

# Employment & Industrial Alert

November 2007

## **STATUTORY IMMUNITY FROM LIABILITY UNDER THE WORKPLACE HEALTH & SAFETY ACT 1995**

### **A REMINDER FOR EMPLOYERS**

The District Court of Queensland recently had to decide whether a Workplace Health & Safety Officer was liable for the failure of a business to maintain safe premises. In *Lloyd v Noosa North Shore Caravan Park [2007] QDC 302*, a tenant of the caravan park suffered injury whilst holidaying when tripping over a rock in the camping area. She brought a claim seeking damages from the caravan park, alleging that as an occupier of the premises, the caravan park had breached its duty of care to her as a lawful entrant. The caravan park, subsequently joined to the case the Workplace Health & Safety Officer employed by the caravan park. The Workplace Health & Safety Officer's duties were to conduct safety audits of the camping ground and resort. The caravan park argued that the plaintiff's accident occurred because of a failure by the Workplace Health & Safety Officer to identify the presence of the rock to it so that it could be removed.

The caravan park was required to appoint a Workplace Health & Safety Officer as 30 or more workers were normally employed at the workplace and this obligation was in place because of the *Workplace Health & Safety Act 1995*.

The *Workplace Health & Safety Act 1995* identifies the functions of Workplace Health and Safety Officers who hold a Certificate of Authority for appointment as a Workplace Health & Safety Officer under the *Workplace Health & Safety Act 1995*. In addition to identifying the functions of a Workplace Health & Safety Officer, the *Workplace Health & Safety Act 1995* also prescribes that an employer's obligations are in no way diminished by the appointment of a Workplace Health & Safety Officer and that an employer's legal liability is not reduced by virtue of an act or omission of a Workplace Health & Safety Officer.

This means, that employers continue to have legal liability for acts or omissions on behalf of Workplace Health & Safety Officers in their employ.

The Court in *Lloyd v Noosa North Shore Caravan Park* was asked to determine whether the Workplace Health & Safety Officer had a statutory immunity or whether he was liable to indemnify the employer paying 100% of the plaintiff's damages or liable to contribute to the plaintiff's damages.

Section 184(2) of the Act provides that a *Workplace Health & Safety Officer is not civilly liable because of the performance of or the failure to perform a health and safety function under Part 8 of the Workplace Health & Safety Act 1995*. (Part 8 of the Workplace Health & Safety Act 1995 includes section 96 which identifies the functions of Workplace Health & Safety Officers and section 98 which states that an employer's obligations are not diminished by the appointment of a Workplace Health & Safety Officer.)

The Court ultimately determined that no claim could be made against the Workplace Health & Safety Officer because of the statutory immunity granted by section 184(2) of the *Workplace Health & Safety Act 1995*.

Employers must therefore ensure that Workplace Health & Safety Officers fulfil the functions for which they are employed. That is:

- To tell the employer about the overall state of health and safety at the workplace;

- To conduct inspections at the workplace to identify hazards and any unsafe or unsatisfactory Workplace Health & Safety conditions and practices;
- To provide written reports to the employer in respect to hazards or unsafe practices identified during inspections;
- To provide education programs in Workplace Health & Safety;
- To investigate or assist in the investigation of Workplace Health & Safety incidents at the workplace;
- To assist Workplace Health & Safety inspectors in the performance of their duties;
- To report incident or risk of incident to the employer.

While an employer may be liable for failures on behalf of the Workplace Health & Safety officer in performance of these duties, it is potentially open for an employer to escape liability if it can prove that there was misleading or deceptive conduct engaged in on the part of the Workplace Health & Safety Officer. In the case of *Lloyd v Noosa North Shore Caravan Park*, the caravan park argued that the Workplace Health & Safety officer had engaged in misleading and deceptive conduct as contemplated by section 52 of the *Trade Practices Act*. It further argued that due to the operation of the Commonwealth Constitution the Trade Practices Act as a federal law overrides the *Work Place Health & Safety Act* where there is inconsistency between the two laws.

In *Lloyd v Noosa North Shore Caravan Park*, there was no evidence that the Workplace Health & Safety officer had been guilty of misleading and deceptive conduct within the meaning of those words as interpreted by the Courts.

The argument that section 52 of the *Trade Practices Act* overrides the operation of the *Workplace Health & Safety Act 1995* may give an employer protection against absolute liability for the conduct of its Workplace Health & Safety Officer where he/she has been engaged in conduct which can be described as misleading and deceptive within the ambit of section 52 of the *Trade Practices Act*. For an employer to be successful it will have to prove their employed Workplace Health and Safety Officer has behaved in a fashion which amounts to misleading and deceptive conduct, and secondly satisfy the court that there is inconsistency between s 184(2) of the *WorkPlace Health & Safety Act 1995* and section 52 of the *Trade Practices Act* so that the immunity granted under s 184(2) does not apply.

Whether this can be achieved will be a matter for the courts to determine in future cases.

For all your workplace health and safety advice, contact

Susan Andersen  
07 322364479  
sandersen@qmtlaw.com.au

Christopher Campbell  
07 32236403  
campbell@qmtlaw.com.au