

REGULATION AT WORK

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At the Centre

We are very pleased to advise that three Australian OHS regulators are now sponsoring the activities of the National Research Centre for OHS Regulation. WorkCover NSW, WorkSafe Victoria and the Department of Employment and Industrial Relations in Queensland have agreed to fund the Centre for three years. This sponsorship will enable the Centre to continue to produce this publication *Regulation at Work* each quarter; to conduct an annual Colloquium for OHS regulatory researchers and regulators; and to maintain the Centre's website for working papers, consortium member profiles and links to other regulation websites.

We will also be conducting an annual survey of readers of *Regulation at Work* to ascertain how the information provided in the newsletter is being applied in practice. We will contact readers about the first survey around the middle of 2010.

In this edition of *Regulation at Work* we present the regular updates on **Developments in Regulation**, **Key Research and Reports**, and **Key Cases**. We also present a summary of the key elements of the national model *Work Health and Safety Bill* in the **Feature Article** at the end of this edition.

Readers should look out for two new Centre working papers which will be published towards the end of January 2010 and will be online at: <http://ohs.anu.edu.au>. The first working paper draws on research by Professor Richard Johnstone (Griffith University) and Professor Michael Quinlan (University of New South Wales) into enforcement of process-based regulation, and deals with enforcement of the upstream duties. The second paper, by Professor Richard Johnstone and Associate Professor Christine Parker (University of Melbourne) is about enforceable undertakings.

More information about the National Research Centre for OHS Regulation, its publications and activities, and about OHS regulation and OHS regulatory research more generally, can be found online at: <http://ohs.anu.edu.au>.

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Developments in Regulation

Australia – On 11 December 2009, the Workplace Relations Ministers' Council endorsed the model *Work Health and Safety Bill*. The model Bill was endorsed following some amendments proposed as a result of consideration by Safe Work Australia, input from the Parliamentary Counsel's Committee and public comment. A summary of the model Bill is provided in the *Feature Article* at the end of this newsletter. The model Bill is online at: <http://www.safeworkaustralia.gov.au>.

Australia – Safe Work Australia released the draft *Australian Criteria for the Classification of Hazardous Chemicals* for stakeholder comment. The classification criteria are to introduce to the Australian workplace the international classification criteria for classifying and labelling hazardous chemicals, as contained in the Globally Harmonized System of Classification and Labelling of Chemicals (GHS). The draft classification criteria will support national model regulations for both dangerous goods and hazardous substances and are scheduled to be introduced in Australian workplaces in 2012. Safe Work Australia emphasises that the classification criteria are intended for use by expert classifiers and competent persons preparing safety data sheets, rather than for general workplace use. The stakeholder comment period closes on 18 December 2009. The draft criteria and further information are online at: <http://www.safeworkaustralia.gov.au>.

Australia – The National Industrial Chemicals Notification and Assessment Scheme (NICNAS) is consulting stakeholders on proposals for the regulation of disinfectants and for the regulation of industrial nanomaterials. Information about the regulatory proposals and consultation process is online at: <http://www.nicnas.gov.au>.

Australia – The Heads of Workplace Safety Authorities (HWSA) has agreed to conduct national campaigns in 2010 on the supply of plant, focusing on imported plant, and worker safety on or near public roads. HWSA has also discussed the development of a national instrument for consistent assessment of licensing for high risk work; and a national approach to licensing for asbestos removalists, and training for removalists and auditors. More information about HWSA's activities is online at: <http://www.hwsa.org.au>.

Victoria – WorkSafe published the second edition of the *Victorian Code of Ethics and Minimum Service Standards for Professional Members of Occupational Health and Safety (OHS) Associations*. The code of ethics specifies standards of ethical conduct for professional members of OHS associations, and provides minimum service standards and procedures for managing complaints or disputes. The code of ethics is online at: <http://www.worksafe.vic.gov.au>.

Other Developments

Occupational fatalities in Australia - Safe Work Australia released the latest report on work-related traumatic injury fatalities in Australia which covers the period 2006 to 2007. The data include notifications under OHS legislation and coronial data. They show that for the 295 people who died while working, the highest fatality rates were in forestry and logging (61.8 per 100,000 workers); road freight transport (37.6 per 100,000); agriculture (10.4 per 100,000); mining (9.6 per 100,000); and construction (5.6 per 100,000). The report is online at: <http://www.safeworkaustralia.gov.au>.

Other Developments (continued)

Union support for safe machinery design – In its publication *Twenty Years of the Machinery Directive*, the peak European trade union body (ETUI) takes stock of twenty years of union action to raise machinery safety standards. In particular, the ETUI has helped to develop ways to give workers an active say in technical standards development. The publication provides information about initiatives with doctors, ergonomists and engineers to improve machinery design. The publication can be obtained online at: <http://hesa.etui-rehs.org/uk/publications/pub48.htm>.

Key Research and Reports

Regulatory research

S Halliday and P Schmidt (eds) *Conducting law and society research: reflections on methods and practices*, Cambridge University Press, 2009. This book presents interviews with well-known law and society researchers about how they conducted the research for what have become landmark studies. More than 20 researchers and their research are discussed in the book.

Enforcement

M Quinlan, R Johnstone and M McNamara, "Australian health and safety inspectors' perceptions and actions in relation to changed work arrangements" (2009) *Journal of Industrial Relations* 51: 557-573. This article reports research into how Australian OHS inspectors perceive and address issues relating to contingent work and OHS outcomes. Key findings of the research are that inspectors consider altered work arrangements, especially labour hire and sub-contracting, to be a significant challenge and posing logistical challenges to inspectorates.

S Bisom-Rapp, "What we learn in troubled times: deregulation and safe work in the new economy" (2009) *Wayne Law Review* 55 (forthcoming). This article reviews and compares the performance of the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) during George W Bush's presidency. The article situates these agencies' recent records within academic debates surrounding new governance scholarship and responsive regulatory techniques, revealing pitfalls of traditional and new approaches to regulation and the synergies between them. The article identifies OHS challenges facing employees in the new economy and highlights better ways of protecting OHS. The paper is online at: <http://ssrn.com/abstract=1487963>.

Organisational aspects of OHS

A Hopkins, *Learning from high reliability organisations*, CCH Australia, Sydney, 2009. Based on an analysis of high reliability organisations in the airline, nuclear power and chemical processing organisations, this book examines how organisations that operate with hazardous technology can consistently operate safely and avoid disasters.

Key Research and Reports (continued)

J Busby and A Collins, *Risk leadership and organisational type*, Health and Safety Executive Research Report RR756, HMSO, Norwich, 2009. Based on analysis of accident reports, and interviews conducted in the UK offshore industry and with offshore inspectors, this report examines what it means to be rigorous in organising work, developing effective safety practices, and dealing with the by-products and side-effects of these practices. The study points to the role of leadership that promotes attention to refining practice. The report also discusses the particular problems faced by new entrants to the industry. These problems relate to managing transitions in ownership and organisational culture, getting used to new labour market conditions and regulatory requirements, and coping with the physical and organisational legacies inherited from previous owners of an installation. The authors recommend that the concept of rigour becomes part of the way in which OHS management systems are scrutinised.

S Antonsen, "Safety culture assessment: a mission impossible?" (2009) *Journal of Contingencies and Crisis Management*, 17(4): 242-254. This article presents an analysis of whether it is possible to proactively assess aspects of organisational culture to predict if an organisation is prone to having major accidents. The paper examines this question by comparing the results of a quantitative safety culture assessment on a Norwegian oil and gas platform with the results of a qualitative investigation after a major incident on the platform. The author concludes that the two descriptions of the same culture are dramatically different and that this lack of concurrence suggests that OHS culture surveys may have little predictive value. The article is online at: <http://ssrn.com/abstract=1508837>.

D Borys, "Exploring risk-awareness as a cultural approach to safety: exposing the gap between work as imagined and work as actually performed" (2009) *Safety Science Monitor*, Issue 2, Article 3: 1-11. This article reports on ethnographic research examining the impact of an organisational risk awareness program. The program consisted of a pocket card designed to alert workers to stop and think about risk and a form to complete to demonstrate that they had assessed risk before starting work. The study found that workers did not value the program, especially the paper work aspect, viewing it as a means for managers to protect themselves from legal liability. On the other hand, the collection of paper work by managers gave them a sense of security that workers were working safely. The author highlights the gap between work and work programs as imagined by managers, and as experienced and performed by workers.

Indicators for long latency disease

A Rogers, R Evans and M Wright, *Leading indicators for assessing reduction in risk of long latency diseases*, Health and Safety Executive Research Report RR734, HMSO, Norwich, 2009. This report reviews potential leading indicators for long latency occupational disease, based on a review of the literature review and stakeholder interviews. The review identified a range of indicators relating to OHS management systems, key performance indicators, implementation of risk control measures, and worker surveys of awareness, attitudes and behaviours. Little evidence was found for the predictive validity of leading indicators for assessing the reduction in long latency diseases but approaches are suggested for the development of this aspect. The report is online at: <http://www.hse.gov.uk>.

Key Research and Reports (continued)

Hazardous substances

C Ruden and S O Hansson, *REACH is but the first step – how far will it take us?* National Institute of Environmental Health Sciences, US Department of Health and Human Services, 2009. This paper analyses how much data will be generated through the REACH legislation which aims to generate knowledge about the hazardous properties of industrial chemicals and to improve chemicals risk management. The authors propose some steps towards improving REACH. These include ensuring sufficient data are obtained to make a first hazard assessment of as many substances as possible; creating an effective process for substances of very high concern and risk management decisions for these substances; developing tests and other approaches to meet these information requirements; and systematic reporting of lack of data. The paper is online at: <http://ehp.niehs.nih.gov>.

Asbestos

A-H Harding and G Frost, *The asbestos survey. Mortality among asbestos workers 1971-2005*, Health and Safety Laboratory for the Health and Safety Executive, Research Report RR730, HMSO, Norwich, 2009. Based on data from the Asbestos Survey, established in 1971 to monitor the long-term health of workers covered by regulations to control occupational exposure to asbestos in the UK, this report provides an updated analysis of mortality among asbestos workers, causes of death associated with exposure to asbestos, and a more detailed analysis of asbestos stripping/removal workers. Key findings in the report are that all cause mortality was significantly higher for the asbestos workers than in the general population; known associations between asbestos exposure and mortality from lung, peritoneal and pleural cancers, mesothelioma and asbestosis were confirmed; and some evidence of associations with stroke and stomach cancer mortality were also observed. Among the removal workers, deaths were elevated for all cancers including lung cancer, for mesothelioma and for circulatory disease. Spending more than 40 hours per week in an asbestos stripping/removal enclosure increased the risk of disease from all causes, including circulatory disease and ischaemic heart disease mortality. Different dust suppression techniques and respirator types did not affect mortality rates. The report is online at: <http://www.hse.gov.uk>.

Nanotechnology

N Jackson et al, *Engineered nanomaterials: evidence on the effectiveness of workplace controls to prevent exposure*, Safe Work Australia, Canberra, 2009. This report is a review of the literature relating to the effectiveness of workplace controls to prevent or minimise exposure to engineered nanomaterials. The report is online at: <http://www.safeworkaustralia.gov.au>.

R Drew et al, *Engineered nanomaterials: a review of the toxicology and health hazards*, Safe Work Australia, Canberra, 2009. This report reviews current understanding of the toxicology and health hazards associated with engineered nanomaterials and exposure to them in occupational settings. The report is online at: <http://www.safeworkaustralia.gov.au>.

Key Research and Reports (continued)

R Lee and E Stokes, "Twenty-first century novel: regulating nanotechnologies" (2009) *Journal of Environmental Law* 21(3), pp. 469-482. This article discusses the Twenty-Seventh Report of the Royal Commission on Environmental Pollution (RCEP) in the UK which considers controls for nanomaterials and concludes that existing regulations are poorly adapted to addressing the risks posed by nanomaterials. The article looks at how existing regulations might be modified in the light of RCEP proposals and identifies areas of imprecision in RCEP proposals which may need to be addressed in order to produce a cohesive regulatory structure. The article is online at: <http://ssrn.com/abstract=1500876>.

R Steinzor, A Sinden and S Shapiro, *A return to common sense: protecting health, safety, and the environment through 'pragmatic regulatory impact analysis'*, University of Maryland Legal Studies Research Paper No 2009-45, University of Maryland, US, 2009. This paper critically analyses the additional layer of cost-benefit analysis (CBA) introduced during the Reagan presidency, over the top of pre-existing, statute-driven methods of regulatory impact analysis. The authors propose an alternative approach, which they call pragmatic regulatory impact analysis (PRIA), to replace CBA. This alternative applies a weight-of-the-evidence approach to decision making. It includes a broad inquiry into the nature of the threat and the remedial options by an interdisciplinary group of experts and administrators; the assembly of the best available scientific research and other information regarding these issues; evaluation of the weight of this evidence, considering both the strengths and weaknesses of individual studies; proposal of a remedy for the problem identified; public comment from a full range of stakeholders about the costs and benefits of that proposal; and a judgment or series of judgments about what kind of limits or controls to impose in order to protect health, safety and the environment. The article is online at: <http://ssrn.com/abstract=1500565>.

Shift work and mental health

A-C Bara and S Arber, "Working shifts and mental health – findings from the British Household Panel Survey (1995-2005)" (2009) *Scandinavian Journal of Work, Environment and Health* 35(5): 361-367. This article reports on analysis of data from the British Household Panel Survey which shows that for men, undertaking night work for four or more years was associated with a statistically significant increased risk of mental ill health, and anxiety and depression. For women there was a statistically significant increased risk of anxiety and depression after working varied shift patterns for two to three years, or for four or more years.

Occupational stress

P Winwood et al, "Identification and measurement of work-related psychological injury: piloting the psychological injury risk indicator among frontline police" (2009) *Journal of Occupational and Environmental Medicine* 51(9): 1057-1065. This article reports on the piloting of the Psychological Injury Risk Indicator (PIRI) self-reported measure of psychological injury. The authors conclude the PIRI scale can be used for individual assessment and as a potential online screening tool to enable the early identification of psychological injury.

Workplace bullying

T Bentley et al, "Perspective on bullying in the New Zealand health and hospitality sectors" (2009) *Journal of Occupational Health and Safety – Australia and New Zealand* 25(5): 363-373.

Key Research and Reports (continued)

This article reports an exploratory study into perceptions of workplace bullying in the New Zealand health and hospitality industry sectors. The study found that perceived risk factors for bullying mainly related to the social organisation of work, including issues of hierarchy, resourcing and leadership. Other risk factors were poor human resources practices and inadequate reporting.

Work intensity

European Foundation, *Working conditions in the European Union: working time and work intensity*, European Foundation for Living and Working Conditions, Brussels, 2009. Based on findings from the fourth European Working Conditions Survey carried out in 31 European countries, this report analyses the current situation regarding work intensity in these countries. It finds a clear link between work intensity and poor physical and psychological working conditions, and differences between countries in relation to worker gender and working hours. The report is online at: <http://eurofound.europa.eu>. (In publications by date for 2009).

Immigrant workers and OHS

J Rathod, "Immigrant labor and the occupational safety and health regime; part I: a new vision for workplace regulation" (2009) *New York University Review of Law and Social Change* 33(4) (forthcoming). This article, the first in a series, examines the causes of recent immigrant worker fatalities and injuries in the United States, and makes recommendations for reversing recent trends. The article discusses how the history, structure, and operations of the federal Occupational Safety and Health Administration (OSHA) have obscured the concerns of immigrant workers and left them without a meaningful voice in the regulatory process. The article is online at: <http://ssrn.com/abstract=1503937>.

International News

Human carcinogens - In October 2009, 23 scientists from six countries met at the International Agency for Research on Cancer (IARC) to re-assess the carcinogenicity of a number of chemical compounds and mixtures, and occupational exposures previously classified as carcinogenic to humans (Group 1), and to identify additional tumour sites and mechanisms of carcinogenesis. The review concluded that dioxin (2,3,7,8-TCDD) now has sufficient evidence in humans; and extended the Group 1 classification to 2,3,4,7,8-pentachlorodibenzofuran and 3,4,5,3',4' pentachlorobiphenyl, which are indicator chemicals for a larger class of dioxin-like chlorinated dibenzofurans and dioxin-like polychlorinated biphenyls (PCBs).

The review confirmed formaldehyde as carcinogenic to humans concluding there is sufficient evidence in humans of an increased incidence of nasopharyngeal carcinomas; and that the epidemiological evidence on leukemia has become stronger and that new mechanistic studies support a conclusion of sufficient evidence in humans. The mechanistic studies provided new evidence that formaldehyde can cause blood-cell abnormalities that are characteristic of leukemia development.

International News (continued)

The review also considered occupational exposures which cause cancers of the lung, urinary bladder and pleural mesothelioma in humans. Due to the diversity and complexity of these exposures, it is difficult to identify specific causal agents or a causal mechanism but there is strong evidence that the exposures are toxic to genetic material. The review also found limited evidence of an association between maternal exposure to painting before and during pregnancy and an increased risk of childhood leukemia in the offspring. An overview of the evaluations is online at: <http://monographs.iarc.fr/ENG/Meetings/vol100F-evaluations.pdf>

Key Cases

The Relationship Between the Commonwealth OHS Act and State Acts When a Firm is a 'non-Commonwealth Licensee'

***John Holland Pty Ltd v Victorian Workcover Authority* [2009] HCA 45;**

***John Holland Pty Ltd v Inspector Nathan Hamilton* [2009] HCA 46.**

These two cases addressed the operation of the Commonwealth *Occupational Health and Safety Act* 1991 and its interaction with the *Occupational Health and Safety Act* 2004 (Vic) and *Occupational Health and Safety Act* 2000 (NSW) respectively. John Holland had become a 'non-Commonwealth licensee' under the Commonwealth *Occupational Health and Safety Act* 1991 Cth. Under section 4 of that Act, John Holland was to be regulated exclusively by the Commonwealth Act to the exclusion of the State legislation for its future activities. The issue in both cases was whether John Holland could be prosecuted for events that had occurred before it joined the Commonwealth scheme.

The High Court ruled that John Holland could continue to be prosecuted for safety risks that had arisen before 14 March 2007, when the Commonwealth scheme commenced. At [2009] HCA 45 at [25] the High Court stated that:

The apparent purpose of s.4 is to relieve "employers" from the observance of the concurrent operation of multiple sets of legislatively imposed duties, whether imposed by State or Territorial law. That objective assumes the operation of the federal system for the securing of the health, safety and welfare of employees. It is not advanced by a construction of s.4 which would absolve those who become "employers" from liability to prosecution for offences against a State occupational health and safety law allegedly committed before that status was acquired.

Key Cases (continued)

The General Duties

Transfield Services (Australia) Pty Ltd and Gavin Scott Wesche (Queensland Industrial Court, C/2009/18, 1 October 2009)

A worker engaged by Transfield Services (Australia) Pty Ltd suffered a serious injury to the face when a handle came off a crank shaft while the worker was attempting to raise a rail drawbridge. Transfield was charged with a contravention of the general duty provision in section 28 of the *Workplace Health and Safety Act 1995* (Qld) imposed upon a person conducting a business or undertaking. Transfield argued that it should not have been convicted of the offence because Queensland Rail had been the owner of the drawbridge, which meant that “more than one person” had an obligation to the worker. It argued that Workplace Health and Safety Queensland had to prove beyond reasonable doubt that the employer had “control” of the workplace.

Hall P pointed out that section 15B of the *Workplace Health and Safety Act 1995* stated that the “person in control” of the relevant workplace area will be considered the owner, unless “there is in place a lease, contract or other arrangement that provides ... for another person to have effective and sustained control of the relevant workplace area”. In such a case, “the other person, and not the owner, is the person in control”.

Hall P found that the fact that Transfield’s control of the drawbridge “was temporary and might have been terminated” was irrelevant, because the charge the obligation in section 28 related to the “obligations of those who conduct businesses and undertakings”. Hall P held that a person conducting an undertaking has “control” of a worksite - and not the worksite's owner - even if the undertaking is temporary. Hall P dismissed the appeal.

Morrison v Milner and Baldwin (No 2) [2009] NSWIRComm 191

These proceedings concerned appeals by Rodney Dale Morrison (the appellant) against a judgment given by the primary judge, Justice Haylen, in *Rodney Dale Morrison v John Hamilton Milner and Rodney Dale Morrison v Stephen Barry Baldwin. Prosecutions under s 15(1) of the OH&S 1983 by virtue of s 50 of the OH&S Act 1983* [2008] NSWIRComm 77.

The judgment at first instance concerned the prosecution of a coal mine manager and the managing director of a company. The prosecution followed an incident in which one mine worker died and a second was seriously injured in a rock fall while attempting to recover a remotely controlled continuous miner (CM) which had become immobilised under unsupported roof in the mine. Following a lengthy trial, dealing with complex issues relating to the nature of the risk, the adequacy of safe work procedures and risk assessment at the mine, the trial judge dismissed the charges against the mine manager and the director finding that neither was guilty of a breach of the OHS Act. Haylen J found that the prosecution had failed to establish a causal connection between the alleged acts or omissions of the company and the particularised risks to safety. In particular, with regard to charges relating to risk assessment, Haylen J found:

[259] [T]he Court cannot be satisfied beyond reasonable doubt that the company failed to undertake an assessment of the risks associated with the recovery of an immobilised continuous miner from under unsupported roof in pillar extraction coal mining operations.

Key Cases (continued)

The prosecution appealed the decision. Like the trial at first instance, the appeal case dealt with complex questions relating to technical aspects of particular types of coal mining operations, the form and content of risk assessments, risks to health and safety arising from particular types of rock falls, and the capability of miners and mine deputies to deal with dangerous situations, among other matters. There were 53 grounds of appeal which the Full Bench dealt with in four categories. The 'category D' grounds related to findings in the trial at first instance, including findings relating to risk assessment.

Particular (k)(i) alleged that the company failed to undertake an assessment of the risks associated with the recovery of the immobilised continuous miner from under unsupported roof in pillar extraction coal mining operations. In his opening in the proceedings at first instance the prosecutor had submitted that the defendant had relied on a generic risk assessment that recognised a risk associated with recovery of a continuous miner immobilised by rock fall but had not addressed in any *formal* manner the risks associated with recovery of an immobilised continuous miner from under unsupported but still in place roof, and had not addressed the particular problems of such an operation in circumstances of pillar extraction mining.

The Full Bench noted at [149] that:

[T]he allegation was that the company 'failed to undertake an assessment of the risks ...'. That charge appears to have been amended to a slight degree in the appellant's opening address to the effect that there was a failure to undertake a formal or detailed assessment of the risk. The charge was not a failure to undertake an *adequate* risk assessment, but rather that there was a complete absence of a formal or detailed assessment of the risks associated with the recovery of an immobilised CM from under unsupported roof in pillar extraction coal mining operations.

Further, the Full Bench observed that:

[157] In his submissions on the appeal, the appellant contended that an employer's duty under the OHS Act was to be pro-active in the identification of risks to the health and safety of its employees: *Mainbrace Constructions Pty Ltd v WorkCover Authority of New South Wales (Inspector Charles)* [2000] NSWIRComm 239; (2000) 102 IR 84 at [66] as to the general significance of carrying out a risk assessment to the strict duty on an employer; and *Newcastle Wallsend Coal Company Pty Ltd v Stephen Finlay McMartin* [2006] NSWIRComm 339; (2006) 159 IR 121 at [339] for a relevant similarly-worded particular to that in the present case.

[158] There can be no doubt there is an obligation upon an employer to search out and eliminate any risks to health and safety and one of the most effective means of doing this is to undertake a formally planned, structured, step-by-step risk assessment. In our experience very many employers, including those in the coal mining industry, have adopted such an approach. An improvised or unplanned and unstructured risk assessment has a greater chance of not identifying all of the risks associated with a particular undertaking.

[159] It seems to have been accepted by the respondents in these proceedings that there was no formally planned, structured risk assessment in writing in place at the time of the incident on 20 December 2000 for recovery of a stranded CM under unsupported roof in PPE mining operations. Based on the evidence in these proceedings there should have been such a risk assessment conducted. The recov-

Key Cases (continued)

ery operation, on any measure, was a dangerous operation and warranted a discrete, formally planned for and structured risk assessment.

However, the Full Bench then noted:

[160] That no such assessment was done, does not lead automatically to a finding that particular (k)(i) is made out. The question here is whether there was a complete absence of a 'formal' or 'detailed' assessment of the risks associated with the recovery of an immobilised CM from under unsupported roof in pillar extraction coal mining operations. Even if that were established, the appellant would need to show that Haylen J erred in failing to find the absence of this assessment caused the risk.

The Full Bench's consideration of this ground of appeal turned on whether there was a complete absence of a *formal or detailed assessment*.

The Full Bench concluded that:

[164] There cannot be any doubt that there was an assessment of the localised shallow fall risk The crew were instructed on and were well aware of this risk and understood the measures that were necessary to avoid exposure to the risk. That could not have been the case if there had not been some form of assessment of the risk....

[165] We have also dealt earlier with the wider goaf fall risk, albeit in a different context, and found that the existence of the risk as charged had not been proven beyond reasonable doubt. Given that the existence of the risk had not been made out, no causal link between a failure to undertake a risk assessment and the risk could logically be established. If the risk of the wider goaf fall had been made out we would have had serious doubts about whether there had been a 'detailed' risk assessment. The assessment was an improvisation and it is eminently arguable that it did not take sufficient account of a wider goaf fall risk.

The Full Bench determined that the trial judge did not err in finding that particular (k)(i) had not been made out because, in essence there was an assessment of at least a localised fall risk and the risk of a wider fall had not been proven.

Corporate Officer Liability

***Victorian WorkCover Authority v Del Brocco*, Count Court of Victoria (Allen J), 13 November 2009**

Section 144 of the Victorian *Occupational Health and Safety Act 2004* provides that a corporate officer will be liable for an offence under the Act if a corporation's contravention "is attributable to an officer of the body corporate failing to take reasonable care" to prevent the contravention. This case was the first in which a company director was prosecuted and sentenced in the Victorian County Court. The company director was convicted and fined \$65,000 after an employee of the company was killed when he was dragged into a machine while cleaning it. Judge Allen said that, as an officer of the company, Mr Del Brocco had failed to take reasonable care for the safety of his workers.

Key Cases (continued)

Legal Professional Privilege

Inspector Anthony Nicholson (WorkCover Authority of New South Wales) v Waco Kwikform Limited [2009] NSWIRComm 123

The NSW Industrial Court in this case held that certain documents were protected by legal professional privilege because the dominant purpose for their creation was to provide material to the defendant's solicitors so that the solicitors could provide legal advice. The relevant documents were investigation notes and a report prepared by the defendant Waco Kwikform Limited's national OHS manager, a handwritten statement from the project supervisor and a statement by a witness to the incident.

Sentencing

Regina Walker AND Blue Recruit Pty Ltd (C/2009/27, Queensland Industrial Court, Hall P, 3 November 2009)

Labour hire firm Blue Recruit Pty Ltd hired out a worker to Austcast Pty Ltd. Blue Recruit delegated the worker's induction and supervision to Austcast. The worker was inexperienced and was instructed by another Blue Recruit worker to use an electric angle grinder in a way that did not conform to the manufacturer's instructions. While using the grinder the worker suffered a laceration injury to his wrist. Blue Recruit pleaded guilty to breaching the general duty in section 28 of the State *Workplace Health and Safety Act 1995* (Qld) and was fined \$20,000 without conviction. In separate proceedings, Austcast was also found guilty and fined.

Workplace Health and Safety Queensland appealed to the Industrial Court and argued that the fine was "manifestly inadequate". Hall P found that because the Industrial Magistrate gave no reasons it was "impossible to glean" why \$20,000 was considered appropriate. Hall P held it was the "blameworthiness" of Blue Recruit against its obligation, not other obligation-holders, that should be measured. Blue Recruit had erred in relying too heavily on Austcast. It had not "done all it could" and stated that:

[An] employer who adopts a business model that inhibits the employer's capacity to supervise employees must find other ways to discharge the obligations under the Act.

Hall P doubled the fine to \$40,000.

Common Law Negligence

Doumit v Jabbs Excavations Pty Ltd [2009] NSWCA 360

A labourer employed by Jabbs Excavations was seriously injured when struck by a reversing bulldozer while he was picking up debris at a demolition site. He sued the employer in negligence. Prior to

Key Cases (continued)

the incident the worker was instructed at an induction conference and toolbox meetings on how to work near bulldozers. The trial judge then found that the worker “wandered off heedless of the danger to him” into a blind spot behind the machine. The trial judge reiterated that employers had a duty to ensure that even inattentive workers were safe, but said that:

[I]t does not follow that an employee (or pedestrian) may suspend his sensory and critical faculties and wander at large on a construction site, paying no heed to patent danger, ignoring warning sounds and signs and ignoring instructions ... It seems intuitively difficult to maintain the position that a worksite system should preclude operation of machinery in part or in whole whenever a manual worker not involved in the actual operation of the machine eludes surveillance or walks alone.

The NSW Court of Appeal rejected the labourer’s appeal.

***DIB Group Pty Ltd Trading as Hill & Co v Cole* [2009] NSWCA 210**

In this case the NSW Court of Appeal restated the principles governing an employer’s “non-delegable” duty to establish safe systems of work on premises under the control of a third party. Basten JA said that:

[53] The description of a duty as “non-delegable” appears to invoke a concept of “delegation”. In most circumstances, that language is inapposite. As explained by Toohey J in *Northern Sandblasting Pty Ltd v Harris* [\[1997\] HCA 39](#); [188 CLR 313](#) at 350 (omitting footnotes):

There has been criticism of the concept of a non-delegable duty in the law of tort. And there has been criticism of the expression itself on the footing that one cannot delegate a duty imposed by law; rather the question is whether the duty is personal or whether it can be discharged by engaging someone else to perform what has to be done. There is force in these criticisms but the concept is now part of the law as the expression is part of its vocabulary. It is the operation of the concept in the circumstances of the present appeal that is critical.

[54] The employer’s duty, however effected, to adopt safe systems of work and to provide proper plant and equipment, will operate differently on its own premises and in circumstances over which it has full control, as compared with premises under the control of others and circumstances over which it does not have control. Where the safety of premises is at stake, as in this case, it is appropriate to ask quite specific questions with respect to what may be expected of an employer exercising reasonable care for the safety of its employees. For example, is it reasonable for the employer to request or require access to premises to carry out its own safety inspection? Is it necessary (and sufficient) if the employer inquires of the occupier what steps it has taken to conduct such an assessment? Is it necessary (and sufficient) for the employer to inquire in specific terms of its own employees as to the nature of the conditions they encounter at other premises?

[55] These questions are analogous to the approach to be adopted with respect to the acquisition of plant and equipment ... In such a case, it is not sensible, nor consistent with the requirement to take reasonable care, to treat the employer as “delegating” its duty to provide safe equipment to the manufacturer or supplier. So long as it has acted reasonably, the employer will not be liable for injury to its employee resulting from a defect in equipment or plant not identifiable by reasonable care on the part of the employer, even though the defect is the result of negligent manufacture.

The National Model Work Health and Safety Bill

On 11 December 2009, the Workplace Relations Ministers' Council endorsed the model *Work Health and Safety Bill*. The intention is that each Commonwealth, state and territory government will enact a *Work Health and Safety Act* to commence on 1 January 2012. The following summary highlights key elements of the model Bill. Readers should refer to the Bill for full details. It is online at: <http://safeworkaustralia.gov.au>.

The main **object** of the model Bill is to secure the health and safety of workers and workplaces through elimination or minimisation of risks; fair and effective representation, consultation, co-operation and issue resolution; encouraging employer organisations and unions to play a constructive role; provision of advice, information, education and training; and effective and appropriate compliance and enforcement measures, among other matters. Workers and others are to be given the highest level of protection from hazards and risks as is reasonably practicable. (WHS Act, s 3)

A number of definitions are provided in the model Bill, including the definition of a **hazard** as a situation or thing that has the potential to cause injury, illness or death of a person; and **risk** as a probability that injury, illness or death will occur and the consequences of that occurrence. (WHS Act, s 4). The expression **reasonably practicable** is defined to mean that which is, or was, at a particular time reasonably able to be done in relation to ensuring health or safety, taking into account and weighing up all relevant matters including: (a) the likelihood of the hazard or the risk concerned occurring; (b) the degree of harm that might result from the hazard or the risk; (c) what the person concerned knows, or ought reasonably to know, about the hazard or the risk, and ways of eliminating or minimising the risk; and (d) the availability and suitability of ways to eliminate or minimise the risk. After assessing the extent of the risk and the available ways of eliminating or minimising it, the cost associated with the available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk, is also to be taken into account. (WHS Act, s 17).

The model Bill establishes a series of **duties** which cannot be transferred to another person; and are concurrent in that a person can have more than one duty, and more than one person can have the same duty. If more than one person has a duty for the same matter, each person must discharge the duty to the extent the person has the capacity to influence and control the matter (or would have that capacity but for an agreement or arrangement purporting to limit or remove that capacity). (WHS Act, ss 13-15). A duty imposed on a person to **ensure health or safety requires** the person: (a) to eliminate risks to health and safety, so far as is reasonably practicable; and (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable. (WHS Act, s 16).

Persons who conduct businesses or undertakings (alone or with others, and whether or not for profit or gain), will have duties unless they conduct the business or undertaking solely as a worker in, or as an officer of, that business or undertaking. (WHS Act, s 5). The duty of a person conducting a business or undertaking is to ensure, so far as is reasonably practicable, the health and safety of: (a) workers engaged, or caused to be engaged by the person; and (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking. A person conducting a business or undertaking must also ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. This primary duty encompasses the provision and maintenance of: a work environment without risks to health or safety; safe plant and structures; and safe systems of work. It also includes the safe use, handling, storage and transport of plant, structures and substances; the provision of and access to adequate

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facilities for the welfare of workers; the provision of information, training, instruction or supervision; and monitoring of the health of workers and the conditions at the workplace. (WHSa, s 18).

Persons conducting businesses or undertakings have **additional obligations** if they **manage or control** workplaces or fixtures, fittings or plant at workplaces; **design, manufacture, import or supply** plant, substances or structures; or **install, construct or commission** plant or structures. (WHSa, ss 19 to 25).

Officers of bodies that have a duty or obligation under the model Bill must exercise due diligence to ensure that the body complies with that duty or obligation. Due diligence is defined to mean taking reasonable steps in relation to acquiring and keeping up to date knowledge of work health and safety matters; gaining an understanding of the nature of the operations and the hazards and risks associated with those operations; ensuring that the body has appropriate resources and processes to enable hazards associated with the operations to be identified and risks eliminated or minimised; ensuring that the body has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding to these in a timely way; and ensuring that the body has, and implements, processes for complying with the body's duties and obligations. (WHSa, s 26).

Workers must take reasonable care for their own health and safety and to ensure that their acts or omissions do not adversely affect the health and safety of other persons; and comply with any reasonable instruction to comply with the Act, or policy or procedure of the person conducting the business or undertaking which relates to work health or safety and that has been notified to workers. (WHSa, s 27).

Other persons at the workplace have a duty to take reasonable care for their own health and safety and to ensure that their acts or omissions do not adversely affect the health and safety of other persons; and to comply with any reasonable instruction to comply with the Act given by the person conducting the business or undertaking. (WHSa, s 28).

The model Bill provides for three **categories of penalties** - for reckless conduct; failure to comply with a health and safety duty and exposing an individual to a risk of death or serious injury or illness; and failure to comply with a health and safety duty. (WHSa, ss 30 to 32).

There are requirements relating to the **notification of incidents** by the person who conducts the business or undertaking; and for persons with management or control of a workplace at which a notifiable incident has occurred to ensure that the site is not disturbed until an inspector arrives at the site or otherwise directed by an inspector. Notifiable incidents are those involving the death of a person, serious injury or illness (as defined) and dangerous occurrences (also defined). (WHSa, ss 34 to 36).

There are provisions requiring the **authorisation** of particular workplaces, plant, substances or work, or particular qualifications or experience, if prescribed by regulation. (WHSa, ss 39-44).

Duty holders have a duty to **consult and coordinate** with other duty holders. If more than one person has a duty in respect of the same matter under the Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter. (WHSa, s 45).

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The person conducting a business or undertaking must, so far as is reasonably practicable, consult with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to health or safety at work; and in accordance with any procedures agreed between the person conducting the business or undertaking and the workers. Consultation with workers is defined with reference to sharing of relevant information; giving workers a reasonable opportunity to express their views, raise issues and contribute to decision-making; taking workers' views into account; and advising workers of the outcome of the consultation in a timely manner. If the workers are represented by a health and safety representative, the consultation must involve that representative. The model Bill establishes that consultation is required when identifying hazards and assessing risks; making decisions about ways to eliminate or minimise those risks; making decisions about the adequacy of facilities for the welfare of workers; proposing changes that may affect the health or safety of workers; making decisions about the procedures for resolving health or safety issues, monitoring the health of workers or workplace conditions, information and training or consultation with workers; and when carrying out any other activity prescribed by the regulations. (WHS Act, ss 46 to 48).

The model Bill also prescribes arrangements for the appointment, powers and functions of **health and safety representatives, and committees**. (WHS Act, ss 49 to 78). These arrangements allow for health and safety representatives to represent workers carrying out work for one or more persons conducting businesses or undertakings at one or more workplaces. (WHS Act, ss 50 and 54). Health and safety representatives are not personally liable for their acts or omissions in good faith and are entitled to attend a course of training approved by the regulator. (WHS Act, ss 65 and 71).

There are procedures for **resolving health and safety issues** not resolved after discussion between the parties involved. These include a representative of a party to an issue attending the discussions and involvement of an inspector if an issue remains unresolved after reasonable efforts have been made to resolve it. (WHS Act, ss 79 to 81). In addition, individual **workers have the right to cease work** if they have a reasonable concern that carrying out the work would expose them to a serious risk emanating from an immediate or imminent exposure to a hazard. (WHS Act, ss 82-83). **Health and safety representatives may direct that unsafe work ceases** if they have a reasonable concern that to carry out the work would expose the worker to a serious risk, emanating from an immediate or imminent exposure to a hazard. (WHS Act, ss 84 to 89). Subject to certain conditions relating to consultation and training, health and safety representatives may also **issue provisional improvement notices** if they reasonably believe that a person is contravening a provision of the Act; or has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated. (WHS Act, ss 89 to 102).

It is an offence for any person to engage in **discriminatory conduct** for prohibited reasons. These reasons relate to a person's intention to or exercise of powers or functions under the Act. A series of provisions deal with this offence and proceedings, orders for damages or reinstatement, and other matters relating to discriminatory conduct. (WHS Act, ss 103-114)

The model Bill entitles unions to apply to the relevant authority for a **WHS entry permit** to be issued to a person who is an official of the union. A person with a WHS entry permit may enter a workplace for the purpose of inquiring into suspected contraventions of the Act. Permit holders are also entitled to exercise rights relating to inspection; consulting with relevant workers and the per-

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son conducting the relevant business or undertaking; inspecting and making copies of certain record or documents; and warning persons reasonably believed to be exposed to a serious risk emanating from an immediate or imminent exposure to a hazard. The model Bill establishes procedures and conditions for the issue and use of workplace entry permits. (WHS Act, ss 115 to 150).

The model Bill establishes the **functions of the regulator** (in each Commonwealth, state and territory jurisdiction). These are wide ranging and relate to: advising and making recommendations to the relevant Minister and reporting on the operation and effectiveness of the Act; monitoring and enforcing compliance with the Act; providing advice and information on work health and safety to duty holders and the community; and collecting, analysing and publishing statistics. They also include fostering a co-operative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives; promoting and supporting education and training; engaging in, promoting and co-ordinating the sharing of information to achieve the objects of the Act (including other regulators); and any other function conferred by the Act. (WHS Act, s 151). The Bill establishes **broad powers** enabling regulators to do all things necessary or convenient to be done for or in connection with the performance of its functions. (WHS Act, ss 152 to 154).

The model Bill provides for the **appointment of inspectors with functions and powers** relating to providing information and advice about compliance; and assisting in the resolution of issues relating to WHS, access to a workplace by an assistant to a health and safety representative, and right of entry provisions. Inspectors' functions and powers also include: reviewing disputed provisional improvement notices; requiring compliance with the Act through the issuing of notices; investigating contraventions of the Act and assisting in the prosecution of offences; and attending coronial inquests in respect of work-related deaths and examining witnesses. Inspectors have prescribed powers relating to entry and assistance; search warrants; requiring production of documents and answers to questions; obtaining and retaining records or documents; seizing any thing the inspector reasonably believes is evidence of an offence against the Act; taking and removing for examination, analysis or testing a sample of any substance or thing; seizing dangerous workplaces and things; and other related matters. (WHS Act, ss 155 to 186). It is an offence under the model Bill to hinder or obstruct, impersonate, assault, threaten or intimidate an inspector. (WHS Act, ss 187 to 189).

Inspectors are empowered to issue **improvement notices** if they reasonably believe that a person is contravening a provision of the Act; or has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated; and the Act establishes requirements relating to the contents of improvement notices and for compliance with them. (WHS Act, ss 190 to 193). Inspectors are also empowered to issue **prohibition notices** if they reasonably believe that an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; or an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard. The model Bill also establishes requirements relating to the contents of prohibition notices, compliance with them and remedial action by an inspector if a person issued a prohibition notice fails to take reasonable steps to comply with the notice. (WHS Act, ss 194 to 212). The model Bill enables the regulator to apply to a court for an injunction compelling a person to comply with a notice; or restraining a person from contravening a notice. (WHS Act, ss 213 to 214).

A regulator may accept an **enforceable undertaking** given by a person in connection with a matter relating to a contravention or alleged contravention of the Act by the person (except for a

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contravention or alleged contravention that is a Category 1 offence). The Bill establishes requirements in relation to the regulator's and duty holder's role and responsibilities in relation to an enforceable undertaking. (WHS Act, ss 215 to 221).

Part 12 of the model Bill deals with **reviewable decisions**, procedures for internal review by the regulator and arrangement for external review by a prescribed body. (WHS Act, ss 222 to 228).

Part 13 deals with **legal proceedings** which may only be brought by the regulator; or an inspector with the written authorisation of the regulator. Proceedings may be brought within two years after the offence first comes to the notice of the regulator; or within one year after a finding in a coronial inquiry or an official inquiry that the offence has occurred. Proceedings may also be brought within 6 months after an enforceable undertaking is contravened, it comes to the notice of the regulator that the WHS undertaking has been contravened, or the regulator has agreed to the withdrawal of the WHS undertaking. There are procedures for a person to request and receive information if the person reasonably considers that an act, matter or thing constitutes a Category 1 offence or a Category 2 offence; and no prosecution has been brought in respect of the matter (after 6 months but not later than 12 months after the occurrence). (WHS Act, ss 229 to 232).

If a court convicts a person, or finds a person guilty, the court may make one or more **orders** against the offender, in addition to any penalty that may be imposed or any other action that may be taken in relation to the offence. These may be adverse publicity orders; orders for restoration to remedy matters; community service orders; release on the giving of a court ordered enforceable undertaking; injunctions; or training orders. (WHS Act, ss 233 to 241).

A series of **general provisions** deal with the offence of giving false or misleading information; legal professional privilege; immunity from liability for inspectors; and confidentiality of information. (WHS Act, ss 250 to 253).

The Act provides for **codes of practice** to be approved by the relevant Minister. In a proceeding for an offence against the Act, the court may have regard to an approved code of practice as evidence of what is known about a particular hazard or risk, risk assessment or risk control to which the code relates; and rely on that code, in conjunction with other evidence, in determining what is reasonably practicable in the circumstances to which the code relates. However, failure to comply with a code of practice does not of itself give rise to any civil or criminal liability. (WHS Act, ss 256 to 257).

Finally, we note a substantive omission in the model Bill. The second report of the National OHS Review (pp 179-180) recommended that the primary duty holder be required to **employ or engage a suitably qualified person to provide advice on OHS matters**. Businesses or undertakings with 30 or more employees were to be required to appoint a workplace health and safety officer. The model Bill is silent on the matter of capacity or support for addressing OHS matters.