Trends in Workplace Health and Safety in Asia Pacific

Wednesday, August 23, 2017
(Aug 22\(^{\text{nd}}\) in North and South America)
Moderator

Peter Walts
Chief Operating Officer
Employment Law Alliance
Global
If you need another copy of the power point slides, open a new window, go to the ELA homepage (www.employmentlawalliance.com) and click the webinar title.
Audio

Questions and Tech Support
Speakers

Marie Costa  
Corrs Chambers Westgarth  
Melbourne, Australia  
marie.costa@corrs.com.au  
+61 3 9672 3000

Carl Blake  
Simpson Grierson  
Auckland, New Zealand  
carl.blake@simpsongrierson.com  
+64 9 977 5163

Jenny Tsin  
Wong Partnership  
Singapore  
jenny.tsin@wongpartnership.com  
+65 6416 8110

Vivien Yui  
Wong Partnership  
Singapore  
vivien.yui@wongpartnership.com  
+65 6416 8110

Reena Enbasegaram  
Shearn Delamore & Co.  
Kuala Lumpur, Malaysia  
reena@shearndelamore.com  
+603 2027 2727

Cynthia Chung  
Deacons  
Hong Kong  
cynthia.chung@deacons.com.hk  
+852 2825 9297

Atul Gupta  
Trilegal  
Bangalore, India  
atul.gupta@trilegal.com  
+ 91 80 4343 4646
Marie Costa
Australia
Statutory regime in Australia

• The Commonwealth, states and territories are responsible for regulating and enforcing the laws in their jurisdictions with respect to work health and safety (WHS).

• Model WHS laws have been implemented in all jurisdictions, except Victoria and Western Australia.
Objective of WHS laws

• The WHS laws provide a framework to protect the health, safety and welfare of all workers at work and of other people who might be affected by the work.

• Key duty holders include persons conducting a business or undertaking (employers), workers and officers.
Offence Provisions

• WHS laws are enforced by national and state-based regulators. Suspected breaches of the legislation are also investigated by relevant national and state-based regulators.

• Contraventions are criminal offences and attract penalties such as fines and imprisonment.
Model WHS laws - Category 1 offences

• Category 1 offences are classed as the most serious.

• Although the laws became operative in most jurisdictions five years ago, we had not seen any Category 1 prosecutions until recently.

• In the last 12 months, Category 1 prosecutions has been initiated in New South Wales, Queensland and South Australia.
There has been a marked increase in the level of fines imposed for breaches of WHS legislation across Australia.

The principal sentencing consideration is general deterrence.
Carl Blake
New Zealand
Director responsibilities – due diligence

1. Keep up to date with health and safety matters
2. Understand the nature of the business and its hazards and risks
3. Ensure the business has appropriate resources and processes to eliminate or minimise risks to health and safety
4. Ensure there are appropriate reporting and investigation processes in place
5. Monitor that these processes are in place
6. Verify
Enforceable undertakings

- Alternative to prosecution for H&S breaches – avoid conviction
- Purpose is to benefit:
  - workers in the workplace;
  - wider industry or sector; and/or
  - the community
- Party giving undertaking must take responsibility and accountability – but not a guilty plea
- Case of St Kentigern College – Sweeney Todd
WorkSafe’s position on critical risks

WorkSafe wants NZ organisations to determine their critical risks and ensure they have the necessary controls in place.

It is looking for:

• Evidence based targeting of critical risks
• Targeted interventions to address key harm drivers
• Influencing practice and behavioural change
Singapour  Jenny Tsin  Vivien Yui
A Singapore Perspective to WSH
Key Legislation
Workplace Safety & Health Act (WSHA)

• Covers all workplaces in Singapore
• Aims to inculcate good safety habits and practices in all individuals at workplaces
• 3 guiding principles:
  – Strengthening industry ownership of workplace safety and health outcomes;
  – Ensuring sufficiently high penalties to deter non-compliance;
  – Requiring stakeholders to eliminate and reduce risks at their source.
Proposed amendments to WSHA

• In order to improve WSH performance, the following amendments to the WSHA have been proposed:

(1) Public release of incident learning reports

• This proposed change would allow the Commissioner for WSH to publicise an incident learning report with detailed investigation findings, including the root causes and associated recommendations, at any time/manner he thinks fit (including before legal action is taken against any party under investigation). This would help to prevent recurrence of similar incidents.

• To address the concern that the report may prejudice an accused’s position, the report would be inadmissible in any legal proceedings, and be solely for learning purposes.
Proposed amendments to WSHA

(continued…)

(2) *Increasing maximum fines for breach of subsidiary legislation*

• This proposed change increases the maximum fine for breaches of WSHA subsidiary legislation from $20,000 to $50,000.

• The new maximum penalty will only be applied to the most serious offences under WSHA subsidiary legislation, *i.e.* offences that could result in death, serious injury or dangerous occurrences. The government does not intend to increase the penalties for other offences under WSHA subsidiary legislation.
WSH 2018 Plus

• A plan to achieving sustained improvements in Workplace Safety and Health performance

• Support by Tripartite Partners – Ministry of Manpower, Singapore National Employer’s Federation and the National Trade Union Congress

• National strategy to improve workplace safety and health in Singapore.

• Vision: “A safe and healthy workplace for everyone; and a country renowned for best practices in workplace safety and health”.
Enforcement Philosophy

• Proactive risk based approach taken in inspections, to enforce WSHA
  – Inspections used in conjunction with prosecutions.
  – Purpose of inspections is to ensure effective safety management system at work and that employers comply with that system even before any accident takes place.
Enforcement Philosophy

• Zero tolerance towards contravention:
  – In first half of 2017, 41 cases of persons/companies convicted under WSHA for fatal workplace accidents.
    • Maximum fine imposed $400,000 on a corporation
    • 4 weeks’ imprisonment imposed on a supervisor for endangering safety / health of himself/others
Reena Enbasegaram
Malaysia
OCCUPATIONAL SAFETY AND HEALTH ACT 1994

- Aims of the act
- Application – as part of the t & c
- Breach of the act – case studies
OTHER APPLICABLE LEGISLATION

• WORKMEN'S COMPENSATION ACT 1952
• EMPLOYEES' SOCIAL SECURITY ACT 1969 (SOCSO)
CURRENT TRENDS

• Impact of a Foreign workforce
• Mental Health / Presenteeism
• Workplace health / Wellbeing programmes
Concept of the challenge

i. This is the 3-month challenge starting from 1st September to 31st November 2017.

ii. Participating employers will delegate their own workers as participants.

About Challenge

Physical inactivity is one of the leading risk factors for death worldwide. It is a key risk factor for noncommunicable diseases (NCDs) such as cardiovascular diseases, cancer and diabetes.

Physical activity is essential for good health. Workplaces can help increase physical activity levels, and thus improve the health of employees, reduce sickness absence and increase productivity.

The program aims to encourage employers to help their employees to stay active wherever they may be at even at the workplace! Using the concept of being active while collecting rewards, this program can make physical activity an interesting activity to do.
Cynthia Chung
Hong Kong
Recent statistics and authority’s attitude in minimizing work related injuries/diseases

<table>
<thead>
<tr>
<th>Category</th>
<th>2015 No. of Cases</th>
<th>2016 No. of Cases</th>
<th>Percentage change in figures</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) Industrial Accidents</td>
<td>11,497</td>
<td>10,883</td>
<td>-5.3%</td>
</tr>
<tr>
<td>(B) Occupational Injuries</td>
<td>35,852</td>
<td>35,768</td>
<td>-0.2%</td>
</tr>
<tr>
<td>(c) Confirmed Occupational Diseases</td>
<td>256 (Including monaural hearing loss)</td>
<td>334 (Including monaural hearing loss)</td>
<td>+30.5%</td>
</tr>
</tbody>
</table>
Highlight of Legal Requirements for Workplace Health and Safety in Hong Kong

• Compulsory Employees’ Compensation Insurance for work related injuries/diseases

• Occupational Safety and Health Ordinance: “Every employer must, so far as reasonably practicable, ensure the safety and health at work of all the employees.”

• Occupational Safety and Health Regulation

• Display screen equipment regulation

• Factories and Industrial Undertaking Ordinance
Civil Liability for employers regarding occupational stress

- Psychiatric injury suffered by workers due to occupational stress/harassment/victimisation has not been the subject of claims by workers in Hong Kong.

- Position may change in view of the increase in such actions in the UK - *Barbar v Somerset County Council*  
  - Overall test: reasonable and prudent employer in light of what he knew or ought to have known.

- Foreseeability of psychiatric injury will be the main determinant in occupational-stress claims against an employer.

- Even if civil claims are not common in Hong Kong, the employees suffering from psychiatric injury are still protected by Disability Discrimination Ordinance.
Overview of Workplace Health and Safety Legislations in India

**Constitutional Perspective:** Enshrined in the Directive Principles of State Policy, The Constitution of India (Art.39(c), Art. 41 and Art. 43) – To strengthen the health and strength of workers and secure just and humane conditions of work.

**Supreme Court:** Right to health and medical aid to protect the health and vigor of a worker is a fundamental right under Article 21.

**Specific Statutes**

**Factories Act and Mines Act:**
- Provide for prevention of occupational hazards, creating safe and healthy conditions of work in factories and mines.
- Extensive provisions dealing with ventilation, fencing of machinery, waste treatment, overcrowding, and other welfare provisions like provision of canteens, crèche’s, etc.

**Shops and Commercial Establishments Act:**
- Enacted by each Indian state separately
- Regulate working hours, establishment timings and overtime.
- Contain general provisions relating to cleanliness, ventilation, etc.
- Special exemptions required for women to work in night shift
General Statutes

Electricity Act 2003: Consumers must also adhere to some safety requirements -
• Factories with a large load must designate an Electrical Safety Officer
• Owners/occupiers of high rise buildings responsible to prevent danger due to shock and fire hazards
• Safety measures to be followed by consumers associated with switchboards/conductors
• Any electrical installation, repair, etc. must be carried out through licensed contractors.

Municipal Regulations: State specific regulations. For e.g. in Bangalore, after Carlton Tower fire, stronger fire safety measures were notified –
• No Occupancy Certificate to be given for a building unless fire safety mechanisms are adhered
• Fire Safety Certificate renewal required every 2 years
• Owner to get inspection done every 2 years
• Fire Safety Measures in National Building Code of India adopted by various states
• Tenants to ensure adequate contractual safeguards in any lease agreement
The Rights of Persons with Disabilities Act, 2016:
• Recently notified
• Extends to private establishments as well
• Organizations must publish an equal opportunity policy
• Establishments with 20 or more employees must appoint a liaison officer to supervise recruitment of PwD and provision of requisite facilities
• Adhere to standards of accessibility relating to physical environment, transport, IT and communication.

Employee’s Compensation Act, 1923:
• Provides for compensation for injury or death arising “during the course of employment”.
• Classifies injuries and compensation on severity - Death, Permanent Total Disablement, Permanent Partial Disablement. Temporary Disablement whether total or partial (more than 3 days), Contracted Occupational diseases
• Compensation calculated on monthly wages of the employee and the loss of earning capacity (in case of injury). Subject to certain statutory caps.
• Employer liable to bear expenses of medical treatment in some circumstances.
• Payments must be deposited with the jurisdictional authority.
Director’s Liability For Health & Safety Violations

Assessment of director liability can vary based on statute and circumstances involved

FACTORIES ACT, 1948

J.K Industries v. Chief Inspector of Factories and Boilers and Ors.

Only a director can be an occupier and not another nominee/employee. Director being ignorant about the management of factory cannot absolve him.

No Mens Rea needed - Beneficial social defence legislation which creates strict liability

ELECTRICITY ACT, 2003

K.D. Diwan and Ors. v The State of Jharkhand

Charges against the director filed for electrocution of an employee due to violation of Indian Electricity Rules.

S. 149 – “Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company.”

Finding – Vicarious liability to be imputed against the director only with the requisite allegation of director being involved in day-to-day management.
INDIAN PENAL CODE, 1860

**State of M.P. Through CBI v Warren Anderson and Ors (Bhopal Gas Leak case)**

- Release of dangerous gas from Union Carbide Factory, leading to thousands of deaths.
- Keshub Mahindra, a *non-executive director* and Chairman, imputed for death by criminal negligence among other accused.

**Finding** –

- Negligence is imputed on directors due to the long chain of circumstances of negligence in the plant.
- Clear knowledge with accused that omissions and neglect could lead to such accidents.
- Director being unrelated to the direct causing of the gas leak and not dealing with safety aspect is not valid argument.

**Sushil Ansal and Ors. v State of Delhi (Uphaar Cinema Case)**

59 people died in a fire in a cinema theatre.

*Charges framed against the ex-directors* among other accused.

**Finding** –

Liability for death by criminal negligence as:

- Varied safety rules violated – Extra Seats added, Closing of exits, gangways and balcony, no speedy exit.
- *Ex-directors were convicted* as it was proved that:
  - They took crucial decisions relating to these defects years back.
  - They still controlled the company and had varied powers.
SHOPS AND ESTABLISHMENT ACTS – Varying verbiage in each state legislation

Badri Prasad Gupta and Ors. v The State of Bihar and Anr.

S. 35 – “If the person contravening any provision ........ is a company ............... every director, ..... shall, unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention, be deemed to be guilty of such contravention.”

- Once offence against company is established, deeming fiction of vicarious liability is laid on the directors and charges are framed.
- **Burden on proof on directors** to establish absence of knowledge or diligent actions thereof.

However, in contrast under the **Delhi S&E Act, 1954**, the verbiage differs and thus, no such deeming fiction exists. It was held under **Union of India v. S.P. Agarwal and Ors that:**

- No charge can be framed against a director till it is shown that he was in charge;
- Responsible for the conduct of business; (Exception: Unless he is the notified ‘Occupier’)

Questions & Answers
Conclusions and Wrap Up
Contact Our Speakers for More Information

Marie Costa  
Corrs Chambers Westgarth  
Melbourne, Australia  
marie.costa@corrs.com.au  
+61 3 9672 3000

Carl Blake  
Simpson Grierson  
Auckland, New Zealand  
carl.blake@simpsongrierson.com  
+64 9 977 5163

Jenny Tsin  
Wong Partnership  
Singapore  
jenny.tsin@wongpartnership.com  
+65 6416 8110

Vivien Yui  
Wong Partnership  
Singapore  
vivien.yui@wongpartnership.com  
+65 6416 8110

Reena Enbasegaram  
Shearn Delamore & Co.  
Kuala Lumpur, Malaysia  
reena@shearndelamore.com  
+603 2027 2727

Cynthia Chung  
Deacons  
Hong Kong  
cynthia.chung@deacons.com.hk  
+852 2825 9297

Atul Gupta  
Trilegal  
Bangalore, India  
atul.gupta@trilegal.com  
+ 91 80 4343 4646
Please complete the survey that should appear on your computer screen when you disconnect from the webinar.

To listen to this webinar again or to any past ELA webinars, please visit our website at: www.employmentlawalliance.com.

A Certificate of Attendance and supporting materials are posted on the ELA website (click this webinar’s title; the link to the Certificate is on the landing page). Attendees seeking continuing education credit should submit these materials directly to the appropriate organization.
For More Information

If you have any questions, or need further information please contact:

Mary Anne Creighton, Director
Member Relations
mcreighton@employmentlawalliance.com