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Legal Strategy – funder/members
Requiring WorkSafe to Prosecute over the Hotel Quarantine Disaster
Briefing
Nov 2021

Self Employed Australia (SEA) is running the campaign to require WorkSafe Victoria to prosecute Victorian Government agencies and responsible individuals (Premier and others) for the hotel quarantine disaster of 2020 that resulted in 801 deaths.

This briefing provides an overview of the court action options available and being planned to push WorkSafe toward undertaking the required prosecutions.

Funding is needed to run the campaign - <https://selfemployedaustralia.com.au/notabovethelaw/>
Contribute here <https://selfemployedaustralia.com.au/join-self-employed-australia/become-a-campaign-member/>
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1. Overview – Key Facts and Events

- a) *WorkSafe Victoria* is both the investigator and prosecutor under the Occupational Health and Safety Act (Vic) 2004.
- b) *The Coate Report* into the Hotel Quarantine disaster of 2020 provides overwhelming evidence that Victorian Government departments and responsible individuals (Premier etc) should be prosecuted under the OHS laws. WorkSafe is failing to do this (see below).
- c) *Section 131* of the OHS Act allows any person to lodge a requirement for WorkSafe to investigate with a view to prosecute, if after six months from an incident WorkSafe has not initiated a prosecution.
- d) *On 29 Sept 2020 SEA lodged a s131* requirement on WorkSafe in relation to the hotel quarantine disaster. SEA required WorkSafe to investigate 27 entities (Departments and individuals)
- e) *WorkSafe had 9 months* to initiate prosecution. WorkSafe must provide its investigation to the Director of Public Prosecutions (DPP). WorkSafe did not meet that deadline of 29 June 2021
- f) *WorkSafe has refused to supply* to the Director of Public Prosecution their investigations as required under the OHS Act. WorkSafe’s refusal to comply with the law means that the other statutory required steps could not be carried out, namely that
 - a. The DPP must then review the investigative material and make recommendations back to WorkSafe as to whether to prosecute or not, and
 - b. WorkSafe must then hand the DPP report to SEA.

- g) *Prosecuting Health*: On 29 Sept 2021 WorkSafe announced they are prosecuting the Department of Health, but no others. That is, of the 27 entities named by SEA WorkSafe is only prosecuting one. However,
- h) WorkSafe is still required to supply to the DPP their investigations.
 - a. WorkSafe continues to refuse to do this.
- i) *Health plead guilty?* One scenario is that Health may plead guilty and pay a 'round robin' fine. (ie) The government fines itself meaning (effectively) no fine. Hearing date is 10 March 2022.

2. Achievements to date

It is fair to say that the 18 months plus effort by SEA under the Not Above The Law (NATL) campaign eventually pressed WorkSafe to prosecute Health. The announced prosecution validated that SEA's call for prosecution is totally correct.

How did SEA achieve the result? To date SEA has had the impact without needing court action. There have been 38 pieces of correspondence between Self Employed Australia and WorkSafe over the last year. In addition during September SEA wrote to the Director of Public Prosecution, Attorney General, Shadow AG, WorkSafe Minister, Shadow WorkSafe Minister, Ombudsman and Solicitor General. There has been careful legal guidance at every step.

3. Next Steps

WorkSafe's refusal to comply with its statute obligations means that the rule of law in Victoria on this matter is being defiled, we say, by the very institution responsible for upholding the rule of law.

To achieve justice for the families and to see the rule of law applied, SEA now seeks to take the matter to court seeking orders to require WorkSafe to comply with its statute obligations.

4. The specific legal options

SEA has engaged a legal team that has studied the legal options and recommends moving forward as follows.

- 1) Application to the Victorian Supreme Court under Section 8 of the *Administrative Law Act 1978 (Vic)* to require WorkSafe to provide the reasons for their decision.

Focus would be on the reasons why

 - a) charges have not been brought against each of the other 26 individuals and entities referred to in the 29 September 2020 request.
 - b) As to why the matters pertaining to each of the other 26 individuals and entities referred to in the 29 September 2020 request have not been referred to the DPP.

A letter of demand was sent to WorkSafe on 29 October 2021 on this.
- 2) Further, application can be made to the Victorian Supreme Court for a *writ of mandamus* (court order) requiring WorkSafe to comply with its statutory obligations.

5. Anticipated WorkSafe response

Given WorkSafe's refusal to comply with its (s131) statutory obligations to date SEA must move forward on the assumption that WorkSafe will use every technical legal avenue and argument to defeat SEA's applications above. The s131 provisions are, we are advised, untested before the Courts. SEA must assume that in initiating this 'rule of law' action that ultimately appeal to the High Court is highly probable.

6. Ultimate outcomes sought

First SEA is seeking to require WorkSafe to do its job as required by law, that is to

- undertake the required investigations into each of the 26 entities so far not being prosecuted.
- Supply to the DPP its investigations of those not being prosecuted so that
- the DPP can review and make recommendations back to WorkSafe and
- WorkSafe then supply those recommendations to SEA

Ultimately SEA is seeking to see proper prosecutions of the 26 remaining entities we say should be prosecuted base on the evidence from the Coate Inquiry. For example, given that Health is now being prosecuted we say that the following individuals should also be prosecuted

- *Daniel Andrews*, The Premier of Victoria
- *Jenny Mikakos*, The former Health Minister
- *Kym Peake*, Secretary for Health and Human Services
- *Melissa Skilbeck*, DHHS, Deputy Secretary, Regulation, Health Protection and Emergency Management:
- *Andrea Spiteri*, DHHS, Executive Director, Emergency Management
- *Jason Helps*, DHHS, Deputy Director, Emergency Management
- *Brett Sutton*, Chief Health Officer
- *Annaliese van Dieman*, Deputy Chief Health Officer
- *Michelle Giles*, Deputy Public Health Commander
- *Simon Crouch*, DHHS, Senior Medical Adviser, Acting Deputy Chief Health Officer
- *Noel Cleaves*, DHHS, Manager Environmental Health, Regulation and Compliance