible
- ❖ Want to attempt to avoid posts and social media that further damage your business or may contribute to damaging your legal professional privilege

Importance of communication

- ❖ May need to consider how you will govern communications with your staff and the public
- ❖ For example, who communicates from the organisation, how the communications are to be disbursed via twitter, facebook etc
- ❖ You should consider the appointment of a media/PR consultant in the circumstances of a critical incident or a high profile incident – they can liaise with your customers, eg. schools, government etc.

Example of importance of social media and communication

- Two school buses and three cars collided in Wollongong
- Both school buses belonged to the same company
- It was a high profile news incident as a number of students were treated by paramedics at the scene and two boys were seriously injured and airlifted to Sydney hospitals
- One airlifted student was thrown through a window and landed on the road, sustaining serious head injuries another boy was “thrown about” during the crash but remained inside the bus
- The incident was reported on via online platforms, including social media, particularly twitter
- Online newspaper articles referenced one of the school’s Facebook pages to provide information on the incident.

Post Incident Actions

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

SafeWork SA Investigation

- 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?

Case Examples

DPP v Vibro-Pile (Aust) Pty Ltd [2016] VSCA 55

- > Frankipile Australia Pty Ltd was contracted to do piling work on a development site
- > They in turn contracted Vibro-Pile (Aust) Pty Ltd to operate a Fundex 3500 pile drilling machine
- > On 28 May 2011 a section of the piling rig collapsed as a result of bolts not being correctly inserted
- > An employee of Frankipile fell from the top section of the rig and died
- > Vibro-Pile (Aust) Pty Ltd and Frankipile Australia Pty Ltd were both charged and penalised \$750,000 per company



Case Examples

- *Symons v Howard & Sons Pyrotechnics (Displays) Pty Ltd* [2011] SAIRC 53
 - > Howard Pyrotechnics arranged and performed fireworks displays and was contracted by a community group to conduct a display on the grounds of a primary school
 - > Howard Pyrotechnics installed ground fireworks on the oval and fitted the fireworks to a donkey costume worn by one of their employees
 - > Howard Pyrotechnics did not provide a physical barrier between the fireworks and the dance area and they did not provide proper safety equipment to the employee wearing the donkey costume
 - > Howard Pyrotechnics was fined \$63,750



Case Examples

- *Smith v BHP Billiton Iron Ore Pty Ltd* [2013] WASCA 111
 - > Mr Smith was employed by Macmahon Contractors Pty Ltd who was contracted by BHP Billiton Iron Ore Pty Ltd to carry out mining activities at the Mount Whaleback mine site. Mr Smith was a truck driver at the mine site
 - > Mr Smith attempted to clean a road sign with a rag while standing on two Haulpak tyres that secured the road sign and he fell in the process
 - > Neither Macmahon Contractors Pty Ltd or BHP Billiton Iron Ore Pty Ltd were penalised or found guilty of breaching the legislation in this case

Conclusion

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



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