In this Briefing

This Work Health and Safety Briefing presents some recent key cases. The cases have implications for the interpretation of “reasonably practicable”, “control” and who is an “officer”, although their relevance must be considered in light of the specific provisions of work health and safety legislation in a particular jurisdiction.

Whether an improvement notice should be stayed pending external review

Essential Energy and WorkCover Authority of New South Wales [2012] NSWIRComm 83

The Industrial Relations Commission of New South Wales has, in this case, handed down the first judgment on an issue under the harmonised work health and safety legislation - on issues to do with external review of an inspector’s decision to issue an improvement notice under the Work Health and Safety Act 2011 (NSW) (the Act). The internal and external review provisions are set out in Part 12 of the Act. Applications for external review can be made to the Industrial Relations Commission of New South Wales (s 229(1) of the Act). The Commission is empowered to stay the operation of a decision that is the subject of an external review pending a decision on the review (s 289(3)). The central issue before the Commission in this case was whether the improvement notice should be stayed pending the Commission’s decision in the external review.

The applicant in the case was Essential Energy, an electricity company. Essential Energy was one of three New South Wales Distribution Network Service Providers required to allow Accredited Service Providers access to its network to complete ‘contestable works’, which included customer connections, increasing the capacity of the distribution network, and so on.

Hibbard Pty Ltd required particular work (the erection of a new power pole) on the network, and engaged Ronin Pty Ltd, an Accredited Service Provider, to do the work. Ronin Pty Ltd requested from Essential Energy, and was granted, an Access Permit and Low Voltage Authority to Work to carry out work on the network. Ronin Pty Ltd employed Mathew Sweeney (a 20 year old apprentice electrician) to do the work. Sweeney was electrocuted when ascending a power pole.
After investigating the incident, a WorkCover Authority of New South Wales inspector issued an improvement notice. Essential Energy sought an internal review of the notice. The notice was confirmed on internal review by an officer of the WorkCover Authority of New South Wales. Essential Energy sought external review of the internal reviewer’s decision. In brief, Essential Energy argued that (i) it did not have a relevant duty under section 19 of the Act; (ii) Mr Sweeney was not a relevant ‘worker’; and (iii) it had not breached section 19. Essential Energy argued that it had handed over control of the site to Ronin Pty Ltd; that it had no contractual relationship with Ronin Pty Ltd, no control of Ronin Pty Ltd and did not direct activities; that work was conducted by Ronin Pty Ltd as part of Ronin Pty Ltd’s business or undertaking; and that Essential Energy’s involvement was limited to allowing Ronin Pty Ltd access to the network.

Backman J held that Ronin Pty Ltd was carrying out work as part of Essential Energy’s business or undertaking. Essential Energy was a network provider and was required to give access to allow work to be performed. It laid down operating procedures to be applied once access was granted. Backman J held that it was open to the internal reviewer to find that Sweeney was ‘a worker’ – he was carrying out work as part of Essential Energy’s undertaking. Even if he was not a ‘worker’, he could fall under the definition of ‘other person’ in section 19(2) because he had been ‘put at risk’ by Essential Energy’s undertaking.

Nevertheless Backman J determined that Essential Energy had an arguable case that it did not have a relevant section 19 duty; and, alternatively, that it had discharged its responsibilities under section 19 as the notice had been issued because the inspector believed ‘it was likely that the contravention [the exposure to risk of electric shock] will continue or be repeated’, and the review raised the issue of the precise work area of the site, and whether it covered the pole where electrocution took place.

Backman J then considered the issue of whether the balance of convenience favoured the granting of a stay in this case. After considering a range of factors, including that the work had been completed, and that there was no identifiable immediate risk to workers from EE’s system, Backman J ordered that the requirement to comply with the improvement notice be stayed in accordance with section 229(3) of the Act pending the outcome of the external review.

**Adverse action and membership of a health and safety committee**

*Construction, Forestry, Mining & Energy Union and Daryl Peter Lamberth v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697*

Mr Lamberth was a member of the Construction, Forestry, Mining and Energy Union (CFMEU) and was employed as a trainee by the Pilbara Iron Company under a fixed term contract of 12 months, after which he was not offered permanent employment. Lamberth and the CFMEU claimed that Pilbara Iron Company’s failure to make an offer of permanent employment, marking Mr Lamberth down in his mid-year performance review and not accepting his nomination for a position on its safety and health committee amounted to ‘adverse action’ for prohibited reasons under the *Fair Work Act 2009* (Cth) (see ss 340 and 346). The three reasons alleged by the CFMEU and Lamberth were that (para [2]) ‘Mr Lamberth was a member of the CFMEU; that he engaged in industrial activity by promoting or advancing the views or interests of the union; and that he exercised his workplace right to make complaints and/or inquiries in relation to his employment when he took up with his supervisors various issues, particularly issues relating to workplace safety.’ Pilbara Iron Company argued that it took the action it did because Mr Lamberth exhibited ‘a poor attitude’ and behaved in an aggressive and confrontational way when communicating with his peers and supervisors.
In the Federal Court of Australia Katzmann J held that Pilbara Iron Company ‘refused to accept Mr Lamberth’s nomination for election to the safety and health committee because he exercised a workplace right and engaged in industrial activity’ (para [179]). Katzmann J was ‘not satisfied that the action taken in connection with the performance review was not taken for reasons that included the fact that Mr Lamberth made complaints and inquiries in relation to his employment’ and was also ‘not satisfied that that fact was not a substantial and operative reason for the poor assessment’ (para [159]). Further, while the draft performance review of Mr Lamberth was satisfactory, Katzmann J found that the final version was ‘entirely critical’ (para [144]) and that (para [145]):

Apart from the changes in the scores, perhaps the starkest difference is the assertion made in the draft report that Mr Lamberth had fitted in “fairly well” into the crew, whereas the final report refers to “disruptions and disharmony” in the crew.

Katzmann J held that the allegations of adverse action had been made out, and ordered Pilbara Iron Company, inter alia, to offer Mr Lamberth a permanent position.

The Kirk decision in Queensland

NK Collins Industries Pty Ltd v President of the Industrial Court of Qld & Anor [2012] QSC 147

In this case, NK Collins again argued that the High Court of Australia’s decision in Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs) (2010) 239 CLR 521 applied to prosecutions under the Workplace Health and Safety Act 1995 (Qld), so that the prosecuting authority was required to identify ‘each act or omission relied upon in a prosecution of this nature’. In the Supreme Court of Queensland, Martin J considered the decision of Boddice J in NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland & Anor [2010] QSC 373 and at para [20] stated that:

I am in respectful agreement with Boddice J as to the differences which exist between the New South Wales and Queensland legislation and, thus, the inapplicability of Kirk to the circumstances of this case.

Sentencing principles

DPP (Vic) v Coates Hire Operations Pty Ltd [2012] VSCA 131

This case involved an appeal by the Director of Public Prosecutions (DPP) against the decision of the County Court of Victoria to impose a fine that the DPP argued was ‘manifestly inadequate in all the circumstances’ for offences against the employer’s general duty in section 21(1) of the Occupational Health and Safety Act 2004 (Vic) (the Act) against Coates Hire Operations Pty Ltd (Coates). An employee of sub-contractor driver Redline (deemed to be an ‘employee’ of Coates by section 21(3) of the Act) was fatally injured in a loading incident in which safe loading and unloading procedures were not followed. Coates entered a plea of guilty. In doubling the fine imposed by the County Court, the Supreme Court of Victoria, Court of Appeal (Maxwell P, Weinberg JA and Hollingworth AJA) endorsed and set out some important sentencing principles.

First, the Court accepted Coates Hire’s submission that section 33(2) of the Act, which allows for two or more contraventions of the same provision to be charged ‘as a single offence if they arise out of the same factual circumstances’, permitted ‘the court to deal with the totality of what is in reality a single offence with different component parts.’ (See paras [31] and [32]). At para [33] the Court noted that:

The company’s culpability had to be assessed by reference to each of the ways in which it had admitted failing to fulfil its safety obligations. As is clear from the statement of the charge, these comprehended both the failure to provide and maintain a safe system of work and the failure to provide the information, instruction, training and supervision necessary to ensure that the work of loading and unloading equipment could be carried out safely and without risks to health.
Further (para [35])

Contravention of s 21(2)(e) – by failing to provide appropriate information, training and supervision to Redline and its employees regarding the safe loading procedure – was the more serious because Coates had previously been the subject of specific enforcement action [two improvement notices] by [the inspectorate] in relation to the issue of training for contract drivers.

These ‘events made Coates aware of “the risks associated with the loading and unloading of plant”’ (para [39]), and of the importance of training.

The court also noted that it was ‘inexplicable’ that Coates’ occupational health and safety manager had failed to enforce Coates’ safety requirement, when he knew it was being breached, and that he was ignorant of the fact that contract drivers had not been given the necessary tools to enable equipment to be safely ‘freewheeled’ once the winch was attached (see para [47]). Coates’ yardman had never been instructed to make sure that drivers and contractors followed Coates’ safety procedures, and had been instructed by a senior manager to leave it to the contract drivers to decide for themselves how to load equipment.

The court noted that the trial judge had quoted the Victorian Supreme Court of Appeal decision in Director of Public Prosecutions (Vic) v Amcor Packaging Pty Ltd (2005) 11 VR 557 at 565:

When determining the appropriate penalty in a case of the breach of a statutory duty imposed for the purpose of protecting the lives and well being of those who may be affected by the breach, the foreseeable potential consequences must be taken into account as it is the avoidance of those consequences which, when considering the objective seriousness of the offence, constitutes the raison d’être for the establishment of the legislated regime in the first place. To a substantial extent the seriousness of a breach must be assessed by reference to those potential consequences and the measure of evidenced disregard concerning the safety of employees in the circumstances.

The Court of Appeal also referred to its own decision in R v Commercial Industrial Construction Group (2006) 14 VR 321 at 331-2:

As this case illustrates, the formal adoption of a satisfactory safety management system will not have the beneficial effects intended unless it is accompanied by the employer’s active implementation of the system in the workplace. The employer’s duty will not be discharged simply by creating a safe system of work. The obligation requires the employer to ensure ‘that procedures and instructions [are] actively and positively complied with by employees’. Not only must employees be appropriately trained but there must be ongoing supervision and compliance audits, to ensure that the system is being applied in practice. Employee compliance with the safe system of work must be constantly monitored by the employer.

The Court in R v Commercial Industrial Construction Group (at 331) also commented on the situation where a company’s health and safety procedures are not followed because of the actions of a senior employee: ‘[W]hen the employee in question is the person with supervisory responsibilities, including responsibility for ensuring safety at the site, the gravity of the company’s breach is increased, not reduced.’ The Court of Appeal in this case stated that:

61 The notion of a corporate dutyholder under the Act being ‘let down’ by management reflects a misapprehension of what is required of an employer in order to fulfil its obligations under the Act to ensure a safe workplace. Of necessity, a company acts through its managers. It is for the managers to ensure, so far as their respective powers and duties allow, that the company complies with its safety obligations under the Act.

62 This proposition is given statutory recognition in s 144(1) of the Act, which renders a company officer liable to prosecution if the company contravenes the Act and the ‘contravention is attributable to [that officer] ... failing to take reasonable care’. On conviction, the officer is liable to a fine up to the maximum which would apply had it been a natural person who contravened the Act.
When – as here – an employer’s appointed safety manager allows a known disregard of safety procedures to continue, it is the employer which has let its employees (and contractors) down, not the other way round. As his Honour correctly found, the ‘real failure’ was that of Coates itself, in ‘systematically allowing its own safety procedures to be disregarded.’

The Court of Appeal endorsed that principle stated in the Amcor case (at p 565) that:

[The primary factor to look at in relation to the penalty to be imposed is the objective seriousness of the offence. Particularly in cases involving a serious breach of the OH&S Act, subjective factors, such as a plea of guilty, co-operation with the investigation and subsequent measures taken to improve safety, must play a subsidiary role in the determination of penalty to the gravity of the offence itself. While the court must keep in mind not only facts which establish the seriousness of the offence, but also those which tend to mitigate that seriousness or exculpate the offender, the presence of the subjective factors referred to should not be permitted to produce a sentence which fails to adequately reflect the seriousness of the offence.]

The Court of Appeal concluded that:

68 In the circumstances, the fact that a Coates employee was killed as a result of the very danger which the safety procedure was designed to eliminate makes Coates’s ‘disregard of employee safety’ a matter of very high culpability, in our view.

69 As senior counsel for the Director submitted on the appeal, the conduct of Coates in the period leading up to Mr Todd’s death ‘came close’ to reckless disregard of a known risk. The company had known, since March 2004 (when the improvement notice was issued), that inadequate training in the use of the winching procedure put the ‘health and safety of employees at this workplace ... at risk’. It had known, since the incident which prompted the issue of Safety Alert No 27 in January 2006, that there was a serious risk of injury if the winch was not attached. Yet, as at September 2006:

- the company’s Safety Manager … knew that this safety requirement was being ignored, and did nothing to enforce compliance; and
- the company’s Dandenong Plant Manager … instructed the yardman … not to enforce the requirement.

70 It is immaterial that Coates management were unaware of the particular risk associated with the M600. The hazard to which the safety requirement was directed was generic. As the Safety Statement declared, winching was necessary to eliminate the risk of ‘equipment sliding off [an] inclined tray in an uncontrolled manner.’ The safety requirement was absolute. All equipment had to be winched. The peculiarities of particular equipment were irrelevant.

71 Moreover, the ignorance of management about the M600 was the product of the very disregard of safety to which the judge referred. As his Honour found, if the company had been monitoring compliance with the safety instructions, as it was obliged to do in order to ensure a safe system of work, the incident involving [the fatally injured employee] and the M600 would inevitably have come to light.

72 Nor did it matter that the particular truck … was a ‘super tilt’ tray truck. As we have emphasised, this was a ‘no exceptions’ policy. It applied to all equipment and all tray trucks. The position might have been different if, after satisfying itself that there would be no risk to safety, Coates had decided to exempt ‘super tilt’ trucks from the mandatory winching requirement. But there is no suggestion that any such process was ever contemplated.

73 More fundamentally, an employer’s duty under the Act is to ensure that employees are not exposed to risks, rather than to prevent a particular accident. [42] As Harper J said in Holmes v R E Spence & Co Pty Ltd: [43]

[The question in cases such as the present is not whether the detail of what happened was foreseeable, but whether accidents of some class or other might conceivably happen, and whether there is a practicable means of avoiding injury as a result. Here, such a practicable means of avoidance was available.

The same was true here.
Following the incident, Coates made many changes to its work health and safety processes, trebled the size of its health and safety team, and expressed remorse. Nevertheless, the Court of Appeal held that:

77 In our view, specific deterrence still had a role to play in the sentencing of Coates, notwithstanding these pro-safety initiatives. The disregard of safety which resulted in Mr Todd's death had to be seen against the background of the company's two prior convictions for breaches of occupational health and safety law. In 2001, the company was convicted of failing to provide a safe working environment and fined $10,000. In 2003, it was convicted of failing to ensure a safe workplace and was fined $22,000.

78 The size of the fines indicates that these breaches were very much at the low end of seriousness. But what matters for present purposes is that, having been prosecuted twice for workplace safety breaches, Coates should thereafter have been doubly vigilant to ensure that no further breach occurred. There was, moreover, the 2004 enforcement action by WorkSafe, when the inspector told Coates that it was in breach of the Act by reason of inadequate training for safe loading and unloading of equipment.

79 For offending of this kind, general deterrence is also a consideration of great importance. In Orbit Drilling [2012] VSCA 82, [60] this Court endorsed the view of the Industrial Commission of New South Wales in Court Session, that:

[T]he fundamental duty of the Court in this important area of public concern ... [is] to ensure a level of penalty for a breach as will compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety at the workplace.

Further, the Court of Appeal stated that:

80 The sentencing judge was obliged to have regard to current sentencing practices [Sentencing Act 1991 (Vic) s 5(2)(b)]. He was also obliged to have regard to the maximum penalty for a breach of s 21 (1) of the Act. The maximum is 9,000 penalty units which, at the time, equated to $966,870.

81 Consideration of comparable cases is a necessary and appropriate step in the ascertaining of current sentencing practices. [Hudson v The Queen (2010) 2005 A CrimR 199]. It is also a necessary part of ensuring consistency of sentencing, as the High Court confirmed recently in Hili v The Queen [(2010) 242 CLR 520, 536-7].

The Court of Appeal compared the case before it to a similar case, in Director of Public Prosecutions v Nationwide Towing & Transport Pty Ltd [2011] VSCA 291. It concluded that:

86 In our opinion, the breach to which Coates pleaded guilty was in a more serious category. Nationwide had instituted a system which (but for human error) would have prevented the fatal accident, whereas Coates – through its senior management – acquiesced in the systematic disregard of safety procedures which the company knew were necessary to ensure the safe loading and unloading of equipment. To have failed to enforce the winching requirement in the wake of the 2006 incident, and in the knowledge that it was not being complied with, was inexcusable. As this case demonstrates, there is no utility in having safety procedures if those responsible for enforcing them choose not to do so.

87 The fine of $250,000 which the sentencing judge imposed was, in our view, manifestly inadequate. That is, it was outside the range reasonably open, given that the gravity of the offending had to be the primary factor in the fixing of the penalty and given the importance of specific as well as general deterrence.

88 As the prosecutor submitted on the plea, the culpability of Coates was ‘considerably higher’ than that of Redline, [the deceased’s] employer. Redline had earlier been fined $130,000 by the same judge. There were, moreover, material differences between the position of Coates and that of Redline. In sentencing Redline, his Honour had identified as mitigating factors the fact that Redline had no prior convictions; the Director of Redline had agreed to give evidence at the trials of Coates and DHH; and Redline was ‘essentially a small one man company in a precarious financial position.’

89 We would allow the appeal, set aside the sentence and impose a fine of $500,000. But for the company's plea of guilty, the fine would have been $600,000.