



# Insight

Occupational Health & Safety

April 2010

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## OHS and workplace bullying – a problem for your employees is a problem for you too

Employers should heed the warning – workplace bullying is a serious problem which can happen anywhere, and regulators are cracking down on both bullies and their employers.

Holding Redlich recently acted for an employer in a high-profile prosecution by the Victorian WorkSafe Authority (WorkSafe). The company, its director and several former employees were prosecuted by WorkSafe after an inquest found that a young waitress killed herself after an extended period of serious bullying at the café in which she worked.

The café's owner (the sole director of the company which owned the café) was not found to have engaged in any bullying conduct himself. However, the company's failure to put reasonable systems in place to prevent workplace bullying meant that the company (and therefore the director) was liable for breaches of the Occupational Health and Safety Act 2004 (VIC). The company and director pleaded guilty and received criminal convictions and fines (\$220,000 for the company and \$30,000 for the director). Since then, WorkSafe has instituted the 'Respect at Work' campaign in an effort to stamp out workplace bullies.

Industries considered by WorkSafe to be 'high risk' include hospitality and trades. This is because these industries have a high proportion of vulnerable workers including young workers, new workers, apprentices and injured workers including workers on return to work plans. However, bullying happens frequently in all workplaces, in industries as diverse as white-collar, manufacturing, mining, education or healthcare.

In all jurisdictions in Australia, employers are required to ensure the safety and welfare of their employees. This extends to protecting their employees psychological welfare from

bullying and harassment. An employer must take all reasonably practicable steps to ensure that bullying and harassment is eliminated from the workplace.

Workplace safety inspectors have the power to inspect workplaces, respond to complaints and take action against businesses and individuals that are allowing bullying to occur. There are a number of actions that Workplace safety inspectors can take including assisting employers to train staff or helping employers to put in place anti-bullying processes. They can also issue notices which direct businesses to develop an anti-bullying strategy or investigate complaints which can result in criminal charges being laid in serious cases.

All employers should carry out a regular check of their workplace in consultation with health and safety representatives and workers to identify signs that bullying is happening or could happen, and to take steps to deal with any problem areas.

Things that you can do include:

- ensure your managers and staff are trained in anti-discrimination law and regularly enforce a policy of non-harassment in the workplace.
- at induction, provide information to all workers, including casual and labour hire workers, about workplace policies and procedures on bullying prevention;
- promote the principles of dignity and respect, and take action to combat discrimination;
- introduce a buddy system for young and new workers; and
- provide cultural awareness training.

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### A consistent approach to Safe Work Method Statements

In the construction industry, Safe Work Method Statements (SWMS) form a central element in ensuring safety at the workplace but commonly are the source of risk and frustration for Principal Contractors. Recently, the use of SWMS has come under increased criticism from industry groups such as the Master Builders Association (MBA).

This criticism has centred on the fact that SWMS, which were intended to be easy to use documents, have often become so large and complex that they are impractical to use. The criticism has also been levelled at OH&S regulatory and accrediting agencies for applying inconsistent standards when considering the content of any particular SWMS. As a result, there have been calls by industry groups such as the MBA to create a nationally consistent template for SWMS.

#### The purpose of SWMS

The development of the SWMS system was intended to improve safety at the workplace by requiring a contractor to briefly describe in writing the work it intended to carry out and the associated safety risks and to include the measures to minimise or eliminate any risks of injury.

The requirement for a contractor to produce a SWMS also allowed the Principal Contractor to supervise the work performed by the contractor and ensure the safe work procedure was being implemented. In most jurisdictions in Australia, the use of SWMS, or similar documents, was prescribed under health and safety legislation. For example, in New South Wales, regulations 227 and 229 of the Occupational Health & Safety Regulation 2001.

#### Current problems

Industry groups and Principal Contractors have identified a number of causes of the SWMS system no longer being manageable including SWMS:

- being expanded to unmanageable levels by including potential risks which would not reasonably be likely to arise and in some cases are simply hypothetical. This expansion has in part developed in response to Safety Inspectors scrutinising the risks identified in any SWMS during their investigations.
- lacking consistency depending on whether the project is being performed for a private client or a State or Federal entity. This inconsistency has resulted in part from the large number of different accreditation agencies in Australia applying different standards in assessing compliance. In some cases, this has caused a relatively straight forward template for a SWMS to become more complex than may be required in any practical situation.
- being modified to suit the particular agency auditing the business, without the modification necessarily corresponding to any assessment that will improve safety. This issue has developed in part by the requirements imposed on businesses attempting to obtain qualifications for State and Federal Government projects and different auditors applying different standards under the same guidelines.

#### Likely outcomes

There is now an increasing risk that a Principal Contractor will be subject to prosecution for failing to ensure that a contractor follows their SWMS, or for failing to prevent a contractor from following a defective SWMS. As such, there has been increasing pressure on Principal Contractors to carefully review all SWMS provided by contractors because they are under a strict obligation to ensure that the sub-contractor complies with the processes set out in that document.

One of the practical outcomes for Principal Contractors is how to effectively monitor the multitude of SWMS in circumstances where they are now increasingly complex and in different formats and may not necessarily reflect the risks involved in the work being undertaken.

As Australia moves towards a national OH&S system it is likely that there will be greater calls by industry for OH&S regulators to consider requiring a standard SWMS template. This step may well provide a level of consistency in the practice of using SWMS in the construction industry, and that consistency will be a key factor in the enforcement of safe systems of work.

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### Dealing with the gatekeeper of Federal Government building work: The Federal Safety Commissioner

The Federal Safety Commissioner (FSC) administers an OH&S accreditation scheme (Scheme), which assesses accreditation applications by head contractors under the Construction Industry Improvement Act 2005 (Cth) (Act). The Scheme, which is mandatory for head contractors tendering for Federal Government (Government) building work, requires head contractors to satisfy a 2 step audit process prior to achieving accreditation.

Increasingly, head contractors are facing challenging times in obtaining accreditation. This is often a direct result of the particular approach taken by the Scheme's auditors. This article will outline the requirements of these audits and examine how you can best prepare in order to maximise your chances of approval.

#### Background

Head contractors who fail to achieve accreditation under the Scheme, or who fail to maintain their accreditation, are prevented from entering into particular Government building contracts including directly Government funded contracts that exceed \$3 million or more in value, and indirectly funded contracts where the Government's contribution is at least \$5 million (representing at least 50% of the total construction value) or \$10 million or more (irrespective of the total construction value). Initiatives that were announced and funded under the Government's \$42 billion Nation Building and Jobs Plan are excluded from the Scheme.

In alliances and joint venture arrangements only the party carrying out 'building work' will require Scheme accreditation. However, if multiple alliance or joint venture partners are undertaking 'building work' then you will all require accreditation, irrespective of the monetary values of your proportion of the work.

Head contractors applying for approval under the Scheme should adopt a systematic approach and ensure they address each audit criterion. This requires the applicant to review all of its occupational health and safety procedures and address any deficiencies prior to making an application.

#### Approval criterion

The FSC undertakes a 2 step audit process in determining eligibility under the Scheme. The first step is a desktop audit, which involves a paper-based assessment of your documentary evidence for compliance with the audit criterion. If you provide sufficient evidence to pass the desktop audit, then the FSC

will conduct an onsite audit to confirm that the policies and procedures are actually implemented onsite.

On 21 July 2009, the FSC released its updated Audit Criteria Guidelines (Guidelines). These Guidelines are particularly useful to applicants who are preparing for the desktop audit, as they specify the kinds of evidence that may be submitted to satisfy the audit criterion. The Guidelines specify the following audit criterion:

- OHSMS audit criteria;
- Scheme audit criteria; and
- Hazard audit criteria.

#### OHSMS audit criterion

In order to pass the desktop audit, your organisation must demonstrate that it has an occupational health and safety management system (OHSMS) which has been certified as compliant with Australian Standard 4801:2001 or international standard OHSAS 18001:1999. This criterion is primarily concerned with an organisation's high-level OH&S policies and procedures.

In order to satisfy this requirement you should provide evidence of a comprehensive risk management procedure addressing hazard identification, risk assessment, control measures, implementation of control measures and monitoring and review. You should also provide evidence that these procedures have been satisfactorily implemented, such as work instructions and work method statements, emergency action plans, inspection programs, reporting requirements and OH&S audit programs.

#### Scheme audit criterion

The Scheme Audit criterion, which is mandatory under the Regulations, requires:

- a. demonstrated senior management commitment to OH&S;
- b. demonstrated effective subcontractor OH&S management;
- c. integration of safe design principles into the risk management process;
- d. whole of project OH&S consultation and communication;
- e. whole of project OH&S performance measurement; and
- f. OH&S training requirements.

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### Senior management commitment

This criterion requires the allocation of a senior management position with overall OH&S responsibility, senior management endorsement of OH&S policies, a procedure for regular management site visits and a procedure for senior management monitoring, resolving and preventing of significant OH&S issues. Essentially, you must ensure that senior management are informed of, and have a significant input in, the management of OH&S issues.

### Integration of design issues

Where contracts that you undertake are for design and construction, then you must have a process for the conduct of risk assessments during the design phase of the project. If you have no input during the design phase of projects, you must have a procedure to ensure that design related hazards are identified and managed prior to the commencement of construction.

### Whole of project consultation

This requires effective policies for the communication and consultation with all workers onsite. This should include a policy for the election, and appropriate training of, employee representatives and/or OH&S committees. This also requires an effective procedure for exchanging information with relevant external parties, and the involvement of workers in developing safety procedures.

### Management of subcontractor OH&S

This criterion requires head contractors to have a process in place to ensure that OH&S plans submitted by subcontractors are reviewed against defined criteria, as well as policies to ensure that subcontractors are properly inducted and involved in site inspections and audits. Essentially, you must ensure that appropriate oversight is maintained over your subcontractors and their safety systems and that you do not delegate responsibility for the safety of your subcontractors.

### Project performance management

You must have effective procedures for the reporting and recording of incidents and non-compliance, addressing incidents and non-compliance, measurement of safety data across the life of the project, and regular senior management review of performance reports.

### Training arrangements

This criterion requires you to have effective training and competency procedures, procedures for the identification of training gaps upon promotion, the recording of training and the evaluation of the effectiveness of training.

### Hazard audit criteria

The hazard audit criterion identifies 19 hazards that are commonplace in the construction industry, and requires you to provide appropriate evidence of your organisation's response to relevant hazards. The hazards include, for example, working at heights, demolition, asbestos, temporary support structures, confined spaces, excavation and mobile plant and equipment. If any of these hazards are relevant to your workplace, it is essential that you provide documentary evidence that those hazards have been addressed. In many cases, there will be specific Codes of Practice applying to the particular hazard, which must be complied with.

### Onsite audit

If you are successful in passing the desktop audit, the FSC will conduct an onsite audit. During the onsite audit the FSC inspector will conduct an inspection of the relevant site, a system review at the site office or head office location, and will speak to senior management representatives, site personnel and subcontractors.

In preparing for the onsite audit you should ensure that the audited sites will be operational on the scheduled inspection date/s, all system documents will be readily available onsite, onsite company staff will have a good understanding of the OHSMS, and senior management and all subcontractors will be available for discussions.

### Conclusion

Anecdotally, it is clear that many businesses fail the auditing process on their first few attempts. Part of this results from very strict approaches being taken by some of the auditors to the information contractors are required to include in their documentation as well as evidence of the procedures themselves being implemented.

In order to best prepare for an FSC audit, it is helpful to undertake a process of self-audit, or in some cases, to obtain an independent external audit, to pre-empt any issues that may otherwise delay the accreditation process.

## Workplace Safety: The impact of the High Court decision in Kirk

Australian OH&S laws impose an onerous duty on all businesses to ensure safety at their workplaces and, until recently, there has been historically little success in defending prosecutions initiated by OH&S Regulators. However, in February 2010, the long awaited and highly publicised decision of *Kirk v WorkCover NSW (and Ors)* [2010] HCA 1 (Kirk Decision) was handed down by the High Court which goes some way to help employers in complying with their duties and defending a prosecution if one is commenced against them.

Although the Kirk Decision did not change the onus on employers in NSW and Queensland to establish a defence to any prosecution, they are now assisted when conducting a defence by the clear authority in the Kirk Decision that a prosecution is not valid if the prosecutor does not clearly identify the steps that an employer should have taken to comply with their OH&S obligations.

### The facts

Mr Kirk was the director of Kirk Group Holdings Pty Ltd (Kirk Group), which owned a farm near Picton, NSW. Mr Kirk took no active part in running the farm and left the day-to-day operation of the farm to Mr Graham Palmer, an experienced manager. In March 2001, Mr Palmer was driving alone on an all-terrain vehicle on the farm when, for reasons unknown, he diverted from the road down a steep slope. The vehicle overturned and Mr Palmer was killed.

WorkCover commenced an investigation and subsequently prosecuted Mr Kirk and Kirk Group under the Occupational Health and Safety Act 1983 (NSW) (1983 Act), being the predecessor of the current Occupational Health and Safety Act 2000 (NSW) (Act). The Kirk Group was prosecuted on the basis that it had failed to take reasonably practicable steps to ensure the health and safety of Mr Palmer, in particular, a lack of training and supervision. Mr Kirk was charged on the basis that, as a director of the Kirk Group, he was deemed to have committed the same offence as the company.

### The prosecution

The prosecution in respect of Mr Palmer's death was brought under sections 15 of the 1983 Act (now section 8(1) of the Act) which requires that employers must "ensure the health, safety and welfare at work of all the employer's employees". A similar charge was also brought under section 16 of the 1983 Act (now

section 8(2) of the Act) in respect of other workers at the farm, who were not employees, but who were also exposed to risk of injury as a result of Mr Palmer's conduct in driving down the steep slope.

The specific charges brought against the Kirk Group and Mr Kirk failed to identify the specific acts or omissions that were said to constitute the offence. The charges were limited to restating the examples of what may amount to a contravention as set out in section 15 of the 1983 Act. Amongst other matters, Mr Kirk and the Kirk Group objected to the manner in which the prosecution was conducted in that WorkCover failed to particularise what further steps Mr Kirk or the Kirk Group could have done in order to comply with their occupational health and safety obligations, including the training and supervision it was alleged had been deficient.

At first instance, the NSW Industrial Relations Commission (IRC) found that both the Kirk Group and Mr Kirk had breached their obligations under the 1983 Act and had not established a defence. The Court imposed fines totalling \$121,000 and ordered that Kirk Group pay WorkCover's legal costs of the proceedings.

Mr Kirk and the Kirk Group unsuccessfully challenged this decision both in the Full Bench of the IRC and also in the NSW Court of Appeal. Ultimately, Mr Kirk was granted special leave to appeal the decision of the Court of Appeal to the High Court. The appeal sought to quash the convictions of the IRC on a number of bases, including that the charge failed to disclose the particular act, matter or thing alleged to constitute the foundation of the charge.

### High Court decision

In a unanimous decision, the High Court upheld the appeal of Mr Kirk. The High Court was particularly critical of WorkCover's approach and in particular the failure by the prosecutor to adequately identify the failures of the Kirk Group. In the Court's view, this approach rendered the operation of the defence almost meaningless because the Kirk Group could not know what measures it needed to prove were not "reasonably practicable". This effectively denied the Kirk Group or Mr Kirk an opportunity to properly raise a defence. In those circumstances, the High Court considered that the IRC based its judgment on a misconceived construction of the 1983 Act which did not require the prosecutor to take these steps.



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As a result, the High Court quashed the convictions on the basis that the IRC had acted outside its jurisdiction in convicting the Kirk Group and Mr Kirk on an incorrect view of the 1983 Act.

### Implications for employers

#### ■ Change of approach to prosecutions

The Kirk Decision has been welcomed by employers, particularly in NSW and Queensland, as a ruling which will greatly assist them in responding to and defending any prosecutions. This is because the Kirk Decision makes clear that an OH&S Regulator is not permitted to initiate or conduct a prosecution if it fails to first establish how an employer has failed to comply with its obligations. The OH&S Regulator must first evidence the particular steps that it alleges could have been taken at the time to prevent the breach. In NSW and Queensland, the onus then shifts to the employer to establish a defence.

#### ■ Change of approach to investigations

Another outcome of the Kirk Decision will be the importance placed by OH&S Regulators on Codes of Practice, Australian Standards and other industry standards. In particular, during any investigation into a safety breach OH&S Regulators are more likely to require employers to provide evidence of their compliance with applicable Codes and Standards. This approach may be taken in order to establish whether there were "reasonably practicable" steps that could have been adopted at the time. Employers will need to consider carefully how they respond to this avenue of investigation and their ability to demonstrate that they took all reasonable steps.

#### ■ Kirk Decision related litigation

Another immediate implication of the Kirk Decision is that a number of employers are reviewing the validity of previous convictions as well as the conduct of any current investigations or prosecutions initiated by OH&S Regulators. The purpose of these reviews is to consider whether the withdrawal of current or pending prosecutions should be pursued and whether existing convictions should be quashed.

If you consider that your business may be affected by the Kirk Decision or you have any other OH&S inquiries, then please contact our office to discuss the matter further.

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