

Enforcement under the Work Health and Safety Act

Presented by

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Introduction to the following

- Incident reporting
- Main penalty categories
- Infringement notices
- Enforceable undertakings
- Power of Health and Safety Representatives

Introduction

- Improvement notices, prohibition notices, non-disturbance notices
- WHS civil penalty provisions
- Prohibitions on discriminatory coercive or misleading conduct

Incident Reporting

- In order to capture potential offending the categories of notifiable incidents have been broadened.
- Moved from the regulations to part 3 WHSA
- Previously required an “immediately notifiable” event or a “notifiable dangerous occurrence”

Incident Reporting

- Immediately notifiable was:
 - Injury that causes death
 - Acute symptoms associated with exposure to a substance
 - Treatment as an in-patient in hospital immediately after injury

Incident Reporting

- Incident notification now is:
 - The death of a person
 - Serious injury or illness of a person
 - A dangerous incident

Incident Reporting

- Serious injury or illness is defined as is a dangerous incident
- Serious injury or illness includes:
 - Amputation, serious head injury, serious eye injury, serious burn, spinal injury, serious lacerations (where immediate treatment is required)

Incident Reporting

- Dangerous incident includes:
 - Uncontrolled escape, spillage or leakage of a substance, uncontrolled explosion or fire or escape of gas or steam
- Penalty:
 - \$10,000 individual, \$50,000 body corporate
- Notification by telephone, writing including electronic means

Primary Penalty

Category 1

- Corporations \$3M
- Officers \$600K/ 5 years
- Workers \$300K/5 years

intentional/
reckless
indifference

Category 2

- Corporations \$1.5M
- Officers \$300K
- Workers \$150K

compliance failure
exposing risk
death/injury

Category 3

- Corporations \$500K
- Officers \$100K
- Workers \$50K

compliance
failure

No Previous Offence for Reckless Conduct

- Involves “without reasonable excuse” engaging in conduct that exposes “an individual to whom that duty is owed to a risk of death or serious injury or illness” and:
- The duty holder must be “reckless as to the risk to an individual of death or serious injury or illness”

Category 1

- Penalty:
 - Individual \$300,000, PCBU \$600,000 or 5 years imprisonment, body corporate \$3,000,000

Category 2

- Category 2 offence similar to current OHS & WA offending
- Penalty:
 - Increase raises issue as to whether there will be a consequent increase in penalties by Industrial Magistrates

Category 3

- A category 3 offence arises where there is any failure by a person who has a health and safety duty to fail to comply with that duty
- There are exceptions for volunteers and unincorporated associations.

Primary Penalty: Sentencing

- 2 year limitation period remains
- Whilst the OHSWA provides for non-pecuniary penalties these have been expanded and include:
 - Adverse publicity orders at the direction of the court.
 - Orders for restoration.

Primary Penalty: Sentencing

- Work health and safety project orders
- A release on the giving of a workplace health and safety undertaking (akin to probation)
- Training orders

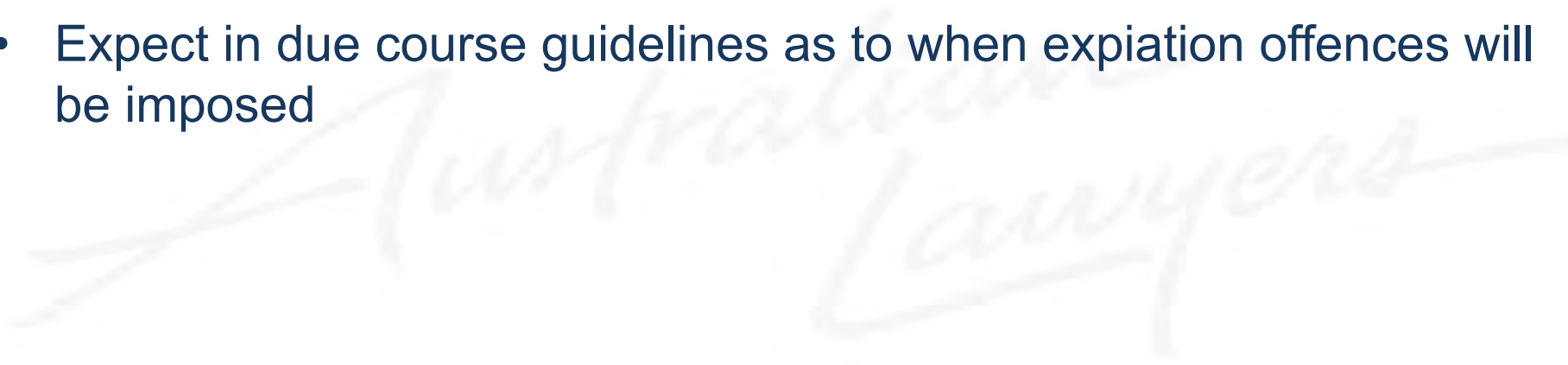
Infringement Notices

- This is a new concept and is governed by the *Expiation of Offences Act 1996*
- A draft operational procedure for infringement notices indicated a much broader use than appears to have been adopted under the WHSA and Regulations

- Specific provisions of the Regulations for which an expiation fee is prescribed. It is only those provisions where such an expiation fee can be imposed
- Example:
 - Regulation 46 concerning duties of workers to use personal protective equipment
 - Maximum penalty: \$3,600 or expiation of \$432

Infringement Notices

- Expect in due course guidelines as to when expiation offences will be imposed



Enforceable Undertakings

- A new concept
- Cannot be used where there is a contravention or alleged contravention of a Category 1 offence
- The giving of an undertaking does not constitute an admission of guilt
- Can be sought where there is a contravention or alleged contravention

Enforceable Undertakings

- Assume there will be guidelines published regarding WHS undertakings
- Where a WHS undertaking is accepted by the regulator then it will be published on its website
- A contravention of a WHS undertaking has penalties:
 - \$50,000 individual, \$250,000 body corporate

Enforceable Undertakings

- A contravention or alleged contravention of an WHS can be the subject of application to an Industrial Magistrate
- With the agreement of the regulator a WHS undertaking can be withdrawn or varied
- No proceedings can be taken outside of the WHS undertaking whilst it is still in force
- No proceedings can be taken where a WHS undertaking has been completely discharged

Enforceable Undertakings

- An indication of the type of guidelines can be found at www.worksafe.qld.gov.au
- Indicates that there will be requirements for making a submission for a WHS undertaking such as:
 - Commitment to ongoing health and safety
 - Indication organisational change

Enforceable Undertakings

- From the regulator's perspective it provides a similar deterrent effect to a successful legal proceeding
- Provides an opportunity for the person to communicate to their industry peers and the community about the consequences of unsafe work practices

Enforceable Undertakings

- Example:
 - Orrcom Operations Pty Ltd 27 January 2012
 - Worker suffering partial amputation right foot
 - 17 page enforceable undertaking given
 - Involves such things as designing developing and certifying an improved coil transport system

Enforceable Undertakings

- Replacing existing equipment
- Providing for training of contractors and employees
- Providing information to the steel industry through specified forums as to the event and rectification measures

Enforceable Undertakings

- “provide financial support to Surf Lifesaving Queensland for the redevelopment and delivery of the SLSQ Club Safety Officer training based on new workplace health and safety legislation”
- Minimum expenditure for undertaking \$195,000

Improvement Notices

- The scheme for improvement notices is largely the same
- Penalties have been increased from \$40,000 an individual to \$50,000 an individual and \$120,000 body corporate to \$250,000 body corporate

Prohibition Notices

- The scheme for prohibition notices is also similar to the current scheme but again penalties have increased but only in relation to a body corporate from \$300,000 to \$500,000
- Individual remains at \$100,000

Powers of Health and Safety Representatives

- An HSR may direct a worker in the HSR's work group to cease work if the HSR "has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard"
- Is a requirement to consult with the person to whom it relates (usually the PCBU)

Powers of Health and Safety Representatives

- The HSR cannot give such a direction unless appropriate initial training has been undertaken in accordance with the WHSA and regulations
- An HSR can issue a provisional improvement notice
- Cannot be done unless there has been consultation with the person to whom it relates (generally the PCBU)

Powers of Health and Safety Representatives

- An HSR cannot issue a provisional improvement notice if an inspector has already issued or decided not to issue an improvement or prohibition notice in relation to the same matter
- Person who is the subject of a provisional improvement notice can within 7 days request the regulator to appoint an inspector to review the notice

Discriminatory, Coercive and Misleading Conduct

- Has a similar flavour to the “general protections” provisions of the *Fair Work Act 2009*
- Essentially prohibits taking action against a person who has a right to exercise a health and safety role or power
- There is a criminal penalty of \$100,000 for an individual and \$500,000 for a body corporate

Discriminatory, Coercive and Misleading Conduct

- Can also give rise to civil proceedings in the Industrial Relations Commission where the person offended against can seek orders such as an injunction, reinstatement or re-employment or that a prospective worker be employed in the position “for which he or she had applied”
- A one year limitation period

WHS Civil Penalty Provisions

- Applies to part 7 which concerns workplace entry by WHS entry permit holders
- A WHS civil penalty will apply where it is nominated as being a “WHS civil penalty provision”
- Does apply to both the person required to provide access or other response to a WHS permit holder, but also to the WHS permit holder themselves

Exemptions

- Under the proposed Regulations there is a process by which exemptions can be sought for various obligations imposed by the Regulations. Similar to current Regulations.
- By way of example high risk work licenses can be subject to an exemption but only in circumstances where the regulator is satisfied that the granting of the exemption “will result in a standard of health and safety that is at least equivalent to the standard that would have been achieved without that exemption”

Conclusion

- *"We have a debate in this country at the moment about productivity in the work place. This is in the context of finding an entrepreneurial spirit which will develop new businesses to broaden the base of endeavour in the country rather than relying on the resources sector"*
- *In my view, fear and punishment as the regulatory paradigm in the area of occupational health and safety is just one element that presents a barrier to achieving that goal*

Conclusion

- *In essence what I raise for consideration is a paradigm based on optimism which is that, through the positive encouragement of safety behaviour with more emphasis on reward than punishment, there will be a more enduring and fundamental acceptance of health and safety regulations"*
- *Extract opinion piece Guy Biddle Law Society Bulletin April 2012*

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