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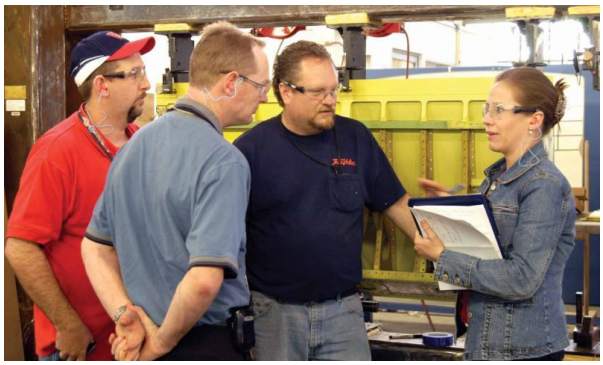
SPRING 2017

SAFETY IN THE WORKPLACE

Welcome to our Spring 2017 Edition of "*Safety in the Workplace – WHS Quarterly*". Since the first edition, we have seen an increasing number of prosecutions in the WHS space, the move in Victoria to "harmonise" its WHS legislation, and Queensland is set to introduce the charge of industrial manslaughter in its WHS legislation following the 2016 Dreamworld fatalities.

In this edition, we consider the duty to consult with other duty holders following a significant decision of the South Australian Industrial Relations Court. We also consider whether it is time for your business to "spring clean" your WHS policies, practices and procedures.



CONVICTION AND $120,000 FINE FOR EMPLOYER'S FAILURE TO CONSULT WITH HOST EMPLOYER: *WHAT IS THE DUTY TO CONSULT WITH OTHER DUTY HOLDERS?*

In the first prosecution of its kind under the harmonised work health and safety ("**WHS**") laws, the South Australian Industrial Relations Court ("**SAIRC**") in *Boland v Trainee and Apprentice Placement Service Inc [2016]* SAIRC 14 ("**Boland v TAPS**"), held an employer company liable under section 46 of the WHS Act (South Australia) for failing to, so far as was reasonably practicable, consult, cooperate and coordinate activities with other duty holders, including the host employer "Joseph Cameron Argent trading as Shear Edge Roofing" ("**the Host Employer**"), in relation to the companies' shared health and safety duties.

In this matter, the defendant, being Trainee and Apprentice Placement Service Inc. ("**the Employer**"), had placed the worker into a job at the Host Employer and under the Host Employer's supervision. Inspire Construction Services Pty Ltd (in liquidation) controlled the site. In performing the job, the worker sustained multiple serious injuries when the guttering that the Host Employer had instructed him to handle came into contact with high voltage wires. His injuries, however, were irrelevant to the SAIRC's decision-making as to whether there has been a breach of the duty to consult with other duty holders under section 46 of the WHS Act.

In reaching its decision to record a conviction against the Employer and impose a $120,000 fine, Industrial Magistrate Ardlie considered various matters, including:

- Three of the Employer's field officers had attempted to attend the Host Employer's sites every eight weeks;
- The Employer's conduct after the incident in attempting to improve its existing safety systems, in particular, its systems to ensure it complies with its duty to consult, cooperate and coordinate with its host employers;
- The Employer's ongoing financial support to the worker following the incident, including an offer of counselling and a camping equipment voucher to provide the worker with respite from his rehabilitation;
- The Employer's swift compliance with improvement notices; and

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SPRING 2017

SAFETY IN THE WORKPLACE

- The Employer's early guilty plea, which entitled the Employer to a discount of up to 40% on the penalty, and this incident being its first offence.

These proceedings remind duty holders of the importance of engaging in consultation and to not become complacent in discharging their strict health and safety duties even when those duties are shared with other duty holders.

The duty to consult, cooperate and coordinate arises:

- Between duty holders – such as between the employer and the host employer (s.46) ("**the Concurrent Duty**"); and

- Between the person conducting the business or undertaking ("**PBCU**") and workers and their elected health and safety representative/s (if any) (ss. 47-49) ("**the Duty to Consult**").

The Concurrent Duty to Consult

The decision in Boland v TAPS illustrates the importance of all duty holders to consult, cooperate and coordinate on a continuous basis with other duty holders. It is not sufficient to consult on health and safety at the beginning of a contract but not thereafter. The duty is ongoing and must be discharged in a way that promotes two way dialogue. However, the extent of the duty is curtailed by what is reasonably practicable.

In making such a finding, Industrial Magistrate Ardlie was not convinced that the failed attempts to attend the various sites were all that the Employer could have reasonably done to discharge its duty to consult. Instead, the three field officers' failed attempts were in and of themselves evidence of the Employer's failure to consult with the other duty holders.

The Duty to Consult

Whilst the decision in Boland v TAPS turns on section 46 of the WHS Act, it necessarily implies that the more general consultation obligations will become a focus of the watchdog.

The duty to consult with workers arises under section 47 of the WHS Act. In discharging this duty, the PCBU must, so far as is reasonably practicable, consult with workers who carry out work for the business or undertaking and who are, or are likely to be, directly affected by a WHS matter.

The duty is imposed on the PCBU and requires the PCBU to consult with the workers who will (or are likely to) be directly affected by a WHS matter. As elsewhere in the WHS Act, reference to "worker" is intended to be broad. The concept of the "worker" encompasses, for example, an employee, as well as contractors, sub-contractors, their employees, apprentices, volunteers, and labour hire workers.

"Consultation" requires:

- The sharing of relevant information about the WHS matter with the worker;

- Providing workers with the opportunity to express their views, raise WHS issues and contribute to decision making regarding the matter;

- Taking into account the worker/s views;

- Advising workers of the outcome of the consultation; and

- Involving the elected health and safety representative/s (if any).

Whilst consultation requires more than simply providing health and safety information to workers, it does not require the PCBU to negotiate on the WHS matters. The duty to consult is triggered in the following situations:

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SPRING 2017

SAFETY IN THE WORKPLACE

- In risk assessment – when identifying and assessing WHS risks and determining measures to eliminate or minimise those risks;
- In determining the adequacy of welfare facilities for workers;
- When proposing changes that may impact the WHS of workers; and
- When making decisions for:

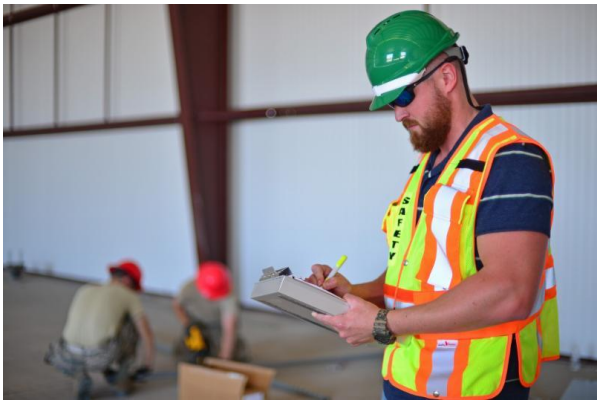
    1. Consulting with workers;
    2. Resolving WHS issues;
    3. Monitoring worker health;
    4. Monitoring workplace conditions; and
    5. Providing information and training to workers.

The Take-Home Message for Your Business

Consultation need not be so time consuming as to distract from your business. In proactively managing WHS and the duty to consult, your business will be able to "chip away" at its obligations by attending to the duties more frequently. Useful consultation habits to consider include integrating consultation into regular toolbox or team meetings; new worker inductions; project planning; proactively engaging with worksite managers; and ensuring your independent contracts, policies, and procedures refer to the essential obligation of the independent contractor to engage in safety consultation.

Read the full case here: http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SAIRC/2016/14.html

Should you have any questions regarding your consultation rights and obligations, please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.



WORK HEALTH & SAFETY AUDITS – *IS IT TIME FOR A SPRING CLEAN?*

Being employment specialists, we get a flutter of excitement when we see our clients have implemented robust yet practical policies and procedures in their workplace. We understand the delicate nature of implementing shiny new policies, and appreciate the time it takes you, our clients, in revising and implementing policies, particularly those relating to WHS.

A duty holder's WHS obligations are ongoing and non-delegable. As such, implementing WHS policies and hoping for the best will not discharge the duty holder's obligations. Even more, failing to update and mould WHS policies and procedures to suit the changing workplace and obligations puts the duty holder at an even higher risk of breaching its duties.

In adopting a proactive and preventative approach to WHS, we recommend conducting an audit of the work health and safety of the workplace. Ideally, your WHS audit should cover (at a minimum):

1. Legislative compliance;
2. Management systems and controls;

3. Workplace hazards; and
4. Emergency management.

Preparing for, and conducting your first WHS audit is a daunting and time consuming task and should be executed in a manner that is well-planned and thorough. As WHS experts, we are pleased to conduct WHS audits for our clients, from reviewing current policies and procedures for legislative compliance, to site visits to review management systems and controls and workplace hazards, and educating you on how to conduct your own ongoing audits.

Please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray if you would like to discuss how the Team at Stevens & Associates Lawyers can assist with your WHS audit.