

## LANDMARK DECISIONS UNDER THE WHS LAWS - MEANING OF 'OFFICER' EXPLAINED AND RECORD \$1.1 MILLION FINE IMPOSED

The first decision explaining the meaning of an "officer" under the harmonised Work Health and Safety laws has been recently delivered in the ACT Industrial Magistrates Court. The harmonised WHS Laws have applied across Australia since 2012, with the exception of Victoria and Western Australia. The recent decision sheds much needed light on the new obligation for officers to exercise due diligence. The Court held in *McKie v Muni Al-Hasani, Kenoss Contractors Pty Ltd (in liq)* [2015] ACTIC 1 that a senior Project Manager, Mr Al-Hasani, was not required to exercise the due diligence obligation because his position did not meet the threshold required for an officer under the WHS Laws. This is because he did not make, or participate in making, decisions that affected the whole, or a substantial part of, the business of Kenoss Contractors Pty Ltd ("**Kenoss**").

Criminal proceedings were brought against Mr Al-Hasani concerning the fatality of a truck driver whose truck struck live power lines. Specifically, it was alleged that Mr Al-Hasani did not implement adequate measures to address the risk posed by live overhead electric cables.

In citing High Court authority, the Court focused on having regard to the role of the individual in the wider corporational structure as a whole. To that end, the Court found that although Mr Al-Hasani, amongst other things, had operational responsibility for the implementation of specific contracts, participated in management meetings, liaised with customers, engaged with safety management plans, managed the performance of the projects team and monitored the progress of projects, his role did not rise to the level of an officer under the WHS Laws. Rather, the Court determined that:

- although Mr Al-Hassani sat close to the top of the structure, the management structure was flat and no evidence was presented to demonstrate that he made or participated in making decisions that affected, at the very least, a substantial part of the business;
- Mr Al-Hassani did not commit corporate funds, did not sign off on tenders for particular work and was not responsible for hiring and firing employees; and
- no evidence was presented that he had direction over the contracts Kenoss pursued or that he attended board meetings or met any of Kenoss' legal obligations, such as ASIC returns or establishing quality assurance compliance.

Importantly, the Kenoss business was not limited to construction work but extended to a development business, over which Mr Al-Hassani had no control over.

The case is therefore a useful reminder that not all "managers" will be determined by the Court as an officer under the WHS Laws. Notwithstanding this, each case depends on its individual circumstances and regard must therefore be had to the particular employee's role and whether they, in fact, participate in making decisions that affect a substantial part of the business as a whole.

In light of this decision, all types of managers should carefully consider what active steps they are taking to discharge their due diligence obligation and what further steps (if any) should be taken. Additionally, employers should also review their corporate management frameworks to ensure the officers in their organisation are appropriately identified and are aware of their due diligence duties. To this end, Harmers Workplace Lawyers can assist organisations and their officers to ensure their obligations are appropriately exercised, including by conducting due diligence training sessions and assisting in the preparation of due diligence frameworks.

Arising out of the same set of facts, on Wednesday 19 August 2015, the ACT Industrial Magistrates Court imposed a \$1.1 million fine on Kenoss for failing to ensure the safety of the driver in breach of section 32 of the harmonised WHS Act. The maximum fine the Court can award for a breach of section 32 is \$1.5 million. This is the highest fine recorded for a single safety offence in Australian history. The Court has not released the full decision but it has been reported in the media that Kenoss' circumstances were unique as, for example, its safety officer had no qualifications for his role, it attempted to hinder the investigation into the fatality and it lacked a systematic approach to safety. We will provide you with a further alert regarding this decision once it has been released in full by the Court.

# LANDMARK DECISIONS UNDER THE WHS LAWS - MEANING OF 'OFFICER' EXPLAINED AND RECORD \$1.1 MILLION FINE IMPOSED

© Copyright harmers workplace lawyers 2015. All rights reserved. No part of this alert may be reproduced, in whole or in part, by any means whatsoever, without the prior written consent of harmers workplace lawyers.

Disclaimer: this newsletter provides a summary only of the subject matter covered without the assumption of a duty of care by the firm. No person should rely on the contents as a substitute for legal or other professional advice.

Please contact Harmers Workplace Lawyers if you would like further information:

## SYDNEY

Level 27 St Martins Tower  
31 Market Street  
Sydney NSW 2000  
tel: +61 2 9267 4322  
fax: +61 2 9264 4295

## MELBOURNE

Level 40  
140 William Street  
Melbourne VIC 3000  
tel: +61 3 9612 2300  
fax: +61 3 9612 2301

## BRISBANE

Level 19  
10 Eagle Street  
Brisbane QLD 4000  
tel: +61 7 3016 8000  
fax: +61 7 3016 8001

CHANGE MANAGEMENT | INDUSTRIAL RELATIONS | EMPLOYMENT | WORK HEALTH & SAFETY  
HUMAN RIGHTS & EQUAL OPPORTUNITY | LEGAL RISK MANAGEMENT | INVESTIGATIONS | TRAINING