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WH&S law throws doubt on indemnity

A recent decision in South Australia has created uncertainty as to whether insurance policies that indemnify directors to allow the avoidance of personally paying fines for workplace health and safety law breaches will be effective under the new WHS law. Maria Capati, Senior Associate and Ryan Ainscough, Lawyer discuss.

A recent decision in the South Australian Magistrates Court has criticised the use of insurance policies which indemnify directors allowing them to avoid personally paying fines for workplace health and safety law breaches. The decision has created uncertainty as to whether such insurance policies will be effective under the new workplace health and safety legislation and has shown an intention of the courts to impose tough sentences for directors who seek to avoid paying fines personally.

Background

In *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22 an employee was killed when a 1.8 tonne steel monorail beam fell on him whilst being lifted to the rafters of a partially built building by a crane. The fabric sling supporting the beam snapped while the employee was standing underneath the beam and attempting to tilt the beam to a level position to allow it to be bolted to a rafter. There was no risk assessment or job safety analysis undertaken for this type of lift and no safe working procedure had been devised to take account of the particular hazards of the task.

The Employer, Ferro Con (SA) Pty Ltd was found to have failed to ensure, so far as was reasonably practicable, that the employees were safe at work under the *Occupational Health, Safety and Welfare Act* 1986 (SA) (the Act). The Employer's sole director, Mr Paolo Maione was found to have failed to take reasonable steps to ensure compliance by the Employer with its obligations under the Act, in circumstances where Mr Maione's failings contributed to the commission of the offence by the Employer.

The offences by the Employer and Mr Maione were held to be very serious breaches of their obligations resulting from their core business activities rather than isolated lapses of an otherwise compliant OHS system.

The use of insurance policies to indemnify employer breaches

In determining the sentences to be imposed for the breaches, Industrial Magistrate Lieschke considered the "surprising arrangement" where the Employer had a general insurance policy which included an indemnification of its director for fines imposed for criminal conduct. The insurance cover carried a $10,000 excess payment which Mr Maione paid personally as the Employer was in liquidation. By paying the excess Mr Maione ensured that he obtained the indemnity and effectively avoided the majority of the fine.

Industrial Magistrate Lieschke considered the actions taken by Mr Maione to undermine the Court's sentencing powers and send a message to other employers and Responsible Officers that insurance cover for OHS offences can reduce the personal consequences of very serious offending, even if an offence has fatal consequences.

It was considered that the actions of Mr Maione dramatically outweighed any mitigating circumstances, such as showing contrition, cooperating with SafeWork SA and making an early guilty pleas and accordingly, there was no reduction in penalty.

What does this decision mean for employers?

This decision was made under the now repealed *Occupational Health, Safety and Welfare Act* 1986 (SA). In his judgement, Industrial Magistrate Lieschke made reference to the provisions of the new *Work Health and Safety Act* 2012 (the New Act), namely section 272 which states that any term of a contract which seeks to modify the operation of the Act is void.

His honour stated that, while unclear, under these provisions it would still be possible for an insurer to sell such policies and grant indemnity for commercial benefit. Whether such indemnities should be outlawed is a policy consideration for Parliament to consider.

It remains to be seen whether, as a consequence of this decision, the Parliament will amend the New Act to expressly prohibit such insurance, as is the case in New Zealand's corresponding OHS legislation or whether future decisions under the New Act will interpret such insurance policies to be an "attempt to modify the operation of the Act".

Employers should be aware of the risks of relying on such insurance policies and the court's attitude to sentencing if such policies are used. In any event, it is clear that complying with workplace health and safety laws in the first instance remains the most appropriate risk management tool.

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