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Lawyers

OH &S Legal
Obligations on
Original Equipment
Manufacturers

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What I will cover

- Outline of OH& S Act for OEMs
- How the Coal Mine Health & Safety Act impacts on those obligations
- Tips to avoid a prosecution
- Case examples
- Trends in prosecutions

What Legislation Applies

- Occupational Health and Safety Act 2000
- Coal Mine Health and Safety Act 2002 not yet gazetted

The Occupational Health and Safety Act 2000 (NSW) (“2000 Act”)

- Employers must ensure the health, safety and welfare at work of all employees (s. 8(1)).
- Employers (and Self employed persons) must ensure the health and safety of people at their places of work (other than employees) by not exposing them to risk (s. 8(2)) and (s. 9).
- Persons who control non - domestic premises, plant or substances must ensure they are in safe condition and that plant or substances are safe when used at work by non -employees (S.10).

The Occupational Health and Safety Act 2000 (NSW) (“2000 Act”)

- Manufacturers, designers and suppliers of plant and substances for use by people at work must ensure that they are safe and without risk to health and that adequate information is provided to ensure safe use (s.11 (1), (2)).
- Persons who erect or install equipment at a workplace have the same obligation as a manufacturer (s. 11(3)).
- Directors/Managers liability (s. 26).

Key Elements of offences

- **Persons who control** Plant is in safe condition
- **Manufacturers, designers and suppliers** of plant must provide adequate information
- **Erect and install plant**
- **Employees** take reasonable care
- **Director and person concerned in the management of the corporation**

Key things Prosecutor must prove

- Who is the employer of the persons put in danger.
 - Ask the question, group certificates
- If the person endangers non employees the place of work must be their undertaking
 - workplace and environs
 - Woolworths case

Section 11

- Designs, manufactures or supplies plant must
 - Ensure that plant is safe and without risks when properly used
 - Provide adequate information to ensure its safe use
- These obligations extend to supply by way of lease

Dual Test

- Plant must be safe AND
- Must be without risk
- Test is whether the plant supplied for use at work was safe and without risks. If the answer is no then a breach
- if the answer is yes but a person uses the plant improperly then can use the defence “when properly used”

Unsafe Plant

- Is not excused by improper use
- Well settled that plant must be safe regardless of the use to which it is eventually put
- Knowledge of the manufacturer or supplier important

Adequate Information

- To ensure its safe use
- If supplying by lease or hire broader duty to keep informed over the time of the hire
- If machinery is unsafe liability cannot be avoided by issuing advice or instruction

Obligations of OH&S Regs

- Clause 122 anyone who sells or transfers plant is to ensure all available information concerning health & safety about the plant
- Obligations under schedule 1 of OHS regs re history of equipment
- Clauses 96 and 105 re obligations on manufacturers and suppliers

Risk Assessments

- To discharge duty suppliers and manufacturers must supply a risk assessment S11

Occurrence happens !

- Inspector and Check Inspector notified
- Investigation takes place
 - S60 CMRA / 154CMHS 2002
 - Different powers, signed statements
 - Gather documentary evidence
 - Pleading the “5th”
 - Remember the elements of the offence

Will we prosecute for breach of OH&S Act?

- Advice from legal department
- Two years from occurrence to commence proceedings
- Additional two year extension if coronial proceedings
- Need statements that cover evidence and reports that include all relevant documents

Decision to prosecute

- Court proceedings filed within 2 years. Summons that particularises the exact breaches
 - Failure to have/instruct employees on safe system to change conveyor booms
- Who are the defendants?
 - Owner of equipment
 - Employer of workers

Prosecution Brief

- Different to report for coroner
- Obligation of Criminal prosecutors to include all relevant material, even if prejudicial
- Give defendant “fair notice of the case to be met or knowledge of the essential ingredients of actual offence charged”
- Experts reports
- HazOps, how they were obtained
- Relevant witness statements that tell the story and cover elements of the offence
- Company searches, group certificates, hire agreements

Ok we've done our bit why does it take so long?

- Summons and other court documents filed
- Directions hearing (4-6 weeks)
- File and serve prosecution brief
- Time for defendants to consider to plea or not
- Preliminary Points
 - 107 OHSA
 - Consent

Still not at Court

- Defendants enter plea of guilty or not guilty before a judge and the matter set down for hearing
- Judge in the Industrial Commission of New South Wales
- Plea will take 1 to 2 days
- Contested hearing could take 4 weeks

Guilty Plea

- Often to a reduced charge
- Acceptable to negotiate to reduce the charge or drop some claims. In return for a prompt guilty plea
- Statement of Agreed Facts, this may also involve some concessions
- Evidence from defendants about what they have done to remedy problem
- First offence, contrition, severity of occurrence

Not Guilty Plea

- Onus of proof – beyond reasonable doubt
- Prosecution goes first to prove all element of offence.
- Documents such as group certificates, mining leases, hire agreements
- Witnesses to occurrence and persons at risk to prove method of work and risk to health and safety
- Defendant presents evidence that system or training was adequate, or persons not at risk

Defences

- Section 28
 - Not reasonably practicable
 - Narrower than “physically possible”
 - Due to causes over which they had no control and against the happening of which it was impracticable for the person to make provision
- Section 26 concerned in the management
 - Not in a position to influence
 - Used all due diligence

Judgment

- Fines
 - Corporation up to \$500,000 for a first offence, \$825,000 for second .
 - Individuals up to \$55,000 for a first Up to \$82,500 or 2 years imprisonment or both
- Remedial Orders to fix work practices
- Prosecutor's legal costs paid

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