STEVENS & ASSOCIATES LAWYERS

JUNE 2017

SAFETY IN THE WORKPLACE

Over recent years, we have witnessed a fundamental shift in methods of work and an increasing focus on work health and safety, from prevention to prosecution. With this greater focus on the increasing obfuscation between work life and personal life, ensuring a safe and healthy workplace is essential from both a compliance and competition mind set.

The Team at Stevens & Associates Lawyers is always looking for new ways to add value for our clients. With this in mind, we are pleased to introduce our new publication dedicated to updates and information on work health and safety law, to be published quarterly and as a complement to our existing "*Vision in the Workplace*" monthly newsletter.

We trust our new publication will prove informative and topical. We welcome your feedback on how we can continue to assist with the work health and safety of your workplace.

In this First Edition of Safety in the Workplace – WHS Quarterly, we introduce you to our suite of work health and safety ("**WHS**") services; analyse the obligations of employers and WHS entry permit holders when a WHS entry permit holder seeks to enter the work site; and the extent of the duty of care to persons other than workers.

STEVENS & ASSOCIATES LAWYERS – WHS SUITE OF SERVICES

Taking a proactive approach to the work health and safety of your workplace is worth the investment.

A "one size fits all" approach to WHS is inadequate in this safety age. In developing a workplace that fosters a safety culture, through identifying hazards, and assessing and minimising the associated risks, your business can directly benefit through enhanced operational controls and industrial relations with workers and unions, lower insurance premiums, and claim management costs, reputation maintenance and fewer workforce interruptions.

The Team at Stevens & Associates Lawyers is pleased to offer you access to our suite of valuable WHS services, tailored to your business and workforce, including:

- Proactive safety audits that measure your WHS compliance;
- Management, Board and/or employee WHS training;
- Advice and support;
- Development of appropriate and tailored WHS policies;
- Prosecutions and critical incident management;
- Workplace bullying;
- WHS due diligence in mergers and acquisitions;
- Streamlining workplace consultation; and/or
- Management of right of entry issues.

In obtaining our WHS services, you will continue to receive direct and responsive access to your choice of lawyer. We would be pleased to further discuss your WHS needs at a time and place suitable to you.

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WHS ENTRY PERMITS – THE "UNFETTERED" RIGHT OF ENTRY?

The right of union officials to enter a workplace is strictly regulated by the *Fair Work Act 2009* (Cth) ("**the FW Act**") and the relevant work health and safety legislation in your state (in this article, we refer to and focus on the *Work Health and Safety Act 2011* (NSW) ("**the WHS Act**").

Although the right is strictly regulated, we frequently see WHS permits and rights of entry being abused and/or used by the permit holder for inappropriate purposes. In this article, we examine the essential rights and obligations of permit holders and persons conducting a business or undertaking ("**PCBU**"), and the potential consequences for breach of the same.

The purpose of a WHS entry permit is to provide the WHS entry permit holder with the right to enter the workplace to inquire into a suspected contravention of the WHS Act that relates to a member worker or worker eligible to become a member (together, "**the Worker**"). However, prior to entering the workplace, the WHS entry permit holder must reasonably suspect that a contravention of the WHS Act has or is occurring.

Once lawfully in the workplace, the WHS entry permit holder may exercise various rights, such as inspection of work systems and plants, consulting with the workers and the relevant PCBU, and inspecting and making copies of relevant documents.

Entry to a workplace under a WHS entry permit is regulated to the extent that:

- The right of entry must be exercised only during normal working hours;
- The location is restricted to where the relevant worker conducts work and/or areas where the worker's health and safety is directly affected;
- The WHS entry permit holder must comply with the relevant PCBU's reasonable request to adhere to the health and safety practices and procedures of the workplace;
- As soon as reasonably practicable after the entry (and subject to certain exceptions) the WHS entry permit holder must provide notice of the entry and suspected contravention; and
- At least 24 hours (and not more than 14 days) before entry to a workplace, the WHS entry permit holder must provide notice of their proposed entry if the purpose is to inspect or make copies of documents, such as employee records.

A frequent difficulty that arises for PCBUs is in what situations the PCBU can block a WHS entry permit holder's

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entry to part or all of its workplace? This question was recently considered by the Industrial Relations Commission of NSW ("**the IRC**") in *CFMEU (NSW Branch) v Acciona Infrastructure Australia Pty Limited and Ferrovial Agroman (Australia) Pty Ltd t/as the Pacifico Acciona Ferrovial Joint Venture [2017] NSWIRComm 1000.*

In deciding to grant, in part, the CFMEU's application for entry-related orders, IRC Commissioner John Murphy clarified the WHS entry permit rules and usefully reaffirmed that right of entry should be exercised responsibly and for its intended purposes.

The issue in dispute arose from whether the Respondent ("**Pacifico**") was entitled to refuse CFMEU entry permit holders, Mr Rigby and Mr Kelly, entry to its worksite.

The CFMEU claimed that Mr Kelly and Mr Rigby had received reports from employees at the site that Pacifico's employee, "Doc", had engaged in conduct that amounted to bullying and harassment, and which was causing mental distress to the employees ("**the Alleged Conduct**"). The Alleged Conduct included making threatening comments such as "*don't join the CFMEU*" and "*if you do join the CFMEU there will be consequences*".

Pursuant to section 122 of the WHS Act, Mr Rigby and Mr Kelly gave notice of their intention to enter the worksite and consult and advise workers. Mr Rigby and Mr Kelly discussed the employees' concerns with Pacifico's HR Manager and later provided notice pursuant to section 119 of the WHS Act for the purpose of inquiring into a suspected contravention of the WHS Act and sought inspection of Pacifico's bullying and harassment policy. Pacifico declined the request. However, the IRC determined the notice was sufficient.

In determining to decline the CFMEU's request for orders that would confirm the CFMEU WHS permit holders as having "*reasonably suspect*[ed] *contraventions*" of the WHS Act, Commissioner Murphy observed: "*the question to be answered was whether or not there was some factual basis, some material or materials with probative value, which would create in the mind of a reasonable person a suspicion that Pacifico had contravened, or was contravening, section 19 of the WHS act by failing to ensure, so far as is reasonably practicable, the psychological health of workers engaged on the* [worksite]…*The formation of a reasonable suspicion* [of a contravention] *requires more than hearsay evidence and direct observation of workers feeling stressed, anxious and uncomfortable at work*." [Emphasis added]

The take home message for employers, despite the low bar for meeting the WHS Act's notice requirements, is WHS entry permit holders cannot enter your workplace for inappropriate purposes, and must hold a reasonable suspicion of a contravention of the WHS Act.

If you would like to further discuss the conduct of WHS entry permit holders at your workplace, please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

POTENTIAL GAOL TERM FOR "RECKLESS" ENGINEER

A full bench of the Industrial Relations Court South Australia ("**the SA IRC**") has upheld charges against an engineering company, Safe is Safe Pty Limited ("**the Company**") and its officer, Hamish Munro, for "recklessness" following the death of an eight year old girl at the Royal Adelaide Show in 2014 after being ejected from an amusement ride and being fatally injured.

Prior to the accident, the Company had performed its annual inspection of the ride and issued a certificate of compliance that the ride was compliant with the appropriate safety

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standards. Mr Munro was an officer of the Company and was found to have "*aided, abetted, counselled or procured*" the Company to commit a breach of the *Work Health and Safety Act 2012* (SA) ("**the SA WHS Act**", in terms mirroring the NSW WHS Act) being that the Company, "*without reasonable excuse, engaged in conduct that exposed a class of individuals to whom a health and safety duty was owed…to a risk of death or serious injury, and that it was reckless as to that risk.*"

As a timely reminder:

- Section 19(1) of the SA WHS Act prescribes the primary duty of care on a PCBU to ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work; and

- Section 19(2) of the SA WHS Act prescribes the primary duty of care on a PCBU to ensure, so far as is reasonably practicable, the health and safety of other persons is not put at risk from the PCBU's work.

The defendants unsuccessfully argued that the "*health and safety duty imposed by s 19(2) of the* [SA WHS] *Act only exists whilst work is being carried out by the* [PCBU and]*…does not extend to the consequences or product of work, after the work has been carried out or completed*." The defendants unsuccessfully argued that the defendants' had completed the relevant "work" on the ride prior to the accident and therefore, the duties under section 19(2) of the SA WHS Act had lapsed because the victim was not at the "workplace".

In rejecting the defendants' arguments, the IRC held that the duty under section 19(2) of the SA WHS Act does not merely complement the primary duty to workers by extending it to customers and visitors to a workplace, rather, the duty is wider in order to "*protect the public at large from the adverse health and safety consequences of work undertaken by a PCBU*."

The IRC also went on to hold that "*the gist of an offence under s19 of the* [SA WHS] *Act is the exposure to the risk…the consequence of a breach of the duty is not an element of the offence. It is the creation of the risk that constitutes the offence*." [Emphasis added] Accordingly, the SA IRC held the risk arising from the defendants' work sufficiently extended to members of the public, specifically, the deceased child.

The Company is now exposed to a maximum fine of $3 million and Mr Munro may face a gaol term of up to five years or a $600,000 individual fine in his position as officer of the Company.

If you would like to discuss the scope of your work health and safety duties, please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.