

## **When is a director liable for a worker's death?**

### ***Consent, connivance or negligence – Keating v Fry [2012] WASC 15***

Section 55(1) of the *Occupational Safety and Health Act 1984 (WA)* provides that company officers, managers and persons with delegated authority (**Directors**) face personal criminal liability for company safety breaches if the offence occurred with the consent, connivance or negligence of the Director. It is not only a question of what directors actually know but what they ought to know.

Directors and managers who are intimately involved in the business of their company and with ultimate responsibility for the safety of staff must give clear and specific instructions and put in place practices to ensure that all staff use safe work practices exclusively. For hands-on directors, an inference of negligence or connivance is a “relatively short step” away.

### ***Issues at stake***

D&G Hoists and Cranes Pty Ltd (**D&G**) operates cranes, hoists and yards. It instructed its doggers and riggers to use a particular safe method for tying/slinging loads (**Safe Method**). Unbeknown to the directors, some riggers were using an alternative unsafe method (**Unsafe Method**). On 9 October 2007, a D&G employee was killed when an unsafely slung load slipped and crushed him.

At trial D&G and its two directors were found guilty. The company and its directors appealed. Only the D&G directors appealed against their convictions.

The findings at trial, and upheld at appeal, included:

1. The directors were active, hands on in the business, based in the workplace and frequently in the yard;
2. Both directors understood the hazard of using the unsafe method and would have stopped riggers from using the unsafe method had they seen it being used;
3. The unsafe method had been used on occasion for some time prior to the incident;
4. Not all D&G staff had received safety inductions;
5. All doggers and riggers were competent but certain senior doggers and riggers gave directions to staff to use the unsafe method; and
6. D&G did not have a safety officer, D&G had prepared a written safety procedure but had not yet implemented it and D&G's operations manager had no safety training or expertise in dogging and rigging.

The Court of Appeal accepted that neither director knew that the unsafe method had been used. However, D&G's system of supervision had broken down. The directors ought to have introduced a proper induction system or have taken other steps to ensure that doggers and riggers used safe methods only. The closer directors are to the running of the business, the more likely they are liable to an inference of negligence and personal culpability in the event of a safety breach.

**Please contact David Markovich of Murfett Legal if you have any questions.**