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LAWYERS

Safety Matters

May 2006

Bird Flu – Ensuring the Health and Safety of Your Employees

Employers have an obligation to ensure the health and safety of their employees under both occupational health and safety legislation and the general law of negligence. The recent Avian influenza (bird flu) epidemic has caused many employers to seek clarification about the steps they should take to ensure compliance with their health and safety obligations.

Experts have identified Avian H5N1, the strain of influenza responsible for the recent outbreak of bird flu cases, as a strain with pandemic potential. So far, more than 150 cases of avian influenza affecting people have been reported, including more than 80 deaths overseas (*Frequently asked questions about Avian Influenza or Bird Flu,* last updated 6 February 2006, http://www.health.gov.au/internet/wcms/Publishing.nsf/Content/health-avian_influenza-faq.htm).

Although it is not possible to accurately predict if and when a pandemic might occur, experts have suggested that if a pandemic does emerge it will be too late for employers to respond effectively. With the SARS crisis of 2003 only a recent memory, employers are being strongly urged to start planning in order to minimise the spread and impact of bird flu in the workplace and to protect the health and safety of their employees.

Practical measures

Employers can adopt a number of practical measures to comply with their obligations under occupational health and safety legislation and the general law of negligence, including:

- monitoring information about the risk of the spread of bird flu in their workplace. Relevant agencies which provide updated information on their websites include the World Health Organisation, Federal Department of Health and Aging, and Health Services Australia Group;

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- informing staff of the risks involved and the steps taken to minimise those risks;
- taking steps to minimise the spread of bird flu in the workplace (for example, by ensuring common areas such as bathrooms and kitchens are kept clean and disinfected and by conducting health training for employees). This may also necessitate establishing quarantine protocols;
- for staff employed offshore, having contingency arrangements in place to respond quickly to any outbreak in that location;
- identifying critical areas that will need to be staffed during an outbreak and providing cross-training to ensure appropriate staffing levels to maintain the continued viability of the workplace during periods of high absenteeism;
- prohibiting any work related travel to regions where infection is suspected;
- if work related travel is required to regions where infection is suspected, fully briefing employees about the risks of such travel and ways to minimise those risks. All necessary items to protect against the risk (eg masks and increased hygiene) should be provided to employees and employers should offer full medical examinations on the employee's return to Australia;
- requiring employees who do travel in regions where infection is suspected not to attend for work for a "quarantine period". Employers are able to make it a condition of the approval of leave that if the employee travels to an infected region, he or she must not attend for work for a period after their return from leave. The employer may require that such a period be additional annual leave or unpaid leave provided this is agreed in advance;
- implementing flexible working arrangements, for example, allowing employees to work from home; and
- updating leave policies.

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Lessons for employers

- **Employers need to plan to minimise the spread and impact of bird flu in the workplace and to protect the health and safety of their employees, particularly those employees who may be working or travelling in overseas regions.**

On Track? Industrial Action and Safety

The New Metropolitan Rail Project is the largest public transport project ever undertaken in Western Australia. Leighton Kumagai Joint Venture (LKJV) is constructing a part of the Project called "package F". Since inception, the railway project and package F have been subject to constant industrial action.

Alleged safety issues

The Construction, Forestry, Mining and Energy Union (CFMEU) has cited safety-related matters as a contributing basis for industrial action on numerous occasions, including:

- 1 August 2005 – 400 workers on the project, including 156 direct employees, called in sick ("blue flu");
- 6 to 12 September 2005 and 14 to 21 October 2005 – allegedly employees worked too hard; and
- 11 November 2005 – allegedly no safety evacuation plan on the site that housed the $10 million borer.

Workers have also taken industrial action on the project for other reasons.

Federal permit refused

Mr Joe McDonald (Assistant State Secretary, CFMEU) has been involved in many of the events resulting in industrial action.

On 28 October 2005, Vice President Ross of the Australian Industrial Relations Commission (AIRC) refused Mr McDonald's application for a permit to enter and inspect premises (PR964419). Ross VP found that Mr McDonald's inappropriate conduct included procuring unlawful industrial action on the rail project under the guise of a safety claim. Mr McDonald had previously had his federal permit revoked by the Full Bench of the AIRC in July 2001 (PR906747). The WA Commission suspended his State permit for three months in 2004 (2004 WAIRC 12071). The Full Bench refused leave to appeal Ross VP's decision.

CFMEU barred from industrial action for life of project

On 6 December 2005, the AIRC issued a section 127 order under the *Workplace Relations Act 1996* (WR Act) barring the CFMEU from taking further industrial action on Package F of the new railway line for the life of the project (PR966077). In effect, the order bans the CFMEU from encouraging employees to take part in industrial action unless it is protected under Commonwealth legislation, authorised by Leighton Kumagai or based on a "reasonable concern" about workers' health or safety that cannot be addressed by alternative means.

Concerns about health and safety then emerged as a significant issue on Package F of the rail project, including allegations by the CFMEU of 80 safety rules breaches. The CFMEU also issued cameras to workers to photograph alleged safety breaches.

On 24 February 2006, notwithstanding the section 127

Lessons for employers

- **Industrial action on safety grounds and right of entry for safety purposes are set to attain heightened significance under the Work Choices amendments.**
- **Employers who wish to take advantage of the changes will need to be well prepared, and in some cases, resolute.**

"life ban" on industrial action, over 400 workers stopped work over the alleged dismissal of shop steward Peter Ballard. LKJV then applied for and obtained an interim injunction from the WA Supreme Court.

Despite the section 127 order and the interim injunction, strike action continued. On 3 March 2006, LKJV applied to the WA Supreme Court for (among other things) a contempt finding against the CFMEU *(Leighton Contractors P/L v CFMEU (Civ 1132/2006))*. The Court did not lift the interim injunction, and is still to determine the contempt issue.

The workers resumed work on 8 March 2006.

On 2 March 2006, the Office of the Australian Building and Construction Commissioner (ABCC) sent letters to the LKJV employees who had not attended work since 24 February 2006, asking them to "show cause" why the ABCC should not initiate proceedings against them for taking unlawful industrial action. The *Building and Construction Industry Improvement Act 2005* (BCII Act) provides for a maximum penalty of $22,000 for an individual who has taken unlawful industrial action.

The railway project shows that at this stage, workers may be willing to take unlawful industrial action despite the potential consequences. However, the full impact of provisions in the BCII Act – which applies to industrial action in the construction industry – is yet to be realised.

Will Work Choices make a difference in other industries?

The Work Choices amendments to the WR Act commenced on 27 March 2006. These amendments will impact in three main ways when industrial action is taken for "safety purposes".

1. Right of entry

Union rights of entry for safety purposes in New South Wales, Victoria and Western Australia are now also federally regulated for constitutional corporations. In addition, in those States unions must continue to comply with State law requirements on OHS right of entry. In other States, there is no additional federal regulation of OHS right of entry. In those States, the Work Choices amendments preserve any union OHS right of entry under State laws.

Under the federal regime, federal permits are required to exercise union rights of entry that exist under safety laws in New South Wales, Victoria and Western Australia. There are greater restrictions on who may be given a federal permit and provisions that make it easier to obtain revocation of permits. In New South Wales, Victoria and Western Australia, the tactic of unions using State permits to investigate suspected breaches of occupational health and safety legislation by corporations will no longer be effective.

In New South Wales, Victoria and Western Australia, employers that are corporations are now able to exercise greater control when federal permit holders exercise rights of entry. Employers that are corporations can require federal permit holders to comply with reasonable safety requirements. Federal permit holders can only exercise the right of entry during working hours. They must give 24 hours written notice with reasons to inspect employment records. Otherwise, unions must comply with the State safety right of entry requirements.

An employer that is a corporation can seek an injunction to stop any misconduct by a federal permit holder. There is also a wider range of offences for which federal permit holders and unions may be fined.

The federal right of entry for safety purposes is not restricted to workplaces where there are members or eligible members. Employers that are corporations in New South Wales, Victoria and Western Australia may find that unions exercise this right more frequently as a way of contacting workers to whom a union may otherwise have no access.

Employers will need to review their right of entry protocols to reflect the Work Choices changes.

2. Industrial action

As was previously the case, if industrial action is neither excluded nor protected, individuals lose their immunity against civil action being taken against them.

The definition of "industrial action" continues to exclude action based on a reasonable concern by the employee about an imminent risk to his or her health and safety. The employee must still comply with reasonable directions by his or her employer to perform other available work (that is safe and appropriate), including at another workplace. However, the onus of proof that this safety exclusion applies is now on the person relying on it.

Under the Work Choices amendments, rigorous secret ballot requirements make it more difficult to organise and take protected industrial action. The Work Choices amendments also make it easier for employers to stop unprotected industrial action. Employers may find that one effect of these changes is an increase in industrial action that purports to be excluded (ie based on reasonable concerns about imminent risks to health and safety).

The Work Choices amendments have also tightened the provisions prohibiting payment for unprotected industrial action and action that is not excluded. However, the penalties under the Work Choices amendments on individuals who take unprotected industrial action are not as high, and apply in fewer circumstances, than the $22,000 maximum penalty that applies under the BCII Act.

3. Medical certificates

Under the Work Choices amendments, an employer may require an employee to provide documentation that supports a sick leave claim. This may theoretically help to prevent use of mass sickies as an industrial tactic. However, an employee can obtain the required documentation from a registered or licensed health practitioner (not just a medical practitioner). An employee can also provide documentation in the form of a statutory declaration. While these forms of documentation may be easier to provide than a medical certificate, they are still more onerous than providing no documentation at all.

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Smoke-Free Workplaces in Victoria

Amendments to the Victorian *Tobacco Act 1987* commenced on 1 March 2006. It is now an offence for a person to smoke in an enclosed workplace in Victoria. The occupier of an enclosed workplace can also be guilty of an offence should a person smoke in an enclosed workplace. The maximum penalty for each offence is currently $525.05. This amount will be indexed each year.

What is an enclosed workplace?

The word "enclosed" means an area, room or premises that is or are substantially enclosed by a roof and walls, regardless of whether the roof, walls or any part of them are permanent or temporary, open or closed. A "workplace" means any premises or area where one or more employees or self employed persons (or both) work, including volunteers.

The offence of smoking in an enclosed workplace does not apply to residential premises that are not used for carrying on a business, licensed premises, an outdoor dining or drinking area, a casino, a vehicle, a place of business occupied by a sole operator that is not used by the public, a personal sleeping or living area of premises providing accommodation to the public for a fee or a residential care facility, an area in an approved mental health service that is declared to be a smoking area, prison cells and exercise yards in prisons, and detention centres.

The exemption to licensed premises applies only until 1 July 2007. That is, from 1 July 2007, all enclosed licensed premises must be smoke-free.

Occupier's defence

An occupier is a person who appears to be in control of the area or premises. Where smoking occurs in an enclosed workplace, the occupier will not be guilty of an offence if the occupier proves that it:

a) did not provide an ashtray, matches, lighter or any other thing designed to facilitate smoking; and

b) was not aware, and could not reasonably be expected to have been aware that smoking was occurring in an enclosed workplace; or

c) requested the person to stop smoking and informed the person that he or she was committing an offence.

Other States and Territories

South Australia, Tasmania and the Northern Territory have legislation that prohibit smoking in an enclosed workplace. Legislation in the other States and Territories is not workplace specific but excludes smoking in smoke-free areas or enclosed public areas. These areas could include workplaces.

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Lessons for employers in Victoria

- **Employers must educate employees, contractors and visitors that smoking will not be permitted in enclosed workplaces on site.**
- **Employers may need to implement or update their smoke-free policy at work.**
- **Even though it is not an offence for a person to smoke in an open area, for example outside the entrance to a factory, or in an employer's vehicle, the employer can implement policies prohibiting smoking in certain workplaces that is broader than the prohibitions in the *Tobacco Act 1987* and require employees to comply with these policies. Employers are required under occupational health and safety legislation to provide and maintain a working environment that is safe and without risks to health.**

Changes to Construction Health and Safety in Queensland

Construction is one of Australia's highest risk industries. In Queensland, the *Workplace Health and Safety Act 1995* (WHS Act) and the *Workplace Health and Safety Regulation 1997* (WHS Regulation) have recently been amended with a view to making construction work safer.

The amendments are based on the National Standard for Construction Work. The National Standard for Construction Work was declared by the National Occupational Health and Safety Commission (NOHSC) in April 2005. The amendments alter significantly the health and safety obligations in respect of construction work undertaken in Queensland. Some of the amendments came into force on 1 January 2006. It is anticipated that the remaining amendments will come into force later in 2006.

The changes to health and safety obligations

The most striking changes are:

- **A new, broad definition of "construction work"** – this new definition means that the construction specific obligations contained in the WHS Act and WHS Regulation now apply to work such as renovations, repairs, refurbishment and the "prescribed activities" of demolition and asbestos removal work. People undertaking these additional construction activities will have 12 months to obtain a General Safety Induction (Construction Industry) card.
- **The introduction of the "client" as an obligation holder** – the client is the person who commissions the construction work and appoints the principal contractor and project manager. The client has an obligation to consult with the designer, the project manager and the principal contractor about health and safety and to pass on to each of those persons, any information about the risks of which the client is aware. The appointment of a principal contractor (which was previously the responsibility of the owner), may only be done by using the prescribed form, which must then be submitted to the chief executive of the Department. Accordingly, it will not be sufficient for the client and principal contractor to simply state in a contract that the appointment is agreed. The obligations upon clients will only arise where the construction work is a prescribed activity (ie demolition or asbestos removal work), where the estimated final price for the construction work is more than $80,000 or where the construction work is for a structure that is not a class 1a building (ie a detached house, row house, town house, terrace house or villa unit) (the designated circumstances).
- **The introduction of the "project manager" as an obligation holder** – a project manager is the person engaged by the client to carry out the planning and management of the construction work where the designated circumstances arise. Once appointed, a project manager must ensure that construction work is planned and managed in a way that prevents or minimises risks to the health and safety of all persons undertaking the construction work and persons at or near the workplace during the construction work. The project manager must also give the client a written report on the health and safety aspects of the construction work before the construction work starts.

- **The expansion of the supervisory obligations of "principal contractors"** – the principal contractor is the person appointed as such by the client using the prescribed form where the designated circumstances arise. A principal contractor must coordinate, supervise and oversee the construction work in a way that prevents or minimises risks to the health and safety of persons at or near the workplace during work and consult with the designer, project manager and other relevant persons about how the construction work should be undertaken in a way that prevents or minimises risk. Where a principal contractor reasonably believes, or should reasonably believe, that a person is not discharging their health and safety obligations, the principal contractor must direct them to do so. If the person fails to comply with the direction, the principal contractor must ensure that the person stops work until they comply.
- **Changes to the obligations of "designers"** – the designer of a structure must ensure that the design of the structure does not affect the workplace health and safety of persons during the construction of the structure and, once constructed, when the structure is being used for the purpose for which it was designed. The designer must now also give the client a written report on the health and safety aspects of the design before construction work starts.
- **Changes to the regulation of tower cranes and mobile cranes** – the owners of such cranes must now have their cranes inspected by a competent person before registration on 31 January each year and by a suitably qualified engineer every 10 years.
- **A transfer of the assessment of prescribed occupations from accredited providers to Registered Training Organisations (RTOs)** – the transfer will take place over an 18 month period. Prescribed occupations include scaffolders, doggers, riggers, crane and hoist operators, load shifting equipment operators and pressure equipment operators.

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Lessons for employers

- **The new obligations reflect the trend in recent years of greater health and safety regulation of the construction industry. The new obligations may help to clarify who is responsible for what on a construction site, but they also make the prosecution's job easier where a construction related incident occurs.**
- **Clients should ensure that when they appoint a principal contractor, they use the prescribed form. When engaging principal contractors and project managers, clients should ensure that the contract provides them with appropriate controls and comfort in the event that something goes wrong (eg indemnities, a right to suspend work etc). Clients should also consider establishing protocols and procedures to help them discharge their obligations to consult with, and pass health and safety information to, project managers, principal contractors and designers. Clients should be particularly careful to pass on any information they have (or should have) about hidden risks on site (eg the presence of asbestos) before construction work starts.**
- **Principal contractors should carefully consider how they plan to execute, in practice, the greater supervisory expectations placed upon them. They should carefully screen their subcontractors for satisfactory health and safety practices. They should review the adequacy of their site presence, site supervision, site rules and procedures for site inductions, tool box talks and training to satisfy themselves that the health and safety message will get through to their subcontractors.**

The Federal Safety Commissioner

In 2005, the Federal Government passed the *Building and Construction Industry Improvement Act 2005* (Cth), which creates the office of Federal Safety Commissioner. This article looks at the role and powers of the Federal Safety Commissioner, and what building industry participants can expect in the months to come.

The Act implements a number of key recommendations made by the Cole Royal Commission into the Building and Construction Industry, with the ultimate aim of improving workplace relations practices in the building and construction industry.

One aspect of the Act of particular interest to those involved with occupational health and safety was the creation of the office of Federal Safety Commissioner, and subsequent appointment of Mr Tom Fisher to that office. The Act also provides for the appointment of a number of Federal Safety Officers to assist the Federal Safety Commissioner.

Role of the Federal Safety Commissioner

The Federal Safety Commissioner has a number of functions which broadly relate to the promotion of occupational health and safety in relation to building work.

Building work has an extremely broad definition under the Act. It encompasses a range of activities including the construction, alteration, extension, restoration, repair, demolition and dismantling of buildings, structures or work that form or will form part of land. It also extends to work which is preparatory to any of those activities (such as site clearance or laying of foundations) and to the installation of fittings such as heating, lighting, air-conditioning, drainage, sanitation and water supply.

The breadth of this definition means that a large number of employers who might not have traditionally considered themselves to be building industry participants (such as utility companies who provide power supply connections or air-conditioning contractors) will be covered by the legislation.

Accreditation scheme

One key function of the Federal Safety Commissioner and the Office of the Federal Safety Commissioner is to act as the relevant authority administering the new accreditation scheme provided for by the Act.

Lessons for employers

- **Employers wishing to enter into Commonwealth building contracts should ensure that they seek accreditation under the Accreditation Scheme as soon as possible.**
- **Federal Safety Officers will become increasingly visible in the next 12 months.**
- **Employers who have sought or obtained accreditation should anticipate site visits, and should be aware of the powers a Federal Safety Officer has during such visits.**

The accreditation scheme, contained in regulations to the Act, is a scheme of voluntary application which requires accredited participants to have efficient OHS systems and to display the highest level of management commitment to safety protocols. Before the Federal Safety Commissioner grants accreditation, the applicant must demonstrate appropriate OHS Management System certification, have comprehensive OHS policies, procedures and work practices, disclose relevant records in relation to workplace safety and pass

a pre-accreditation audit.

Although accreditation is voluntary, the effect of the Act and regulations is such that if a person or company wishes to enter a Commonwealth building contract with the Commonwealth or a Commonwealth authority on or after 1 March 2006, and the value of the contract would be $6 million or greater, then the person or company must be accredited. This provides a significant incentive for companies to seek accreditation.

Federal Safety Officers have the power to enter premises for the purpose of conducting audits to determine whether an applicant meets the accreditation requirements. Once accredited, Federal Safety Officers may enter premises to determine whether an accredited person or company is completing or has complied with conditions of accreditation, particularly in respect of building work in a Territory or Commonwealth place. These powers may be exercised at any time during working hours and without prior notice.

Federal Safety Officers have a range of other incidental powers, such as the power to inspect work or machinery, take samples, interview any person, inspect or make copies of documents or require the production of documents.

Building Code

The Act also provides for the creation of a Building Code. Unlike the accreditation scheme, compliance with the Building Code will not be voluntary. All building contractors which are constitutional corporations must comply with the Building Code. The Building Code will be a different, and more onerous, compliance issue than the National Code of Practice for the Construction Industry.

The Building Code has not yet been released. However, it is anticipated that the Building Code may be released later in 2006 and that it will contain occupational health and safety aspects. The Federal Safety Commissioner has indicated that his office will be involved with the preparation of the occupational health and safety section of the Building Code, and will have responsibility for monitoring and promoting compliance with the Building Code in respect of occupational health and safety matters.

To this end, the Act provides that Federal Safety Officers may enter premises for the purpose of determining whether the Building Code has been complied with, or is being complied with, by a building industry participant. They may also exercise the powers described above, such as the power to inspect work or machinery, take samples, interview any person, inspect or make copies of documents or require the production of documents, when investigating compliance with the Building Code.

Where to from here?

Prior to 1 March 2006, the Office of the Federal Safety Commissioner was occupied almost exclusively with reviewing applications for accreditation under the accreditation scheme. With the passage of the initial 1 March 2006 deadline, the focus of the Federal Safety Commissioner is likely to turn to compliance. Building industry participants who have obtained accreditation can expect an increase in the number of visits from Federal Safety Officers checking that accreditation conditions are complied with. Once the Building Code is introduced later in 2006, building industry participants can also expect greater visibility of Federal Safety Officers investigating compliance with the Building Code.

Currently, over 100 builders have applied for accreditation and those applications are being processed. Seventeen builders have been awarded accreditation as at early April 2006.

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The Buck Stops With the Host Employer – Secure Employment Test Case and OHS Issues

On 28 February 2006, a Full Bench of the Industrial Relations Commission of New South Wales (IRC) handed down the *Secure Employment Test Case Decision*. Where a NSW award has been varied to include the Secure Employment test case standard clause, employers should review their current practices to ensure that the award is complied with.

The background

Unions NSW sought to establish a test case "Secure Employment" award provision (in the form of a model clause), which could be inserted into New South Wales industrial awards upon application. Unions NSW argued that the clause should cover a range of matters including reinforcing the OHS obligations on employers who engage labour hire businesses and/or who contract out work. Unions NSW argued that the increasing use of labour hire has resulted in a division of responsibility for OHS in the workplace, with many employers seeking to pass on their legal liability for OHS.

The IRC found that employees of labour hire businesses and/or contract businesses, who are engaged by host employers (labour hire employees), are exposed to greater risks to their health and safety at work as compared with co-workers who are directly engaged by host employers. Further, the IRC found that there is presently a considerable level of misunderstanding and ignorance as to where the responsibility for protecting the health and safety of labour hire employees lies.

Accordingly, the IRC held that the Secure Employment test case standard should include provisions setting out the obligations imposed on an employer relating to the health and safety of labour hire employees so that those obligations could be reinforced and clarified.

Secure employment test case standard

In summary, the Secure Employment test case standard requires any host employer which engages labour hire employees to:

- consult with labour hire employees regarding the workplace occupational health and safety consultative arrangements;
- provide labour hire employees with appropriate occupational health and safety induction training including any training required for such employees to perform their jobs safely;
- provide labour hire employees with appropriate personal protective equipment and/or clothing and all safe work method statements; and
- ensure labour hire employees are made aware of any risks identified in the workplace and the procedures to control those risks.

The IRC refused to include in the OHS clause an amendment proposed by Unions NSW which would have required an employer to take all reasonable steps to provide suitable duties to a labour hire employee injured at its workplace.

The Secure Employment test case standard clause expressly notes that the clause is not intended to affect or detract from any obligation or responsibility upon a contract business or labour hire business arising under the *Occupational Health and Safety Act 2000* (NSW) or the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

Lessons for employers

- **Some NSW awards may recently have been varied to include the Secure Employment test case standard clause.**
- **NSW awards which have been varied to include the Secure Employment test case standard clause prior to the commencement of the *Work Choices* legislation will continue to apply as transitional instruments.**
- **Where a NSW award has been varied to include the Secure Employment test case standard clause, employers should review their current practices to ensure that the award is complied with. Failure to do so may result in the imposition of penalties.**

Whilst a number of storemen and packers awards were varied to include the model clause, numerous other NSW awards were varied prior to the commencement of the Work Choices legislation.

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Asbestos Health and Safety Changes in Queensland

Many older buildings in Queensland contain asbestos. Asbestos is especially dangerous when asbestos fibres become airborne. The inhalation of asbestos fibres is known to cause mesothelioma, asbestosis and lung cancer.

On 1 January 2006, several important changes were made to the *Workplace Health and Safety Regulation 1997* (Qld) (WHS Regulation) that affect the way in which asbestos must be managed in Queensland workplaces. The changes are designed to implement the National Occupational Health and Safety Commission's (NOHSC) National Code of Practice for the Management and Control of Asbestos in Workplaces (Asbestos Management Code) and its revised National Code of Practice for the Safe Removal of Asbestos (Asbestos Removal Code). The two codes of practice replace the *Asbestos Advisory Standard 2004*, which has been repealed. They were adopted on the basis that they offer the most effective solution for minimising potential exposure to asbestos, without imposing unreasonable costs.

Asbestos Management Code

The Asbestos Management Code outlines the steps that must be taken to eliminate or minimise the risks of exposure to airborne asbestos fibres.

Under the WHS Regulation, a person who conducts a business or undertaking must not perform any work (or allow their workers to perform any work) on asbestos containing material (ACM), except in accordance with the Asbestos Management Code. The appendices to the Asbestos Management Code provide examples of how it may be used to develop work methods for eliminating exposure to ACM.

The WHS Regulation also requires in certain circumstances that owners of buildings and structures manage any existing asbestos in accordance with the Asbestos Management Code.

For example, any owners of buildings who did not comply with the previous regulations for the management of asbestos must immediately comply with the Asbestos Management Code. Owners of buildings who did comply with the previous regulations have until 1 January 2008 to comply with the Asbestos Management Code, unless a relevant event occurs, such as the building being altered, demolished or offered for sale. In this case, the owner of the building must comply with the Asbestos Management Code prior to the relevant event occurring.

"Owner" is defined very broadly in the legislation and includes a person who has control of a place, a lessee, a licensee, a mortgagee in possession and a receiver or company administrator. This means in some circumstances, various persons could have overlapping obligations for managing asbestos.

Where the Asbestos Management Code applies, there are requirements to:

- develop, implement and maintain an asbestos management plan outlining compliance with the Asbestos Management Code. Part of the development of the asbestos management plan will include consultation with any person who may be affected by the presence of ACM including workers, contractors and occupants;
- investigate the premises for the presence or possible presence of ACM and develop and maintain a register of the identified or presumed ACM. The ACM register will include details about the location, accessibility and condition of the ACM as well as any risk assessments carried out on the

ACM and the control measures put in place to manage the risk of the ACM;

- provide clear warning signs and labels to any areas of the workplace which contains ACM to ensure that the asbestos is not unknowingly disturbed without the correct precautions being taken; and
- provide information and training to persons who may come into contact with ACM in the workplace, either directly or indirectly.

Asbestos Removal Code

The WHS Regulation provides that all asbestos removal work in Queensland workplaces must be undertaken in accordance with the Asbestos Removal Code. The key components of the Asbestos Removal Code are as follows:

- any person with control who commissions the asbestos removal work (the client) must ensure an asbestos removalist carries out the removal of ACM. The asbestos removalist must hold the relevant certificate to carry out the asbestos removal and it is an offence to carry out asbestos removal work without the appropriate certificate. From 1 July 2006, different certificates will be required depending on whether the removal is of friable or non-friable ACM;
- the client must give the asbestos removalist a copy of the workplace's register of ACM before any asbestos removal work commences. It is the client's responsibility to identify ACM and if there is no register of ACM, the client must ensure a register is established before removal commences;
- the client must ensure that the decision to remove the ACM is based on an application of the site's asbestos management plan and that a risk assessment is performed by a competent person prior to the asbestos removal; and
- the client must provide the asbestos removalist with work specifications for the removal of ACM including technical descriptions of the ACM to be removed and arrangements for clearance inspections and air monitoring.

The Asbestos Removal Code provides that an owner must also comply with the specific requirements outlined above as if the owner was a client.

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Lessons for those with obligations to manage asbestos

The broad scope of the new legislation means that various people could have overlapping obligations to manage asbestos at the workplace. A whole range of persons can be "owners" for the purposes of the WHS Regulation including persons who have control of a place, lessees, licensees, mortgagees in possession and receivers or company administrators.

It is imperative that persons who conduct a business or undertaking and "owners" of buildings and structures:

- **identify any buildings or structures under their control that have or may have asbestos containing material;**
- **become familiar with the full extent of their onerous obligations under the Asbestos Management Code and Asbestos Removal Code;**
- **communicate, co-operate and co-ordinate with any other persons who have overlapping responsibilities for asbestos management in the relevant buildings or structures; and**
- **as appropriate, ensure that the asbestos is either managed or removed by a licensed asbestos removalist.**

Road Transport Accident – OHS Prosecution over Multiple Fatalities

In *R v Allbulk Landscape Supplies Pty Ltd* [2006] VCC, transport company Allbulk Landscape Supplies Pty Ltd (Allbulk) has been prosecuted and fined $130,000 following a fatal road accident involving one of its employees. This case provides a timely reminder to employers to ensure appropriate safety management systems are in place. The article on page 15 also discusses new driver fatigue obligations in NSW.

Facts

On 15 October 2001, a prime mover with trailer attached, which was owned by Allbulk and being driven by one of its employees, Mr Brett Foster, ploughed into the rear of another vehicle. Road works were being carried out on the Murray Valley Highway at Cobram East and 13 vehicles were waiting in a stationary line. The last vehicle in this line was hit by the Allbulk prime mover, three people were killed in that vehicle and one person was killed in the vehicle immediately in front of this vehicle. Evidence suggested that Mr Foster braked only half a second before impact.

The accident occurred 24 hours after Mr Foster commenced his shift. During that period, he drove approximately 1,195 kilometres and had not slept. A blood sample taken shortly after the accident showed evidence of cannabis use prior to the accident. Mr Foster was charged with four counts of culpable driving and was sentenced to nine and a half years' imprisonment.

The sentence

Charges were laid against Allbulk under sections 21 and 22 of the *Occupational Health and Safety Act 1985* (Vic) and Allbulk pleaded guilty to both charges. On 24 March 2006, Justice Shelton handed down his reasons for sentence.

In handing down the sentence, his Honour considered Allbulk had failed to properly maintain the prime mover and attached trailer. Inspections of the prime mover and trailer at the time of the accident confirmed that both the prime mover and the trailer were in an unroadworthy condition.

The judge also found that Allbulk had failed to have a proper system in place to ensure drivers did not exceed legal driving limits and drive when fatigued. Allbulk had a drivers' manual which referred to the need to rest when fatigued, however no steps were taken to enforce this or the breaks required by the Regulations.

His Honour was concerned with the foreseeable potential consequences of the breaches and commented that it was clear that the breaches of the Act could well have dire consequences such as serious road accidents or fatalities. He did say, however, that given the complicating factor of Mr Foster's cannabis use, he was not able to positively conclude that exceeding driving limits and any consequent fatigue was a contributing factor to the accident.

When determining the sentence his Honour considered:

- Allbulk's cooperation with investigating authorities;
- the early guilty plea; and
- the fact that Allbulk had no prior convictions and no convictions since the accident.

He further considered the efforts made by Allbulk since the accident to change its ways. In particular its reduction in operations, the fixing of satellite tracking devices to its vehicles, fatigue management training and maintenance improvements. His Honour acknowledged that Allbulk's efforts to change its operations was relevant, so far as rehabilitation is concerned.

Lessons for employers

- **Employers must ensure they have a safety management system that, as far as reasonably practicable, reduces risks to the health and safety of employees and non-employees, and is enforced by the company.**
- **Courts will consider steps taken by employers following an accident or incident to address the risk. Employers should undertake an assessment of their safety management system following an incident or accident and take action to address any weaknesses identified.**

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Driver Fatigue – Are You Covered?

On 1 March 2006, the *Occupational Health and Safety Regulation 2001* (NSW) (OHS Regulation) was amended to include a range of new duties on employers, head carriers, consignors and consignees to ensure the health and safety of long haul truck drivers.

Background

In recent years, there has been a string of legal actions commenced against companies and individuals involved in long haul road freight transport, including:

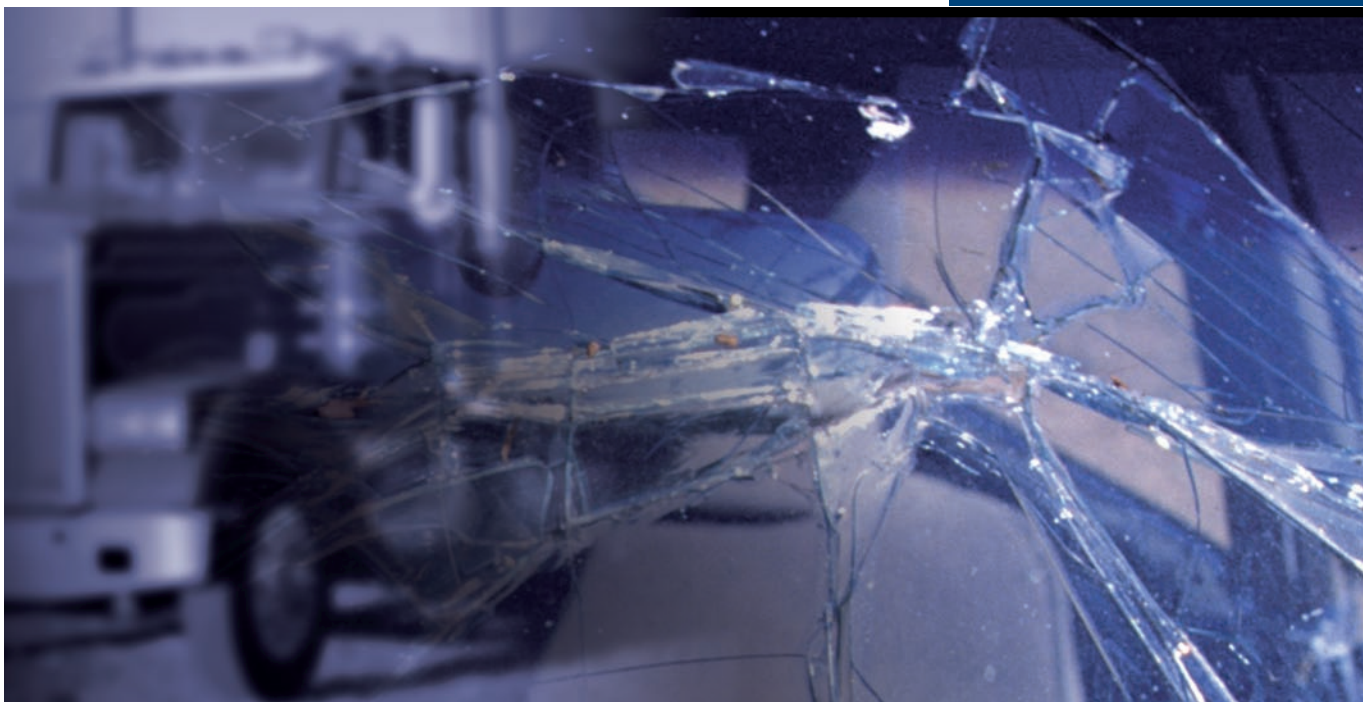
- in NSW, a company director was prosecuted under the *OHS Act* and fined $42,000 as a result of the death of one of the company's drivers who, when suffering from fatigue, crashed his semi-trailer into another semi-trailer;
- in a prosecution in Queensland under that State's "chain of responsibility" laws, a transport company was fined a total of $40,000 in relation to a collision which resulted in a double fatality in 2000. Earlier this month, an additional series of charges have been brought against the company, seven of its executive officers and a number of drivers;
- in Victoria, a transport company was prosecuted under the Victorian *OHS Act* and fined a total of $130,000 after one of the company's drivers, who had been driving for 17 consecutive hours, was fatigued and was found to have been smoking marijuana, crashed his 17 tonne truck into a line of vehicles stopped at roadworks. The driver was subsequently jailed. See the article on page 14 for more information on this case.

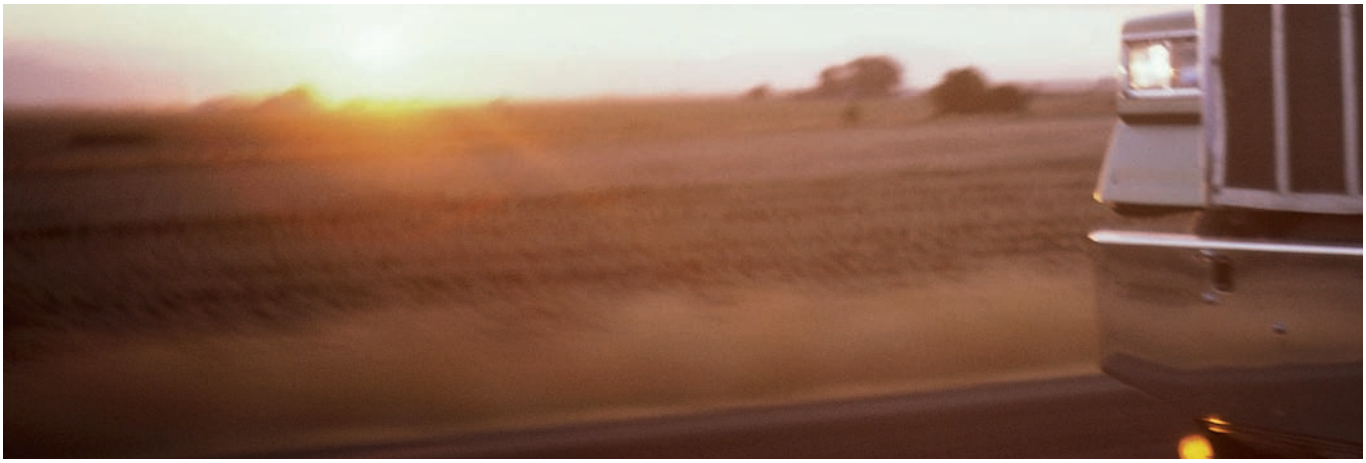
The new duties

The amendments to the Regulation are aimed at reducing the fatigue of drivers of heavy trucks who transport freight long distance. The new laws apply to trucks, or a combination of trucks, with a gross vehicle mass of over 4.5 tonnes, who transport freight over 500km, whether by means of a single journey or a

Lessons for employers

- **The object of the amendments is to reduce the fatigue of drivers of heavy trucks. Whilst many parties may not be considered to be an "employer" under the Regulation, new duties have been introduced for other participants in the transport chain such as consignors and consignees. All parties who enter into contracts to transport freight long distance should review their transport arrangements to identify if they have duties under the Regulation.**
- **As a party to a contract to transport freight long distance, you may need to ensure that any risk of harm from fatigue is eliminated or controlled to the extent that your activities contribute to that risk.**
- **Detailed duties have been introduced in relation to the preparation of driver fatigue management plans – do they apply to you?**





series of journeys. The Regulation imposes duties on employers, self-employed persons, head carriers and consignors and consignees who carry on a "prescribed business". Prescribed businesses include mining, manufacturing, construction, the retail trade and transport and storage.

Under the Regulation, employers of long haul drivers, head carriers who contract with self-employed carriers, and consignors and consignees who contract with self-employed carriers are required to assess the risk of harm from fatigue to the driver's health or safety and, to the extent the party's activities contribute to that risk, ensure that the risk is eliminated or, where elimination is not reasonably practicable, ensure the risk is controlled.

Additional duties are placed on consigners or consignees of freight to ensure that, when contracting with head carriers, they can satisfy themselves on reasonable grounds that any delivery timetable is reasonable as regards the fatigue of any driver transporting freight long distance under a contract, and that each driver transporting freight long distance is covered by a driver fatigue management plan (DFMP).

A breach of the Regulation may result in a penalty of up to $27,500 for each breach.

Driver fatigue management plans

Under the Regulation, an employer (other than a self-employed carrier) must prepare a DFMP for all drivers who, in the course of their employment, transport freight long distance. Similarly, head carriers and consignors/consignees who contract with self-employed carriers must prepare a DFMP for all drivers who transport freight long distance under the contract. A breach of this duty may result in a penalty of up to $11,000.

The Regulation sets out the matters which must be addressed in a DFMP. These include:

- trip schedules and driver rosters;
- management practices including the methods for assessing the suitability of drivers;
- work environment and amenities;
- training and information in relation to fatigue;
- loading and unloading schedules, practices and systems, including queuing practices and systems; and
- the effects of accidents and mechanical failures.

The Regulation also imposes requirements in relation to consultation, availability of documents and record keeping.

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