



WORKPLACE SAFETY AUSTRALIA PTY LTD

Safety Alert: 04 - 2005

Manslaughter, negligence, intent, the Crimes Act and OHS Prosecutions

A question sent to Workplace Safety Australia's Research department this week by one of our subscribers forms the first part of this week's OHS alert. It involves the recent high profile appeals lodged by several NSW mining companies against the conviction of them and their managers and surveyors for breaches of the OHS Act.

This case should be of interest to everyone around Australia involved in OHS.

The current case that has received a lot of press, with two mining companies lodging appeals in the NSW Court of Appeal against their conviction in the NSW Industrial Relations Commission for failing to provide for the health and safety of employees at work. In this case, several mine managers and a surveyor were also found guilty of offences. The Act allows that individuals who are "concerned in the management" of a company can be found liable for an OHS breach can also be charged. In this case, the Commission found that several managers and the surveyor were "involved in the management". They had the ability to control the company, to set its policies, and to manage its affairs to such an extent, the Commission found, that they could have prevented the breaches from occurring.

In Workplace Safety Australia's last week's OHS Alert we looked at a case in the UK where a manager was imprisoned for manslaughter after the death of a worker. There is a key difference to the way in which the UK Act, and Australian crimes acts (that make things like murder and manslaughter crimes) and the OHS Act work, which is the basis of the appeal in Australia by the mining companies.

In the criminal law, the prosecutor (usually referred to as "the Crown" is required to prove that the accused person committed the elements of the crime. In the OHS Act, it is presumed that the person committed the crime of which they are accused, and the onus is on them *to prove that they did not do it*. An employer who is charged with a breach of the OHS Act must show that they "did all that was practicable to prevent" the OHS breach.

The second major difference in the two systems, that is also a major part of the Australian appeal relates to the question of "intent". In order to understand this element, it is necessary to know a little about the relevant NSW law – the *Crimes Act*.

The NSW Crimes Act says:

"Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or

omitted with **reckless indifference** to human life, or with **intent** to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter”

There are other offences in the Crimes Act for ‘lesser’ crimes – for instance:

35 Malicious wounding or infliction of grievous bodily harm

(1) Whosoever maliciously by any means:

(a) wounds any person, or

(b) inflicts grievous bodily harm upon any person,
shall be liable to imprisonment for 7 years.

Grievous bodily harm is defined in the Act as:

“Grievous bodily harm includes any permanent or serious disfiguring of the person.”

“Malicious” is described in the following way:

*“Maliciously”: Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with **indifference** to human life or suffering, or with **intent** to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done **recklessly or wantonly**, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.”*

As can be seen from each of the above sections the prosecutor must show some *intent* on the part of the accused person to have committed a crime. Elements like “reckless indifference” are where a person clearly should have known that their actions (or omissions) could have resulted in murder or death or harm, but went ahead with their actions anyway.

What are some examples?

- Where a mine manager sends his miners into the mine even though he knows the mine is actually about to collapse. Since the mine manager knew his actions *would* result in death, he would, if a prosecutor could prove this, be guilty of murder.
- Where a mine manager knew that there were dangerously high levels of gas in his mine but sent his miners in anyway. This could be murder or manslaughter. The manager was certainly “recklessly indifferent” as to what happened.
- Where a mine manager who knows there were dangerous levels of gas in a mine had a hangover from the last nights drinking, and instead of going into work and preventing his miners from going into the mine, just went back to sleep because he could not be bothered doing anything about it. In this case, the manager did not actually do any thing that caused the subsequent death of the miners, but his omission – his failure to do something, was equally indifferent.
- Where a mine manager thought there might be a problem with gas in a mine, but was busy and did not check to see if this was the case, and miners were

subsequently killed. Here there was no *intent* to kill anyone, but there was certainly indifference. Whether the indifference was grievous or reckless probably would depend on the likelihood of the gas being there.

- Where a mine manager received reports on gas levels once a month (which was a safe procedure – one check a month was all that was necessary to check safe levels) – but one month did not receive the report and forgot to follow it up. There was a build up of gas and an explosion resulting in death prior to the next month's report.

If we look at this last example, there is clearly no *intent* to harm anyone on the manager's part. There is probably no reckless indifference because the manager did have a safe system in place and could probably prove that he was generally careful but in this case was just very busy and forgot. It would probably be very difficult for a prosecutor to convince a judge to find the manager guilty of any of the above *Crimes Act* offences in this case. The situation in regards to the OHS Act is clearly different however. In this last example, could the manager prove he did all that was practicable to prevent the accident occurring? Clearly not – he could have asked for the report that would have shown the gas build up! In this case, all the prosecutor under the OHS Act would have to show was that there was a clearly foreseeable danger, and there was a way that the accident could have been prevented: The Manager would have a great deal of difficulty proving there was nothing he could have done.

In the NSW situation, the appealing parties also claim it is unfair that they are not able to appeal their case further. When a person is convicted of a crime under the Crimes Act they may appeal all the way to the High Court: in an OHS appeal, there is no appeal further than to a full Bench of the Industrial Relations Commission in Court session.

Is the system fair as it is, or do the appellants in this case have valid reasons to complain? You decide – we at Workplace Safety Australia will keep you informed of the outcome.

Bogus Safety Strikes...

The NSW Commission recently criticised employees at BlueScope Steel's Bulk Operations Department at Port Kembla in NSW (see *BlueScope Steel (AIS) Pty Limited v. Australian Workers' Union* [2005] NSWIRComm 1009). The employer and employees were in negotiations regarding a new Enterprise Agreement for the site. The NSW Commission had issued orders that there should be no industrial action until further notice while the negotiations proceeded.

However, a series of stoppages occurred over a period of just a few weeks – supposedly in relation to “safety concerns” at the site. The Commission noted its suspicions and emphasised that employees should not take OHS as a light matter – and using safety as an excuse to attempt to assert pressure against their employers was just such a disregard of the importance that the employees should have been placing on safety. The Commission said:

“...one strike may constitute happenstance, two strikes may be a coincidence but the series of work stoppages that have occurred by the operators in the bulk operations berth over a range of apparently unrelated matters suggests “...enemy action...” by the employees to me, as it does to BlueScope Steel....”

Moreover, I share the same suspicions concerning the genuineness of the alleged safety concerns of the employees as does BlueScope Steel management. As I indicated in my unreported decision of Thursday, 14 November, 2002 in the *Caltex Australia Limited Dispute Case* [Matter No.IRC 817 of 2002 at p.24]:

"...Safety is too important a matter to be addressed in other than a formal way through the proper procedures and with those who are experts in that field... It is far too common for industrial disputes to be dressed up as bogus safety problems when they are nothing of the sort and the destructive role often taken by trade union officials in that respect does nothing more than cloud the issue so that, when a legitimate safety concern by employees does emerge, they, like the boy who cried wolf, are not believed..."

In the above instance, the Commission issued orders preventing the employees in question from taking any form of industrial action. Comments such as these – in non-OHS proceedings, emphasise the importance in which the Commission holds OHS issues. Similarly, at a company level, employers should not only take their OHS duties seriously themselves, but should ensure employees should also.

For instance, an employee playing a prank that leaves a fire extinguisher half full will not result in anything except the inconvenience of having to refill it 99 times out of 100, but that 100th time when there is a fire may certainly have extremely serious consequences. Similarly, the pulling of the chair from under someone as a joke, or the tampering with someone's safety clothing may not have any effect but producing a laugh almost every time it happens.... The one time that it results in a maiming, permanent injury, disability or death, will be an exception that is remembered by everyone involved for the rest of their lives.

Changes to Queensland Regulations

Recent amendments to the *Workplace Health and Safety Act 1995* and the *Workplace Health and Safety Regulation 1997* have resulted in:

- removal of the requirement for various classifications of employers (e.g. manufacturers and retailers) to register details of their workplace and workplace activities with Workplace Health and Safety Queensland for a fee;
- adopting the National Occupational Health and Safety Council's (NOHSC) plant registration requirements from the *National Standard for Plant (NOHSC, 1994)*, with the exception of air-conditioning units and cooling towers.

Workplace registration requirements have been abolished effective 1 February 2005. Owners of workplaces no longer need to register their workplaces with Workplace Health and Safety Queensland.

Please note that plant registration will continue. To allow greater consistency for business, the recent amendments have aligned the current Queensland plant registration requirements with the *National Standard for Plant*.

The new schedule will require registration of the following items of plant:

- boilers
- pressure vessels

- tower cranes
- lifts
- escalators (including moving walkways)
- building maintenance units
- specified amusement devices
- truck mounted concrete placing units with booms
- mobile cranes with a safe working load greater than 10t
- air conditioning units
- cooling towers.

Although air-conditioning units and cool towers are not covered by the national standard, in Queensland's environment there are strong policy grounds such as increased risk of Legionella disease, for this type of plant to remain registered and monitored.

Housekeeping Audit in the Qld Construction Industry

Workplace Health and Safety Queensland (WHSQ) reports that it will be conducting a state wide audit focussing on housekeeping practices in the construction industry in February 2005. WHSQ inspectors will be randomly targeting a range of building and construction sites throughout Queensland in the civil, commercial and residential sectors. Inspectors will be conducting their normal inspections of sites, but will focus on housekeeping issues during the course of their visit.

The audits will test the industry's compliance with the *Workplace Health and Safety Regulation 1997*, in particular *Part 8A – Safe housekeeping practices for construction work*. Penalties of not complying with the Regulation can range from an Improvement or Prohibition Notice to an Infringement Notice incorporating an on-the-spot fine.

Employee or contractor?

The question of whether a particular worker is an employee or a contractor is often a vexed one for employers – not only because the answer can dictate whether certain types of benefits need to be paid to the worker, but also to determine what precisely an employer's legal obligations are to that employee.

Additionally, in many instances employees will be more expensive to engage than contractors, and for certain jobs contractors will be a more useful and productive use of labour in an enterprise. For these reasons *Workplace E-Law Australia* will keep you up to date on the latest legal findings in relation to the employee/contractor question.

In the latest decision in an Australian Court, the Western Australian Industrial Appeal Court has handed down a decision overturning a finding by a full bench of the Western Australian Industrial Relations Commission two workers working on Perth construction sites were employees of the labour hire firm that supplied them. Instead, the Court found, they were genuine contractors.

The relationship in question was between two workers and a "labour-hire" company. The CFMEU claimed the workers were employees of the labour hire company, whilst the company claimed they were sub-contractors.

There were two contracts between the workers and the labour hire company – one signed in 2001 and one in 2003. The terms of the 2001 contract between the labour hire company and the workers was summarised by the Court:

Mr Bartley's [one of the workers] 2001 document was a single page, headed "Agreement to Contract", which a representative of Tricord [the labour hire company] also signed. This document contained an acknowledgement and agreement that Mr Bartley had "no relationship of Employer-Employee with Tricord Personnel", he was "self-employed", and "as such" he was "not bound to accept any work through" Tricord. The document further provided for Mr Bartley to work at an agreed price per hour for "actual on-site hours" or the "job price to be agreed", which was the extent of Tricord's "responsibility or liability" to him. All work he agreed to do "through" Tricord he agreed would be done "in a 'workmanlike' manner" and Tricord would be indemnified against "faulty workmanship". He agreed that he had no claims on Tricord for holiday pay, sick pay or similar. And he agreed to supply his own "personal tool kit, safety gear or any necessary ancillary equipment required", with no claim on Tricord for any of this.

The Court described the 2003 contract:

"The 2003 document is headed "Independent Contractor Agreement" and is between Tricord and each man identified as a "Contractor". There is an express disclaimer of any intention to create the relationship of employer and employee, and a statement of an intention to create one of principal and independent contractor.."

There were two Judges who found that the relationship between the workers and the labor hire company was one of contractor and independent contractor (one judge dissented saying the relationship was one of employer and employee). In coming to this decision, the majority examined the various tests that the Courts have traditionally applied to determine the answer to the question.

The issue of "control"

Traditionally, the law regards a relationship where one person 'controls' the way another works as generally one of employer and employee. Therefore, the more 'control' there is in a relationship, the more likely the relationship is one of employer/employee. If the worker has a great amount of freedom as to how she or he goes about and completes their work, the relationship tends away from being employer/employee and towards one of principal contractor/independent contractor.

When the Full Bench of the Industrial relations Commission handed down their earlier decision stating that the relationship between the parties was one of employer/employee they pointed to a number of things that they claimed indicated that Tricord so comprehensively controlled how the workers were to carry out their work that they must be employees.

On appeal, the Court looked at the evidence and found that the evidence was less compelling than the Commission had thought. One of the major indications taken by the Commission to show control was the provision of a handbook by Tricord to the workers that gave detailed instructions on how employees were to meet their OHS obligations (among other things). The Appeal Court considered that although this did show some

control, given the strict requirements of the various laws governing the workplace, such control was also appropriate between contractors and those that engaged them.

In all, when looking at the control issue, the Appeal Court found that there was evidence that pointed both ways – that may have indicated an employer/employee relationship on the one hand or a contractor/subcontractor relationship on the other hand.

Other things that Courts look at...

Courts also look at other aspects of a relationship to determine whether it is more likely employer/employee or something else. In this case, the workers were required to provide their own tools and equipment etc. This is often a sign that workers are not employees. Another thing that is often looked at is whether the worker is provided with benefits such as holidays, sick leave etc. In this case, neither of the workers were provided with benefits such as these – another indication that the relationship was not one of employer/employee. The ability of the person engaged to delegate their work would on the face of it tend away from the status of an employee, and the Court noted that there was no ability to do this in the workers contracts.

The language of the contract

The Court also looked at the “language of the contracts” between Tricord and the workers. Courts have repeatedly noted that simply because an agreement says that the relationship is not one of employer/employee this is not definitive of the relationship – in other words, the contract may say that, but everything else may point to the relationship being one of employer/employee: Or in some cases, such a clause may be inserted by employers as a “sham” to try to get out of providing the benefits they are required to.

In this case, the Court found that there was nothing that pointed to the clause being a sham – that is, both Tricord and the workers seemed genuinely to be intending that the relationship between both of them was to be one of contractor/independent contractor

The conclusion

As Court considered that there was evidence pointing “both ways” how did they resolve the issue?

The Court cited a well-known English case that stated as follows:

“If their relationship is ambiguous and is capable of being one way or the other [i.e., either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them”.

In this case, the finding, noted above, of the fact that the contractual clause indicating both parties intended the relationship **would not** be one of employer/employee became crucial. Although the Court cautioned that this clause had to be “read” in the context of the language of other parts of the contract and the contract as a whole, the fact that the parties had “tried to remove any ambiguity” between them by a clear clause that said the relationship was not one of employer/employee tipped the balance in favour of a finding that the relationship was principle contractor/independent contractor not employer/employee...

“...on the balance of indications to be drawn from the language of the parties’ relationship and the rights and obligations to which it gave rise I am of the view that the relationship here is one of principal and independent contractor in each case”.

and the Chief Judge stated in similar terms. Judge Simmonds concluded...

“In such a case, and in circumstances in which (contrary to what was said by the Full Bench) there is, in my respectful opinion, little to suggest that the label applied by the parties is a sham (and a good deal to suggest that it is not), it seems to me that the evident intention of the parties should be given effect and that the relationship between them should, in each case, be found to be that which they have been at some pains to describe, namely, that of independent contractor and principal and not that of employer and employee.”

Conclusions...

This is one of very many cases that have looked at this issue – given that there have been so many, it is perhaps surprising that it still remains so difficult for Courts to agree on the issue, but that is an indication of the extreme variety that can be found in the different work arrangements that can be found.

The case is also an indication of the complexity that businesses need to be aware of in engaging independent contractors; it is often the case that a business can engage what they think is a contractor, but what turns out to be an employee! Those businesses that regularly structure their relationship with workers should keep informed of the cases that come before Australian Courts and what the findings in these cases are to ensure they are as fully informed as possible when putting together contractor agreements.

Yours Faithfully,

Workplace Safety Australia Pty Ltd.

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