



# SISA Update October 2020

Robin Shaw

Manager, Self Insurers of SA

## SISA members in the COVID-19 pandemic

- Appears that a large majority of members have continued to work through the situation very well
- Different approaches to working from home – some offices are staffed again, others still WFH
- Of the full members contacted recently, 92% reported either business as usual or a rise in demand (12%)
- Only 8% reported business declined, all now recovering
- University enrolments increasing
- Border closures the most common issue raised
- Instances of non-compliance by interstate truckies

## SISA members in the COVID-19 pandemic

- Aged care providers challenged by rapid-fire changes to directions
- Some shortfalls in PPE supply early on – SA Health among those now assisting
- Some advise that some protocols will be made permanent – eg automatic temperature testing, hand hygiene
- Value of protocols demonstrated by the very low flu season
- Detmold got mask production up and running very quickly

## Working from home – the upside

- More productive time – no commute
- Takes full advantage of paperless systems such as the Solv products, Skytrust etc
- More relaxed environment
- No disruptions or interruptions (other than kids!)
- Fewer unproductive meetings
- Generates upgrades of home IT capability & mobile devices (and a significant shortage of hardware)

# Working from home – the issues

- Conversations being held about the implications of WFH on:
  - Discharging duties under the WHS Act
  - Liabilities under the RTW Act
  - Risk of actions under the State & Cth FW Acts
  - Potential mental health risks
  - Increased exposure to domestic violence
  - Capital Gains Tax exposures?
  - How to properly train new people remotely?

# SWSA body-worn camera trial

- Inspectors to wear cameras on all site visits Sept-Dec 2020
- Trial will be followed by evaluation and recommendations on future use
- A two-edged sword?
- May serve to improve the professionalism of inspectors
- Privacy concerns – schools, aged care, hospitals, shelters
- Member comments welcome

# Body-worn cameras – ICAC recommendation 22

- Recommendation for use by inspectors in order to:
  - Protect from aggression or unfounded complaints
  - Assist investigation of unfounded complaints
  - Positively affect inspectors' behaviour
  - Provide benefits from an evidentiary perspective by capturing the workplace as the inspector saw it
  - Identify whether an inspector has overlooked (either mistakenly or deliberately) work health and safety risks
  - To identify training needs for the individual inspector or the inspectorate as a whole, and to manage performance
  - Minimise the risk of influence, grooming and capture by PCBU's, industry bodies and unions, while improving the standard of inspectors' behaviour

# Body-worn cameras – the issues

- Question of the admissibility of recorded material as evidence – ICAC believes it would be
- Inspectors’ powers appear to authorise the use of BWCs under the WHS Act s.165(1)(c) and (d); but -
- What if a 3<sup>rd</sup> party objects to the use of a BWC? – think of schools, hospitals, shelters, aged care – privacy considerations may conflict with inspectors’ powers
- Are BWCs ‘surveillance devices’ for the purposes of the SA *Surveillance Devices Act 2016*? That Act does not define ‘surveillance’
- Macquarie dictionary – ‘watch kept over a person’
- If they are, the *Surveillance Devices Act 2016* places some limitations on their use



# Legislation

- *Work Health & Safety (Industrial Manslaughter) Amendment Bill 2020*
  - Introduced in Legislative Council 23/9/20
  - Replaced lapsed 2019 Bill
  - In similar terms to 2019 and 2015 versions but with much higher maximum fine of \$13 million – to align with Qld
  - Government remains opposed to industrial manslaughter laws in general
  - Bill therefore likely to be defeated in the House of Assembly
  - Opposition position unknown
  - Government is still considering aspects of the recommendations of the Boland Review – may try to tweak existing laws to ensure that gross negligence is adequately covered as was done in NSW

## June 2020 changes to NSW WHS Act

- Expands Category 1 offences to include 'gross negligence'
- Creates an offence of obtaining or benefiting from insurance against WHS fines
- Increases maximum penalties for all WHS offences
- Extends the time in which a person can make a request to a regulator to bring a prosecution regarding a workplace incident from 12 to 18 months

## SISA position on industrial manslaughter laws

- Existing criminal law (WHS & Criminal Law Consolidation Acts) is adequate
- Manslaughter is manslaughter – making a specific law for workplaces doesn't alter that
- No evidence that increasing penalties affects employer behaviour or reduces incidents – increasing fines hasn't reduced the road toll
- Why pick on workplaces – what about manslaughter on the roads, or through the use of firearms? They are all caused by negligence and are just as preventable

# Legislation

- Non-essential legislation generally slowed down by debates related to pandemic
- *Automated External Defibrillators (Public Access) Bill 2020* – still in 2<sup>nd</sup> reading in Upper House; Govt likely to oppose
- *Return to Work (Post Traumatic Stress Disorder) Amendment Bill 2020* - still in 2<sup>nd</sup> reading in Upper House; Govt likely to oppose

## Legislation

- *Return to Work (COVID-19) Amendment Bill 2020* – Greens Bill, still in 2<sup>nd</sup> reading in Upper House; Govt will oppose, Labor may support if their Bill is voted down in Lower House
- *Return to Work (COVID-19 Injury) Amendment Bill 2020* – Labor Bill – passed Upper House, still in 2<sup>nd</sup> reading in Lower House, Govt will oppose, likely to be defeated

## Recent SAET cases

- *Donovan v SA Ambulance* 2020 SAET 161 – WPI for back injuries from separate causes not to be combined
- *Education v Peter* 2020 SAET 182 – appeal against trial judge’s finding of 73% WPI dismissed by Full Bench
- *Lemon v RTWSA* 2020 SAET 178 – application by worker with psych injuries to be taken as seriously injured rejected

## Recent SAET cases

- *Taylor v RTWSA* 2020 SAET 154 – Full Bench found trial judge’s reasons for upholding claim rejection were inadequate – sent for rehearing
- *Story v RTWSA* 2020 SAET 174 – application by worker for costs relating to disputed hearing loss WPI assessment rejected
- *Suliman v Coles* 2020 SAET 172 – worker ordered to attend medical examination arranged by Coles, otherwise proceedings will be stayed

## Recent SAET cases

- *Tolosa v RTWSA* 2020 SAET 184 – Full Bench held that trial judge’s reasons for dismissing application for interim seriously injured status were so inadequate that it caused miscarriage of justice
- *Hincks v RTWSA* 2020 SAET 167 – application for interim seriously injured status approved
- *Girdler v Accolade* 2020 SAET 169 – application for review by IMA refused



## Recent SAET cases

- *Cooper v Central Adelaide Local Health Network* 2020 SAET 143 – application for pre-approval of hip replacement surgery granted
- *Atwal v RTWSA* 2020 SAET 155 – worker required certain shoes for orthotics. Held that shoes are also therapeutic appliances along with orthotics
- *Li v Department for Health and Wellbeing* 2020 SAET 190 – applicant living interstate & unable to give evidence in person due to border closures sought permission to give evidence by phone – application refused & matter adjourned until restrictions ease

## Recent SAET cases

- *Williams v RTWSA* [2020] SAET 192 – medical entitlements expired. Applicant sought cost of injecting lubricant into knee as surgery or therapeutic appliance. Treatment considered to delay the need for total knee replacement. Held that it is not an appliance, but it is surgery – appeal allowed
- *Cepon v RTWSA* [2020] SAET 195 – worker injured under repealed Act, had surgery under current Act resulting in assessable impairment. Held that surgical injuries were existing injuries for the purposes of cl 43 of sch 9 – no s.56 entitlement

## Recent Full Court of the Supreme Court case

- *RTWSA v Agnew* 2020 SASFC 79 – worker died in 2012 as a result of a work injury. Claim for lump sum by non-dependent spouse rejected by Full Court. Held that the claim is precluded by the operation of clause 45(1) of Schedule 9 of the RTW Act, which overrides clause 29(1)(a) of Schedule 9.

## Recent Full Court of the Supreme Court case

- *Cooper V RTWSA* [2020] SASCF 94
- *RTWSA v Cooper* [2020] SAET 117 was a successful appeal to SAET Full Bench against single DPJ decision to give interim seriously injured status
- Appealed to Full Court on grounds of procedural fairness
- Full Court found no fault in the Full Bench's conduct or reasoning
- Permission to appeal to Full Court denied

## SISA news

- RTWSA WPI assessment webinar was held 13 & 15 October, 2 more on 22<sup>nd</sup> & 30<sup>th</sup>
- Website upgrade on the way
- Invoicing for 2<sup>nd</sup> half of FY 20/21 to begin in January
- New quarterly fee payment option

# Questions?

