



Frank Zipfinger &lt;frank.zipfinger@gmail.com&gt;

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## SLOPES: Workplace Health & Safety laws - Update for Clubs

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SLOPES <slopes.au@gmail.com>  
Bcc: frank.zipfinger@gmail.com

29 December 2014 at 08:09

Dear SLOPES Clubs

Section 3 of the NSW Work Health & Safety Act states that the framework of the Act is "*to protect the health, safety and welfare of all workers at work and of other people who might be affected by the work*".

### WHS and SLOPES Clubs

SLOPES has been looking at the issue of how and to what extent Work Health & Safety (WHS) laws affect our Clubs.

The answer is not a simple one. And, as usual, different Clubs will be affected differently given their particular circumstances.

However, in an effort to summarise some key principles and promote consideration of the issues by Clubs individually, attached are copies of:

1. a memorandum dated 19 December 2014 prepared by Michael Selinger of law firm Holding Redlich, and
2. a sample draft board resolution provided by a SLOPES Club (with personal club details omitted).

### Key Principle

The key principle is that WHS liability only arises if:

(A) a Club is a PCBU (ie a "*Person Conducting a Business or Undertaking*"), and

(B) as a PCBU, the Club failed to take "*reasonably practicable*" steps to eliminate or control safety risks arising from the operation of its ski lodge.

### WHS Liability Consequences

WHS liability can lead to fines up to \$3m, and personal liability for Club officers of fines up to \$600,000 and/or 5 years in prison.

### General Conclusions

Based on our understanding of the circumstances common to most SLOPES Clubs, it seems:

a) all Clubs are likely to be PCBUs rather than volunteer associations because they either employ a manager (about 30 clubs out of 88 do) and/or they charge third parties to use the lodge (probably all 88 Clubs would fall into this category)

b) all officers of Clubs that are PCBUs face personal liability for WH&S breaches

c) but officers who are "*volunteer officers*" do not face personal liability, because they are exempted from prosecution. A volunteer officer is a person working without payment or reward (note - reimbursement of expenses does NOT constitute payment or reward in this context apparently)

d) however, volunteer officers are expected to comply with the personal duty (as if there were no exemption from prosecution). In any case, directors would not want to be arguing fine points about liability and prosecution exemption in this way - better to approach the issue as if they were liable and properly deal with the WH&S risks - clearly the better approach for the Club, users of the lodge and the officers of the Club.

### Further Information

The Holding Redlich memo discusses the above issues in more detail. [SLOPES appreciates the Holding Redlich memo provided, without cost through an introduction via a SLOPES Club, which is circulated to Clubs with the consent of that firm.]

More background generally on WHS issues can be found on the WorkCover website: see <http://www.workcover.nsw.gov.au/lawpolicy/acts-and-regulations/work-health-and-safety-legislation/Pages/default.aspx>

### Next Steps

The Holding Redlich memo states in the opening paragraph that it is "*general in nature only and should not be relied on as legal advice*".

Despite that, Clubs should review the memo and note in particular the last paragraph which states:

*Even if the Clubs are found not to be PCBUs and their volunteer officers cannot be prosecuted under the current WHS laws, each of them still face potential exposure to public liability claims. These claims will generally be covered by an insurer, but in our experience insurers may seek to decline cover if an exception is available, for example, intentional conduct or reckless indifference. Apart from these liability issues, there also remain reputational issues for the Clubs which may result from any adverse publicity caused by a serious safety incident. This would include publicity associated with any coronial inquest or other media coverage. As such, a systematic approach to safety management in compliance with the WHS laws should be adopted by the Clubs in order to avoid such risks and to ensure the continued safe use of their lodges and facilities.*

SLOPES strongly encourages all Clubs to assess these WHS, public liability and reputational issues fully in relation to their particular circumstances and to put in place "*a systematic approach to safety management*".

Examples of some WHS related issues and approaches to them that a Club board might consider are set out in the sample draft board resolution.

Michael Selinger of Holding Redlich has confirmed he is willing to be instructed on a paid basis by individual clubs wanting bespoke legal advice on their situation.

Of course, other lawyers are available in this area and could be consulted as an alternative to Holding Redlich.

For example, there are Accredited Specialists in Employment and Industrial Law under the NSW Law Society scheme. See, for example, this search: <https://www.google.com.au/#q=WHS+lawyers+NSW+accredited+specialist>

### **SLOPES Protocol**

Finally, in accordance with the usual SLOPES Committee protocol, please note:

- i) the information in this email is provided by way of general background only
  
- ii) SLOPES is not providing nor purporting to provide advice (legal or otherwise) to Clubs nor is SLOPES recommending that Clubs use the services of Holding Redlich or any other particular lawyer or law firm, and
  
- iii) Clubs must obtain and rely on their own advice regarding their particular circumstances.

Regards

Frank Zipfinger

President

SLOPES

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#### **2 attachments**



**SLOPES WHS advice Holding Redlich.pdf**

77K



**WHS sample draft board resolutions.pdf**

51K

## Confidential Memorandum

**To:** Frank Zipfinger, President, SLOPES  
**From:** Michael Selinger  
**Date:** 19 December 2014  
**Subject:** Ski Clubs

Dear Frank

Thank you for asking me to prepare you a short note on some of the issues that the Clubs who are members of SLOPES (**the Clubs**) face in respect of the current Work Health & Safety (**WHS**) laws. As discussed, this memo is general in nature only and should not be relied on as legal advice. Rather it outlines some of the issues that may impact on the Clubs when considering the best approach to be taken for WHS. The focus of this memo is on the statutory WHS laws that impose strict liability to ensure safety. However, as there is a cross-over between WHS liability and public liability, some comment is made on public liability as well.

### What if this report appeared in the Canberra Times?

An effective way to assess the impact of WHS laws is to examine a scenario and consider how this would apply to the Clubs. Often a dramatic scenario can best highlight the issues, for example:

*At 9pm on Saturday, 19 July, a fire broke out at a lodge in Perisher killing three people. The lodge was at full capacity with both the members of the lodge and their guests. Although investigations are yet to be completed it appears that there was inadequate fire protection equipment in place and no emergency plan in operation. This led to a delay in emergency services responding to the incident. The apparent cause of the incident was the unsafe storage of flammable substances in a confined space. Workplace inspectors and police are currently undertaking a joint investigation into the incident. The matter will be referred to the coroner for inquiry.*

### Outline of key issues

If such an incident occurred, the Clubs might face potential liability under WHS laws for the failure to eliminate or control the risk to health and safety posed by the fire. A number of other scenarios of risk and injury could equally be imagined. Under current WHS laws, this liability can result in fines of up to \$3,000,000 for the most serious case (involving recklessness) and personal liability for officers of the organisation of up to \$600,000 and/or 5 years in prison.

The liability for the Clubs will only arise if two elements are found by a court to exist, being:

- That the Clubs are found to be a “Person Conducting a Business or Undertaking” (**PCBU**). A PCBU is defined in the WHS laws as being the primary duty holder to ensure safety; and
- As a PCBU, the Clubs failed to take “reasonably practicable” steps to eliminate or control safety risks arising from the operation of the ski lodges.

The key questions for each club will be:

- Whether they fall within the exception set out in section 5(7) of the WHS Act that excludes volunteer associations from the definition of a PCBU. If so, the WHS laws will not apply in respect of that organisation.
- If the volunteer association exception does not apply, to what extent will individual Club officers face personal liability under the WHS laws.

#### **Would the Clubs be considered volunteer associations?**

On first blush it would appear that the Clubs would not be considered PCBUs because of the exception for a “volunteer association”. This is because the Clubs (apart from the one or two large clubs which are part of a larger organisation that employs workers) could assert that they were:

*“a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association”*

This definition of “volunteer association” is new and has not yet been interpreted by the Courts. It is not clear whether each Club could be said to be working for “one or more community purposes” as distinct from private or even commercial purposes. The risk for the Clubs is that a Court considering a scenario like the one above might look to interpret the exception narrowly.

Some of the key factors that each Club would have to consider in determining if the WHS Act applies to them include:

- The purpose of the Club, including the statements set out in their constitutions, rules, mission statements or articles of association;
- Whether any person is employed to do work for the Club either directly, or indirectly (for example work being done by one of the volunteers’ own employees in any location). While contractors are not employees, a Club would need to consider whether any paid worker is in fact a casual employee rather than a true contractor;
- Whether the lodge or other Club facilities owned or controlled by the Club are used by third parties, at any time, on a commercial basis, for example, visitors who pay for the use of the lodge; and
- The extent to which the Club has contractual or practical control over the lodge and other facilities at any particular time, such that it could take “reasonably practicable” steps to address safety issues. For example, a Club may have arrangements in place where a third party such as a site manager or tenant can also exercise control at any particular time. The question will be in those cases, is the Club taking all steps within its control to ensure safety.

#### **Personal liability**

The current position under the WHS Act is that any “officer” of a PCBU will face personal liability if they fail to comply with the duty to exercise due diligence. An “officer” is defined in a similar way to the Corporations Act such that it would apply to a member of the board or an executive of the Clubs.

The duty of an officer is to take reasonable steps to ensure the PCBU complies with its duty of care. The legislation imposes the same duty of care on volunteer officers. A volunteer officer is a person working without payment or reward. Reimbursement of expenses does not constitute payment or reward. However, for policy reasons the legislation includes an exception so that volunteer officers cannot be prosecuted if they breach the duty of care. This means that for the majority of the Clubs where officers

are volunteers, the officer is required to comply with the duty to exercise due diligence but will not be prosecuted if they breach the duty.

Issues that will impact on the Clubs include:

- If the Club employs a manager during winter, then the Club will be a PCBU and officers of the Club will be exposed to liability
- If Board members receive some fees or remuneration from the Club, then the Club may be a PCBU if they are deemed to be causal employees. In part this will depend on the correlation between the fees paid and the work performed. Board members who are truly volunteers will not be exposed to liability.
- If the Club lodge is used by third parties on a paid basis (for example non-members, members guests or families) then the Club is likely to be a PCBU.

#### **Why should safety be made a priority?**

Even if the Clubs are found not to be PCBUs and their volunteer officers cannot be prosecuted under the current WHS laws, each of them still face potential exposure to public liability claims. These claims will generally be covered by an insurer, but in our experience insurers may seek to decline cover if an exception is available, for example, intentional conduct or reckless indifference. Apart from these liability issues, there also remain reputational issues for the Clubs which may result from any adverse publicity caused by a serious safety incident. This would include publicity associated with any coronial inquest or other media coverage. As such, a systematic approach to safety management in compliance with the WHS laws should be adopted by the Clubs in order to avoid such risks and to ensure the continued safe use of their lodges and facilities.

**Michael Selinger**

**Partner**

**Holding Redlich**

**(02) 8083 0430**

**[Michael.selinger@holdingredlich.com](mailto:Michael.selinger@holdingredlich.com)**

### Sample Draft Board Resolution:

That the board notes the potential application of the WH&S Act;

That the board resolves to:

1. continue to have a standing agenda item in its meetings in relation to health and safety. As part of this agenda item, the board should continue to turn its mind to inter alia:
  - **Accidents / Injuries** - receiving and considering updates on any accidents/injuries within the Lodge and its immediate vicinity (via the Weekly Winter Lodge Captain reports) provided by XXX; and
  - **Possible Risks** - what could, in the future, amount to a serious safety incident at the Lodge? - eg fire hazards, old planks on the balcony collapsing, snow build up on roof and around walkways (ie do we have appropriate guttering), other risks?;
2. the board members/officers inspect the Lodge themselves periodically to identify to the best of their ability WH&S risks and assist with ensuring the Lodge is well maintained;
3. the board holds one board meeting per annum at the Lodge;
4. the board:
  - on an annual basis, review and update the Lodge Information Sheets which Lodge Administration sends to members and their guests before their stay at the Lodge. *For example, YYY be requested to review the Information Sheets and update them to include a short warning regarding the risks of the build-up of snow on and around the Lodge (eg in response to the death of the 7 year old Haadi Akhtar, 7, who died on 26.06.14 at Mt Buller in Victoria when snow from an apartment roof fell on him - a freak accident, but a foreseeable risk);*
  - consider the need for appropriately positioned warning signs within the Lodge (that fit within the high quality nature of the Lodge) - without turning the Lodge into one big warning sign;
5. the board procure the services of a WH&S expert consultant to undertake an inspection of the Lodge, and review its recommendations (noting that the Lodge has financial constraints), and consider the frequency for any further inspections where appropriate; and
6. the board receive training in WH&S via email updates from law firms such as Holding Redlich. ZZZ is requested to provide each board member's email address to [Holding Redlich and/or other law firms] for periodic updates. The board noted that the WorkCover website also has a subscription list to which directors' emails can be added - AAA to provide the link.