

Episode 51: Summary

Episode name: Safety Starts at the Top - Officers' Personal Liability for WHS Breaches

Guest(s): Peter Rozen

What area(s) of law does this episode consider?

The importance of proactive involvement with workplace safety, and personal liability under work health and safety (**WHS**) laws.

Why is this topic relevant?

The model WHS laws aim to harmonise health and safety standards for workers across Australian jurisdictions. Although most states (excluding Western Australia and Victoria) have adopted the model WHS laws, differences remain both in practice and enforcement.

Section 27 of the *Work Health and Safety Act 2011* (Cth) provides that an officer of a person conducting a business or undertaking (**PCBU**) must exercise due diligence in ensuring their business or undertaking complies with relevant WHS laws.

Modern due diligence under section 27 can mean proactive involvement in work safety compliance.

What legislation is considered in this episode?

Work Health and Safety Act 2011 (Cth) (**WHS Act**)

Work Health and Safety Act 2011 (NSW) (**WHS Act (NSW)**)

Corporations Act 2001 (Cth) (**CA 2001**)

Occupational Health and Safety Act 2004 (Vic) (**OHS Act**)

What cases are considered in this episode?

R v Commercial Industrial Construction Group Pty Ltd [2006] VSCA 181

- A construction worker fell through a hole which was not barricaded. In the County Court, CICC Group pleaded guilty to a breach of the 1985 predecessor of the OHS Act. In issue in the VSCA was whether the sentence imposed was manifestly excessive. The court found that although CICC Group had formally adopted a safety management system, its duty was not discharged as it was not actively implemented. The VSCA dismissed the appeal.

Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal [2021] FWCFB 6059

- Mt Arthur Coal, a member of BHP Group, implemented a COVID-19 vaccination site access requirement. In issue in the FWCFB was whether the access requirement was a lawful and reasonable direction. The FWCFB noted that a vaccination mandate can be a lawful and reasonable direction, however, Mt Arthur had not complied with its work health and safety consultation obligations under the WHS Act (NSW) (based on the model WHS laws).

What are the main points?

- There are minor differences in legislation between states that have adopted the model WHS law. Victoria and Western Australia are yet to adopt the model law and differ quite significantly in some key areas. This includes the use of the term employer instead of PCBU.
- For the purposes of WHS law, the definition of “officer” piggybacks on the definition contained in the CA 2001.

- An officer must exercise due diligence in ensuring compliance with WHS regulations, otherwise they may be held personally liable.

What are the practical takeaways?

- The most effective way to reduce workplace incidents and injuries is to encourage a participatory approach to safety. If you are an officer of a company, go to the actual workplace that you are in charge of to ensure that WHS regulations and the safety management plan are being complied with.
- Utilise effective management tools that convey WHS information as simply as possible. This can be achieved through employee education programs or one-page pictorial summaries of WHS issues.

Show notes

[The Royal Commission into Aged Care Quality and Safety](#)

[Report by Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman called 'National Review into Model Occupational Health and Safety laws'](#)

[SafeWork NSW website summarising prosecutions under WHS law from 2012-2021](#)

[SafeWork NSW page on workplace inspections with comment from Dimitri Hari](#)

[Australian Transport Safety Bureau's report titled 'A systematic review of the effectiveness of safety management systems'](#)

[WorkSafe Victoria case against the Victorian Department of Health for breaches of hotel quarantine](#)