

Safety Matters

May 2002

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Editorial

In this edition of *Safety Matters*, we review a number of interesting cases and developments in occupational health and safety across Australia.

The West Australian government has released a discussion paper reviewing the WA OHS and mining safety laws. Colleagues in our Perth office recently held a briefing on the proposed laws. Judging from attendance at the briefing, the proposed changes hold a lot of interest for those with operations in WA. We will continue to keep you posted of developments in WA as they occur.

In New South Wales, Sophie Thomas writes about two recent decisions of the Industrial Relations Commission where defences were successfully established to prosecutions under the New South Wales OHS Act. In her article, Sophie sets out some informative lessons for employers.

Forklifts are under the spotlight in Victoria, with WorkSafe Victoria announcing a State-wide blitz on forklift safety. Yoram Finger and Annika Forss tell us about a number of recent forklift cases and also discuss some new guidelines issued by WorkSafe Victoria regarding the safe use of forklifts.

Dangerous goods and electrical safety are the areas of interest in Queensland. Ben Briggs reports on the introduction of a new electrical

safety Bill in Queensland. He also writes about new dangerous goods legislation which imposes broad safety obligations on occupiers of certain premises.

For our clients involved in coal mining operations, there are significant developments on the legislative front in both New South Wales and Queensland. Look out for our special edition of *Safety Matters in the Coal Industry* which we will forward to you soon.

We continue to look forward to your feedback and suggestions for issues that you would like us to cover in future editions of *Safety Matters*.

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Defences under the OHS Act Established in New South Wales

The Industrial Relations Commission of New South Wales in Court Session recently dismissed two prosecutions on the grounds that a defence under section 53 of the *Occupational Health and Safety Act 1983 (NSW)* (the "Act") was established.

It is generally difficult to contest prosecutions commenced under the Act given the broad and absolute nature of the duties imposed on employers and others.

Section 53 of the Act provides as follows:

"It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for that person to prove that –

- (a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence; or
- (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision."

The onus of proving one of the two defences outlined above rests with the defendant.

WorkCover (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd

In *Cleary Bros*, WorkCover had alleged that the defendant had breached section 16 (1) of the Act in that it failed to provide barriers to prevent non employees from falling into waste pits and that it had failed to ensure the floor adjacent to the waste pit was clean and free of debris to prevent people from slipping or falling.

The defendant leased a waste management site at Artarmon from Waste Services New South Wales and was responsible for the management

and supervision of the operation in accordance with a lease agreement.

On 31 December 1997 a non-employee was injured when he slipped and fell into a waste pit approximately 1.8 metres in depth. The injured person had alighted from a skip vehicle in which he was travelling and slipped whilst near the back of the vehicle before adjusting the bin so that its contents could be tipped into the pit.

The WorkCover Inspector was cross-examined during the proceedings and stated that it was not practicable given the nature of the environment at the pit for the defendant to ensure that the surfaces were non-slippery all the time. Additionally, there was also evidence which indicated that the swing gates at the pits installed by the defendant after the incident would not have prevented the subject incident from occurring.

The onus of proving one of the two defences rests with the defendant.

An expert report tendered on behalf of the defendant stated that it was not practicable to fit any safety fencing or barriers along the unloading side of the pit due to the need for truck clearance.

The defendant relied upon both section 53 (a) and (b) in respect of the allegation of failing to construct barriers and section 53(b) in respect of the failure to ensure the floor of the area was clean and free of debris.

Lessons for Employers

- Even in circumstances where an employer is not the owner of the workplace site, the test will be whether there is sufficient control over the site to influence infrastructure and systems of work.
- Carefully analyse how WorkCover particularise what the offence is. WorkCover must establish the case as put against a defendant.
- A determination that an incident was reasonably foreseeable will not prevent a defendant from successfully arguing that a defence is available.

Vice President Walton made the following findings:

- the risk of someone falling into the pit, given the lack of barriers and often slippery surface, was foreseeable;
- notwithstanding other parties had responsibility for the site, including the owner, the defendant had the requisite degree of control over the infrastructure of the site to be held culpable for any safety failings at the site, therefore section 53(b) did not apply;
- in relation to section 53(a) an "objective determination must be made as to what measures were reasonably practicable in the circumstances of the case";
- assessing if something was reasonably practicable means a "balancing of the magnitude and gravity of the risk with the expense and difficulty of available measures". It is also a judgment based on what was known at the time of the incident;
- in circumstances where "there is a known risk which entails the

potential for serious injury to persons in the workplace, the defendant will generally have to demonstrate that the costs, difficulty or trouble occasioned by the measures significantly outweigh the risk”;

- the defendant successfully proved that it was not reasonably practicable to install barriers on the side of the pits nor that it was reasonably practicable to ensure an area was always clean and free of debris to prevent slippage.

The case against the defendant was therefore dismissed.

WorkCover v Ridge Consolidated Limited

The judgment in *Ridge Consolidated* was delivered on 25 February 2002 by Justice Peterson. A prosecution was commenced against the defendant in respect of a fatal accident that occurred on the M4 motorway west of Parramatta. State Wide Roads M4 Pty Ltd had contracted the defendant, Ridge Consolidated, to widen the road on the M4 west of Parramatta. The defendant had in turn contracted a tip truck owner to collect the excess

graded material. On 28 August 1997 whilst undertaking his third load for the day, the contracted tip truck driver inadvertently ran over and killed an employee of the defendant.

The defendant had a formal induction process which included instruction on the “buddy system” when undertaking roadworks. This required all truck drivers to look out for employees, and for employees to work in pairs and look out for each other. The tip truck driver gave evidence that he had received this training prior to commencement.

An employee, Watson, who was working with the deceased at the time of the incident, was an experienced road worker and was a Roads and Traffic Authority certified traffic controller. It was Watson’s job to position himself where the tip truck driver could see him and signal to the driver to either stop, reverse, slow etc. Watson said in evidence that he told the deceased 3 times to move out of the way because the truck was coming. Unfortunately the deceased did not move out of the way and the tip truck driver did not see him.

Another witness, a motorist, indicated that he heard the truck’s reversing beeper and saw the truck approach the deceased worker.

WorkCover alleged that the defendant had breached section 15(1) of the Act in that it had failed to provide a person to guide and control trucks and a person to warn pedestrian employees at the worksite.

Justice Peterson found that the provision of a traffic guide/controller would have prevented the accident.

However, it was found that the circumstances of the incident were not reasonably foreseeable and therefore it was not reasonably practicable to make provision for a person to guide and control the trucks. The truck had been reversing at a slow speed with an operational reversing light and beeper. It was not foreseeable that even when warned of an approaching truck, an employee would do nothing to remove himself from the path of an oncoming vehicle.

Justice Peterson stated that even though the provision of a person to guide the truck would have prevented the incident,

“if the happening of an event is not reasonably foreseeable, it is not practicable to make provision against it. When considering the matter of reasonable foreseeability, one should be careful not to substitute reasonable hindsight for reasonable foresight” (WorkCover v Maitland City Council (1998)).

The combination of the buddy policy with the warning devices on the vehicle was deemed sufficient. Section 53(a) was successfully argued and the case against the defendant was dismissed.

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Review of WA Safety Laws

The Western Australian Government has released consultation draft papers on reviews of the *Occupational Safety and Health Act 1984 (WA)* and the *Mines Safety and Inspection Act 1994 (WA)*.

The reviews, conducted by former AIRC Commissioner, Mr Bob Laing, propose significant changes to the WA safety and mining laws.

Key recommendations include:

- streamlining legislation so that the *Occupational Safety and Health Act* also deals with safety and health in the mining and petroleum industries;
- the establishment of a new Occupational Safety and Health Tribunal;
- new offences and penalties holding senior officers responsible for death or serious injury, popularly referred to as "industrial manslaughter";
- bringing maximum penalties in line with recent reforms in NSW and Victoria (up to \$750,000 – \$825,000);

- developing sentencing guidelines;
- introducing non-monetary penalties (for example, work orders, publicity orders, community contributions, negotiated outcomes and dissolution sanctions);
- mandatory "on-the spot" fines (subject to appeal);
- reinstating the role of unions in the safety and health representative process; and
- allowing trained elected safety and health representatives to issue "Provisional Improvement Notices".

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Safety Blitz on Forklift Operators in Victoria

Since 1985, 48 Victorians have died as a result of incidents involving forklifts, and many hundreds more have been seriously injured. In an attempt to reduce the toll, WorkSafe Victoria has recently announced a State-wide blitz on forklift safety. WorkSafe will visit 500 transport operators across Victoria to assess whether they are meeting forklift safety standards.

The majority of deaths and injuries involving forklifts occur as a result of pedestrians being hit by moving or toppling forklifts, or by loads falling off forklifts. These incidents usually occur because there is a lack of segregation of the areas in a workplace used by pedestrians and forklifts. As a result, pedestrians are often not visible to forklift drivers.

Forklift drivers are also frequently injured. For example, they can be injured or killed when the forklift topples over and they fall out because they are not wearing a seatbelt, or if they are hit by the forklift when they leave it unattended but with the engine still running.

Such incidents occur because of a lack of proper training of forklift drivers, and a lack of enforcement of forklift operating policies.

Recent cases

A number of employers have been convicted and fined for breaches of the *Occupational Health and Safety Act 1985 (Vic)* ("the Act") resulting from forklift incidents.

Melbourne Container Park Pty Ltd was convicted and fined \$60,000 plus costs in April 2000 arising from an incident where a forklift reversed into 3 employees. The Magistrate found that the company had no adequate system for ensuring the segregation of forklifts from pedestrians in the workplace. It had also failed to adequately train or supervise its employees in relation to the safe use of forklifts.

Andys Engineers Mildura Pty Ltd was convicted and fined \$100,000 plus costs in May 2000 after an

unoccupied moving forklift hit and killed an employee. A practice had developed where forklift drivers would leave a forklift while the engine was left running. The Magistrate stated that the company was responsible for the practice of leaving machinery unattended. On appeal the fine was reduced to \$50,000.

Murray Goulburn Co-operative Co Ltd was convicted and fined \$35,000 plus costs in October 2000 for injuries to an employee struck by a forklift. The Magistrate noted the failure to have designated walkways to separate forklifts and pedestrians and the fact that employees were allowed to operate forklifts whilst entering data into a computer using a keyboard on the forklift.

Preventing forklift injuries

To assist employers in their obligations under the Act, WorkSafe Victoria has released guidelines on the safe use of forklifts. The guidelines include principles on how to develop an effective forklift traffic management system.

Some of the key elements of the guidelines include:

- developing and implementing a traffic management plan for both forklift and heavy vehicle movement;
- providing specified pedestrian exclusion zones around vehicle tray or trailer and forklift operating areas;
- having workplace specific training and competency in safe forklift operation, use of attachments and safe loading practices;

Opportunities for Employers

- Some employers take a reactive approach to forklift safety and only become aware of dangerous practices after a serious injury or death occurs at their workplace.
- The release of the guidelines by WorkSafe Victoria provide employers with an opportunity to take a pro-active approach in relation to the safe use of forklifts.



- providing safety areas where pedestrians involved in the loading activity are clearly visible to the forklift driver; and
- instructing all visitors, including visiting truck drivers in company procedures.

A copy of the guidelines can be found on the WorkSafe website at www.worksafe.vic.gov.au or by calling WorkSafe Publications on (03) 9641 1333.

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Green Light Given for Electrical Safety Bill in Queensland

The Queensland government has approved the preparation of a Bill covering electrical safety.

Premier Beattie has said that for the first time in Queensland electrical safety will be separated from the commercial aspects of regulating the electrical industry. Premier Beattie has indicated that "this new Act will give Queensland the best possible chance of reducing the unacceptable number of electrical fatalities every year in this State". Last year alone, there were 10 electrical fatalities and 1,234 electric shocks reported in Queensland. Queensland has the highest rate of household electrocutions in Australia.

The new legislation will provide for:

- more audits of electrical work in homes and businesses;
- greater enforcement of safety laws by increasing the number of specialist electrical inspectors responsible for investigating electrical fatalities throughout Queensland;
- restrictions on live electrical work; and
- improved standards for electricity suppliers.

Premier Beattie said that the proposed legislation would also apply to other workers such as tree loppers

and crane drivers carrying out work around power lines or other live electrical circuits.

The Queensland Industrial Relations Minister, Gordon Nuttall, said that specialist electrical inspectors responsible for investigating electrical fatalities in Queensland will carry out increased numbers of audits of contractors' work and their work practices. Mr Nuttall said that the proposed legislation would also include a new safety management system for electrical distributors which will mean increased audits on power, lighting poles and transformers.

Under the new *Electricity Safety Act* a Commissioner of Electrical Safety will be appointed, as will a new Electrical Safety Board which will advise on standards for the industry and report directly to the Minister for Industrial Relations.

The new legislation will be developed in consultation with industry, unions and community groups including the families of victims of electrical incidents.

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Stop Press

Victorian Liberals Block Industrial Manslaughter Bill

In a press release issued 23 April 2002, the Leader of the Opposition in Victoria, Dr Denis Napthine, announced that the Opposition would oppose the Bracks Government's industrial manslaughter Bill in both houses of Parliament. Dr Napthine asserts that the Bill "will not improve workplace safety". He said that "deaths in the workplace are down because of a co-operative approach between employers and employees" and that the passing of the Bill "would set back our bid to improve workplace safety by 10 years".



Dangerous Goods in Queensland

From 7 May 2002, persons who store, handle or manufacture hazardous materials will be regulated by the *Dangerous Goods Safety Management Act 2001 Qld* (the "Act") which was passed by Queensland Parliament on 17 May 2001. The Act aims to protect people, property and the environment from the impact of industrial and chemical materials by regulating amongst other things their storage, handling and manufacture. It does this by placing broad safety obligations on those who work with these materials and other persons such as manufacturers and importers of dangerous goods.

Under the Act, premises are classified into one of the following depending upon the quality of dangerous goods stored at the premises:

- minor storage workplaces;
- dangerous goods locations (DGLs);
- large dangerous goods locations; and
- major hazard facilities (MHFs).

A site will be classified as a DGL or an MHF if dangerous goods or combustible liquids are stored or handled at the site and if the threshold quantities (prescribed by Regulation) of those goods or liquids are exceeded. A site will be classified as a minor storage workplace if it is not classed as a DGL or MHF but still stores or handles small quantities of dangerous goods or combustible liquids.

A site will be classified as a DGL or an MHF if dangerous goods or combustible liquids are stored or handled at the site.

What are dangerous goods and combustible liquids?

Dangerous goods are chemicals which have the potential to be an immediate threat to people and the environment if not properly managed. Dangerous Goods are divided into 9 classes which are set out in the Australian Dangerous Goods Code. Under the Act "dangerous goods" include goods too dangerous to be transported.

Flammable and combustible liquids are liquids that can burn. Their definition is contained in Australian Standard AS 1940 – *The storage and handling of flammable and combustible liquids*.

Safety obligations

Under the Act, "occupiers", which includes an employer, or other person, who has overall management of a workplace must (depending upon the classification of their premises):

- provide induction, information, education, training and supervision for all persons involved in the storage and handling of dangerous goods;
- conduct an assessment of the risk to people, property or environment that the hazardous substance causes;
- implement a documented safety management system;
- have an established documented emergency plan and procedure;
- take all reasonable precautions and care to minimise the risk of harm to persons, property and environment arising from the site; and
- consult with and inform neighbours of the nature of the facility.

Lessons for Employers

- Ensure that you are compliant with the new Act to avoid the imposition of significant penalties, including conducting a risk assessment, documenting the safety management system and introducing training.

These are examples of the obligations imposed on occupiers under the Act. Obligations also fall upon employees, manufacturers, suppliers and importers of dangerous goods and manufacturers, importers and suppliers of storage and handling systems. For example, the Act requires manufacturers, suppliers and importers to provide information on the safe use and storage of hazardous materials.

Penalty

Significant fines are in place for persons who fail to discharge their safety obligations under the Act and where that failure causes:

- multiple deaths and serious harm to the property and environment;
- multiple deaths;
- death or grievous bodily harm;
- exposure to a substance likely to cause death or grievous bodily harm;
- bodily harm; or
- serious harm to property or the environment.

Maximum fines for persons failing to discharge their safety obligations under the Act range from \$37,500 to \$225,000. Alternatively, jail sentences might be imposed with the maximum sentence ranging from 1 year to 3 years imprisonment depending upon the nature of the breach.

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WA Penalty Inadequate – Appeal Heard

In our December 2001 issue of *Safety Matters* (which can be found on our website at www.bdw.com.au/publications/safety/safety122001.pdf), we reported on an appeal by WorkSafe against a decision of the Esperance Magistrate's Court. To briefly recap, the Court had fined the employer, Co-Operative Bulk Handling, \$7,500 for failing to provide and maintain a safe system of work in relation to a workplace fatality at the employer's grain storage facility just east of Esperance. The employee was killed when the tarpaulin he was working on broke free in windy conditions and sent him flying 30 metres into the air.

Following the decision, WorkSafe Commissioner, Mr Brian Bradley, spoke out publicly on the inadequacy of the sentence. He voiced WorkSafe's concern on the continuing trend of low penalties and their limited value to act as a deterrent.

The appeal has now been heard. The Supreme Court of Western Australia ordered that a fine of \$12,000 be substituted for the original penalty of \$7,500.

The Court held that the original fine was manifestly unreasonable. It also held that that fine was inappropriate as a deterrent irrespective of Co-Operative Bulk Handling being the only employer that "did what it did in the State."

Justice Hasluck stated that the Court will attempt to categorise the

"hazard" in general terms and in a way which would be relevant to activities in other industries.

In balancing these findings and in considering the adequacy of the penalty, Justice Hasluck took into account the employer's early plea of guilty, the absence of any prior record and its clearly demonstrated concern for safety and determination to prevent a repetition of the incident.

Nevertheless, Justice Hasluck sounded a clear warning for employers, stating that "where the risk was insidious, a significant penalty would be imposed if the appropriate precautions were not taken".

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Lessons for Employers

- A genuine commitment to providing and maintaining a safe workplace will always be held as a factor in not only determining liability but also the extent of any penalty which might be imposed.
- Operating in or servicing a unique industry will not be an excuse for failing to identify and prevent or minimise workplace hazards.
- If you are aware of hazards in your workplace but take no action, watch out! The courts and WorkSafe have signalled a clear intention of a greater vigilance and determination with respect to workplace safety.
- In a review of Western Australia's occupational health and safety laws, former Australian Industrial Relations Commissioner, Mr Bob Laing, has commented on the manifest inadequacy of penalties imposed by the courts for workplace safety breaches, flagging significant changes in the area.

Upcoming Briefings

Safety Briefings

Brisbane	23 July	– Breakfast Briefing: OH&S
Perth	6 August	– Breakfast Briefing: OH&S
Sydney	15 August	– Breakfast Briefing: OH&S
Melbourne	20 August	– Breakfast Briefing: OH&S
Canberra	21 August	– Afternoon Briefing: OH&S

Workers Compensation Briefings

Sydney	9 May	– Breakfast Briefing: Workers Compensation
	15 May	– Twilight Briefing: Workers Compensation
	22 August	– Breakfast Briefing: Workers Compensation
	28 August	– Twilight Briefing: Workers Compensation

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