

The interface between injury prevention and injury management
 A legal perspective

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This presentation will address:

- The importance of maintaining sound OHS policies
- The potential legal implications flowing from a workplace injury
- How to best manage a workplace injury to prevent future liabilities
- Facilitating the return of an injured worker to ensure compliance with OHS and other regulations

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What can go wrong following a workplace injury?

- Workers compensation ramifications
- Company doesn't learn it's lessons
- Fails to implement necessary changes
- Injured worker returns to workplace too early
- Inadequate monitoring of returning worker

CONSEQUENCE POTENTIAL OHS BREACH

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Fines under Occupational Health and Safety and Welfare Act 1986

	Column 2	Column 3
Division 1 fine	\$200,000	\$600,000
Division 2 fine	\$100,000	\$300,000
Division 3 fine	\$40,000	\$120,000
Division 4 fine	\$30,000	\$90,000
Division 5 fine	\$20,000	\$60,000
Division 6 fine	\$10,000	\$30,000
Division 7 fine	\$5,000	\$15,000

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Legal implications that may arise

- Breach of s 19 of OHS & W Act
- Further injury or aggravation
- Psychological injury
- Tensions among co-workers

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Bullying and harassment

- Bullying and harassment is an OHS issue
- Enormous cost to business
- Bullying:
 - » Bullying is behaviour that is directed towards an employee or a group of employees, that is repeated and systematic, and that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten the employee or employees to whom the behaviour is directed; and
 - » that creates a risk to health and safety.

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Bullying and harassment – legal implications

- Breach of contract
- Human Rights and Equal Opportunity Commissions
- Constructive dismissal
- Breach of policy
- Unfair dismissal

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Preventing and controlling workplace bullying in the injury management context

- Educating employees about acceptable conduct
- Identifying the hazard
- Risk assessment
- Consultation
- Induction and training
- Incident management systems
- Establishing communication points
- Verification processes

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Equal opportunity and discrimination

- Racial Discrimination Act (Fed)
- Sex Discrimination Act (Fed)
- Equal Opportunity Act (State)
- Disability Discrimination Act (Fed)

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What is disability discrimination?

Disability discrimination is treating people unfairly because of their disability.

- » *Direct discrimination* occurs when a person with a disability is treated in a less favourable manner or not given the same opportunity as another person without the disability because of that disability.

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Indirect discrimination?

- *Indirect discrimination* occurs where a person under a disability is required to comply with a requirement, policy or a condition which on the face of it seemed neutral, however, which:
 - » Disadvantages the person due to their disability
 - » Is not reasonable having regard to the circumstances

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Employer responsibilities

- Ensuring that a person is not treated less favourably because of his or her disability
- Modifying premises wherever reasonable, and when this does not cause undue hardship
- Providing appropriate equipment and flexible working conditions wherever reasonable, and when this does not cause undue hardship
- Providing necessary training and assistance to employees and co-workers

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Facilitating the return of a disabled worker

Pursuant to the DDA, employers are under an obligation to provide *reasonable accommodation* for people with a disability. This includes making reasonable adjustments to:

- » Enable them to perform the requirements of the job, and
- » To get access to equal terms and conditions of employment

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Making the necessary adjustments

- Changing recruitment and selection procedures
- Modifying work premises
- Changes to job design, work schedule or other work practises
- Modifying equipment
- Providing training or other assistance

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What if the changes are too onerous?

- Inherent requirements of the job
- Unjustifiable hardship
- Worker presents danger to himself or others
- Not able to respond adequately to emergency

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Termination of injured employees

- S 58B Workers Rehabilitation and Compensation Act 1986 – penalties
- Fair Work Act 2009

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Fair Work Act 2009

- Unfair dismissal – harsh, unjust or unreasonable
- Considerations
 - › Valid reason related to capacity or conduct
 - › Worker notified
 - › Opportunity to respond
 - › Support person present
 - › Size of employer's undertaking
 - › Other relevant matters

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Unlawful termination

- Must not terminate the injured worker's employment for reasons relating to race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

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Adverse action

- Can't take adverse action against an employee because that employee has a 'workplace right'
- Adverse action includes dismissing an employee, injuring the employee in their employment, altering the position of the employee and discriminating against the employee
- Broad remedies

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Conclusion

- Many risks to employers in workplace injury setting
- Employers and injury management advisers need to keep in mind other risks, not just workers compensation claims costs

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Thank you
