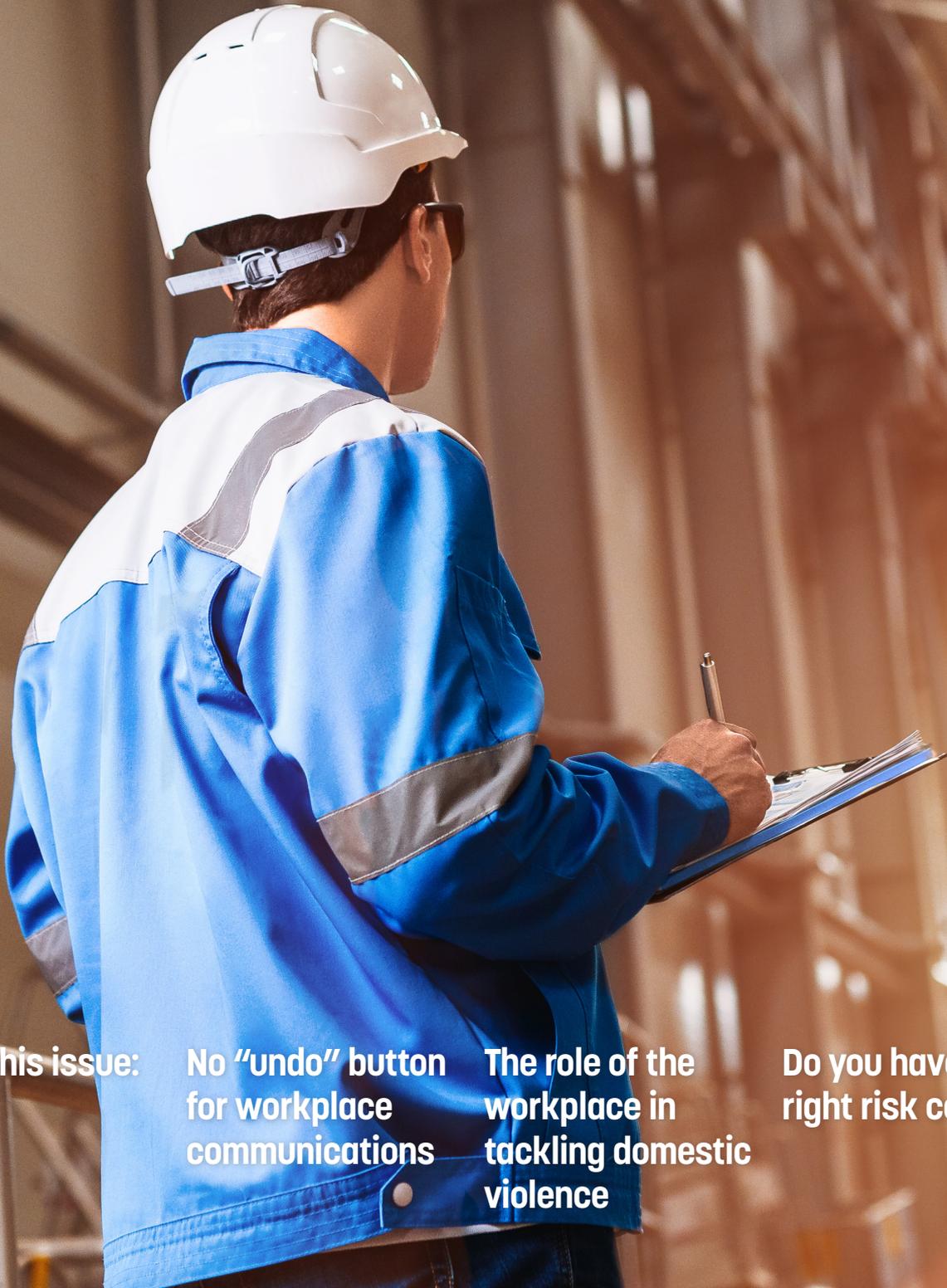


Workplace Matters

Sparke Helmore Lawyers

Issue 11 | December 2016

When a union official comes knocking



Inside this issue:

No "undo" button for workplace communications

The role of the workplace in tackling domestic violence

Do you have the right risk cover?

Contents

Welcome	3
<hr/>	
By Catherine Wilkinson, National Workplace Group Leader, Sparke Helmore	
No "undo" button for workplace communications	4
<hr/>	
Appropriate workplace behaviour for electronic communication	
The role of the workplace in tackling domestic violence	6
<hr/>	
How workplaces are addressing domestic violence as part of WHS policy	
When a union official comes knocking	8
<hr/>	
The rights of employers and union officials concerning right of entry	
Do you have the right risk cover?	10
<hr/>	
Types of insurance cover to address workplace risks	
Labour hire: work health and safety obligations and the duty to consult	12
<hr/>	
Taking proactive and reactive steps to meet your obligations	
Recent developments	14
<hr/>	
A summary of recent legal developments affecting employers	

If you have any questions or suggestions about *Workplace Matters* contact the editor, Catherine Wilkinson, on +61 2 4924 7212 or catherine.wilkinson@sparke.com.au

If you would prefer to receive a soft copy of future issues, or no longer wish to receive this publication, please send an email to sarah.joseph@sparke.com.au or call us on +61 2 9260 2448

Copyright 2016 © Sparke Helmore

This publication is not legal advice. It is not intended to be comprehensive. You should seek specific professional advice before acting on the basis of anything in this publication.

Looking over the horizon



Welcome to the December issue of *Workplace Matters*.

In this issue we discuss the importance of professional and appropriate workplace electronic communications, using examples from recent decisions where communications between workers have been made available during litigation, following orders to produce.

Recent case law has increased employers' responsibility for the wellbeing of employees who are victims of domestic violence. We look at how workplaces are dealing with domestic violence situations through various intervention and response measures.

Union officials with valid entry permits are able to exercise their right of entry, but what do you need to know before, during and after they visit your workplace? We cover the key points you need to know when a union official comes knocking.

Workplace risk cover can be an overwhelming consideration for employers. Many employers take out workplace cover without fully understanding what is available to them. We explain some of the different policies so you can make sure you have the right cover for your workplace.

The onus of responsibility for the health and safety of contracted workers was scrutinised recently in the *Boland v Big Mars Pty Ltd* [2016] SAIRC 11 decision. Labour hire agencies have a duty of care to ensure the host's working environment is safe and suitable for workers. We look at the best ways to ensure safety obligations are met.

If there are any other topics you'd like us to explore in *Workplace Matters*, please send me an email at catherine.wilkinson@sparke.com.au

I hope you enjoy this issue of *Workplace Matters*.

Sincerely,

Catherine Wilkinson
National Workplace Group Leader
Sparke Helmore Lawyers

No “undo” button for workplace communications

By Ian Bennett and Layla Langridge

We’ve all hit send on an email then thought better of it. The quick and casual nature of email correspondence means you probably send and receive hundreds a day, often without much consideration for the wording and content.

While some communications are intended to be innocent or merely casual “pub talk”, they could be heavily scrutinised down the track and pose an evidentiary obstacle if discoverable in subsequent legal proceedings.

A large bank recently learned the hard way that emails can resurface and cause a nasty headache. In legal proceedings between the bank and a businessman, a number of emails were discovered that revealed a culture potentially supportive of racial bigotry. Internal correspondence between senior executives of the bank contained numerous comments about the businessman (and his wife) to the effect “we are dealing with Indians with no moral compass” and “this has been a very Indian-characteristic transaction”. While the bank has denied the comments were intended to be derogatory or reflective of its corporate values, this has become an additional issue in the proceedings. It also poses ramifications from a public relations and reputational perspective.

Similar issues can occur in workplace matters or disputes. A remark in a private email, perhaps intended as an innocuous comment, could be construed negatively and have a detrimental impact on the author and

the employer. It is important for organisations to proactively educate workers on what is considered to be appropriate conduct and use of communication systems within the workplace.

But it was meant to be private and confidential...

Like other documents, emails are likely to be discoverable unless they are subject to privilege (most commonly, legal professional privilege—LPP—or without prejudice privilege). Generally speaking, LPP cannot be asserted retrospectively or claimed over documents that were not created for the dominant purpose of obtaining legal advice or in anticipated legal proceedings.

In practical terms, this means even if an employer subsequently seeks legal advice and assistance on a claim by a former employee, written communications that already exist between managers and human resources personnel (or even between co-workers) relevant to the decision to terminate the employee, may be discoverable. Similarly, correspondence immediately following a safety incident that hypothesises causes, without any instruction or involvement of legal representation, may also be discoverable.

There may be a requirement for workplace documents to be produced through a variety of processes. Under applicable WHS legislation, regulators have extensive powers to compel production relating to risks. The Fair Work Commission (FWC) and courts, including the Federal Court, have broad powers to order the disclosure and inspection of documents. However, a further complication is that the FWC is not bound by the rules of evidence and may elect to consider documents traditionally considered private, privileged or confidential.

I’ll just label it “without prejudice”

Without prejudice privilege allows parties to explore potential settlement opportunities without fear of any associated documents

being used against them in future proceedings. However, this does not mean that simply using the words “without prejudice” will satisfy a claim of privilege.

In *Hammerton v Knox Grammar School* [2013] FWC 9024, an employee pursued an unfair dismissal claim, alleging she was forced to resign. As part of its defence, the school sought the production of a file from the employee’s union that contained documents relevant to negotiations and submissions regarding an ongoing dispute between the parties. The employee objected to the production of these documents on the basis they were part of “without prejudice” communications.

The FWC determined the documents should be produced as the employee had put certain facts in issue and the production of these “without prejudice” documents would assist in the resolution of the relevant issues. Although this decision turned on the facts, it is a reminder that labelling a document “without prejudice” may not necessarily prevent it from being discoverable down the track.

What else could go wrong?

As well as the risk of documents being discoverable, there is the possibility that these documents may present other issues for the employer. For example, documents that emerge in the context of a litigated dispute (such as an unfair dismissal) may demonstrate or highlight potentially inappropriate use of communication systems by other employees. This may necessitate a separate process to deal with potential misconduct and could present a further legal minefield.

There are many cases in which employers have experienced challenges when managing misconduct issues involving the use of internal communication systems. In *Beamish v Calvary Health Care Tasmania Limited T/A Calvary Health Care Tasmania* [2016] FWC 1816, a terminated employee was reinstated after it was found that a reference to the Director of the Catholic Mission as “Mission Impossible” in internal emails was a misguided attempt at humour and not sufficiently serious to warrant termination.

In *Anderson v Thiess Pty Ltd* [2015] FWC 478, the FWC found that although the employee had engaged in inappropriate conduct by expressing anti-Muslim rhetoric in emails to colleagues, the failure of the employer to proactively train employees on relevant policies and expectations of appropriate email use undermined the reasonableness of the decision to terminate.

It is incumbent upon employers to reiterate to employees that their use of internal communication systems may be monitored and they should keep their interactions professional.

Think before you put it in actual or electronic ink

Workplaces should not be discouraged from keeping appropriate business records. However, employers should turn their minds to any potential ramifications if these documents are exposed to an unintended audience down the track. It is recommended that employers and managers:

- adequately document discussions but keep the language and tone appropriate and professional
- use the “newspaper test”, that is, refrain from putting anything in writing that you would not be comfortable defending in public or saying to a person’s face
- when dealing with a difficult situation, avoid raising personal sentiments unless relevant to the issue being explored
- performance-based feedback should be presented in a constructive and balanced manner (ideally in person at first then confirmed in email), and
- before you send an emotionally charged or reactive email, consider asking a colleague to review it or leave it in your drafts folder for a period of time before re-evaluating if it is appropriate to send.

The best way to avoid embarrassing exposure down the line is to be proactive in your approach to training employees on document management and appropriate workplace behaviour. This may be achieved through maintaining current policies and procedures that adequately cover employee expectations and foster strong workplace values.



The role of the workplace in tackling domestic violence

By Laura Dexter and Ellen Locke

Domestic violence is a community-wide problem, described by some as a national crisis of epidemic proportions. There is no question that workplaces are also impacted through absent workers affected by domestic violence, lower staff performance and productivity, and high attrition rates. Despite this, the workplace is increasingly recognised as having the potential to intervene and respond to domestic violence, and many employers are playing an active role in addressing the problem.

A survey by the Australian Bureau of Statistics in 2012 found that men and women will experience at least one violent encounter in their lifetime. In 2014, New South Wales Police recorded 28,780 victims of family and domestic violence assaults (383 victims per 100,000 people).

Australian workplaces are increasingly recognised as being able to protect workers against the health and safety risks posed by domestic violence. The *Royal Commission into Family Violence Report 2016* noted that workplaces provide a safe and neutral environment to identify signs of violence and have a unique opportunity to support employees affected. The Commission recently proposed recommendations advocating active participation by employers and suggested the introduction of dedicated family violence leave to the National Employment Standards in the *Fair Work Act 2009* (Cth).

However, workplaces aren't guaranteed safe havens and can sometimes contribute to vulnerability and suffering. Instances of domestic and family violence can infiltrate the workplace directly, through aggressive communications, stalking, physical altercations and other means.

In the recent case of *Leyla Moghimi v Eliana Construction and Developing Group Pty Ltd* [2015] FWC 4864, the Fair Work Commission (FWC) considered an unfair dismissal application by Ms Moghimi, who had taken time off work because of a domestic violence

incident. Ms Moghimi and her partner, the perpetrator, worked together. Upon returning to work, Ms Moghimi was told by her employer "that it would not be safe or nice for her employment to continue", and that "keeping both her and her partner in the office was a no".

In determining whether there was a valid reason for the dismissal, the FWC considered the role of the employer in circumstances where domestic violence crosses over into the workplace. While the FWC acknowledged the limited extent to which an employer can be expected to accommodate the private lives of employees, it found that the employer had dismissed Ms Moghimi for no valid reason and was ordered to pay \$27,500 in compensation.

One mechanism proven to be effective in managing the crossover of domestic violence into the workplace is the introduction of paid domestic violence leave. Such leave is intended to allow affected persons to receive medical attention, attend court, receive legal advice, make childcare arrangements and find alternative housing.

Currently more than two million Australian workers have access to paid domestic violence leave, either through official enterprise agreements or informal company policies. A third of the private sector has such leave policies. However, Victoria's Royal Commission found domestic violence victims instead often exhaust other leave entitlements, which mean they risk facing disciplinary action and job loss.

Dedicated leave for family and domestic violence was introduced in 2010 in *Surf Coast Shire Council Enterprise Agreement No.7 2010-2013* [2010] FWAA 9380, where negotiations between the Australian Services Union and Surf Coast Shire Council in Victoria resulted in one of the earliest enterprise agreements providing for family violence leave of up to 20 days.

The case also looked at how an employee would prove an entitlement to this leave. In this instance, the employer required that any incidence be verified by a police report, or document issued by a doctor, nurse, support worker or lawyer. This progressive enterprise agreement was hailed as a step in the right direction in helping victims of physical, sexual, financial, verbal and emotional abuse to retain their jobs. The public sector has introduced domestic violence leave, with the Victorian Government declaring that all future public sector enterprise agreements will contain a family violence provision. The Victorian Police also offers employees 10 days' paid family violence leave plus additional leave as is reasonable.

On another note, employers in the ACT will soon be able to apply to the Magistrates Court for a work protection order (WPO), following the passing of the *Personal Violence Bill 2016*. A WPO aims to protect employees and/or other persons in the workplace from physical violence, sexual abuse, stalking or property damage, as well as threats of such behaviour. Conditions of a WPO can include prohibiting the respondent from entering or being within a particular distance of the workplace.

Despite these changes, the complexities associated with workplaces having different resourcing considerations and structures, need to be considered when introducing leave and other entitlements.

The presence of domestic violence in the workplace also raises concerns for employers regarding their work health and safety (WHS) duties. For example, if an employee discloses a family violence situation to an employer, this may trigger employer responsibilities.

WHS laws in Ontario, Canada, provide an interesting case study. In this jurisdiction, domestic violence has been introduced in WHS legislation as a type of workplace violence. Employers have an express duty to take reasonable steps to protect workers if they are aware, or ought to be reasonably aware, that domestic violence may expose a worker to physical injury in the workplace.

Under Australian WHS laws, employers have a primary duty to ensure the health and safety



of their workers at work, so far as reasonably practicable. This extends to situations where workers are bullied, abused, threatened or assaulted in circumstances relating to their work. However, the legislation is silent on whether the impact of family violence in the workplace constitutes a risk to work health and safety and, consequently, whether the primary duty is broad enough to capture domestic violence.

Employers offering domestic and family violence leave are acknowledging the prevalence of domestic violence in Australia and its impact on the workplace. The Australian Council of Trade Unions indicates that over 1.6 million Australian workers are now entitled to such leave. It is evident that the traditional separation between domestic and work life is becoming indistinct, and with the health and safety of workers being a paramount consideration, the employer and the workplace now play a significant part in tackling this national issue.

We would like to acknowledge the contribution of Susan Withycombe-Taperell to this article.

When a union official comes knocking

By Alistair Talbert and Joe McCombe

Did you hear the one about the “crocodile hunter” who stopped a concrete pour at a construction site? Or the union official who abused a safety manager, threw away his lunch and locked him out of the crib room? How about the HR manager who threatened to confiscate a union newsletter detailing the company’s unlawful enterprise agreement?

Workplace interaction between unions and employers provides fertile ground for conflict but what does the law say about a union’s right to access your workplace and speak to your workers?

What is right of entry?

Right of entry describes the regulation of a union’s right to enter workplaces. Right of entry provisions in the *Work, Health and Safety Act 2011* (WHS Act) and the *Fair Work Act 2009* (FW Act) aim to strike a balance between a union’s right to represent its members by holding discussions and investigating possible contraventions of WHS laws in a workplace, and the right of employers to carry out business without undue interruptions.

When can a union official enter your site?

A union official can enter the workplace to:

- hold employment/industrial discussions with employees under the FW Act
- investigate suspected breaches of the FW Act
- consult with/advise workers on health and safety matters under the WHS Act, and
- inquire into suspected safety breaches under the WHS Act.

Who can enter a site?

A union official must have a valid and current entry permit from the Commission to enter a workplace. To exercise a right of entry under the WHS Act, the official must also hold an entry permit from the state safety regulator.

Is notice required?

Notice of entry must be provided by the union to the employer/occupier of the premises

during working hours and 24 hours before entry (but no more than 14 days prior to entry). The notice must specify the premises to be entered, entry date and the union the permit belongs to.

When entering for a purpose stated in the FW Act, the permit must include the specific section of the FW Act authorising entry.

Notice isn’t required for entry under the WHS Act where the permit holder reasonably suspects safety contraventions, or where providing notice would defeat the purpose of entry or unreasonably delay the permit holder in an urgent case, for example, a serious safety incident or risk to workers.

There are penalties for obstructing a permit holder’s entry, however, this doesn’t prevent you asking legitimate questions or verifying the validity of entry rights, such as “Can I see your entry permit?” or “What is your reason for entering this workplace?”

The importance of asking such questions was confirmed by the finding in *Director of the Fair Work Building Industry Inspectorate v Bragdon* [2015] FCA 668. In June 2013, two Construction, Forestry, Mining and Energy Union officials (one claiming to be Steve Irwin) were fined \$20,000 and \$27,500 for entering a construction site and obstructing a supposedly unsafe concrete pour. Although both officials possessed permits under the FW Act, neither held a permit under the WHS Act, which is required to investigate unsafe work practices. When attending the site they were not asked to produce their entry permit and, when an employee of the head contractor (Abigroup) went to fetch personal protective equipment for the men, they entered the site unattended.

The officials successfully appealed their fines arguing that upon entering the site they didn’t assert they were exercising any rights under the FW Act or the WHS Act. In April 2016, the Federal Court found (on appeal) in favour of the officials and quashed the penalties imposed. It held that Abigroup was not obliged

to let the officials enter the site as they were not exercising a right of entry under the FW Act or WHS Act. The Court held Abigroup could have asked the men to leave at any time and that a failure to leave would have been criminal conduct.

What can a union official do at a worksite?

An official must have a specific purpose for entering a workplace. The scope of an official’s powers of entry depends on which Act the entry is exercised under.

Under the FW Act, an official can:

- inspect any work, process or object relevant to a suspected contravention of the FW Act
- interview any person about the suspected contravention, and
- hold discussions with one or more employees who perform work on the premises.

Under the WHS Act, an official can:

- inquire into a suspected contravention
- inspect or make copies of employee records or documents directly relevant to a suspected contravention of the WHS Act, and
- consult and advise workers on WHS matters.

Right of entry requirements

An official exercising right of entry must:

- only enter during normal working hours
- enter during the workers’ meal time or breaks (except when entering under the WHS Act)
- obtain a worker’s agreement before interviewing them
- comply with all WHS requirements, and
- only enter areas of the workplace where relevant workers work or other areas that directly affect the health and safety of workers whose industrial interests they represent.

Union coverage

Officials may only enter a workplace where their union is entitled to represent the industrial interests of workers. The union doesn’t need to have members at the worksite, but there

must be employees that the union **could** represent. For example, a union official from a professional services union will unlikely have a legitimate right to enter an underground mine to consult with workers. If an official seeks to gain entry in contravention of any of these requirements they will be in breach of their entry permit.

What to do when an official next comes knocking

Entry permits may have certain conditions attached to them by the authorising bodies, so check for any such conditions on the permit.

Entry permits don’t have a photo of the union official, but you can request photo identification to verify that the name on the permit matches the person presenting it.

If an official is entering a workplace to consult on WHS matters, they can warn workers they believe are currently exposed to a serious health or safety risk at the workplace. For instance, an official enters to consult with workers but observes a worker working at heights without fall protection. However, they are limited to warning the worker of the risk and cannot direct the worker to stop work.

When entering to hold discussions with workers, the location of the discussions must be agreed between the official and employer/occupier. If an agreement isn’t reached, the discussion can occur in an area where the worker has meal breaks. Courts have found that areas used “in part” for meals or other breaks will satisfy this requirement.

Conclusion

It’s important for employers to fully understand their rights (and the rights of union officials) regarding right of entry under the WHS and FW Act, so the rights are exercised in a way that doesn’t breach the Acts. Companies that fail to comply with these obligations can be prosecuted and face fines of up to \$50,000. For further information on right of entry, seek legal advice.

Note: Victoria and Western Australia are yet to adopt the model WHS legislation. The obligations in the existing state-based safety legislation remain applicable.

Do you have the right risk cover?

By Sara McRostie and Andrew Mansfield

In November 2015, the Productivity Commission reported that the average unfair dismissal claim costs employers \$13,500. Claims for general protections, discrimination and bullying, as well as workplace health and safety prosecutions also represent a significant cost to employers in terms of legal defence costs and downtime.

Many employers take out insurance to cover workplace risks, without fully understanding the different types of policies on the market and the risks they cover. Some employers are not fully aware of their obligations under their policy when a claim is made and it is important that they understand how to maximise their cover.

Workplace risk insurance policies

Employment practices liability (EPL) insurance covers an employer—including its directors, officers, managers and employees—for claims made by employees, contractors and job applicants. The types of claims covered include unfair dismissal, general protections, failure to promote, bullying, harassment, discrimination and retaliation. The policy usually covers legal defence costs, settlement payments and other payments the employer may be ordered to pay.

Statutory liability insurance covers an employer and its employees for defence costs, fines and penalties imposed as a result of breaches of federal and state legislation. Workplace health and safety, and competition and consumer legislation are two examples.

Management liability insurance covers an employer and its employees for wrongful acts relating to the management of the business. It generally includes EPL and statutory liability as well as fidelity, directors' and officers' liability, cyber risk liability and corporate liability for activities such as audits conducted by the ATO.

Directors and officers (D&O) insurance covers an employer's directors and officers (and in some cases senior managers) to protect them from personal liability for claims arising from the discharge of their responsibilities and duties. If the employer incurs legal defence

costs on behalf of a covered individual, it may claim reimbursement of those costs under the policy. Most D&O policies offer EPL as an extension of cover for payment of an additional premium.

Know your notification obligations

An employer must notify its insurer of a claim against it, including being subject to an investigation or prosecution, or any facts or circumstances that might reasonably be expected to give rise to a claim. The time frame in which notification must be given varies between policies. Some require immediate notification while others require it as soon as reasonably practical.

This requirement allows the insurer to investigate the claim or possible claim at an early stage. Evidence that might otherwise become unavailable over time (for example, security footage that is only retained for a short period) can be identified and preserved. Witnesses can be interviewed while the events are still fresh in their mind. Early notification can also allow a claim or possible claim to be resolved before loss or further loss is suffered, thereby reducing the cost of the claim.

Claims can go unnotified for various reasons. An employer may overlook that it has an EPL policy if, for example, it was offered as an extension of another insurance policy. Some employers do not understand what types of employment claims and losses are covered under their EPL policy.

An employer might also make a deliberate decision not to immediately notify their insurer of a claim or possible claim because they believe they can resolve the claim and avoid paying any excess under the policy.

Whatever the reason for late notification, the consequences for the employer can be severe. If the insurer has been prejudiced by the late notification it may reduce its payment under the policy or even decline cover completely, leaving the employer exposed for the full amount of the claim and its own legal defence costs.

Know what extras are available under the policy

Almost all policies offer extensions of cover, such as costs of engaging public relations or crisis management services in connection with a claim. This assistance can prove invaluable to employers in quickly minimising potential reputational damage to the business and its senior officers.

If a claim is made against an officer or employee who is covered by the policy, but has passed away or is incapable of managing his or her own affairs for reasons such as ill-health or bankruptcy, cover under the policy may be extended to that person's estate or legal representative.

An extension may also apply, extending cover under the policy to any subsidiary acquired or created during the policy period as well as any subsidiary that ceased to be so during the policy period.

What happens after a claim is notified?

Once a claim is notified and accepted by the insurer, it will generally take responsibility for defending the claim. This means the insurer will make strategic decisions about how the defence is run, including whether to settle or defend it. This is a standard term in most policies and reflects that the insurer bears the costs of defending the claim and payment of any settlement or court proceedings.

Under some statutory liability policies, the employer remains responsible for defending the claim but the insurer agrees to advance defence costs before the claim is resolved.

Insurers have appointed panels made up of law firms that are experienced in defending workplace claims. The insurer will decide which firm to appoint for a claim, but will generally agree to appoint the employer's preferred firm from the insurer's panel. Insurers will generally decline to appoint an off-panel law firm even if that firm is responsible for the employer's general day-to-day legal matters. It is important to be aware that if an employer incurs legal defence costs before it notifies its insurer of a claim, the employer may be unable to recoup those costs under the terms of its policy.



Once a claim is notified and a panel law firm is appointed, the employer needs to remain actively involved by responding to requests for information and documents without delay and keeping an open dialogue with the broker, insurer and appointed law firm. This will assist in resolving the claim with minimal disruption to the employer's business.

Next steps

To maximise insurance cover for workplace risks, employers should:

- get the right risk cover for their business and industry
- know what is covered under their policy
- have sound internal processes so claims do not go unnotified
- avoid incurring legal defence costs before notification
- know which law firms the insurer uses and request a firm if the employer has a preference, and
- remain actively involved in the strategic management of the claim.

Labour hire: work health and safety obligations and the duty to consult

By Luke Holland

The nature of employment is evolving. It is now common for work that was previously performed by employees to be outsourced to other entities or businesses, which can include labour hire or group training agencies. This often involves a triangular employment relationship where there is an agreement between a worker and the agency, and a commercial contract between the agency and host organisation.

These relationships often cause confusion about which party holds health and safety obligations—the host is not engaging the worker directly as an employee and the agency is not in control of the workplace, so the responsibility for safety obligations can become blurred. The model work health and safety legislation provides clarification on this issue by establishing that health and safety duties are held concurrently by **both** parties...but what does this mean in practical terms?

Work health and safety duties

Under the model work health and safety laws, host organisations have a duty to ensure the health and safety of **all** workers while at work, so far as is reasonably practicable. This includes any labour hire workers at their workplace.

Labour hire agencies are also obligated to ensure the health and safety of workers during their placement with host organisations so far as is reasonably practicable. This involves the elimination of or, if this is not reasonably practicable, the minimisation of risks to health and safety that a labour hire worker may encounter during their placement.

The recent case of *Boland v Big Mars Pty Ltd* [2016] SAIRC 11 highlights the serious consequences that can occur when a labour hire organisation misunderstands its duties and leaves all health and safety considerations to a host.

The Big Mars decision

In *Big Mars*, a labour hire worker was assigned to work at an abattoir run by a separate host company. On 6 November 2013 the worker was performing duties for the host by sterilising meat hooks when he fell into a chemical bath and suffered burns to 32% of his body. It was found that a major contributing factor to the incident was the worker's inability to read or speak English to the required standard. This meant he was unable to understand the host's safety instructions regarding the duties he was assigned.

Following the incident, the labour hire company, Big Mars Pty Ltd, was prosecuted for failing to provide a safe system of work and failing to provide information, instruction, training and supervision to the worker.

Big Mars did not meet its safety obligations as a labour hire provider as it failed to have any policies in place regarding risk management. Instead it left these considerations to the host company. This was evident given Big Mars did not audit the host's safety procedures or the work areas where its labour hire workers were placed. If an audit had been undertaken, Big Mars would have become aware that there were communication issues for workers who did not understand English, which led to the host's safety instructions being ineffective.

Big Mars had a duty to take all reasonably practicable steps to ensure that risks to safety were controlled. This included satisfying the duty to provide appropriate safety instructions that the worker could understand.

Duty to consult, cooperate and coordinate

A crucial part of ensuring that concurrent duty holders meet their safety obligations is the need for parties to consult. Section 46 of the *Work Health and Safety Act 2011* (Cth) (the Act) sets out that all duty holders who have safety obligations around the same matter must consult, cooperate and coordinate so far as is reasonably practicable to ensure their concurrent obligations are met.

This duty was highlighted in the recent decision of *Boland v Trainee and Apprentice Placement Service Inc* [2016] SAIRC 14 where a group training provider entered a guilty plea for failing to consult with a host employer. It was found that the defendant did not adequately consult with the host employer, resulting in a failure to adequately audit the host's safety measures on-site. The defendant was therefore unable to satisfy that the host undertook risk assessments and implemented necessary control measures for work undertaken by the defendant's apprentice. As such, the defendant was not in a position to confirm that its apprentices were working in line with safe work practices.

This was the first prosecution in Australia for a failure to consult under the Act and is likely to result in more attention being placed on the requirement for duty holders to liaise with each other, particularly in cases involving labour hire or group training relationships.

Tips for ensuring compliance

These decisions highlight the need for labour hire and group training providers to ensure they are compliant with their safety obligations under the Act and do not rely too heavily on host organisations to ensure the safety of workers.

Before placing a worker with a host, it is generally a requirement that a labour hire agency should (subject to what is reasonably practicable in the circumstances):

- exercise due diligence by reviewing the host's safety record before agreeing to the placement of a worker
- set out each party's safety responsibilities in writing so expectations are clear
- provide workers with a general safety induction, covering consultation methods (so workers are aware of who to contact if they have safety concerns during their placement)
- audit workplaces for any risks to work health and safety
- verify that the host will provide site-specific and task-specific inductions, safety training and personal protective equipment
- gather information about the work to be performed and any associated risks as well as consult with the host to ensure safety controls are in place to eliminate or, if this is not reasonably practicable, minimise safety risks, and
- ensure that consultation with the host is ongoing.

If the above steps are taken (and documented so compliance can be easily demonstrated) then labour hire and group training providers should be in a good position to ensure they have met their safety obligations under work health and safety legislation.



Recent developments

There have been a range of recent legal developments that affect safety and human resources decision-makers.

Wage increases

Following the FWC's annual wage review, Australia's lowest paid workers are taking home an extra \$15.80 per week. The increase affects the 1.86 million Australian workers who currently receive the minimum wage and applies to all national system employees. The FWC is also reviewing penalty rates in seven awards for the hospitality and retail sectors as part of the four-yearly review of modern awards required under the FW Act. [Click here to read more...](#)

Cashing out annual leave

Employees covered by most modern awards can now cash out their annual leave, following a determination by the FWC last year, which came into effect on 29 July 2016. This new provision was sought by employers but hotly contested by unions. In approving the proposal, the FWC noted they had previously been reluctant to allow the cashing out of leave because it could undermine the purpose of annual leave—to provide employees with a physical and mental respite from work. Like the minimum wage increase, the model clause is one of a raft of amendments to modern awards forming part of the FWC's four-yearly review. [Click here to read more...](#)

Paid parental leave entitlements

The recently amended *Fairer Paid Parental Leave Bill 2016* aims to reduce benefits for workers who currently receive parental leave from their employer and will save the Government almost \$1.2 billion. If the Bill passes, government funded benefits will be reduced by any enforceable employer-funded parental leave entitlement to care for a child under one or due to the still-birth of a child. With a proposed start date of 1 January 2017, employers may need to act quickly to assess whether their parental leave schemes will be impacted and review their policies to reflect the amendments. [Click here to read more...](#)

Double dissolution

Since its inception in 2005, Australia's construction industry watchdog has been through a number of changes. This year, when the Coalition tried to re-introduce the original Australian Building and Construction Commission, it was blocked by the Senate and a double dissolution election subsequently took place. Workplace policy was therefore expected to be at the forefront of election campaigns, however this was not the case. As the Coalition ultimately claimed only a small majority of seats in the House of Representatives and the Senate, it is anticipated the Coalition may encounter some difficulties in passing any workplace legislation to meet their mandated, pre-election policies. [Click here to read more...](#)

Reckless endangerment

Companies who are found to have recklessly endangered a person in the workplace under the Victorian *Occupational Health and Safety Act 2004* (OHS Act), may now receive a maximum penalty of \$3 million. *The Treasury and Finance Legislation Amendment Bill 2016* was passed with bipartisan support by the Victorian Parliament on 23 June 2016 and brings Victorian maximum penalties in line with most other states, territories and the Commonwealth. It remains to be seen what effect, if any, this penalty increase will have on general sentencing practices under the OHS Act. [Click here to read more...](#)

Employee underpayment

Offsetting is a common practice used by businesses whereby employees receive more than the minimum award wage through an annualised salary, or above award weekly or hourly payments, in lieu of receiving prescribed award entitlements. The decision in *Stewart v Next Residential Pty Ltd* [2016] WAIRC 00756 will affect employment contracts that seek to offset allowances employees are entitled to under their relevant industry award. [Click here to read more...](#)

About the contributors



Sara McRostie, Partner

Sara specialises in workplace law. She helps public and private sector employers across multiple industries including construction, transport, manufacturing, health and professional services to deal with industrial relations and employment law matters. She is known for her expertise in anti-discrimination law.



Luke Holland, Partner

Luke is one of South Australia's leading experts in the areas of work health and safety, and employment law. He provides pragmatic advice on how to best manage workplace issues and deal with regulators, and is known for his practical and balanced approach.



Alistair Talbert, Special Counsel

Alistair is an experienced employment, industrial relations, occupational health and safety, and discrimination lawyer. He helps CEOs, executives and legal counsel in the mining, logistics, retail, manufacturing and government sectors.



Ian Bennett, Senior Associate

Ian helps clients solve complex workplace issues and has particular skills in defending WHS prosecutions, unfair dismissal and adverse action claims.



Andrew Mansfield, Senior Associate

Andrew advises insurers, insureds and brokers on all aspects of insurance law, from coverage and indemnity advice to proactively investigating and resolving claims.



Laura Dexter, Lawyer

Laura works closely with senior lawyers and assists clients to manage investigation processes, enforcement actions and prepare for WHS prosecution proceedings.



Layla Langridge, Lawyer

Layla works with senior members of our Workplace team to resolve a range of employment and WHS issues, including legislative and award compliance, terminations, workplace investigations, bullying and harassment, industrial disputes, performance management and breach of contract matters.



Joe McCombe, Lawyer

Joe works closely with senior lawyers to assist clients to comply with regulatory and legislative requirements under WHS law. Joe also assists with the management of investigations, complying with enforcement action as well as WHS and coronial proceedings.



Ellen Locke, Lawyer

Ellen works closely with senior lawyers to advise clients on WHS compliance and WHS management systems. She also assists clients to manage investigation processes and enforcement action.

Key contacts

Adelaide: Luke Holland, Partner | t: +61 8 8415 9875 | e: luke.holland@sparke.com.au

Brisbane: Sara McRostie, Partner | t: +61 7 3016 5057 | e: sara.mcrostie@sparke.com.au

Brisbane: Matthew Smith, Partner | t: +61 7 3016 5027 | e: matthew.smith@sparke.com.au

Melbourne: Brendan Charles, Special Counsel | t: +61 3 9291 2352 | e: brendan.charles@sparke.com.au

Melbourne: Nicole Fauvrelle, Partner | t: +61 3 9291 2378 | e: nicole.fauvrelle@sparke.com.au

Melbourne: Penny Stevens, Partner | t: +61 3 9291 2315 | e: penny.stevens@sparke.com.au

Newcastle: Catherine Wilkinson, Partner | t: +61 2 4924 7212 | e: catherine.wilkinson@sparke.com.au

Perth: Alistair Talbert, Special Counsel | t: +61 8 9288 8040 | e: alistair.talbert@sparke.com.au

Sydney: Roland Hassall, Partner | t: +61 2 9260 2449 | e: roland.hassall@sparke.com.au

Sydney: Carlie Holt, Partner | t: +61 2 9373 1412 | e: carlie.holt@sparke.com.au

Sydney: Bill Kritharas, Partner | t: +61 2 9373 1423 | e: bill.kritharas@sparke.com.au

Sydney: Rossana Parmegiani, Special Counsel | t: +61 2 9260 2531 | e: rossana.parmegiani@sparke.com.au