

# Update: The South Australian Government seeks to remove indemnity “loophole”

*In August, the Corporate Transport team reported on the decision of Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor [2013] SAIRC 22 which criticised the use of insurance policies allowing directors to avoid personally paying fines for workplace health and safety law breaches (see Piper Alderman Transport Update, August 2013). In this update, we review the government’s response to the decision and the likely changes to be made.*

## The Decision

The case concerned an employee who was killed when a 1.8 tonne steel monorail beam fell on him whilst being lifted to the rafters of a partially built building by a crane. There was no risk assessment or job safety analysis undertaken for the type of lift and no safe working procedure had been devised to take account of the particular hazards of the task.

The Employer was found to have failed to ensure, so far as was reasonably practicable, that the employees were safe at work. The Employer’s sole director, Mr Paolo Maione was found to have failed to take reasonable steps to ensure compliance by the Employer with its obligations under the Act, in circumstances where Mr Maione’s failings contributed to the commission of the offence by the Employer.

Industrial Magistrate Lieschke had regard to the fact that the Employer had a general insurance policy which included an indemnification of its director for fines imposed for criminal conduct. The insurance cover carried a \$10,000 excess payment which Mr Maione paid personally as the Employer was in liquidation. By paying the excess Mr Maione ensured that he obtained the indemnity and effectively avoided the majority of the fine.

It was considered that the actions taken by Mr Maione undermined the Court’s sentencing powers and sent a message to other employers and Responsible Officers that insurance cover for OHS offences can reduce the personal consequences of very serious offending, even if an offence has fatal consequences. The actions taken by Mr Maione were held to outweigh any mitigating factors that existed and accordingly there was no reduction in penalty.

In his judgement, Industrial Magistrate Lieschke stated that, while unclear, under the provisions of the Work Health and Safety Act 2012 it would still be possible for an insurer to sell such policies and grant indemnity for commercial benefit. His Honour noted that whether such indemnities should be outlawed is a policy consideration for Parliament.

## The Government’s Response

In response to the decision, the South Australian Deputy Premier and Minister for Industrial Relations, John Rau has outlined his intention to close the “loophole” in South Australia and consult the Federal Minister for Workplace Relations on the issue.



Mr Rau stated:-

*Insurance should not be the preference over safe equipment and safe work standards. As the law presently stands, if a company receives a \$10,000 fine or \$10 million fine from the Industrial Court, if they are insured, the consequence may be the same- no impact!*

*Whilst most employers do the right thing, this dodge effectively means that the incentive for a company to provide a safe environment for its workers is diminished or eliminated. This is not the message we want to send to South Australia's employers- or our State's workers."*

[South Australian Government, 'Deputy Premier moves to close company insurance dodge' (News Release, 29 August 2013).]

## The Likely Changes

A likely indication of that a change to the legislation will look like can be found in the equivalent legislation in New Zealand, the Health and Safety in Employment Act 1992 (NZ) which provides as relevant at section 561, to the extent that an insurance policy indemnifies or purports to indemnify a person for the person's liability to pay a fine or an infringement fee under this Act, the policy is of no effect and no court or tribunal had jurisdiction to grant relief in respect to the policy or contract.

Given the intergovernmental efforts to harmonise Work Health and Safety laws

across the Australian jurisdictions, other states and territories are likely to be keeping an eye on the South Australian government's progress with interest.

*To discuss any of these issues further, please contact:*



**Peter Dwyer**

Partner

t +61 7 3220 7716

pdwyer@piperalderman.com.au



**Maria Capati**

Senior Associate

t +61 7 3220 7722

mcapati@piperalderman.com.au



**Ryan Ainscough**

Lawyer

t +61 7 3220 7734

rainscough@piperalderman.com.au

## Contact us

### Brisbane

Riverside Centre  
Level 36  
123 Eagle Street  
Brisbane QLD 4000  
GPO Box 3134  
Brisbane QLD 4001  
DX 105, Brisbane  
t + 61 7 3220 7777  
f + 61 7 3220 7700

### Sydney

Level 23  
Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000  
DX 10216, Sydney Stock Exchange  
t + 61 2 9253 9999  
f + 61 2 9253 9900

### Melbourne

Level 24  
385 Bourke Street  
Melbourne VIC 3000  
GPO Box 2105  
Melbourne VIC 3001  
DX 30829, Collins Street  
t + 61 3 8665 5555  
f + 61 3 8665 5500

### Adelaide

Level 16  
70 Franklin Street  
Adelaide SA 5000  
GPO Box 65  
Adelaide SA 5001  
DX 102, Adelaide  
t + 61 8 8205 3333  
f + 61 8 8205 3300

[www.piperalderman.com.au](http://www.piperalderman.com.au)

Follow us on

