



The registered business name of
Independent Contractors Australia
Incorporated Victoria No A0050004U
ABN: 54 403 453 626
www.selfemployedaustralia.com.au
PO Box 13103 Law Courts 8010 Vic

Rowena Orr
Solicitor General Victoria
Level 22
Owen Dixon Chambers West
525 Lonsdale St
Melbourne 3000
By Email: rowena_orr@vicbar.com.au
Cc: sg.secretary@vicbar.com.au

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URGENT

Dear Ms Orr

I wish to bring to your attention as the highest independent non-politically aligned law officer in Victoria and the Government's most senior legal counsel, a very serious and worrying matter concerning WorkSafe Victoria's continuing failure to comply with its statutory obligations under the Occupational Health and Safety Act 2004 (Vic), specifically to supply to the Director of Public Prosecutions its investigative materials into the Victorian Government Hotel Quarantine Program as required under section 131(3) of the Occupational Health and Safety Act 2004 (Vic).

Background

On the 29 September 2020, at least 6 months after the disastrous commencement of the Victorian Government Hotel Quarantine Program, I made a formal written request under s.131 of the Occupational Health and Safety Act 2004 (Vic) (OHSa) to WorkSafe Victoria for it to prosecute 27 of Victoria's senior Ministers and bureaucrats, including the Premier, for indictable offences under the OHSa for their respective parts in the catastrophic Hotel Quarantine Program.

WorkSafe accepted my request and has been investigating the matters I raised since at least that time. WorkSafe has stated that it had commenced an investigation into the Hotel Quarantine Program at an undisclosed earlier date.

In the aftermath of that Hotel Quarantine Program, 801 people died in Victoria from COVID-19, thousands of people were infected, and billions of dollars were consequently wasted in the subsequent attempts to rectify the mess.

The Coate Inquiry, established by the Victorian government to investigate the gross mismanagement of the Hotel Quarantine Program, stated that the Program was:

a “catastrophe waiting to happen” *
a “disaster that tragically came to be” **
and was caused by “lack of proper leadership and oversight.” **

(From the Coate Report, Chapter 8, *para 329, **para 421.)

Since 29 September 2020, WorkSafe has condescendingly advised me on several occasions that its investigations are still ongoing. WorkSafe has refused on several occasions to provide me with proper updates as to the status of its investigations despite some 28 instances of correspondence between WorkSafe and myself.

On the 29 June 2021, exactly 9 months (A) after my letter of 29 September 2020 was received, WorkSafe formally asked me whether I wished the investigation to be referred to the DPP—as the statutory procedure requires when WorkSafe has not made a decision whether or not to prosecute within 9 months (s.131(3)). I advised WorkSafe immediately in writing on 29 June 2021 (B) that I did require the investigation to be referred to the DPP.

WorkSafe breaching its statutory obligations

On the 5 August 2021, I received a letter from WorkSafe (C) which included a letter from the DPP, dated 4 August 2021 and addressed to WorkSafe, in which the DPP stated:

“The matter remains under investigation by WorkSafe Victoria. I cannot make a determination in this matter until I have viewed the investigative materials.”

It was at that point that it became plainly obvious to me that in fact WorkSafe had not complied with its statutory obligation under the OHSA, an Act that it administers. Further, that it had not referred the relevant investigative materials to the DPP as she clearly states is necessary.

Importantly, WorkSafe itself in its letter of 29 June 2021 (A) clearly implies that it would provide the DPP with all the investigative materials, including any additional material gathered as the investigation continued.

On 9 August 2021 (D) I consequently wrote to the DPP explaining that I believed WorkSafe’s failure to provide her with its investigative materials as required by the OHSA meant that she

could therefore not comply with her own statutory obligation under the OHS Act (s.131(4)) and that, in not doing so, WorkSafe was treating both her and the Victorian public with contempt.

To date, the DPP has not responded to my letter.

I further wrote to WorkSafe on 22 August 2021 (E) and have received no more in response than a denial that it has failed and refused to comply with its obligations under the OHS Act and yet further gratuitous statements that its investigations are still ongoing.

I wrote to WorkSafe again on the 19 September 2021 (F).

On the morning of 29 September 2021, a full year since I sent my letter to WorkSafe Victoria requesting prosecution under s.131, I lodged a formal complaint in relation to the behaviour of WorkSafe Victoria with the Victorian Ombudsman.

In the early afternoon of 29 September 2021, WorkSafe Victoria announced that it had commenced prosecutions against the Department of Health—that is, only one of the 27 entities that I identified in my s.131 request of 29 September 2020. It also announced that its investigations into other individuals and entities had concluded.

In a letter (G) from WorkSafe also dated the 29 September 2021 and received late that afternoon, it asserts that as it has now brought a prosecution against just one of the entities listed in my letter of 29 September 2020, it has somehow complied with its statutory obligations under s.131(3) of the Occupational Health and Safety Act 2004 (Vic). In part the letter says,

*“WorkSafe has now brought a prosecution in respect of the **occurrence** of the act, matter or thing outlined in your request. Accordingly, WorkSafe has now fulfilled its obligations to you under Section 131 of the Act.”* [emphasis added]

This assertion is palpable nonsense and is clearly being used by WorkSafe in an attempt to justify its continuing failure to comply with its statutory obligations. The occurrence of the act, matter or thing outlined in my request of 29 September 2020, was not the fact of the Hotel Quarantine Program as WorkSafe now wants to suggest, but rather the failures in the Program’s planning, development, control, operation and management by the people and agencies involved.

WorkSafe has decided not to prosecute these people and agencies as I requested and therefore must immediately provide its investigative materials to the DPP in accordance with s.131(3) of the Occupational Health and Safety Act 2004 (Vic).

Is WorkSafe seriously suggesting that I should have made 27 separate requests, one for every individual and entity that I requested to be prosecuted, rather than the single letter I sent on 29 September 2020?

For WorkSafe to comply with s.131(3) of the Occupational Health and Safety Act 2004 (Vic), it must now provide the DPP with the investigative materials in relation to the 26 individuals and entities that it has decided not to charge, as it was legally obliged to do three months ago.

WorkSafe Victoria is treating our fundamental governing principle, the Rule of Law, the people of Victoria and the DPP with contempt by its continuing failure to comply with its statutory obligation under the Occupational Health and Safety Act 2004 (Vic).

I have recently written to the Attorney-General, the Minister for Workplace Safety, the Shadow Attorney-General and the Shadow Minister for Workplace Safety explaining WorkSafe Victoria's non-compliance with the very statute that it is supposed to be administering.

I am now left with very few options to ensure that WorkSafe complies with its statutory obligations and to respect the Rule of Law. I therefore turn to you and request your assistance to ensure that WorkSafe Victoria complies with the law of the State of Victoria and provides the DPP with the investigative materials she requires to enable her to comply with her own statutory obligation under the OHSA.

I have attached the correspondence referred to above for your consideration.

I await your urgent responses.

Yours sincerely

Ken Phillips
Executive Director
0412 393 692

Attached letters

- A – From WorkSafe, 29 June 2021
- B – To WorkSafe, 29 June 2021
- C – From WorkSafe, 5 August 2021
- D – To Director of Public Prosecutions, 9 August 2021
- E – To WorkSafe, 22 August 2021
- F - To WorkSafe, 19 September 2021
- G – From WorkSafe 29 September 2021