Briefing Note
Update on attempts by SEA to require WorkSafe Victoria to 'do its job' and prosecute all relevant parties that were involved in the Hotel Quarantine disaster of 2020
19 June 2022

Overview - General

In 2020 the failed Victorian Hotel Quarantine Program resulted in the deaths of some 801 people. The Coate Inquiry into the failed Program forensically identified the government organisations and individuals who ran the Program and their behaviours and failures.

On 29 September 2020 Self-Employed Australia formally triggered provisions in the Victorian work safety laws that enabled SEA to request that WorkSafe Victoria prosecute 27 named organisations and individuals responsible.

On 29 September 2021 WorkSafe initiated a prosecution of the Victorian Health Department but none of the other 26 people or organisations.

- WorkSafe has never revealed whether it has investigated any of the other 26.
- The Victorian Health Department has told its senior bureaucrats that WorkSafe will not prosecute any individuals in the Health Department.
- WorkSafe claims that, in prosecuting only the Health Department, WorkSafe has satisfied its obligations under the work safety laws.
- Self-Employed Australia says that WorkSafe is wrong and that the law requires WorkSafe to investigate with a view to prosecuting the other 26.
- Self-Employed Australia has lodged an application with the Victorian Supreme Court seeking a court order to require WorkSafe to investigate and prosecute (where needed) the other 26. SEA is seeking what is called an 'Order of Mandamus'.

This briefing provides an update of the legal processes underway.

Overview - Legal

The legal argument and process as it currently stands can be summarised as follows:

- A court hearing was to be set to consider whether prosecuting only the Health Department satisfied WorkSafe's obligations under the Act, or whether it was required to prosecute the other 26 entities in Self-Employed Australia's request.

However

- WorkSafe has said that a 'separate question' should first be addressed, effectively arguing that the word 'matter' in the Act is singular. In other words, that if the word 'matter' is singular, only one entity (Health) has to be prosecuted.
- SEA says that this is wrong and is opposing WorkSafe's view.

WorkSafe's 'separate question' application is set for a court hearing on 21 June 2020 where the Court is to decide whether the separate question should be considered prior to the trial of the Mandamus application.

Note: Further background details are available here
https://selfemployedaustralia.com.au/notabovethelaw/

Legal detail
The following provides some level of detail on the legal processes and arguments.

What SEA seeks (Judicial Review Application - Orders of Mandamus)
On 14 February 2022 SEA filed its originating motion for judicial review for orders of mandamus requiring WorkSafe to:

- comply with its obligations under section 131 of the *Occupational Health and Safety Act 2004* (Vic) by investigating the matters referred to it in relation to the Hotel Quarantine Program;
- give reasons why it is not prosecuting the remaining 25 individuals and entities referred to it by SEA in relation to the Hotel Quarantine Program; and
- refer the remaining matters not yet the subject of prosecution in relation to the Hotel Quarantine Program to the Director of Public Prosecutions.

In other words, the Judicial Review Application is asking the Supreme Court to require WorkSafe to do its job properly and to comply with its obligations pursuant to section 131 of the Act.

First Directions Hearing 9 March 2022
A directions hearing was held in relation to the Judicial Review Application.

- At the hearing, a Judicial Registrar made consent orders setting out a procedural timetable. This included timelines for filing of written submissions.
- SEA's legal counsel noted an intention to subpoena around 20 witnesses.
- A further directions hearing was listed for 27 July 2022 where a final court hearing date would likely have been set.

The orders also allowed WorkSafe to file an application for a 'separate question' by 23 March 2022. This meant the timetable would be altered.

(Separate questions are questions which are answered prior to a trial. They deal with issues which, if determined in favour of the applicant for the separate question, could lead to the resolution of the matter without the need for a trial.)

Separate Question Application – Filed 23 March 2022
WorkSafe filed and served an application for the hearing of a separate question (that is, effectively whether 'matter' in s 131 is singular or plural). This meant that a new timetable had to be drawn up and was agreed to just for the Separate Question Application.

As a result, a court hearing is to take place on 21 June 2022. At this hearing the court will decide if a separate question trial should occur. It is not clear whether a determination of this issue will take place on 21 June or be scheduled for a later date, adding further possible delays to the proceedings.

This has therefore delayed the main trial (the Judicial Review Application).

- SEA's view is that WorkSafe has brought the Separate Question Application to avoid or delay the Supreme Court conducting a careful review of what investigations WorkSafe actually did carry out in relation to the Hotel Quarantine Program.
- No detail of WorkSafe's investigation has been provided to date.

Separate Question Scenarios

As of this briefing note, WorkSafe and SEA have filed their submissions on the Separate Question Application.

If WorkSafe succeeds:

- a new timetable will likely be created for a Court hearing of the separate question(s).

Even if WorkSafe does not succeed:

- dealing with the separate question delays the trial of the main hearing, and the issuing of subpoenas to relevant witnesses, including the Premier of Victoria.

SEA is confident that it has a strong case for the rejection of WorkSafe's Separate Question Application. If the rejection occurs, this would put SEA in a strong position in relation to the main trial (the Judicial Review Application).

If, however, the Supreme Court decides to allow a court hearing of separate question(s), SEA is also confident that it has better arguments than WorkSafe.

SEA arguments

SEA's strong preference is to avoid a trial of the separate questions. A separate question trial will only lead to delays in the main trial.

SEA is strongly opposing the Separate Question Application, arguing that the separate questions are inappropriate and would unfairly disadvantage SEA.

SEA has filed submissions which raise a number of issues with WorkSafe's Separate Question Application. These have not been answered by WorkSafe in its reply submissions.

SEA's view of WorkSafe

SEA's assessment—based on WorkSafe's Separate Question Application and the content of WorkSafe's submissions—is that WorkSafe is very concerned about SEA's mandamus application. Further that WorkSafe is seeking to avoid revealing the substance of its investigations into the Hotel Quarantine Program and having its investigations considered and assessed by the Court in an open and public hearing.