



**WORKERS' COMPENSATION:**

**“ON THE FRINGE”**

PRESENTED BY: AEGIS Risk Management Services



# Belinda Scott

Managing Director  
BJS Insurance Brokers Pty Ltd





# Seminar Format



- Committed to getting you out on time
- Save questions for the panel discussion
- Speakers will be available at the end
- Feedback Form



# ON THE FRINGE

PRESENTED BY SIMON BOOTH - AEGIS RMS



# The Limits of Workers Compensation



WorkSafe Victoria, and the employer, are directly liable to any worker, and in the event of the Workers' death, to the dependents of the Worker to pay:

- Any amount of compensation payable under the WIRC Act 2013; and
- Damages to the Worker or the Worker's Dependents as permitted by and in accordance with sections 327 and 366 of the WIRC Act 2013

for which the employer is liable, and for which they are indemnified under their Workers' Compensation Insurance.



# The Limits of Workers Compensation



In Plain English:

**Workers' Compensation Responds to:**

- Statutory Benefits
- Common Law Costs





# The Fringes



## Common Law Proceedings:

- Labour Hire
- Contractors





# The Fringes



## Regulatory Prosecutions & Penalties:

- Your Employees
- Labour Hire
- Contractors





# The Fringes



## Third Party Recoveries

### Section 71(4) WIRC Act 2013

The Authority is subrogated to all rights of action or recovery that an employer has against any person in respect of:

- (a) any claim for compensation
- (b) any claim for damages
- (c) any claim for contributions under the Wrongs Act

made by a worker employed by the employer, or the dependents of a worker



# The Fringes



## Third Party Recoveries:

- Labour Hire
- Contractors





# WorkSafe Prosecutions

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17 October 2018

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# What Do We Prosecute?

- **WorkSafe investigate and prosecute breaches of the following Acts:**
  - Occupational Health and Safety Act 2004
  - Occupational Health and Safety Act 1985 (the old OHS ACT)
  - Dangerous Goods Act 1985
  - Road Transport (Dangerous Goods) Act 1995
  - Equipment (Public Safety) Act 1994
- **WorkSafe also investigates and prosecutes compensation fraud relating to workplace injury payments.**

# What exactly do we prosecute?

The RISK not the OUTCOME (if any).

- Risk of death or serious injury to employees and members of the public
- An employee can include an independent contractor and their employees or employees hired through labour hire agencies.

# No really, what do we prosecute?

- **Unsafe systems of work**
- **Unsafe plant**
- **Unsafe workplaces**
- **Bullying and occupational violence**
- **Manual handling**
- **Unsafe handling, storage and transportation of Dangerous Goods**

# The Process

- **WorkSafe Inspectors attend a workplace**
- **In response to:**
  - An incident
  - An observation
  - A report by an employee/member of the public
- **Notices – Improvement, Prohibition**

A WorkSafe  
Inspector attends a  
workplace



OHS Breaches Identified



Matter referred for investigation



# The WorkSafe Investigator

## What can they do?

- Enter a workplace
- Inspect, examine and make enquiries
- Inspect and seize any document or thing that could be evidence of an offence
- Powers under section 100 of the OHS Act
  - Request documents
  - Require a person at the place to answer any questions put to them
  - Penalties for not complying (60 PU for a person/300 PU for a body corporate)



# What if there is an incident?

**An employer or self-employed person must notify WorkSafe immediately after becoming aware that an incident has occurred at the workplace.**

- Maximum Penalty: 240 penalty units for a person / 1200 penalty units for a body corporate

**An employer or self-employed person must not, without reasonable excuse, fail to ensure that the site where an incident occurred is not disturbed until:**

- **an inspector arrives at the site; or**
- **such other time as an inspector directs**
- Maximum Penalty: 240 penalty units for a person / 1200 penalty units for a body corporate

1 penalty unit is currently \$161.19

240 penalty units = \$38,685.60

1200 penalty units = \$193,428.00

# What Happens Next?



Brief of evidence provided to a WorkSafe Lawyer to determine whether a prosecution will be commenced

## 2 Paramount Considerations

- Is there sufficient evidence to support a prosecution?
- Is it in the public interest for a prosecution to be commenced?
- WorkSafe is guided by Prosecution guidelines which mirror the DPP guidelines.

# Alternatives to Prosecution

## Letter of Caution

- A contravention has occurred
- There is a reasonable prospect of conviction
- It is not in the public interest to commence a prosecution

## Enforceable Undertaking

- Charges may or may not be before the court
- The entity enters into an Enforceable Undertaking any charges are withdrawn
- If the entity contravenes the undertaking, WorkSafe may:
  - Apply to the Court for enforcement of the undertaking
  - Investigate any contravention
  - Reinstate the original charges that were originally before the court

# Sentencing Principles

## Court of Appeal decision of *DPP v Frewstal Pty Ltd* [2015] VSCA 266

1. As the occurrence of death or serious injury is not an element of the offence charged, an accused is punished according to the gravity of the breach of the duty owed under the Occupational Health and Safety Act, not according to the result or consequences of the breach;
2. The gravity of breach is measured by two factors:
  1. The seriousness of the breach itself.
  2. The extent of risk or serious injury which might result from the breach.
3. Assessment of the extent of the risk itself involves consideration of two factors:
  1. Firstly, the likelihood of the event occurring as a result of the breach
  2. The potential gravity of the consequences of the breach (ie death or serious injury)
4. The fact that the breach of the particular case resulted in death is only relevant in that it might manifest or demonstrate the degree of seriousness of the threat to health or safety resulting from the breach.

# Example

## *DPP v W.F Montague Pty Ltd*

- County Court at Melbourne – 21 September 2018
- Family owned business – temperature controlled storage and inventory management
- 12 sites across whole business, employing 382 full-time employees + over 1000 casuals
- WF Montague subcontracted service and maintenance of refrigeration equipment across the sites to CIRS. CIRS Owner/Director attended WF sites to perform maintenance.
- Maintenance manager of WF Montague had resigned and two current employees were filling the role - both lacked the necessary experience for the role.
- CIRS Director walked across a corroded roof and fell through it to the floor below. He died as a result of the injuries sustained.
- Court found it was “both a grave and significant departure from reasonably implemented safety procedures”.
- The CIRS Director’s death was a demonstration of the seriousness of the threat posed by the failure to implement the system in place and of the breach itself.
- General Deterrence.

## ***DPP v W.F Montague Pty Ltd Continued...***

“...the accused's efforts to cover the gap caused by the departure of the maintenance manager were woefully inadequate and the consequential departure from fundamental safety checks around the work to be carried out by Mr Gruyich does mean that the breach was extremely grave and that general deterrence and punishment of principles to which this court must have particular regard in this sentencing exercise.”

W.F Montague were convicted and fined \$380,000

# Personal Liability

- **Duty to not recklessly endanger persons at workplaces**
  - Penalty: 5 years imprisonment or fine not exceeding 1800 penalty units, or both.
- **Duty to ensure a safe workplace and the means of entering and leaving it are safe.**
  - Penalty: 1800 penalty units
- **Duty of employees to take reasonable care for their own safety and that of others and to cooperate with employer to comply with this Act.**
  - Penalty: 1800 Penalty units

**BJS Insurance Group  
Workers'  
Compensation  
Breakfast Seminar**

**Presentation by  
Andrew Douglas**

Wednesday, 17 October 2018

# Serious Incidents – Your Obligations

## Serious Injury or Fatality – Site Duties

1. Make sure the person and site is safe.
2. Don't disturb the site (s39):
  - Protect health of person
  - Aid injured person
  - Make site safe – prevent further risk
3. Notifications (s37 and 38):
  - Immediate notification – oral (meets s37 legal/fact question)
  - 48 hours written record of incident
4. Consultation (s35):
  - Often missed post-incident
  - Clear obligation post-incident to manage on-going risk

## Serious Injury or Fatality – Duties to Investigators

1. Police – name, address occupation.
2. WorkSafe (s98, 99, 100, 101) – inspect, examine, make inquiries, photograph, seize, measure:
  - Must give name and address
  - Reasonable assistance – not hinder, obstruct or conceal
  - No obligation to talk beyond name and address is potential prosecution – s154 self-incrimination  
*(not apply corporation or documents)*

# Serious Incidents – Your Obligations

## Moral and Ethical Obligations

## Purpose

We work with you to create a whole business solution which solves your problems now and empowers you to fashion a sustainable, productive and healthy future.

## Philosophy

Imagining a better world through your eyes and building it.

## Contact

**Andrew Douglas**  
*Managing Principal*

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WorkSafe Victoria

# Recoveries

Section 369 *Workplace Injury Rehabilitation Compensation Act 2013*  
[and Section 138 *Accident Compensation Act 1985*]

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**Mark Fitzgerald**

Recoveries Manager  
WorkSafe Victoria

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# Agenda

Steps in the Recovery Process

WorkSafe using Employers Names to pursue Recoveries



# Recovery Process

## Identification

- ❖ From Worker and Employer Claim Forms
- ❖ Agents notifying WorkSafe
- ❖ Employers - through Agents or Brokers
- ❖ Circumstance investigation reports
- ❖ Common law claims when another party other than the employer is named in the proceeding, or through the reading of the Statement of Claim or Affidavit identifying the injury circumstances, including interstate common law cases.



# Recovery Process

## Authorisation

- ❖ WorkSafe assesses all available information to determine whether to pursue
- ❖ When authorised, WorkSafe writes to employers asking whether they would like WorkSafe to recover their employer excess liability, paid at the start of a claim (eg. first 10 days of compensation and initial medical expenses). Upon a successful recovery WorkSafe reimburses the employer.

## Application

- ❖  $[A - (B+C)] \times X/100$
- ❖ Factor A is an unfettered Common Law assessment and includes general damages, past and future economic loss, medical expenses, and gratuitous care.
- ❖ Eg:  $A = \$200K - C = \$100K \times X = 80\% = \$80K$ , which is the maximum WorkSafe can recover relating to payments made or likely to be made.

# Third Party Examples

- Designers, suppliers, manufacturers and service maintenance providers
- Property owners - occupiers liability
- Construction – Head Contractor or multiple employers on site
- Host employer – labour hire arrangement
- Causing exposure to hazardous substances
- Assaults
- Bullying/Harassment
- Medical Negligence
- Animal owners - attacks



# Benefits of Recoveries

- Providing a civil deterrent for incidents that may not meet the criminal test.
- A successful recovery is passed onto employers by way of premium relief. Whilst directly rewarding the employer, it also impacts on the industry rate calculation.
- WorkSafe has a statutory obligation to recover against negligent third parties.
- Recoveries ensure that WorkSafe fulfils its roles as both the regulator and the indemnifying insurer of the scheme.



# Criteria for WorkSafe using an employer's name to pursue a recovery

Recovering contribution to common law damages in conjunction with a Section 369 Recovery process  
(Generally where WorkSafe has paid a worker damages before there are damages court proceedings)

WorkSafe uses the employer's name in the court proceedings (as well as Victorian WorkCover Authority), as WorkSafe has paid the Common Law damages on behalf of the employer.

[Section 23B *Wrongs Act* 1958]



# Contact

## WorkSafe Victoria

1 Malop Street  
Geelong, Victoria. 3220

Advisory Service: 1800 136 089  
General Enquiries: 03 9641 1555  
24 Hr Emergency: 13 23 60

Email: [info@Worksafe.vic.gov.au](mailto:info@Worksafe.vic.gov.au)

[www.worksafe.vic.gov.au](http://www.worksafe.vic.gov.au)



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# WorkSafe, Prosecutions & Management Liability

CHUBB®

Hidden Costs of litigation

Mark Belcher – Chubb Insurance

## Agenda

- **The Policy: Management Liability**
- **Types of Actions**
- **Legal Costs**
- **Case Example**
- **Life of Claims**

## The Policy:

- What is in it...
  - Management Liability
  - Directors & Officers Liability
  - Limited Prosecution Coverage
  - Legal Expenses
  - Court Attendance

Note: See also Public Liability Policy Coverage



## Types of Actions / Investigations

- Work Safe Investigation
- Coronial Enquiry
- Work Safe Prosecution
- Work Cover Claims
- \*Common Law Claims



## Legal Costs: -“Where does the Money go...”

- Internal Investigation
- Insurance Investigation
- General Legal Advice - Insured's Solicitor
- Defence at a Statutory Prosecution
- Coronial Inquest Representation – Serious Injury or Death Claims
- Defending Civil Claims – Common Law Claims



## Legal Costs:

### Trowbridge Report:

- Legal Costs on Average represent 33-36% of litigation costs

## Example:

- Accident Year 2006 (Yes -12 Years)
- Prosecution, Statutory Claim & Common Law Action:
- Policy Limit for Costs: \$1 Million
- Costs Incurred: \$1.4M

## Litigation Life Cycle

- Differs in each Jurisdiction
- Life of an action 3-5 Years quick
- 5 Years Average
- 5-8 years - not unusual

## Recovery of Costs

“What if we are successful...?”

**Cost awards** – Where does the Money go

- About 70% of Court Costs are recoverable
- Not Solicitor Client Costs
- Hourly rates are capped at Court Scale
- Costs of Action / Uninsured Costs / Insured Costs / Policy Excess



# TIME & MONEY



# INSURING THE FRINGE

PRESENTED BY SIMON BOOTH - AEGIS RMS



# Insuring The Fringe



## Statutory Liability:

- Regulatory Prosecutions & Penalties

### 1.1 Statutory Liability Coverage

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The **Insurer** shall pay on behalf of an **Organisation**, **Loss** on account of any **Claim** first made during the **Policy Period**, or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** occurring before or during the **Policy Period**.



# Insuring The Fringe



## Statutory Liability:

- Regulatory Prosecutions & Penalties

3.4 **Loss** means **Defence Costs** and any **Penalty** which any **Organisation** becomes legally obligated to pay on account of any covered **Claim**, including any reasonable legal costs and associated expense payable by the **Organisation** to any other party by reason of an order of any **Regulatory Authority**.



# Insuring The Fringe



## **Statutory Liability:**

- Stand Alone
- Management Liability



# Insuring The Fringe



## Public Liability:

- Common Law Proceedings
- Third Party Recoveries

### Insuring Agreement

1.1 **Chubb** shall indemnify the **Insured** against all sums which the **Insured** shall become legally liable to pay as **Compensation** in respect of:

- a) **Personal Injury**
- b) **Property Damage**
- c) **Advertising Injury**

first happening during the **Policy Period** within the **Policy Territory** as a result of an **Occurrence** in connection with the **Business**.



# Insuring The Fringe



## Public Liability:

### 2.12 Occurrence means

An event including continuous or repeated exposure to substantially the same general conditions which results in **Personal Injury** or **Property Damage** or **Advertising Injury** neither expected nor intended from the standpoint of the **Insured**. All events of a series consequent on or attributable to one source or original cause are deemed one **Occurrence**.

### 2.13 Personal Injury means

- a) bodily injury, death, illness, disability, shock, fright, mental anguish or mental injury;
- b) false arrest, detention, false imprisonment, malicious prosecution or humiliation;



# Insuring The Fringe



## Public Liability:

- Be Aware:
  - Must declare labour hire
  - Labour Hire may be excluded
  - Will have a higher excess (\$25K and above)

# Panel Discussion



- Belinda Scott - facilitator
- Panel members:
  - Simon Booth, Aegis Risk Management Services
  - Andrew Douglas, FCW Lawyers
  - Mark Fitzgerald, WorkSafe
  - Adrian Trotman, WorkSafe
  - Mark Belcher, Chubb Insurance
  - Teresa Westgarth, BJS Insurance Brokers