Workplace Matters

Sparke Helmore Lawyers

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Looking over the horizon

For *Workplace Matters* readers who don't know me, I'm Catherine Wilkinson and I'm Sparke Helmore's new National Workplace Group Leader. I've been with the firm for 24 years and am delighted to take the Workplace leadership baton from Matthew Smith, following his recent appointment to our Board.

In this issue of *Workplace Matters*, we look at the National Transport Commission's recommendations on amending the Heavy Vehicle National Law. We also examine the growing popularity of enforceable undertakings as an alternative to work health and safety (WHS) prosecutions and as an effective tool to improve WHS in the workplace.

We consider some recent decisions that have signalled the tide turning when it comes to extending time limits for employees to submit unfair dismissal claims, where they are prevented from doing so because of illness.

We talk about the relationship between drug dependence and mental health issues that workers may face—a compound issue that has been highlighted in a recent inquest by the Queensland Office of the State Coroner.

We also look at the need for officers to take not just reactive but also proactive steps to discharge their duties and avoid liability for WHS incidents and failures.

I would also like to welcome Partner Sara McRostie to our Workplace Group in Brisbane. Sara has joined us from Minter Ellison and specialises in industrial relations and employment law. She works closely with government agencies, particularly in the Queensland public sector, as well as corporate clients in a range of industries, including health and aged care, insurance, mining, construction, media and professional services.

If there are any other topics you'd like us to explore in *Workplace Matters* in 2016, 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

Law reform on the road ahead for national heavy vehicle legislation

By Rossana Parmegiani

Over the past year, there have been increasing calls for the improvement of road safety and compliance. In May 2015, all state and territory transport ministers agreed that legislative changes were required and, after considering stakeholder submissions, the National Transport Commission (NTC) released a policy paper in November 2015 proposing a series of recommendations for amendments to the Heavy Vehicle National Law (HVNL).

The NTC has been working with the various jurisdictions and the Parliamentary Counsel Committee to develop a draft Bill in line with the recommendations made in the policy paper, which should be presented to the ministers in mid-2016.

Recommendations made in the policy paper

Chief concerns with the present legislative regime include the fact that it only allows for prescriptive offences. This means that a regulator has to begin many individual prosecutions to address ongoing or systemic safety risks within an organisation.

Also, under the current HVNL, prosecutions for more than half of the offences relating to vehicle standards, mass, dimension, loading, speed and fatigue are dependent on some incident or injury having already occurred. This has the effect of limiting the ability of the legislation to put a stop to unsafe practices before they cause harm.

To address these concerns, the NTC is proposing that Chain of Responsibility (CoR) obligations under the HVNL be reformed to better align with national safety laws. The proposed changes are intended to clarify the roles of duty holders and ensure that these roles encompass a broad scope of responsibilities.

Key recommendations proposed include:

1. Implementation of a "primary duties regime" – If accepted, this recommendation will result in all parties in the CoR having a duty to ensure the safety of road transport operations so far as reasonably practicable (a standard of care consistent with harmonised WHS legislation). Role-specific duties will apply to each party in the CoR to consider the specific risks applicable to the operations of the specific party.

2. Expansion of investigative powers – If accepted, this recommendation will result in greater information gathering powers, comparable to the powers of inspectors investigating WHS breaches. The expanded powers will allow inspectors to obtain information and documentation from any person capable of providing relevant information.

3. Inclusion of voluntary enforceable undertakings – If accepted, this recommendation will result in enforceable undertakings being added to the range of alternative remedies available under the HVNL, such as, for example, improvement notices, infringement notices and supervisory intervention orders.

4. Due diligence obligations for executive officers – If accepted, this recommendation will result in a phased approach to the implementation of due diligence obligations for executive officers. Phase one will involve the introduction of an obligation on executive officers to proactively ensure parties in the CoR comply with their primary duty. Phase two will extend the obligation to include any person with a duty or obligation under the HVNL.

5. Evidentiary status of the codes of practice – Under the present regime, compliance with a code of practice can be used as evidence that the person took all reasonable steps to comply with their obligations. The NTC took the view that this encourages a "tick-a-box" mentality that is inconsistent with the proposed risk-based regime and recommended that the HVNL be amended to clarify the evidentiary status of the codes of practice and bring this status in line with WHS legislation. If accepted, this recommendation will result in the codes being admissible in proceedings as evidence of what is reasonably practicable in the circumstances to which the code relates. Defendants will, however, also be able to introduce evidence of compliance in a manner that is different to the manner contemplated by the code, provided that the manner discloses a standard that is equivalent to or higher than the standard provided by the code.

6. Significant penalties for breach of primary duties – The NTC advocates for penalties for a breach of the primary duties to be aligned with the penalties under the national safety laws.* If accepted, this recommendation will see the implementation of a hierarchy of penalties based on the risk and the nature of the actual harm or damage caused.

The proposed hierarchy once again mirrors WHS legislation by introducing three categories of duty of care breaches:

- category one is a breach of duty involving recklessness that creates a risk of death or serious injury or illness
- category two is a breach of duty creating a risk of death or serious injury or illness, and
- category three covers other breaches of duty.

The road ahead

The proposed reforms to the HVNL are indicative of road safety becoming a growing priority. The move away from numerous prescriptive offences toward broader duty-based obligations signals the intention to create a proactive culture of safety compliance.

All parties who may have CoR duties are strongly advised to familiarise themselves with the proposed recommendations, consider how it will affect their business practices, and consider what (if any) actions will need to be taken to address obligations.

**Currently, WHS legislation provides maximum penalties ranging from $50,000 to $3m and/or five years gaol. Maximum penalties applicable will vary depending on whether the defendant is an individual, an officer or a body corporate and whether the offence is a category one, two or three offence.*

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WHS enforceable undertakings on the rise

By Ian Bennett and Laura Dexter

A noticeable trend is emerging in jurisdictions governed by the model WHS legislation. Notably, enforceable undertakings (EUs) are increasingly being proposed and accepted as an alternative to prosecution and potential conviction for WHS breaches. In effect, this signals an appreciation and willingness by regulators to accept agreeable initiatives that will bring about improvements to WHS in the workplace, following incidents where a WHS breach may be alleged.

What is an enforceable undertaking?

An EU is an agreement between a WHS regulator and a person (whether an individual and/or organisation), binding the person to carry out specific and ongoing initiatives that deliver benefits to the workplace, industry and community.

Under the model *Work Health and Safety Act* (WHS Act), which now applies in all jurisdictions except Victoria and Western Australia, a person (including an individual or corporate entity) may enter into an EU for alleged or actual breaches. Undertakings may also be entered into under the applicable Victorian and Western Australian legislation, however, they have differing application and features.

EUs are not used to avoid ramifications flowing from an alleged or potential WHS breach, in the sense that:

- immediate "reasonably practicable" steps must still be implemented (irrespective of an EU being in place) to address any issues that resulted from the risk in the workplace
- the regulator may still use their powers to conduct an investigation and take enforcement action such as issuing prohibition or improvement notices, and
- in certain circumstances, the regulator may still pursue a prosecution at a later date (more on this below).

If a person would like to put together an EU proposal, the regulator should be contacted to express this interest. A meeting will be arranged to discuss the requirements of any EU proposal and to consider initiatives. A written EU proposal can then be submitted to the regulator for consideration, feedback and potential acceptance. Ultimately, it is at the regulator's discretion on whether to accept an EU proposal.

Notable trends

In many jurisdictions, EUs in the WHS context are a relatively new phenomenon and have gained popularity in recent years. Some notable trends and observations are:

- In the past two years, a number of EUs have been accepted by the various WHS regulators, including 21 EUs in Queensland, 15 in NSW and three in the ACT and South Australia.
- The number of EUs being pursued and accepted has reduced the number of WHS prosecutions that proceed to an arbitrated court outcome.
- EUs are not inexpensive alternatives to prosecution and require a significant financial and organisational commitment. Since EUs became available in NSW in 2012, more than $4.5m has been collectively spent on EU initiatives. A recently accepted EU involved initiatives with a total estimated value of $1m.
- To date, it is primarily corporate organisations, as opposed to individuals, that have pursued and entered into EUs. This is likely due to the difficulties for individuals to meet the required criteria of demonstrating benefits to the workplace, the industry and the community. The associated costs and resources required to meet these objectives may also be a major obstacle for individuals.
- EUs that have been accepted to date generally include six to eight initiatives within a single EU.
- WHS regulators are strongly encouraging organisations considering EUs to be creative and innovative when looking at developing safety solutions or initiatives.

What does an EU look like?

An EU proposal needs to be presented in the appropriate form, which addresses the regulator's specific criteria and links proposed safety initiatives to tangible benefits to the workplace, the industry or the community. WHS regulators have also published guidelines on how to prepare an EU proposal and about their general considerations in exercising their discretion.

Some common initiatives in recent EUs are:

- developing a standardised induction/ training process for workers and suppliers
- developing written procedures for a particular risk area or task
- refresher course or specific training for senior management
- auditing a WHS management system (and checking compliance with AS/NZS 4801:2001 WHS Management Systems)
- producing a safety media campaign on the dangers of a particular activity
- sponsoring a research project in the industry, and
- donating to charity and/or not-for-profit organisations.

Some of the more creative and novel safety initiatives that have been proposed and accepted in EUs are:

- developing an injury/near-miss hazard reporting mobile app for workers
- training to enable workers to achieve certification in WHS management through recognised tertiary courses
- hosting a family day at a workplace to emphasise safety awareness and management, and
- developing a regional television advertising campaign or educational video about a particular hazard.

Why would I enter an EU?

Despite the significant financial and organisational commitment, there are some notable benefits from entering an EU.

A WHS prosecution in the courts may be avoided, meaning there is no conviction recorded against the person. If a prosecution has been commenced, entry into an EU will result in the proceedings being discontinued. If a prosecution hasn't begun, the regulator is precluded from initiating one for this issue, subject to certain conditions detailed below.

The workplace that is subject to the EU has an opportunity to reform and reinforce its ongoing commitment to WHS. It may also have a broader impact on enhancing the workplace's safety culture and provides a practical example of a lesson learned from a WHS incident or risk.

The fine print

There are some important facts worthy of serious consideration before going down the EU path. If accepted, EUs are subject to ongoing compliance monitoring by the regulator, with the possibility of unannounced visits to verify the progress of initiatives. If an EU is not complied with, a court may order compliance and impose a hefty fine of up to $250,000. The regulator may also seek to prosecute the original alleged contravention.

An EU must also be published on the regulator's website, meaning that any alleged contravention that prompted the EU (and the initiatives being implemented) is public knowledge, so there is the potential for public scrutiny and reputational impacts.

Looking forward

An EU is not an easy way out, nor is it an opportunity to avoid all the consequences that may flow from an alleged WHS contravention. However, it is an opportunity for persons to enter into a dialogue with the regulator and seek an alternative to prosecution that facilitates ongoing WHS commitments.

It is anticipated that EUs will continue to be a popular method to ensure WHS compliance. It is strongly recommended that any proposed pursuit of an EU is well thought-out, in terms of the practicality of ongoing commitments and anticipated cost.

Not quite out of the danger zone: Extending time limits for unfair dismissal claims

By Daria McLachlan and Conor McNair

As an employer, you have most likely experienced that nervous 21 day wait for a potential unfair dismissal claim after terminating an employee. No doubt you breathed a sigh of relief when the time limit passed and no claim was filed. If a claim is not lodged within 21 days then employers are usually out of the danger zone. However, recent decisions have highlighted that this is not always the case.

Until now, the Fair Work Commission (FWC) has been reluctant to exercise its discretion to extend the time limit for filing an unfair dismissal application. Increasingly, the FWC has been granting extensions to employees who have been delayed in making a claim because of illness.

The law

Section 394(3) of the *Fair Work Act 2009* (the Act) provides that the FWC has discretion to extend the 21 day time limit for filing an unfair dismissal application if there are "exceptional circumstances". In determining whether to exercise this discretion, the FWC must consider a range of factors, including the reason for the delay, the merits of the application and any prejudice to the employer. In this article, we examine extensions of time sought where the reason for the delay is the applicant suffering an illness.

The historical position

The granting of an extension always turns on the facts and circumstances of the individual case. The FWC has generally taken a strict approach to out-of-time applications. Where illness is the reason for the delay, an extension would only be granted if the employee was prevented from making an unfair dismissal claim until the date the claim was lodged—and this required the employee to essentially be totally incapacitated by their illness.

Case law supported the hospitalisation of an employee during the 21 day period as being a sufficient basis to grant an extension of time. Anything short of this was generally insufficient. The FWC's strict approach to out-of-time applications is clear in *Sutherland v Emerson Pierce* [2014] FWC 3104. An extension of time was not granted because, despite a period of hospitalisation during which the employee was found to be totally incapacitated, the FWC was not satisfied that the employee was incapacitated for the entire 21 day period.

The FWC also took the view that if an employee had the ability to manage daily activities during the 21 day period, then they had capacity to lodge an unfair dismissal application. This was the case in *Rodrigo v Mawland Quarantine Station Pty Ltd* [2014] FWC 5766, where the FWC refused to extend the time limit for an employee suffering mental illness because he had the capacity to arrange accommodation during that period and, therefore, it was held that he should have had capacity to lodge an unfair dismissal application.

The tide turning

Some 2015 cases suggest that the scope of what constitutes exceptional circumstances under s 394(3) of the Act may be expanding. It appears that the FWC may now accept that serious and chronic illnesses amount to exceptional circumstances in and of themselves, rather than requiring an employee to demonstrate they were physically incapable of submitting their application on time.

In *China Southern Airlines Limited v Mohanan* [2015] FWCFB 8260 (*Mohanan*), the FWC full-bench refused leave to appeal an extension of time for an unfair dismissal application lodged 48 days late. The employee was recovering from cancer and had developed a consequential mental illness. Other relevant factors were that the employee wanted to recuperate with family before pursuing her unfair dismissal claim and was overseas when she was dismissed. It was noted by the FWC in *Mohanan* that although the employee had been able to communicate with her employer from overseas in the lead-up to the termination of her employment, this did not mean that the employee was able to lodge an unfair dismissal claim. The FWC held that it was not reasonable to conclude from the employee's ability to send emails that she "was able to function normally and conduct normal day to day activities".

Other recent cases of note that take a more lenient approach to the exceptional circumstance test, include:

- ***Mitchell Curtis v Suncorp Staff Pty Ltd* [2015] FWC 7380 –** The FWC extended the time limit for an application that was 39 days late. The applicant had irritable bowel syndrome and the FWC took into account the "debilitating nature" of the condition. The fact that the illness had a long duration was itself considered an exceptional circumstance.
- ***Rebecca Shannon v Urban WA Real Estate Pty Ltd* [2015] FWC734 –** An unfair dismissal application was late by 51 days because of morning sickness, which on occasion led to hospitalisation. The "reasonable explanation" for the delay, alongside the likely merits of the application, constituted exceptional circumstances.

Employers take heed

Recent case law suggests that the FWC is taking a more permissive approach to granting an extension of time, to the point where it is willing to allow an extension even months after a dismissal takes place. This creates greater uncertainty for employers when weighing up the risk of an unfair dismissal claim.

On reflection, it is arguable that older case law was simplistic in its approach to the exceptional circumstances test. The FWC now recognises that chronic illness can have a variable impact on a person's ability to undertake day-to-day tasks. Despite this, it is clear that the recent cases where an extension of time was granted involved what could be considered "chronic" illnesses, which is not the norm in most unfair dismissal matters faced by employers.

Given the discretion to extend the time for filing an unfair dismissal claim will only be exercised where there are exceptional circumstances and any exercise of the discretion also involves consideration of the application's merits and any prejudice to the parties, employers remain in a strong position to object to requests for extensions of time.

It is important that employers keep in mind:

- that it is possible for a claim to be made successfully, even several months outside of the 21 day time limit, if an employee is suffering from a serious injury or illness
- the need to lodge a jurisdictional objection and vigorously defend any claims lodged out-of-time, and
- the importance of having procedural measures in place to minimise the risk of an unfair dismissal claim being made in the first place, which includes clear disciplinary procedures, providing written warnings to employees and giving employees the opportunity to be heard regarding disciplinary issues.

The compound issue of drug dependence and mental health

By Susan Withycombe-Taperell and Bill Kritharas

Drug use and drug dependence within and outside work hours has long been reported to have a significant impact on organisations in terms of work health and safety through absenteeism, low productivity, poor performance and accidents at work. However, workers with drug dependence problems may also be experiencing mental health issues.

Mental illness issues may develop before a worker's employment with a person conducting a business or undertaking (PCBU) or be caused by factors outside work. Being in the workplace may also cause undue stress, exacerbate or contribute to mental illness. Under the *Work Health and Safety Act 2011* (Cth) all PCBUs must take steps to eliminate and minimise health and safety risks in the workplace, including psychological risks. This duty includes:

- identifying possible workplace practices, actions or incidents that may cause, or contribute to, the mental illness of workers, and
- taking actions to eliminate or minimise these risks.

Drug dependence can be difficult to identify and manage in a workplace as often people will go to great lengths to hide their drug use. There are also competing interests that need to be balanced, that is, ensuring the ongoing health and safety of all workers and the public but at the same time protecting the privacy and welfare of the person suffering from mental illness and/or drug dependence.

Typically, the first step for a PCBU in addressing drug use/dependence and mental health issues in the workplace is to ensure that there are policies in place addressing these risks. But this is not enough. It is also essential that there are systems in place to verify that policies are being complied with and how non-compliance is identified and dealt with.

The complexities arising from compound issues of drug dependence and mental illness were recently highlighted in an inquest held by the Queensland Office of the State Coroner into the death of a nurse.*

The inquest

The inquest heard that the deceased, a registered nurse, had previously survived a drug overdose using a drug (Fentanyl) taken from a patient and injected while at work. On that occasion, the nurse was formally suspended from work for six months and referred to a psychiatrist and psychologist. It is also understood that there were related criminal proceedings commenced against the nurse.

The nurse returned to work some time later with restrictions imposed on her by the Australian Health Practitioner Regulation Agency (AHPRA), including supervision, limitations on access to drugs, drug screening and regular reporting to AHPRA.

Upon returning to work and up until her death, there were a number of incidents or issues reported by the hospital to AHPRA concerning the nurse. These included allegations of the nurse taking medication from the hospital as well as concerns about her behaviour, such as reported erratic behaviour, poor patient management, long unexplained absences at work and suspicions of drug taking, including the discovery of syringes in a bathroom.

These incidents led AHPRA to implement a more restrictive management plan and to investigate whether the nurse's capacity to carry out work safely was "impaired". The nurse's colleagues were aware that the nurse was being investigated by AHPRA, however, the nature of the investigation, including the nature of the allegations and issues posed by the nurse, such as her suspected drug dependence, were not communicated to her colleagues.

Some time later, the nurse fatally overdosed on Fentanyl (most likely taken from the hospital) at her home.

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The inquest canvassed a broad range of issues, including whether:

- there were opportunities for the nurse to obtain drugs directly from patients under her care
- the nurse was properly supervised, and
- the process of supervision was sufficient.

Findings and recommendations

In the findings, the Coroner identified a number of shortcomings regarding the hospital's management of the nurse and the implementation and verification of its policies. The Coroner identified that a problem was "not the lack of a policy but how that policy is complied with and how non-compliance is identified and dealt with" as the hospital's "practice did not meet the required standard", which enabled the nurse to access restricted drugs.

The Coroner also referred to the hospital's competing interests of ensuring clear communication about AHPRA's supervision and support for the hospital's workers, ensuring the health and safety of workers and the public, while also protecting the welfare and privacy of the nurse. The Coroner made a recommendation that systems be implemented allowing for "better communication and support within a work environment where a staff member is being managed with respect to their health, which could include possible dependency/addiction". The Coroner also recommended that "if a staff member was maintained in a work unit with restrictions placed on their practice, the staff member would have to agree to disclosing restrictions to other staff members working with them as part of the agreement".

Potential implications

The death of the nurse may have been the subject of investigation by WorkCover Queensland. In view of the inquest's findings, a prosecution may be initiated against the hospital for failing to ensure the health and safety of the worker.

Unfortunately, this sort of a situation is a not-so-uncommon occurrence. In the findings, the Coroner referred to a number of instances where theatre technicians, nurses and anaesthetists over the years have died after accessing restricted medication at their workplace, with these incidents being the subject of coronial inquests.

This incident illustrates the importance of ensuring not only that policies and procedures are in place at your workplace, but also the importance of taking steps to verify that policies are complied with.

** The name of the deceased has been intentionally de-identified.*

A choice for change: Officer's safety obligations to avoid WHS failures

By Andrew Ross

Officers of businesses in Australia hold serious health and safety responsibilities and must ensure the business is taking both proactive and reactive steps to meet its health and safety obligations as a PCBU. Meeting due diligence requirements for officers is critical to preventing personal liability for safety offences.

For corporations that do business in the "harmonised" jurisdictions of Queensland, New South Wales, the ACT and South Australia, officer obligations are found in s 27 of the *Work Health and Safety Act 2011* (WHS Act) and requires that an officer exercise "due diligence".

Under s 27(5) of the WHS Act, to be due diligent, an officer must at a minimum:

- acquire and keep up-to-date knowledge
- understand the nature of operations and hazards/risks
- ensure availability and use of resources and processes
- ensure processes for receiving, considering and responding to information
- ensure processes for complying with obligations, and
- verify the provision/use of resources and processes.

In WA, the *Occupational Safety and Health Act 1984* (OSH Act) imposes obligations on officers. Under s 55 of the OSH Act an officer of a corporation, including any director, may be liable for breaches of the OSH Act, committed by the company where the offence occurred with the consent, connivance of, or neglect by, that officer.

In Victoria, if a body corporate commits a contravention of the *Occupational Health and Safety Act 2004* (Vic.) and the contravention is attributable to an officer of the body corporate "failing to take reasonable care", the officer may be guilty of the offence.

Who is an officer?

The *Corporations Act 2011* (Cth) defines an "officer" as a director or secretary or a person who:

- makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation, or
- has the capacity to significantly affect the corporation's financial standing, or
- in line with whose instructions or wishes the directors of the corporation are accustomed to act.

As a general guide, some factors that may determine whether a person is an officer include:

- What is the person's budget and their level of control over the budget?
- Does the person take part in board decision making?
- What is the size of the person's internal business unit?
- Who are the person's direct reports?
- To whom does the person report?

What failures are officers liable for?

Case law shows the Court's interpretation of the law and its expectations upon officers to exercise due diligence and to prevent contraventions. The decisions in *Inspector Ken Kumar v David Aylmer Ritchie* [2006] NSWIRComm 323,*WHS Qld v CX and AX* [2010] QIRC C/2010/33 and *SafeWork (NSW) v Romanous Contractors; SafeWork (NSW) v John Allen Romanous* [2016] NSWDC 48 highlight that officers can be liable for failing to meet due diligence requirements, even if they don't have a hands-on role in operations. They may also be liable if their responses to risks are not timely.

Inspector Ken Kumar v David Aylmer Ritchie

Mr David Ritchie was the CEO of Owens Group and oversaw about 30 companies operating in Australia, New Zealand and Fiji. One division of the Group, the Container division, included Owens Container Services Australia Pty Ltd.

Owens Container Services was involved in the repair, cleaning and storage of shipping containers and tanks at its premises in Auburn. On 15 January 2003, an employee, Mr Howie, was using methyl ethyl ketone (MEK), a highly flammable substance to remove some resin in a tank. Mr Howie left the MEK for a period of about 20-30 minutes and then returned to use a high pressure water spray gun to try to remove the resin. There was an explosion in which Mr Howie suffered severe injuries that he died from.

Both Owens Container Services and another company director, John Julian Rose, entered guilty pleas in the NSW Industrial Court, while Mr Ritchie entered a plea of not guilty.

Ritchie argued that because he spent limited "hands on" time on Australian operations, he was in a too remote position to influence the conduct of Owens Container Services and that he had to rely on the divisional managers and site managers' expertise to deal with the finer details of WHS at the company.

Ritchie argued that he was unable to influence the conduct of Owens Container Services when it came to which products were used to clean the containers and other specific requirements. The Court said that Mr Ritchie relied on a "system of assumptions", rather than proactive management. Mr Ritchie was found guilty of a breach of the Act and ordered to pay a penalty of $22,500. The company was fined $160,000.

From this, it can be said that simply because a manager doesn't have a hands-on role in operations does not mean they are absolved of WHS obligations. Mr Ritchie had the authority to seek the implementation of health and safety policies, and so he should have done so.

WHS Qld v CX and AX

A 2010 Queensland decision shows the exposure that officers may have by failing to respond in a timely way to safety warnings. Due to legal reasons, the parties can't be identified.

Mr AX was a workshop manager for CX. On 5 June 2009, Mr AX received an email about an incident at a related company regarding the unsafe removal of a counterweight from a piling rig in another country. The email instructed management to put an amended procedure for assembling and disassembling the counterweights in place. Mr AX failed to act on this request. An incident resulting in a worker's death then occurred at the site under AX's supervision. The Industrial Magistrate found that Mr AX's failure to amend the safety procedure within three months of receiving the warning email was a breach of s 24 of the repealed *Workplace Health and Safety Act 1995* (Qld). The penalties imposed were $200,000 for the company and $20,000 for the officer.

This case highlights that officers have a responsibility to act in a timely manner when they are made aware of a potential risk to the safety of employees.

SafeWork (NSW) v Romanous Contractors

In April this year, Romanous Contractors and its Director, Mr Allen Romanous, received the second largest WHS fine in NSW history following the death of a bricklayer at its construction site in 2014. Mr Romanous was found guilty in the District Court for a breach of s 27 of the WHS Act and fined $85,500 after the bricklayer died when he fell 5 m through a hole at the site. The Court found the company only had ad hoc safety systems in place, despite repeated warnings, and it was fined $425,000.

How officers can meet their obligations

Officers must ensure that their organisation has a proactive system of safety management, including:

- regular auditing by a person with qualifications and expertise
- follow-ups after audits, considering the auditor's recommendations
- incident reporting with corrective actions prioritised
- checks and processes to ensure that risk assessments are current and identify all hazards, with appropriate control measures introduced
- in the harmonised states, meetings to discuss the reasonably practicable options available to ensure safety, and
- ensure that, where work is contracted out, that appropriately qualified and safety-conscious contractors are engaged.

Recent developments

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

Changes looming to work health and safety legislation in Western Australia

The introduction of the general industry *Work Health and Safety Bill* (WHS Bill) in Western Australia is likely to be further delayed following the State Government's call for further public consultation on the WHS Regulations before the WHS Bill is presented to Parliament. WA remains the only state other than Victoria (whose current legislation forms the basis for the model legislation) that is yet to adopt the harmonised laws. Following the announcement of the latest consultation, the Government has recommended businesses don't start training on the WHS Bill, as the proposed Regulations could differ significantly from the national model.

The *WHS (Resources) Bill* (WA) is projected to be imminently introduced, and is on track to take effect from 1 January 2017. *Click here to read more...*

The rising risk of employer liability

Employers' liability and associated costs are increasing and there's no sign that trend will diminish. The Fair Work Commission recorded that there were 11,125 unfair dismissal applications conciliated and 1,527 that were arbitrated in Australia during 2014-2015. This is almost double the figure of 10 years ago.

If an unfair dismissal claim is made against an employer, significant disruptions to the workplace can arise, particularly if the employer does not have adequate processes in place to react efficiently and effectively. Employment practices liability (EPL) insurance can limit this exposure. EPL insurance indemnifies employers (and often their senior managers) against a wide variety of claims brought by their employees. Generally, this includes accusations of unfair dismissal, adverse action, sexual harassment and even breaches of contract. This type of insurance can ensure that companies are legally supported throughout difficult and drawn-out proceedings. *Click here to read more...*

Business and director fined $165k for preventable fall causing serious injuries

The NSW District Court's recent decision in *SafeWork New South Wales v Austral Hydroponics Pty Ltd and Safe Work New South Wales v Eang Lam* [2015] NSWDC 295 has provided some insight into how courts may view non-compliance with approved codes of practice.

The case involves a breach of obligations under the *Work, Health and Safety Act 2011* (NSW) (WHS Act) by Austral Hydroponics Pty Ltd and its Director, Mr Eang Lam, and demonstrates the Courts' willingness to hold officers to a high standard of due diligence where an applicable code of practice exists.

Austral was fined $200,000 and Mr Lam was fined $20,000, which were both then discounted by 25% to take into account their early guilty pleas. The case notes the need for PCBUs and their officers to look beyond the wording of the WHS Act and WHS Regulations to the requirements of approved codes of practice, to ensure their obligations are being discharged. *Click here to read more...*

Restraint of Trade: Is your business information confidential?

Business critical information was protected by a non-compete restraint clause in the recent decision of *Special Broadcasting Service Corporation v Andrew Corbett* [2016] NSWSC 461. SBS sought to restrain Mr Corbett from working for a competitor for the remaining duration of his employment agreement and, additionally, to restrain him from disclosing SBS's confidential information.

The Court found the material the employee had obtained represented major business plans and project budgets of the SBS—material that is often treated as confidential, particularly when in the hands of a competitor. *Click here to read more...*

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Bill is an experienced WHS lawyer. He advises clients in the construction, agribusiness, energy and transport industries and Commonwealth, state and local government sectors on WHS compliance, incident investigations, prosecutions and coronial inquests.

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