SQUIRE PATTON BOGGS

# WORKPLACE VIEW

October 2015

## Managers Beware! The Price Tag of Seniority May be Personal Liability

**Emma Dawson, Associate**

From adverse action to health and safety, two recent decisions have highlighted that managers and officers may be found personally liable for the employer's contravention of workplace laws.

### Personal Liability for Officers Under Work Health Safety Laws

Since 2012, harmonised work health and safety laws (**WHS laws**) have been rolling out around the country with one of the key changes being the imposition of a new positive duty on officers to exercise due diligence to ensure their "person conducting a business or undertaking" (**PCBU**) is compliant.

The term "officer" extends beyond the PCBU's directors and secretaries to any person who:

- makes, or participates in making, decisions that affect the business of the PCBU; or
- has the capacity to affect significantly the PCBU's financial standing.

The recent decision of the ACT Industrial Magistrates Court in *Mckie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq)* [2015] ACTIC 1 is the first judgment to examine the meaning of "officer" under the WHS laws.

In this case, Kenoss Contractors employed Mr Al-Hasani, a well-qualified engineer, to project manage a road resurfacing project in Canberra. A truck hire business was also retained to deliver materials to the project as required and it, in turn, employed driver Michael Booth.

The project manager gave evidence that he had instructed workers not to use the Boldrewood Street compound because it was considered dangerous with low hanging electrical wires. Nevertheless, the compound was left unlocked and had no warning signage indicating the presence of live wires. Mr Booth, despite allegedly being directed to deliver his load to the main compound, attended the Boldrewood Street compound where the bucket of his truck came into contact with live overhead power lines as it tipped its load, causing death by electrocution.

The project manager was charged as an officer under the WHS laws for failing to exercise due diligence to prevent a workplace death by utilising a number of relatively simple safety measures, including not using the Boldrewood Street compound at all, having the power turned off if a delivery was required, and providing appropriate signage as to the risk of the overhead power lines. The charge against him carried a maximum penalty of AU$300,000 or five years imprisonment, or both.

In determining whether the project manager was an officer required to exercise due diligence under the WHS laws, the court considered:

- his influence over Kenoss (the PCBU) as a whole, rather than the *"role in respect to the particular matter in which it was alleged there was a breach of duty"*; and
- the tasks he performed to ascertain whether his participation in the organisation went beyond operational to organisational.

Having considered those factors, the court was not satisfied that the project manager's role amounted to "officer level" because his responsibilities were purely operational, in that they related to the delivery of specific contracts and did not include any organisational responsibilities. Although the project manager sat close to the top of the structure of the business, Kenoss had a relatively flat management structure and there was no evidence he made or participated in making decisions that affected the whole or substantial part of it. For example, he was not responsible for hiring or firing employees, he didn't have authority to commit corporate funds to projects and he couldn't sign off on tenders.

While Mr Al-Hasani avoided personal liability, Kenoss Contractors was found guilty of a category 2 offence under section 32 of the ACT's WHS Act and fined AU$1.1 million, from a maximum AU$1.5 million.

# WORKPLACE VIEW

## Personal Liability for Managers "Involved In" a Company's Contravention of the Fair Work Act

A recent decision by the Federal Circuit Court in *Director of the Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors (No2)* [2015] FCCA 2129 highlights the real and personal threat human resources managers face if they are involved in breaches of the *Fair Work Act* 2009 (Cth) (**FW Act**).

In this case, the employee decided to cancel his membership with the Construction Forestry Mining and Energy Union (**CFMEU**) and, upon hearing this news, the CFMEU delegate confronted the employee and subsequently complained to the project manager. The complaint was discussed at a meeting with the human resources managers and the NSW/ACT operations manager. At that meeting, the operations manager made the decision to change the employee's employment status by taking him off his salaried contract of employment and onto an enterprise agreement between the company and the CFMEU under which he would be paid wages.

Shortly afterwards, the human resources managers met with the employee and:

- told him that his "*role as a Safety Officer and being on a salary* [didn't] *work*" when, in fact, the Court found that the "substantial and operative" reason for the company's decision to change his employment status was that he had engaged in industrial activity within the meaning of s 347(a) of the FW Act by ceasing to be a member of the union and the human resources manages were seeking to "keep the peace" with the CFMEU's vocal delegate; and
- compelled him to sign a letter of resignation from his salaried position and a letter of engagement as a construction worker on a wage which ensured he was covered by the enterprise agreement with the CFMEU.

The court rejected the argument that the human resources managers should not be personally liable because they were following their employer's direction and held that they *"had a choice of not implementing the decision, but failed to implement that choice"*. The court highlighted that the key question in determining the human resources managers' liability was whether they were knowingly involved in the company's contravention. Notably, this test did not require the managers to have knowledge that the conduct was unlawful.

In considering penalties, the court emphasised that, in this case, it needed to *"incorporate an element of general deterrence to deter persons in subordinate positions from complying with directions from superiors to engage in conduct that may involve contraventions of the FW Act"* and accordingly, fined the human resources managers AU$3,500 each for their involvement in the company's contravention.

## What Does this Mean for Employers and Managers?

These two cases serve as a timely reminder that courts are not opposed to "piercing the corporate veil" and, in certain circumstances, placing personal liability on those "involved in" the contravention. To mitigate the risk of a personal liability claim, it is important to ensure that officers, managers and all other senior employees are well aware of their duties under the WHS laws and the FW Act and that the decision making / due diligence process is well documented.

# Client Corner

**Sharon Grosser**
Director, People and Culture of SEQTA

### What Occupation Would You Have Taken Up if You Had Not Done your Current Job?

Prior to co-founding SEQTA I was a secondary English teacher – a job I absolutely loved. I'm sure I would still be teaching if my husband hadn't had the crazy idea of starting a software company!

### What has Been Your Best Professional Moment?

Probably the first time I heard a classroom teacher say that our software really did make her life easier and that she would now only teach in a SEQTA school. That was the moment I knew that all the years of building the software and the company had been worth it. (I also smile when parents tell me that their kids wish their school didn't have SEQTA because now the old 'I don't have any homework' line doesn't work for them).

### What Do You Do for Fun and at the Weekends?

I have just started playing tennis after about 30 years of not holding a racquet and am loving it.

### What is the Main HR/IR Challenge that SEQTA is Facing Currently?

Maintaining our culture as we grow. We have an unbelievable team who are committed to improving the quality of education by supporting teachers and schools. As our staff numbers continue to increase and we have to get more structured and process-oriented, I don't want to lose the things that make SEQTA a great place to work: the sense of shared vision and purpose; the genuine care that people show each other; the embracing of the quirky and the different.

### What Are Two Rules You Try to Live By?

1. Choose kindness.
2. Be the change you want to see in the world.

## Employer Reminder

The recent joint Fairfax-Four Corners report alleging systematic fraud of visa workers by 7-Eleven franchisees is the latest in an increasing number of cases focussing on the exploitation of migrant workers. The report highlights a potential gap in employment protection legislation.

The 7-Eleven report concerned the underpayment of student visa holders who are restricted under their visa conditions from working more than 40 hours a fortnight. Described as a "half pay scam", franchises are alleged to have recorded only a fraction of the hours actually worked by employees meaning that their net hourly rate was well below award rates.

The 7-Eleven employees may be left without recourse as a result of cases such as *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964 in which the Fair Work Commission indicated that a contract would be prohibited if it breached the *Migration Act* 1958 (Cth) (**Act**). This position could be applied to the 7-Eleven employees as a result of them working in breach of their visa conditions, namely, working more hours than they are permitted to work. At the very least, the employees may be reluctant to raise concerns about underpayment with government agencies such as the Fair Work Ombudsmen due to a fear that this would highlight their migration offences which could ultimately lead to the cancellation of their visas and, at worst, deportation.

### So Does This Mean Employers Are Free to Exploit Migrant Workers Without Fear of Reprisal?

Although there is some doubt (because of cases such as Smallwood) that an employer could be penalised for failing to comply with minimum award conditions, there remains a real and significant risk of prosecution under the Act which prohibits an employer allowing a non-citizen to work without a valid visa with appropriate working rights.

In keeping with the other legislation highlighted in our lead article, the Act also provides for personal liability of executive officers of a company if they are found to have:

- known or were reckless as to the breach;
- been in a position to influence the conduct of company; and
- failed to take all reasonable steps to prevent the breach occurring.

The penalties for breach of these provisions range from fines of up to AU$21,600 for individuals and AU$108,000 for companies per illegal worker and up to two years' imprisonment for executive officers.

Employers are therefore reminded to take reasonable steps, for example by using the Department of Immigration and Border Protection VEVO system, to conduct appropriate checks in order to ensure that employees have the right to work in Australia and do not work outside of their visa conditions.

## Did You Know?

In our August edition of Workplace View we reported on amendments to the *Crimes Act* 1914 (Cth). The amendments mean that from 31 July 2015 the maximum penalty under the civil penalty provisions of the *Fair Work Act* 2009 (**FW Act**) is AU$10,800 for individuals and AU$54,000 for corporations per breach.

Any individual involved in a contravention of the FW Act, including directors and managers, may be exposed to individual penalties in addition to a penalty imposed on the company. It is becoming more common for employees claiming adverse action to name the individuals "involved" in the contravention, which may include their direct manager as well as a company director and/or HR Manager.

Penalties may be imposed for breaches of the following FW Act provisions:

- the National Employment Standards
- the terms of a modern award
- bullying orders
- the terms of an enterprise agreement
- the general protections provisions (i.e. adverse action)
- right of entry orders relating to unlawful industrial action

# Legislation Update

| Legislative Instrument | Stage of Legislation | Proposed Changes | Proposed Change |
|---|---|---|---|
| WA | *Associations Incorporation Bill* 2014 | Legislative Council Second Reading on 26/03/2015<br><br>Awaiting consideration by the Legislative Council. | Will replace the current Act regulating WA's incorporated associations.<br><br>Associations will be required to update their rules. The Bill also introduces a number of changes relating to:<br>• financial reporting<br>• governance<br>• privacy<br>• the rules and membership of incorporated associations |
| WA | *Directors' Liability Reform Bill* 2015 | Legislative Council Second Reading –Committee Report Tabled 21/04/2015 | Amends The Criminal Code and various other Acts in relation to the criminal liability of directors and other persons involved in the management of bodies corporate. |

# Events Update

**Employment Law Forum**
**The Law Society of WA, Level 5, 160 St George Terrace, Perth**
Wednesday 14 October 2015
Overview of the Fair Work Act; Occupational health and safety; anti-bullying legislation; preparing employment contracts
Chaired by Elizabeth McLean

**Labour and Employment Breakfast Seminar Series 2015**
**Perth – Level 21, 300 Murray St, Perth**
Wednesday 4 November 2015
*Modern Awards and Enterprise Agreement Making: Emerging Trends*
Presented by Bruno Di Girolami and Kylie Groves

**Labour and Employment Breakfast Seminar Series 2015**
**Sydney – Level 10, The Gateway, 1 Macquarie Place**
Wed 11 November 2015
Modern Awards and Enterprise Agreement Making: Emerging Trends
Presented by Kylie Groves and Anna Elliott

**Legalwise Seminars**
**Perth – Parmelia Hilton, 14 Mill Street**
Tuesday 17 November 2015
School Law Conference: *It Could Happen to Your School Misconduct of Staff Outside School Hours*
Presented by Kylie Groves

**Squire Patton Boggs Employment Law Worldview Webinars**
A number of our offices across the globe will present a webinar on key labour and employment issues in their jurisdiction as part of our new global webinar series. The jurisdictions still to be covered include Germany, Hong Kong, United States and France. Webinars for the United Kingdom, Spain and Australia have already been held.
The next featured country in the webinar series will be the **Germany** at **11pm AWST** on **13 October 2015**, followed by **Hong Kong** at **5pm AWST** on **28 October 2015**.
Please click here to register.

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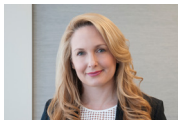

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