



# DonaldsonWalsh Lawyers

Kings Chambers  
320 King William Street  
Adelaide SA 5000

**Tel** +618 8410 2555  
**Fax** +618 8231 7186  
[dwlaw@dwlaw.com.au](mailto:dwlaw@dwlaw.com.au)  
[donaldsonwalsh.com.au](http://donaldsonwalsh.com.au)

# **Safety Discovery Before Injury Recovery – SISA Conference – 23 July 2009**

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## **INFORMATION SESSION E: OHS Prosecutions – Hard Lessons to be Learned?**

**Presented by: Karl Luke, Donaldson Walsh**

# Enforcement of OHS Obligations

- Improvement notices
- Prohibition notices
- Enforceable undertakings (not in SA)
- Criminal prosecutions

# Why proceed with criminal prosecution?

- SafeWork SA can enforce the *Occupational Health Safety and Welfare Act* by invoking the criminal law and conducting a prosecution for a contravention of the obligations set out in the Act and/or regulations.
- But why should SafeWork SA launch prosecutions, particularly when administrative sanctions such as improvement and prohibition notices are available to ensure compliance?

# Function of the criminal law?

- Criminal law can serve functions which are either there to achieve a purpose or to make a symbolic (moral) statement.
- It is generally accepted that OH&S prosecutions are brought to deter OH&S duty holders from breaching those duties.
- General view is that the cumulative effect of numerous prosecutions against other companies and by hearing of the imposition of very large penalties or jail sentences has a deterrent effect.

# Deterrence theory

- Deterrence theory
  - Part of the general theory of criminal law is that it deters people from behaving in a certain way.
  - Applying criminal sanctions to breaches of OH&S duties is thought to cause a change in management behaviour.
  - Inspection without penalty may not create the improvements necessary to lead to safer workplaces.
  - Criminal sanctions in particular create a stigma which increases its deterrent effect.
  - Companies wish to protect their commercial reputation by minimising the number of industrial accidents onsite.
  - The threat of personal sanctions is said to be an important motivating factor in OH&S compliance.

# Who should be prosecuted?

- Company officers?
- Responsible officers?
- Senior officers with control over systems of work?
- Individual workers?

# Problems with prosecutions?

## Criticisms

- In reviewing the cases, it appears that prosecutions are built on an event (or incident) where the factors leading up to an injury or incident are relevant.
- This immediately focuses attention on the incident rather than necessarily focussing attention on underlying systems of work or on a defendant's OH&S management systems.
- The cases give the appearance of isolated “one off” events, rather than being focussed on issues of bad work practices. These are some of the criticisms of the approach taken by the courts in prosecutions.

# What lessons can be learned?

- 2008/2009 prosecutions overwhelmingly relate to incidences involving machinery, combined with failure to carry out any or any adequate hazard identification or risk assessment.
- Additional charges relate to deficiency in training.
- Very few of the prosecutions relate to a failure to comply with procedures in an existing comprehensive OH&S system.
- Very few prosecutions have occurred in relation to circumstances where there is no injury.
- In 2008/2009 there were no prosecutions relating to responsible officer.

# Cases of interest?

- *Patterson v Department of Education and Children's Services & Jones*

# *Patterson v Department of Education and Children's Services & Jones*

## **THE FACTS**

- A football lodged on the roof of a sports shed
- A teacher (second defendant) observed the football from a window on the first floor of a classroom building, which overlooked the roof of a sports shed.
- A student in the vicinity was permitted by Jones to climb out of the window and jump onto the fibro-cement sheeting below, which gave way, causing the student to fall through the floor of the sports shed, a distance of approximately 2.75 metres – student suffered injury, namely an undisclosed fracture of the right leg.
- The Department pleaded guilty to the charge of failing to ensure, so far as was reasonably practicable, that students were safe from injury and risks to health and that it failed to ensure that students did not access the sports shed roof to retrieve balls.
- The second defendant pleaded guilty to the charge of failing to take reasonable care to avoid adversely affecting the health or safety of the student, in that he failed to direct the student not to exit the window on the first floor, to retrieve a ball from the roof of the sports shed.

# *Patterson v Department of Education and Children's Services & Jones*

## IMPORTANT POINTS

- The Department had a comprehensive OH&S management system.
- There were significant policies and procedures in place.
- The student fell through the roof and not off the roof.
- The incident was unpredictable to a certain degree.
- The failure of the Department was to fail to assess the practice of accessing the roof to retrieve balls.
- Failure by the teacher of duty over the students

# *Patterson v Department of Education and Children's Services & Jones*

**QUESTION: Why prosecute the Department  
in these circumstances? (political/moral  
reasons)**

# Duty of Worker

- Section 21(1a)

An employee must take reasonable care to avoid adversely affecting the health or safety of any other person through an act or omission at work.

# *Patterson v Department of Education and Children's Services & Jones*

- Teacher prosecuted.
- Teacher did not foresee the risk.
- The teacher was not given any instructions
- Nevertheless, the teacher was found guilty of the offence charged.

# Why prosecute the teacher?

- Moral hazard?
- Foreseeability of risk?
- Hadn't he taken reasonable care?

# *Spinks v McIvor*

- Fatal electrocution to one employee.
- Deceased employee on roof attempting to change a fluorescent tube inside commercial sign when his hand touched a loose live wire.
- Power supply to sign had not been isolated.
- Employer previously warned of difficulty in finding power isolation switch and need to reach inside sign.
- No hazard identification and risk assessment for maintenance work on sign.
- Inadequate safe working procedures

# *Spinks v McIvor*

- Lessons learned?
  - Importance of hazard identification and risk assessment.
  - Importance of following up control measures.
  - OH&S an organic process of continuous improvement.
  - Taking OH&S seriously.
  - Understanding OH&S.

# 2008/2009 Prosecutions

Incident Type	Name of Cases	Tally
<b>Death/serious injury</b>	<ul style="list-style-type: none"><li>• ZINIFEX PORT PIRIE PTY LTD</li><li>• SSL LIFTS PTY LTD and COX CONSTRUCTIONS PTY LTD (for the same incident)</li><li>• PREMIER ROADLINES PTY LTD</li><li>• KORVEST LIMITED</li><li>• CIVIL &amp; ALLIED TECHNICAL CONSTRUCTION PTY LTD</li><li>• GRANT MCIVOR (T/AS GRAPHIC INSTALLATIONS)</li><li>• MEDMECH SOLUTIONS PTY LTD</li><li>• MULTI-SKILLED ENGINEERING PTY LTD</li><li>• M DEKKER CONSTRUCTIONS PTY LTD</li></ul>	<b>10</b>

\* Cases may appear in more than one category

Incident Type	Name of Cases	Tally
<p><i>Machine/plant caused amputations (or similar)</i></p>	<ul style="list-style-type: none"> <li>• SOYGANIC FOODS AUSTRALIA PTY LTD</li> <li>• BRIDGESTONE AUSTRALIA LTD</li> <li>• COOPER STANDARD AUTOMOTIVE</li> <li>• SOUTHWEST PASTORAL PTY LTD</li> <li>• PORT LINCOLN TUNA PROCESSORS PTY LTD</li> <li>• ADELAIDE INDUSTRIAL LABOUR SERVICE</li> <li>• AMCOR PACKAGING PTY LTD</li> <li>• COOPER STANDARD AUTOMOTIVE (AUSTRALIA) PTY LTD</li> <li>• UNIVERSAL NOMINEES PTY LTD</li> <li>• EAST WEST FURNITURE PTY LTD</li> <li>• ISS PROPERTY SERVICES PTY LIMITED</li> <li>• PORT LINCOLN TUNA PROCESSORS PTY LTD</li> <li>• OLGA'S FINE FOODS PTY LTD</li> </ul>	<p><b>13</b></p>

Incident Type	Name of Cases	Tally
<p><b><i>Failure to carry out any or adequate hazard identification or risk assessment</i></b></p>	<ul style="list-style-type: none"> <li>• SOUTHWEST PASTORAL PTY LTD</li> <li>• PORT LINCOLN TUNA PROCESSORS PTY LTD</li> <li>• PURE LOGISTICS COLD CHAIN PTY LTD</li> <li>• SOYGANIC FOODS AUSTRALIA PTY LTD</li> <li>• CIVIL &amp; ALLIED TECHNICAL CONSTRUCTION PTY LTD</li> <li>• MEDMECH SOLUTIONS PTY LTD</li> <li>• GRANT MCIVOR (T/AS GRAPHIC INSTALLATIONS</li> <li>• TRUBILD PTY LTD</li> <li>• MULTI-SKILLED ENGINEERING PTY LTD</li> <li>• SHE'S APPLES SERVICES PTY LTD</li> <li>• UNIVERSAL NOMINEES PTY LTD</li> <li>• PERFORMANCE WHEEL NOMINEES PTY LTD</li> <li>• MEDMECH SOLUTIONS PTY LTD</li> <li>• TRUBILD PTY LTD</li> <li>• EAST WEST FURNITURE PTY LTD</li> <li>• ISS PROPERTY SERVICES PTY LIMITED</li> <li>• PORT LINCOLN TUNA PROCESSORS PTY LTD</li> <li>• M DEKKER CONSTRUCTIONS PTY LTD</li> <li>• OLGA'S FINE FOODS PTY LTD</li> <li>• ALOREN (NO 44) PTY LTD</li> </ul>	<p style="text-align: center;"><b>20</b></p>

Incident Type	Name of Cases	Tally
<p><i>Training deficiency</i></p>	<ul style="list-style-type: none"> <li>• ZINIFEX PORT PIRIE PTY LTD</li> <li>• SOYGANIC FOODS AUSTRALIA PTY LTD</li> <li>• OLIVERS FODDER PTY LTD</li> <li>• ARTSO CORES SA PTY LTD</li> <li>• PORT LINCOLN TUNA PROCESSORS PTY LTD</li> <li>• ZERELLA HOLDINGS PTY LTD</li> <li>• CIVIL &amp; ALLIED TECHNICAL CONSTRUCTION</li> <li>• DARREN SHIELDSN PTY LTD</li> <li>• PENRICE SODA PRODUCTS PTY LTD</li> <li>• ISS PROPERTY SERVICES PTY LIMITED</li> <li>• PMP (SA) &amp; ASSOCIATES PTY LTD</li> <li>• OLGA'S FINE FOODS PTY LTD</li> <li>• ALOREN (NO 44) PTY LTD</li> </ul>	<p><b>13</b></p>

Incident Type	Name of Cases	Tally
<b><i>Comprehensive OHS systems in place, but a failure to comply with procedures</i></b>	<ul style="list-style-type: none"><li>• DEPARTMENT OF EDUCATION AND CHILDREN'S SERVICES and COLIN RAYMOND JONES (for the same incident)</li></ul>	<b>2</b>

Incident Type	Name of Cases	Tally
<p><b><i>Repeat offences (same or similar incident, same plant)</i></b></p>	<ul style="list-style-type: none"> <li>• MCK PACIFIC PTY LIMITED</li> <li>• KORVEST LIMITED</li> <li>• ANTHONY ROSIER</li> <li>• PERFORMANCE WHEEL NOMINEES PTY LTD</li> <li>• PENRICE SODA PRODUCTS PTY LTD</li> </ul>	<p><b>5</b></p>

Incident Type	Name of Cases	Tally
<i>No injury</i>	<ul style="list-style-type: none"><li>• METALCORP RECYCLERS PTY LTD</li><li>• ANGELO SVINGOS t/as AAA Demolition and Earthmoving</li><li>• OLIVERS FODDER PTY LTD</li><li>• TRUBILD PTY LTD</li></ul>	<b>4</b>

<b>Incident Type</b>	<b>Name of Cases</b>	<b>Tally</b>
<b><i>Bullying and Harassment</i></b>		<b>0</b>
<b><i>Responsible Officer</i></b>		<b>0</b>

# SSL LIFTS PTY LTD 28/11/08

- *(ACN 102 245 983): was convicted ex parte (the matter was dealt with by the court in the absence of the defendant) and fined \$120 000 plus costs and \$10 000 compensation in relation to two counts of s22(2).*
- *On 14 December 2005, a 34-year-old person was fatally injured after he fell through a gap in a moving walk while installing timber framework onto the bulkhead above the moving walk and while the moving walk was being tested. A second person present at the time was exposed to a risk of entanglement or crushing.*

# SSL LIFTS PTY LTD 28/11/08 (cont'd)

- *The company failed to*
  - *ensure that people did not work on or near the moving walks while they were being inspected and tested,*
  - *exclude access to the moving walks by means of suitable physical barriers during inspection and testing,*
  - *erect signs informing people that access to the moving walks was prohibited during inspection and testing,*
  - *ensure there was a person who could monitor access to the moving walks at all times while they were being operated intermittently,*
  - *ensure the moving walks were only operated during inspection and testing using a portable and manually operated control device that required permanent application of manual pressure, and*
  - *ensure that any pallet removed from the moving walks was replaced at any time at which it was not necessary for it to be removed for the purpose of inspection and testing.*

# COX CONSTRUCTIONS PTY LTD 28/11/08

- *(ACN 007 661 350): was convicted and fined \$59 500 plus costs and \$10 000 compensation after pleading guilty to a breach of s19(1). On 14 December 2005, a 34-year-old employee was fatally injured after he fell through a gap in a moving walk while installing timber framework onto the bulkhead above the moving walk and while the moving walk was being tested.*
- *The company failed to:*
  - *exclude the employee from working on or near the moving walks while they were being inspected and tested by SSL Lifts Pty Ltd, and*
  - *adequately warn and advise the employee of the risks and hazards associated with working on or near the moving walks while they were being inspected and tested.*

# PREMIER ROADLINES PTY LTD

- *convicted and fined \$45,000 plus costs and \$20,000 compensation after pleading guilty to a breach of s19(1). On 14 July 2006, a 39-year-old employee was fatally crushed while attempting to change a tyre on the coach he was due to drive from Whyalla to Adelaide.*
- *The company failed to:*
  - *ensure the jacking points on the coach were adequately marked,*
  - *provide an adequate safe operating procedure in relation to coach jacking and wheel changing,*
  - *provide such information, training and supervision as was reasonably necessary to ensure the employee was safe from injury in the event of his having to perform the task of changing a tyre on a coach, and*
  - *provide adequate lighting for the employee to perform the task of changing the tyre*

# ***KORVEST LIMITED (1 OF 2)***

- *(ACN 007 698 106): was convicted and fined \$73 000 plus costs after pleading guilty to two counts of s19(1) and one count of r6.6.3, in relation to two separate incidents. On 28 February 2006, two employees suffered burns when they were showered with molten zinc when a jig was suddenly submerged into the molten bath, causing an explosion of molten zinc.*
- *The company failed to:*
  - *ensure that it provided appropriate personal protective equipment to the employees,*
  - *give preliminary notice of the occurrence by contacting the Department of the Premier and Cabinet - SafeWork SA by telephone or facsimile as soon as practicable after it occurred, and*
  - *give written notice of the occurrence within 24 hours after it occurred.*

***Fine: \$28,000***

# ***KORVEST LIMITED (2 OF 2)***

- *On 28 September 2006, four employees suffered burns when they were showered with molten zinc when a jig was suddenly submerged into the molten bath, causing an explosion of molten zinc.*
- *The company failed to:*
  - *ensure that it provided appropriate personal protective equipment to the employees,*
  - *implement a system to ensure that jigs used in the galvanising process were regularly de-scaled to prevent build-up of zinc,*
  - *provide and maintain appropriate emergency deluge facilities immediately accessible to the kettle,*
  - *ensure there was a procedure requiring that an ambulance be called after employees sustained hot metal burns, and*
  - *implement engineering controls to minimise or eliminate the risk of inadvertent operation of the remote control used to raise and lower the jig in the galvanising process.*

***Fine: \$45 000***

# MEDMECH SOLUTIONS PTY LTD

- *(ACN 105 186 829): was convicted and fined \$38,400 after pleading guilty to two breaches of s19(1). On 14 July 2005, a worker suffered severe injuries including fractures to his face, skull, ribs, cervical spine and collarbone after being struck by a blanking plate while removing it from the end of a compressed air pipeline containing compressed air. A second employee working nearby was placed at risk.*
- *The company failed to:*
  - *conduct adequate hazard identification and risk assessment;*
  - *provide and maintain a written work method for the task to ensure the system was not pressurised prior to the plate being removed;*
  - *make available and install a suitable gauge to detect any compressed air in the system;*
  - *install a release valve if pressure was detected;*
  - *provide necessary information, instruction, training and supervision to ensure the task was not performed if the system was pressurised.*

# CIVIL & ALLIED TECHNICAL CONSTRUCTION PTY LTD

- *(ACN 077 924 120): was convicted and fined \$31,825 after pleading guilty to breaches of s19(1) and r6.6.2. On 1 April 2005, a 36-year-old employee sustained serious leg, hip and spinal injuries after an extension ladder he was using to descend a vertical maintenance shaft collapsed.*
- *The company failed to:*
  - *undertake adequate hazard identification and risk assessment for working in the confined space*
  - *provide and maintain equipment appropriate to working in the confined space*
  - *provide and maintain an entry permit system for entry to the confined space*
  - *provide appropriate arrangements for rescue of a person from a confined space in the event of an emergency*
  - *provide plant in a safe condition in that it provided a ladder that was unsafe*
  - *provide adequate training or instruction to the employee in relation to work in a confined space and*
  - *notify SafeWork SA as soon as reasonably practicable after the occurrence of the injury.*

# **MCK PACIFIC PTY LIMITED (1 OF 2)**

- *(ACN 004 290 288): was convicted and fined a total of \$40,500 after pleading guilty to two breaches of s19(1) in relation to two separate incidents involving the same machine.*
- *On 16 January 2006, a 42-year-old employee sustained injuries when his foot was trapped by a foaming press when the machine was started while he was removing a build up of foam.*
- *The company failed to:*
  - *act on the identified crushing risk the foaming press presented,*
  - *provide written safe operating procedures for cleaning and maintaining the foaming press,*
  - *provide a system to ensure the foaming press was locked out or isolated while employees were in the machine for cleaning and maintenance purposes,*
  - *adequately guard the press to prevent employees the machine under the preload table and the loading tray, and*
  - *equip the press with sufficient or adequate emergency stop devices.*

**Fine: \$18,000**

# ***MCK PACIFIC PTY LIMITED (2 OF 2)***

- *On 13 July 2007 an employee sustained injuries when his foot was trapped by a foaming press when the machine was started while he was changing a tool die.*
- *The company failed to:*
  - *carry out an adequate hazard identification and risk assessment,*
  - *provide adequate written safe operating procedures for a tool change on the press,*
  - *provide a system to ensure the press was locked out or isolated from operation while employees were present in the machine for the purposes of a tool change,*
  - *adequately guard the press as employees could remain inside the press while the machine could be operated,*

***Fine: \$22,500***