OH&S

General Duties, Supervisors/Managers-Responsibilities, Reporting, Plea in Mitigation

(Occupational Health and Safety Act 2004)

By Miro Djuric LLB, Senior Associate

Lovegrove Lord & Johnston

Introduction

The Occupational Health and Safety Act 2004 ("the Act") came into operation on 1 July 2005 (at least most of its sections). The principal purpose of the Act is to protect the physical and mental well being of persons during the course of their employment.

Section 2 of the Act states that the objects of the Act, inter alia, are "*to secure health, safety and welfare of persons at work; to protect them against risk to health or safety; to assist in securing safe and healthy work environments and to eliminate, at the source, risk to the health and safety and welfare of persons at work*".

In Simms Metal Ltd (County Court of Victoria, 9.03.1989, unreported) the Court said about the Act that:

"*It ("the Act") is a piece of social legislation designed to promote and indeed enforce standards of behaviour by employers which were directly or indirectly secure or conducive to the safety of employees in a given industry by the provision of a safe working environment appropriate to it*".

It went further:

"It rationale is to eliminate if it can, or reduce at the least, the likelihood of the risk of death or injury in the workplace and it has laid down penalties for failure to observe the requisites of a safe working environment which are severe enough to underline its philosophy".

General OH&S Duties

The Act (Part 3) imposes general OHS duties on employers, the self-employed, employees, designers, manufacturers, suppliers and others. These general OHS duties require the person to eliminate risks to health and safety so far as is reasonably practicable and if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks as far as is reasonably practicable.

The words "reasonably practicable" require that the duty-holder must do what a reasonable person would do in the particular circumstances by putting in place "reasonably practicable" measures.

The general duties are:

Section 21 of the Act-Duties of employers to employees and contractors

The Act requires all employers to provide and maintain a working environment that is safe and free of any risks to health. This duty extends to independent contractors and their employees who are working at the same workplace but only for matters over which the employer has or should have control

Section 22 of the Act-Duties of employers to monitor health and safety conditions

Pursuant to this section of the Act employers must monitor the health and the conditions of the workplaces under their management and control, keep records and employ or engage the services of a person suitably qualified in OHS to provide advice on point.

Sections 23 & 24 of the Act-Duties of employers and self-employed to other people

Employers and self-employed must ensure that the health and safety of persons other than their employees (members of the public) are not exposed to risks to their health and safety arising from the conduct of the undertaking of the employer. This duty includes matters such as protecting visitors to a workplace, protecting the general public from construction and demolition work and preventing emission of hazardous substances from a workplace.

Section 25 of the Act-Duties of employees

While at work employees are required to take reasonable care for their own safety and the safety of others who may be affected by the employee's acts or omissions at a workplace. An employee must not intentionally or recklessly interfere with or misuse anything provided at the workplace in the interests of health, safety and welfare.

Section 26 of the Act-Duties of those who manage or control workplace

A person (or a body) who has, to any extent, the management or control of a workplace must ensure that the workplace and the means of entering and leaving it are safe and without risks to health. Those who manage or control a workplace could include the employer, the occupier of the workplace, the owner of the workplace and others.

Section 32 of the Act-Duty not to recklessly endanger people at workplaces

It is an offence to, without lawful excuse, to recklessly engage in conduct that exposes, or may expose, a person at a workplace to the risk of serious injury.

Other general duties are described in sections 27,28,29,30 and 31 of the Act.

Risk Management-Responsibilities of managers and supervisors

Effective management of health and safety risks requires engagement of management and the entire organisation. The critical factor is the selection of competent personnel. Their responsibilities and involvements in specific tasks within the process must be clearly defined during the planning process. All of these people must be provided with sufficient information and training to undertake their individual roles effectively.

Mangers and supervisors must accept as an integral part of their duties the responsibility for implementing and administering OHS procedure at the workplace.

Supervisors/ mangers will have overall management responsibility for their sections, and the basic functions of planning, organising, staffing, loading and controlling apply to the safety issue. Responsibilities include the following:

- Overall supervision of employees to ensure that the health and safety of the worker, the public and consumer;
- Hazard identification and assessment and control of risks;
- Implementation of particular safety programs;
- On the job training and instruction;
- Efforts to motivate employees to comply with safe work practices, including directives when giving orders;
- Accident investigation and correct reporting;
- Issue of and ensuring correct use and maintenance of appropriate personal protective clothing and equipment;
- Submission of reports and recommendations/suggestions about hazard controls, workplace procedures to more senior management, when these issues are outside their scope of authority; and
- Decision making regarding job design, workplace layout and recruitment, where they have this authority.

Accident investigation and correct reporting-procedure

We would like now to outline a procedure, which we recommend to you to take into consideration, if a similar situation arises.

It should be noted that the actions of an employer and its employees in the first 3-6 months after a workplace accident can have critical consequences for their ability to defend a possible prosecution. Understanding the steps required to defend a criminal prosecution under the OH &S legislation or to enter a plea in mitigation will enable employers to better predict the consequence of their actions following an accident.

In order to prepare for a potential prosecution employers (managers or supervisors) should ensure the preliminary investigation is conducted as soon as possible.

While a post-accident investigation is generally critical to begin understanding the causes of an accident (and therefore preventing a recurrence) one should accept that all accidents have multiple causes and not one factor will be definitive. Accepting this, one should investigate accidents accurately and avoid the natural temptation to make assumptions, make guesses and identify a single “cause”.

Given the usual delay, which occurs between an accident and the commencement of a prosecution, obtaining detailed evidence two years after the accident increases the risk that the witnesses’ recollection will only be partial or that they have been influenced by intervening action or assumptions. It is essential that detailed statements are obtained from witnesses as soon as possible after the accident has occurred. While the investigating inspector will also obtain statements from witnesses, the practical realities of limited resources and time for an inspector may ultimately result in only a superficial picture being obtained.

Where an accident occurs that is likely to result in a prosecution, there is a distinct advantage for an employer to involve its solicitor at the investigatory stage. In addition to any advantages in having a solicitor present during interviews with inspectors, significant advantages may be gained through the use of legal professional privilege. Where external investigations or reports are required, these should be

commissioned by the employer's solicitor to ensure legal professional privilege attaches. Similarly, internal reports and witness statements should be prepared in conjunction with the solicitor, with the reports being addressed solely to the solicitor. Again, this will ensure that privilege attaches to the document.

Generally WorkSafe inspectors will attend an accident site within a relatively short period of time to conduct an investigation (sometimes within a few hours). In most circumstances employers will have had enough time to conduct a preliminary investigation and carry out remedial work to remove the immediate risk. For this reason many of the substantive actions taken in response to a workplace accident often occur after an inspector's initial visit.

Towards the end of the investigation it is likely that some indication will be given as to how the matter will progress. However, given the wide obligations of employers under the OH&S legislation one should assume that a prosecution would follow all but minor workplace accidents.

Consequences of non-compliance

The Act imposes an absolute liability upon employers with respect to safety of their employees (section 21). Employers must provide a safe workplace and safe system of work. They must know what hazards there are in order to arrange the work so that the employees can carry out the work safely.

The duty to ensure safety is absolute and is statutory. Statutory duty implies actual compliance with the law before the duty is satisfied. If employers fail to comply with the Act then charges may be brought against them.

Proceedings for offences against the Act can be initiated by the authority or by an inspector who has been authorised by the authority to do so.

Criminal maters generally require the prosecution to prove the case against the defendant "beyond reasonable doubt". This standard of proof is a heavy one and

requires that all elements of an offence be proven beyond reasonable doubt, otherwise the prosecution will fail.

In commenting on the different standards of proof Barwick CJ in *Progress and Properties Ltd v Craft (1976) 135 CLR 651 at 660* said that:

"If one considers the analogy of a set of scales, then "beyond reasonable doubt" would be represented by the scales falling heavily to one side whereas "balance of probabilities" would be represented by the scales tipping fairly slightly one way. It is suggested that the criminal standard is the applicable one where breaches of industrial safety legislation are in issue".

In order to defend a matter the defendant will normally challenge the facts alleged in relation to one of a number of the constituent elements of the offence. Usually, with all common law crimes, the prosecution must prove "*mens rea"* before the defendant is found guilty of a criminal offence.

However, in areas covered by OH&S legislation proof of the existence of certain facts is sufficient proof of the occurrence of the offence. It will be enough for the prosecution to identify any act of omission by the defendant to establish its failure to observe a duty to ensure safety of either its employees or the third persons.

The additional requirement to prove a breach of a duty is a proof that the Act was not complied with or that the action of the person(s) responsible was negligent.

Plea in Mitigation

After obtaining all necessary information and documents and after considering all relevant fact and issues the defendant's solicitor would provide a legal advice as to whether a plea of guilty or not guilty should be entered.

If the Defendant decides to plead guilty then the matter will be set down for a short plea in mitigation. The defendant's solicitor will prepare a plea that addresses all matters relevant to the assessment of penalty. The plea should address the following:

1) Summary of facts;

2) Details of any systems of work designed to enhance safety and prevent accidents. That may include details of induction manuals, hazard identification procedure, various control measures and job safety analysis.

3) Evidence of past safety audits relevant to the accident and supervision and past training of other persons and the injured person;

4) Details of an OH&S policy and presence of an OH&S committee and its role

5) Details of history, size (number of employees) and nature of the defendant's company-operation;

6) Details of the defendant's past OH&S record;

   In *DPP v Ancon Travel Towers Pty Ltd (County Court of Victoria, 16 December 1998, unreported)* ("Ancon") the Court, citing a number of authorities noted that:

   "The good history of the defendant's organization with respect to Health and Safety and the absence of prior convictions reduces the penalty".

7) The nature and gravity of the offence and the degree of culpability of the defendant;

   By virtue of the fact that the Act is framed absolutely the intervention of the third party does not necessarily result in avoidance of conviction.

8) Details of remedial actions taken by the defendant after the accident;

9) The seriousness of injury and of the accident;

In *Ancon* Judge Mullaly held that:

"In assessing penalty the Court will have regard to the nature of the breach rather than the consequences of that breach.

10) The defendant's contrition and remorse, cooperation with the prosecution and the defendant's decision to enter a plea of guilty at an early stage will invariably result in a reduction of penalty (see Cameron v The Queen (2002) 187 ALR 65 (the High Court)).

In *Paul Daryl Wong v Melinda Group Pty Ltd [1998] NSWIRComm 184 (9 April 1998)* the Industrial Commission of NSW held that:

"A plea at an early stage will always result in a substantial reduction in the sentence imposed".

In determining whether the defendant, usually a company, is of a good (corporate) character a court may, inter alia, consider:

i) The number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the defendant;

ii) The general reputation of the defendant;

iii) Any significant contributions made by the Defendant to the community.

The sentencing of offenders convicted of offences against OH&S Act occurs in accordance with general sentencing rules (sections 5(1) and (2) of the Sentencing Act 1991 (Vic)) in addition to the relevant provisions of the Act.

Conclusion

It should be noted that the principle role of the Act is prevention of accidents. In the unreported County Court decision of *DPP v Ancon Travel Towers Pty Ltd (16 September 1998)*, the decision frequently cited by the Prosecutors, Judge Mullaly said that:

"…The emphasis on prevention and the role of the enforcement provisions in securing prevention distinguishing the sentencing process in relation to these offences from other offences in which sentencing is responsive…"

For serious offences the Act imposes more severe penalties:

- for corporations the maximum penalty is $943,200
  and
- in other cases the maximum rises to $188,658.00.

The new Act also provides for jail sentences for reckless endangerment. Where conscious and deliberate disregard for safety has taken place, a maximum term of 5 years imprisonment can now apply.

Further, the Act has also introduced a number of alternatives to prosecution, known as enforceable undertakings. They include adverse public orders, orders to undertake improvement projects, infringement notices and special health and safety undertaking that can be enforced for up to 2 years.

www.lovegrovelordjohnston.com

For urgent legal advice and/or representation following an alleged offence or an incident, or for general advice on duties and rights under the legislation, please contact either Miro Djuric at Lovegrove Lord & Johnston, Construction and Commercial Lawyers.