



## A Fatal Lack of Officer Due Diligence

Two recent and separate prosecutions of companies and their Officers will be of interest to anyone who is an Officer and thus has a duty of “due diligence” under section 27 of the WHS Act.

Though these 2 cases are separate they both involve the same incident in which an 8 year old girl died. One Officer was prosecuted for a lack of due diligence. In the other case the Officer is being prosecuted for a lack of due diligence that amounted to negligence. That case is not yet complete.

Both cases illustrate the importance of Officers complying with their duty of due diligence and also being able to show that they did comply.

### **The First Prosecution**

In September 2014 at the Royal Adelaide show, an eight year old girl was ejected from an amusement ride called the Airmaxx 360. SafeWork SA prosecuted the company that owned the Airmaxx and also its Officer. The SafeWork prosecutor told the Court that the defendants had failed to properly maintain the ride or properly enforce safety standards since the Airmaxx was purchased in 2012.

The Officer pleaded guilty to failing to exercise due diligence to ensure that the company complied with its WHS duties in regards to;

- register the Airmaxx as required by WHS Regulations and not use it until its design registration was authorized
- provide and maintain safe systems of work
- have the repairs, maintenance and inspection of the Airmaxx carried out by appropriately qualified persons.
- have appropriate systems and processes in place to record maintenance and repair work

The Tribunal noted that the company and its Officers relied upon and were let down by the experts they engaged for the purchase, registration and operation of the Airmaxx. The Tribunal also noted that there were “ample opportunities” for the Officer to be a lot more careful in carrying out her duty.

The Tribunal recorded convictions against the company and the Officer but because of the “precarious financial situation” of the company and the Officer, the Tribunal did not order financial penalties against them.

## **The Other Prosecution**

SafeWork SA has also prosecuted the engineering company and its Officer for their role in carrying out inspections for the company that owns the Airmaxx. SafeWork SA has charged them with reckless conduct. This is a category one offence – (see section 31 WHS Act). If convicted the engineering company may be fined up to a maximum of \$3 million and the Officer may be fined a maximum of \$600,000 or a 5 year jail term or both.

## **Note**

In the main, prosecutions of Officers under the WHS Act that have come into Court so far have been of small companies where the Officer was involved directly on a daily basis with the operations of the company. We have not yet seen a prosecution of an Officer in a large company where there are layers of management or distance between the Officer and the incident.

Meanwhile what is obvious is that Officers need to exercise the due diligence requirements listed in section 27 of the WHS Act in a manner that is relevant for their workplace. And they need to keep good records of their diligence.

**To assist Officers, Courtenell does deliver a 2 hour course for Officers to assist them in understanding the due diligence requirements and how they might apply them in their workplace. Separately we can provide one on one consultation service for an Officer.**

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