



Mediation and Employment Relations Service

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Member Update 2nd March 2015

What is happening in Industrial Relations in 2015.

WHS, Quad Bikes Coronial Inquest, Employer fined for underpayment of wages, Redundancies-small employer, Public Holidays 2015-17, WorkCover Changes and Calculating Overtime for Casuals

1. Workplace Health and Safety (“WHS”)

In 2013 the WHS legislation changed and so did the obligations for employers, managers and Directors. The Responsible Officer responsibilities have now been included in the provisions for a Person Conducting a Business Unit (“PCBU”).

South Australia is bound by the Model Act developed by Safe Work Australia under the Safe Work Australia (Model Act). officers have a duty to exercise due diligence to ensure that their organisation complies with its WHS duties and obligations. 'Officer' has the same meaning as under the Corporations Act 2001 (Cth) and therefore includes not only directors, but any person who makes or participates in making decisions that affect the whole or a substantial part of the business of the corporation. This means that a wide range of executives and, managers may be captured by the definition of “officer” under the Model Act.

The more serious offences carry the risk of an officer being imprisoned (e.g. offences involving reckless disregard for health and safety). The maximum penalties per offence in South Australia for organisations and their Directors and Officers are currently as follows:

Organisations	Directors / officers
\$500,000 to \$3,000,000*	\$100,000 to \$500,000; and /or imprisonment for up to 5 years*

The duty of officers to exercise due diligence with regard to WHS, have been and will continue to be a catalyst for increasing focus on WHS by senior management and boards of directors. Officers can exercise due diligence by:

- a) maintaining up to date knowledge of WHS law;
- b) understanding the risks of their organisation's business;
- c) ensuring that resources for safety are available and used; and
- d) ensuring that the organisation has processes in place for responding to hazards and complying with WHS law.



The risk of prosecution will take into account the quality of the PCBU's WHS systems.

**This article is based on an article by DHA Piper.*

2. **Employer Fined Over Failing To Enforce Traffic Safety Policy.**

A court has fined a South Australian company \$80,000, following a guilty plea, for failing to provide and maintain a safe system of work. This failure resulted in a driver being injured by a fork lift truck and sustaining serious injuries.

This serious incident occurred despite the existence of control measures at the employer's workplace, including a delivery driver safety policy. It was found that the employer had not enforced its policy. Following an investigation by SafeWork SA, it was alleged that the company had failed to ensure, as far as was reasonably practicable, that the driver was safe from injury whilst at work. In particular, it was alleged that the employer should have ensured that the driver stood in a designated safety zone whilst a forklift was unloading his truck. The employer pleaded guilty to the charge.

What do employers need to do?

Every employer should ask themselves:

- a) Do they have WHS Policies and Procedures?
- b) Are employees licensed and qualified to operate the equipment that they use in the performance of their duties?
- c) Do we have vehicles and people interacting in the workplace? Who and what is at risk?
- d) Have we implemented controls measures (such as known and understood policies or procedures)? Are they adequate and enforced?
- e) When was your workplace last audited by you to identify and rectify risks of injury or damages to property?
- f) Are we enforcing our own policies and procedures?

If you allow a vehicle to enter the workplace, or have plant such as forklifts conducting operations in any part of your workplace, then you have an active duty - so far as is reasonably practicable - to eliminate or minimise that risk.



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Once you have conducted a risk assessment and determined what measures are to be put in place, you must train employees and hold them accountable for compliance. If this step is not taken, such procedures will not provide the employer with any protection in the event of a traffic incident.

Examples of some controls that may help reduce the risk of a traffic incident could be:

- Traffic management procedures and plans – detailing how employers will manage the risks.
- Providing training and information to employees and others about the risk of injury from being hit by moving vehicles, prior to the employee gaining entry to the workplace.
- Signs and instructions in the workplace about the hazards and risks caused by moving vehicles.
- Specific traffic control measures such as:
 - a) audible warning devices on reversing vehicles;
 - b) designated storage,
 - c) load and unloading areas;
 - d) personal protective equipment such as safety boots and high visibility vests;
 - o safe walk ways, and designated safety boxes;
 - o high impact barriers / interlocked gates; and
 - o blind spot mirrors and a system of traffic safety rules.

It is wise to conduct an assessment of your existing traffic management procedures and plans in order to determine whether your risk is being properly managed. Chapters 9 to 11 and the Appendices in the Farmers OHS Guide should assist.

3. Coronial inquest into quad bike deaths

In late 2014 the NSW Coroner commenced dealing with a coronial inquest into deaths arising from the use of all-terrain vehicles. According to the NSW Government, the inquest will address broader issues about the commercial and recreational use of quad bikes. The NFF will be keeping a watching brief on the inquest, related to its interest in ensuring that quad bike use does not put farmers, their



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families and employees, unnecessarily at risk. Members who are interested in the issue should contact [Sarah McKinnon](#) at NFF.

4. Are you paying wages correctly?

An Australian advertising company and its director have been fined a total of \$100,000 after failing to properly pay several workers in Brisbane, Sydney, Melbourne and Adelaide.

OHMedia Melbourne was fined \$85,000 while the company's director and part-owner Wen Zhou was fined \$15,000.

The company was also ordered to completely reimburse the employees what it owed them – which amounted to almost \$60,000.

In Brisbane's Federal Circuit Court, it was found that OHMedia Melbourne underpaid 45 casual employees a total of \$59,145 in less than a month in 2011.

The case was taken to court following an investigation by the Fair Work Ombudsman, prompted by complaints filed by some of the workers.

Most of the employees were overseas workers, in Australia on student and working holiday visas. A number of the employees were paid nothing for their work, while the rest were paid a fraction of what they were entitled to.

Over \$48,000 of the underpayment relates to 34 employees who were based in Brisbane, who individually worked up to 133 with no remuneration.

The other employees were based in Melbourne, Adelaide and Sydney.

OHMedia also failed to keep sufficient records for the workers.

Judge Michael Jarrett found that OHMedia Melbourne had not sought any advice about applicable minimum pay rates, calling the company's contraventions "at the very least reckless".

He added that neither the organisation nor Zhou had shown remorse for their actions, requiring the imposition of a penalty which "serves as a warning to others".

"Employers should understand very clearly that employees, whether within a vulnerable



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class or otherwise, are not available for exploitation and are entitled to all of the protections offered by the Fair Work Act,” he said. “The failure to keep accurate records undermines the [Fair Work Ombudsman’s] ability to investigate and ensure compliance with minimum standards.”

Fair Work Ombudsman Natalie James said that the Court’s decision serves as a reminder to employers that failing to remunerate staff their basic entitlements is a serious issue.

“Successful litigations such as this also benefit employers who are complying with workplace laws, because it helps them to compete on a level playing field,” she said.

**We acknowledge HC On Line for this article.*

5. Redundancy does not apply to Small Employers and Short Term Employees

Since late 2014 when the Transitional Provisions expired the National Employment Standards have exempted the following;

- a) an employee who has not completed at least 12 months’ continuous service with the employer and
- b) the employer has 15 employees or more (this include a head count regardless of whether an employee is casual or part time);
- c) the scale of redundancy pay under the NES does not apply to an employee’s termination of employment if the employee is employed for a specified task, or a **specified period of time**, or a specified season, the termination must take place **at the completion of the specified task, time** or season.

A redundancy occurs when the position is no longer required to be performed in the same way as previous and doesn't need an employee’s job to be done by anyone. Please note that redundancy applies to the position not the employee (eg it does not apply to an underperforming employee).

Redundancy also happens when an employer becomes insolvent or bankrupt.

Redundancy can happen when the business:

- introduces new technology (eg. the job can be done by a machine)
- slows down due to lower sales or production
- relocates interstate or overseas



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- re-structure or re-organises because a merger or takeover happens.



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6. Public Holidays 2015 to 2017 (Source: Safe Work SA)

Holiday	2015	2016	2017
1. New Year's Day	Thursday, 1 January	Friday, 1 January	Monday, 2 January (additional day as 1 January falls on a Sunday) *
2. Australia Day	Monday, 26 Jan	Tuesday, 26 January	Thursday, 26 Jan
3. Adelaide Cup	Monday, 9 March	Monday, 14 March	Monday, 13 March (to be confirmed)
4. Good Friday	Friday, 3 April	Friday, 25 March	Friday, 14 April
5. Easter Saturday.	Saturday, 4 April	Saturday, 26 March	Saturday, 15 April
6. Easter Monday	Monday, 6 April	Monday, 28 March	Monday, 17 April
7. Anzac Day	Saturday, 25 April To be observed on the Saturday.	Monday, 25 April	Tuesday, 25 April
8. Queen's Birthday and Volunteer's	Monday, 8 June	Monday, 13 June	Monday, 12 June
9. Labour Day	Monday, 5 October	Monday, 3 October	Monday, 2 October
10. Christmas Eve and Christmas Day	Thursday, 24 December to 7pm Christmas Eve and all day Christmas Day	Saturday, 24 December 7pm - Christmas Eve and all day Christmas Day	Sunday, 24 December 7pm - Christmas Eve and all day Christmas Day
11. Proclamation Day public holiday	Monday, 28 December (substitute day as 26 December falls on a Saturday).	Tuesday, 27 December (additional day as 26 December is the Christmas Day public holiday)	Tuesday, 26 December
12. New Year's Eve and New Year's Day	31 December 7pm – New Year's Eve and all day New Year's Day	Saturday, 31 December 7pm – New Year's Eve and all day New Year's Day	Sunday, 31 December 7pm – New Year's Eve and all day New Year's Day

* Every Sunday in South Australia is nominally a public holiday and bank holiday under the Holidays Act 1910.



7. WorkCover Changes to take effect on 1st July 2015

We have been attending the WorkCoverSA stakeholder workshops to provide input on behalf of the Farming Community for the changes to occur later this year.

On Thursday, 30 October 2014, the South Australian Parliament passed the Return to Work Act 2014 to deliver a new Return to Work scheme from 1 July 2015. The Return to Work scheme is underpinned by early intervention initiatives and personalised support for workers and employers to improve recovery and return to work outcomes.

The current Scheme will have a major overhaul from as early as 1st July 2015.

This will include a change in name from WorkCover Corporation to the Return to Work Corporation. Workers' entitlement for most injuries will be limited to two years of income maintenance. Currently these payments may continue up to "retirement" age. Workers with serious injuries will not be effected by this change.

Employers' premiums payments are expected to be reduced but employers with past claims will be penalised.

Please refer to previous updates last year regarding an overview of those changes.

Issues effecting employers are now being discussed or rolled out. Some of the more technical information regarding premium reform is summarised as follows;

- WorkCover's next actuarial assessment should be completed soon.
- WorkCover will then be setting the Average Premium Rate and taking that to the Government by the end of March
- WorkCover will be contacting employers individually regarding the premium rate
- The way that the Work Health and Safety ("WHS") fee appears on a premium notice will be more transparent
- WorkCover will be looking at a surcharge (poor performing employers) or remission (excellent performing employers) that will impact around 1000 employers
- Only income maintenance costs (WorkCover wages) will be included in the premium calculation from 2015/16 going forward, ie Option 1 from the proposal.
- There will be employers who experience an increase under the new system (376 employers) - WorkCover will be contacting these employers individually. They expect 50-60 employers to have a significant increase due to the removal of secondary injuries (currently if an employee has an aggravation of an injury with a previous employer the penalties for the aggravation will be with the first employer).
- The premium order should be released in May and will contain industry rates
- ***The expectation is that industry rates will be around 25% lower***
- WorkCover will be putting a premium calculator online in due course



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- There will be a significantly different claim determination process however the details are yet to be discussed with the claims agents. There will be a lot of attention on claims before determination
- There was confirmation that injuries which occurred prior to 1/07/2015 would be managed under the new Act from 01/07/2015
- Mobile Claims Specialists were starting to attend medical appointments with injured workers with good results. The expectation is that there will be 110 mobile claims specialists across both agents
- Rob confirmed that the expectation was that the same case manager, barring normal turnover, would be responsible for a claim for the 2 year entitlement to income maintenance. This was a contractual requirement for the agents.

8. Calculation of overtime for Casual Employees.

Casual employees receive a 25% loading as compensation for non payment of leave (other than Long Service Leave) and Public Holidays not worked.

The Pastoral Award 2010 (MA000038) states in Clause 10.4

(c) A casual employee other than a casual pieceworker must be paid per hour at the rate of 1/38th of the weekly rate prescribed for the class of work performed, plus 25%.

(d) The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.

The Wine Industry Award 2010 (MA000090) states in Clause 13.4

(b) The overtime rates for a casual employee must be applied to 1/38th of the minimum weekly wage prescribed in clause 16—Classifications and adult minimum wages for the work being performed. The casual loading of 25% must also be paid for overtime on a Sunday or public holiday.

The definition in the Pastoral Award spells out clearly what the purpose of the casual loading is for all awards.

Overtime Calculations

A full time rate of say \$16 per hour (note this is an example of a rate only) means that a casual receives a loading of 25% or, in this case \$4 per hour (25% of \$16) more than the fulltime employee. On the basis the fulltime employee earns \$16 and the casual \$20 per hour.



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When calculating overtime for both the fulltime and casual employees at say time and a half both they will BOTH earn \$24.00 per hour but, the casual will in addition be paid the extra \$4 for the 25% casual loading resulting in the casual's entitlement of \$28.00 per hour using these rates. The casual is NOT paid time and a half on the \$20 per hour rate used in this example. The following table may assist in this calculation;

	Fulltime	Casual
Ordinary Hourly Rate of Pay	\$16.00	\$16.00
Overtime time and a half	\$ 8.00	\$ 8.00
25% Casual Loading	N/A	\$ 4.00
Total Overtime Hourly Rate	\$24.00	\$28.00

*Please refer to the award for the ordinary hourly rates which are based on the classification structure.