

From Hi-Vis to Suit and Tie

A Personal Perspective into Workplace Health and Safety

I am a law student currently in my final year of study and a paralegal at HBA Legal. Prior to my employment with HBA Legal, I worked extensively as a part of Australia's labour force where I obtained a Certificate III in Transport and Logistics (Warehousing and Storage).

It is too often that injuries arise in the workplace culminating in not only workers' compensation, but loss of business productivity, damaged reputation and exposure to criminal liability. Such results may readily be avoided through the implementation of a series of safe work measures to guard against the risk of foreseeable harm, but employers need to ensure that safe work methods are back to back with key performance indicators.

Overview

Throughout my five years of personal experience working as a labourer, I have completed various tasks at multiple warehouse distribution centres throughout Western Sydney, including the use of numerous types of material handling equipment ranging from simple pallet jacks to rider pallet trucks weighing three tonnes. I have witnessed first hand the daily risks and hazards to workers' health and safety, and how good systems of work safety can fail.

The *Work Health and Safety Act 2011* (NSW) ('the Act') has at its core, the imperative to ensure the safety of workers through a regime of punitive sanctions focused on risk-creation rather than actual harm. Breaches of the statutory duties are enforced by WorkCover New South Wales and may range from on-the-spot fines or improvement notices,¹ to large fines² and imprisonment by order of the court.³ This is in addition to the various civil law mechanisms available under common law and workplace legislation.

This brief article will cover the scope of employers' primary duty of care under section 19 of the Act, in particular section 19(1) and section 19(3), and provide a personal insight into some of the inner workings and risks faced as an employee in Australia's labour force.



¹ *Work Health and Safety Act 2011* (NSW) s 191.

² *Ibid* ss 31-33.

³ *Ibid* s 31.

The Law

Primary Duty of Care

The employers' primary duty of care, in effect, consists of four legislated non-delegable duties.⁴ However, for the purposes of this article, only the first and third duties will be discussed. It should be noted that the legislation refers to a 'person conducting a business or undertaking'⁵ ('PCBU') and is intended to capture every category of economic activity and government undertaking including employers and labour hire firms, amongst others.⁶

Under section 19 an employer must ensure, so far as is reasonably practicable, the health and safety of workers engaged or caused to be engaged by them,⁷ and whose activities in carrying out work are influenced or directed by them while they are at work.⁸

The duty is informed by the duties in subsection (3) of the Act which include, but are not limited to, ensuring, so far as is reasonably practicable:

- the provision and maintenance of: a work environment without risks to health and safety,⁹ safe plant and structures¹⁰ and safe systems of work;¹¹
- the safe use, handling and storage of plant, structures and substances;¹²
- the provision of adequate facilities;¹³
- the provision of any information, training, instruction or supervision necessary to protect all persons from risks to their health and safety arising from work carried out as part of the PCBU;¹⁴ and
- the health of workers and conditions of the workplace (that is to say that the workplace is monitored for the purpose of preventing illness or injury).¹⁵

Reasonably Practicable

Despite the primary duty stipulating that a PCBU "*must ensure*", suggesting a guarantee or certainty, the duty is qualified. The duty is only enforceable to the extent that the duty holder

⁴ Ibid ss 14, 272.

⁵ Ibid s 5.

⁶ Michael Tooma, *Tooma's Annotated Work Health and Safety Act 2011* (Thomson Reuters, 2012) 17 [5.10].

⁷ *Work Health and Safety Act 2011* (NSW) s 19(1)(a).

⁸ Ibid s 19(1)(b).

⁹ Ibid s 19(3)(a).

¹⁰ Ibid s 19(3)(b).

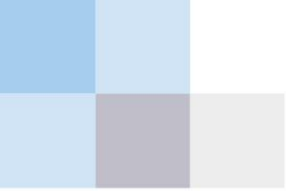
¹¹ Ibid s 19(3)(c).

¹² Ibid s 19(3)(d).

¹³ Ibid s 19(3)(e).

¹⁴ Ibid s 19(3)(f).

¹⁵ Ibid s 19(3)(g).



had available measures to prevent a breach and that it was 'reasonably practicable' to implement those measures.¹⁶ Put another way, there is no failure for taking steps to preclude a risk which was impossible to anticipate.¹⁷ However, the courts have taken a narrow approach in this regard adopting the view that where protective measures are reasonably open to the employer then ordinarily they will not unduly impede the accomplishment of the task.¹⁸

Provision and Maintenance

The key to many of the provisions in section 19(3) is not only the specification of safe work systems, but the maintenance of those systems. In my experience as a labourer, this is a key area of risk management which can easily be overlooked by employers. Maintaining safe systems of work, work environments, plant and structures, and the provision of information, training and supervision requires more than simply implementing those systems and having them on record. It requires taking an active and vigilant approach to the potential dangers and human frailties which can include work pressures and spontaneous stupidity.¹⁹

Various ways I have experienced these measures include: extensive inductions, regular team talks, safety cross-word exercises, random auditing, adequate signage, supervision and re-training.

In Practice

Examples

The extent to which employers comply with their duties varies from workplace to workplace each exhibiting their own pros and cons. For instance, in one workplace, which was a distribution centre for a supermarket, there was an extensive induction period which was commissioned over a full day. It included viewing multiple occupational health and safety videos and completing subsequent assessable questionnaires, a safety tour of the premises including appropriate walkways to be used, and one-on-one training on how to safely lift and move boxes. As a worker I found this information valuable, however, it is easy to see how fewer benefits from an induction program would have been received by non-English speaking workers or those unable to complete written modules on account of literacy problems. Perhaps the best thing this employer did was to prepare the training videos which made the majority of the information accessible to its workforce. This employer read its audience and the induction process was effective because of the use of an accessible audio-visual medium and one-on-one instruction.

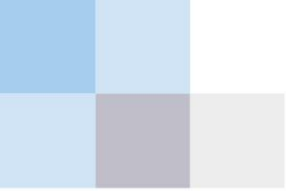
This can be contrasted with another retailer's warehouse where the induction undertaken was significantly shorter. It consisted of a brief occupational health and safety video and an

¹⁶ *Kirk v Industrial Relations Commission* [2010] HCA 1, [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁷ *Carrington Slipways Pty Limited v Callghan* (1985) 11 IR 467.

¹⁸ *Bankstown Foundry Pty Limited v Braistina* (1986) CLR 301, 307 (Mason, Wilson and Dawson JJ).

¹⁹ *Holmes v r E Spense & Co Limited* (1993) 5 VIR 119 (Harper J).



accompanying ten question questionnaire, followed by a tour of the premises. No manual handling training was provided which, in my opinion, is an activity of paramount importance to be undertaken where the primary role is to pick and pack boxes ranging from less than a kilogram to over 20 kilograms. Omitting instructions of correct lifting techniques such as bending with the knees while keeping straight back posture, and the avoidance of twisting at the hips, instead turning the entire body, can result in serious injury especially when coupled with high repetition. At the very least, the employer is likely to have breached its duty by failing to provide adequate information, training and instruction necessary to protect persons from risk of personal injury.²⁰

Another substantial distinction between the approach taken by these employers was the measures in place in the event of a blackout where visibility was significantly impaired. In the first employment example referenced above, all employees using any material handling equipment such as pallet rider trucks or forklifts were required to stop work immediately and remain stationary until the lights turn back on. In another workplace no such measures were in place which gave rise to risks such as collision with other machinery, racking and people. This poses a breach of multiple provisions of the employer's primary duty as the mere exposure of persons to risks to their health and safety can result in the commission of an offence.²¹

Performance Pressures and Workplace Culture

Despite the specifications of good systems of risk management, the drive of people to meet performance targets and budgets means there is always the temptation to take short cuts. Some pressures include:

- curfews;
- demand for urgent stock in busy retail periods; and
- fines that would be payable by the stores if delivery deadlines were not met.

Despite the provision and maintenance of safety measures, on many occasions, and in particular during busy periods, supervisors and managers engaged in contravening conduct of the safety measures that they have been entrusted to enforce, such as lifting and moving pallets with their hands rather than using a pallet jack/forklift. This was not out of laziness or apathy but rather these people were trying to meet targets. The responsibility begins at the very top to ensure unreasonable demands are not placed on warehouse staff, contrary to safe work practices.

²⁰ *Work Health and Safety Act 2011 (NSW) s 19(f).*

²¹ *Haynes v C I & D Manufacturing Pty Ltd (1994) 60 IR 149.*



Conclusion

Work health and safety law is about more than specifying systems. The demands of business and performance expectations need to be consistent the work methods put in place to ensure a safe workplace.

Contact

For more information on this article, please contact:

Rosan Santangelo, Partner
Mobile: 0405 640 654
Direct: +61 (0) 2 9376 1144
rosan.santangelo@hbalegal.com

Jason Francl, Paralegal
Office: +61 (0) 2 9376 1100
Direct: +61 (0) 2 9376 1152
jason.francl@hbalegal.com

www.hbalegal.com

Disclaimer: This article is intended for information purposes only and should not be construed as legal advice. For any legal advice please contact us.