

# Safety Matters

November 2006

## Executive directors prosecuted in NSW

In a recent line of decisions, Justice Haylen of the Industrial Court of New South Wales has found a corporation and two of its executive directors guilty of offences under the *Occupational Health and Safety Act 2000 (NSW)* (the OHS Act).

### Facts

Owens Container Services Australia Pty Limited (Owens) was engaged in the business of repairing, cleaning and storage of shipping containers and tanks. It had a number of facilities within Australia, New Zealand and Fiji. One of its facilities was located at Auburn in New South Wales. Mr John Howie was employed as the Depot Manager at Auburn.

On 15 January 2003, Mr Howie was undertaking the task of cleaning a tank using a highly combustible solvent. Whilst undertaking this work, an explosion occurred and Mr Howie suffered fatal injuries.

### Charges

The WorkCover Authority of New South Wales prosecuted Owens and two of its directors, Mr David Ritchie and Mr John Rose. Mr Ritchie was also the Chief Executive Officer of Owens. Mr Rose also held the position of Division General Manager of Owens.

WorkCover alleged that Owens failed to ensure the health and safety of its employees contrary to section 8(1) of the OHS Act in that it, amongst other things, failed to ensure that a highly combustible solvent was not used within a confined space and that a safe system of work and plant were used by its employees. Owens entered a plea of guilty to

the charge and a fine of \$160,000 was imposed on the company.

By operation of section 26 of the OHS Act, the same charges against the Company were laid against Mr Ritchie and Mr Rose. Mr Ritchie entered a plea of not guilty to the charge. Mr Rose initially entered a plea of not guilty to the charge, however changed his plea to guilty on the second day of the hearing. A penalty of \$18,500 was imposed on Mr Rose and a criminal conviction recorded against him.

### The charge against the CEO

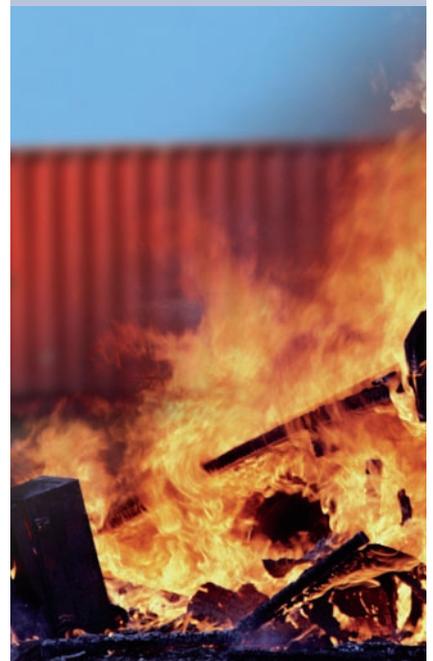
The CEO of Owens, Mr Ritchie, defended the matter by relying upon both defences available under section 26 of the OHS Act, namely:

- that he was not in a position to influence the conduct of the company in relation to its contravention of the OHS Act (section 26(1)(a)); or
- being in such a position of influence, he had used all due diligence to prevent the contravention by Owens (section 26(1)(b)).

Mr Ritchie argued that, in his position as CEO, he was required to rely on the expertise of other managers to deal with the detail of occupational health and safety. He argued that he was too remote to be able to effectively influence the conduct of

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Owens in relation to its contravention of section 8(1) of the OHS Act. There was evidence led that the Owens Group owned 30 companies with 1,600 staff located in approximately 80 different worksites. Mr Ritchie lived and principally worked in New Zealand and was a director of over 10 companies in the Owens Group. He argued that he did not manage the day-to-day operations of the Group but relied on managers to do so. He urged the Court to take a "real world" view of the way in which working directors conducted themselves in large organisations and their ability, or otherwise, to influence the conduct of an organisation.

Justice Haylen rejected these submissions and found that Mr Ritchie had established neither of the defences under section 26.

In relation to section 26(1)(a), the Court found that Mr Ritchie, as a director, was in a position to influence the conduct of Owens. The Court found that the evidence disclosed that Mr Ritchie had both the capacity and ability to influence the conduct of the corporation in relation to the contravention. The Court found that Mr Ritchie had the status and there had been circumstances in which he had influenced the conduct of the corporation in relation to safety issues so that the corporation would not contravene the OHS Act. Justice Haylen found that Mr Ritchie chose a course of involvement in safety that primarily left safety issues in the

hands of others, and in making that decision, he was not able to establish the defence under section 26(1)(a).

In relation to section 26(1)(b), the Court found that Mr Ritchie did not demonstrate "all due diligence" to prevent the contravention by Owens. Mr Ritchie argued that his "due diligence" was established by particular aspects including the extensive safety systems operated by Owens and Mr Ritchie's involvement with them; his reliance upon OHS specialists employed in each division of Owens; Mr Ritchie's receipt and review of reports dealing with OHS; requiring safety to be an agenda item at certain management meetings and the visits he made to Australian sites from time to time.

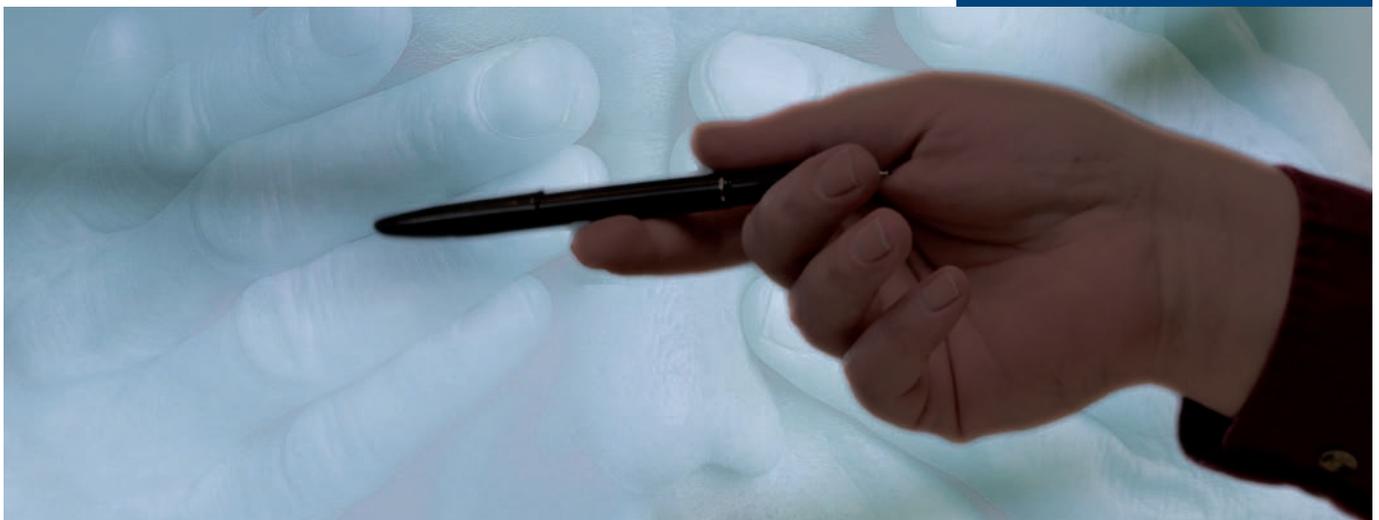
The Court held that these steps were not sufficient to establish the "due diligence" defence. The Court looked at the particular contravention concerning the tank wash operation and found that Mr Ritchie's ignorance of the nature of the wash operation, the chemicals in use, the dangers exposed by those chemicals, the need to properly earth the wash facility and the absence of protective clothing meant that it was impossible to make a finding that the "due diligence" defence had been established.

At the time of publication Mr Ritchie was yet to be sentenced.

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## Lessons for employers

- In recent years in NSW, there has been an increasing trend towards prosecutions of directors and persons concerned in management.
- In considering whether to run one or both section 26 defences, a director/manager needs to focus on the particular contravention alleged. It will not be sufficient for a director/manager to argue that they were focused on OHS in a general sense. Specific regard needs to be had as to whether the director/manager could influence the particular contravention alleged and whether "all due diligence" was exercised in respect of the particular contravention alleged.
- Directors and managers need to continually inform themselves regarding the OHS aspects of the operations over which they have an involvement. Effective systems of governance in relation to OHS need to be established, reinforced and regularly reviewed and tested.



# Director and worker prosecuted in Queensland

Two recent Queensland decisions highlight the increasing inclination of authorities to prosecute individuals following workplace health and safety incidents and the willingness of courts to impose prison sentences.

## First decision – All Souls St Gabriels School in Charters Towers

The first decision involved the prosecution of a former part-time teacher at the All Souls St Gabriels School in Charters Towers.

### Facts

A year 11 student at the School was attempting to cut a 205 litre oil drum with a plasma arc cutting torch to make a feed bin as part of an agricultural skills course. The oil residue or vapour in the drum ignited, causing the drum to explode, killing the student. The class was supervised by Mr Beneke, who was a part-time teacher at the School.

### Charges

Both Mr Beneke and the School were prosecuted by Workplace Health and Safety Queensland in the Townsville Industrial Magistrates Court.

Mr Beneke pleaded guilty to a breach of section 36 of the *Workplace Health and Safety Act 1995* (Qld) (the Act), which requires “workers” to not wilfully place at risk the health and safety of other persons at the workplace.

The School pleaded guilty to a breach of section 28 of the Act, which required it to ensure that others are not exposed to risks to their health and safety arising out of conduct associated with its business or undertaking.

This is the first time that a suspended jail sentence has been imposed for a breach of Queensland workplace health and safety laws.

### Sentence

The School and Mr Beneke were sentenced on 3 October 2006. Mr Beneke received a 12 month suspended jail sentence and was ordered to pay costs. In determining the sentence, the Industrial Magistrate considered Mr Beneke’s guilty plea, his age (60 years) and that he had no previous convictions. The Industrial Magistrate found that:

- Mr Beneke was aware that there was oil residue in the drums;
- residue had leaked out of the particular drum on an earlier cutting task;
- the drums carried clear labels warning that empty drums should not be welded, cut or exposed to flames as residue or vapour may ignite causing injury or death; and
- any risk assessment undertaken by Mr Beneke was “woefully inadequate”.

This is the first time that a suspended jail sentence has been imposed for a breach of Queensland workplace health and safety laws and it is therefore the most significant penalty imposed upon an individual in that jurisdiction.

The School was fined \$80,000. The fine was upheld by the Industrial Court of Queensland on appeal.

## Lessons for employers

- A particular individual’s culpability for a health and safety incident will rarely save an employer from prosecution. An employer should be in a position to prove that it did everything it reasonably could be expected to do in all the circumstances to prevent the incident.
- Management has a special duty to ensure that a corporation complies with its health and safety obligations. Failure to do so can give rise to a personal prosecution against a director or manager. The potential legal consequences are imprisonment, a fine and the recording of a criminal conviction.
- Employers at hazardous workplaces should put in place controls to ensure that persons who do not need to be at the workplace are kept out of the workplace. Visitors to hazardous workplaces should only be allowed to enter the workplace if they have first received appropriate health and safety training and they must receive appropriate supervision while at the workplace. Children should generally be kept away from hazardous workplaces.

## Second decision – SP Exports Pty Ltd

The second decision involved a prosecution of the sole director of SP Exports Pty Ltd, which is a produce company.

### Facts

The 5 year old daughter of two employees of SP Exports Pty Ltd would regularly accompany her parents while they carried out cleaning work at the company's tomato packing house in Childers. On 22 May 2005 the child was at the packing house with her father when her clothing became entangled in an unguarded rotating coupling bolt connected to a conveyor belt used to remove rubbish. She suffered major injuries to her chest and arm and required extensive medical treatment and ongoing rehabilitation. There was evidence that the company knew that the child went to work with her parents. Mr Phillip was the sole director of the company.

### Charges

Both Mr Phillip and the company were prosecuted by Workplace Health and Safety Queensland in the Bundaberg Industrial Magistrates Court.

The company pleaded guilty to breaching its obligations under section 28 of the Act, which required it to ensure that others are not exposed to risks to their health and safety arising out of conduct associated with its business or undertaking.

Mr Phillip pleaded guilty to breaching his obligation as an "executive officer" under section 167 of the Act. Section 167 requires that executive officers of a corporation must ensure that the corporation complies with the Act, subject to certain defences.

An "executive officer" is defined broadly in the Act to mean any person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer.

### Sentence

The company and Mr Phillip were sentenced in August 2006. The Industrial Magistrate fined the company \$60,000 and ordered the company to pay costs. Mr Phillip was given a two year good behaviour bond with a \$10,000 surety. No conviction was recorded.

The following health and safety issues were identified:

- the coupling was located near to the floor at a height well within reach of a 5 year old child;
- the nearest stop switches were unsigned, several metres from the coupling and not apparent to anyone unfamiliar with the plant; and
- components of a simple fixed guard that would have been sufficient to prevent entanglement were found behind an adjacent pump.

The Industrial Magistrate also heard evidence that the incident could have been prevented had the company adhered to the Plant Code of Practice 2005 and applicable Australian Standards.

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## OHS responsibility for specialist contractors

The decision of the Industrial Court of New South Wales (Court) in *Inspector Seneviratne v Qantas Airways Ltd* highlights the reach of the obligations on an employer to ensure the health, safety and welfare of all persons at its place of work.

### Facts

Qantas leased a refuelling facility at Sydney International Airport. The facility was used for refuelling mobile ground plant and stored underground jet and diesel fuel, and petrol. In May 2002, Qantas decided to decommission the site and transfer the fuel stored to a Caltex facility away from the airport. Qantas had no relevant expertise in the transfer of petrol or diesel and so engaged an experienced contractor, Caltex Petroleum Distributors Pty Limited, trading as Metropolitan Fuel Distributors (MFD) to undertake the work. During the course of transferring the fuel, a decision was made to speed up the transfer by using a process known as "top loading". This decision was

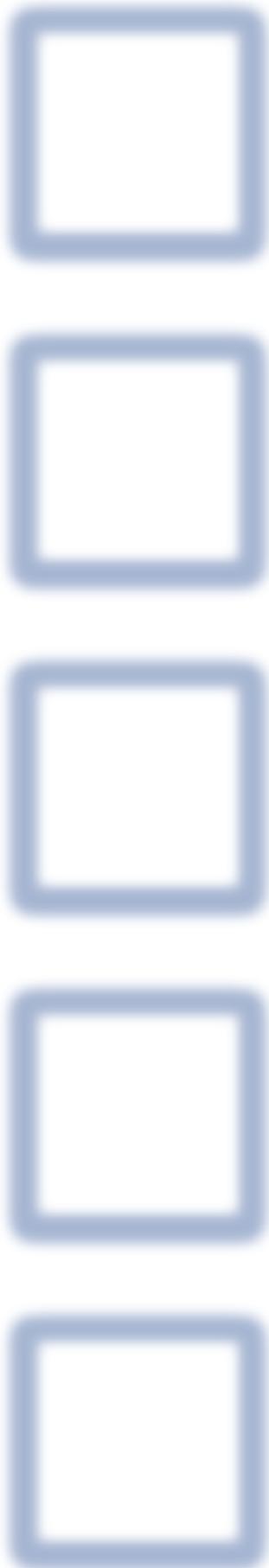
contrary to directions given prior to the commencement of the work, contrary to training and instructions in written procedures, and was made without the knowledge of Qantas. Subsequently there was an explosion which caused burns to an employee of MFD.

### Steps Qantas had taken

Prior to engaging MFD, Qantas undertook an assessment of the suitability of MFD to transfer the fuel. This included establishing that MFD had the necessary expertise and experience to perform the task safely. It also involved Qantas meeting with MFD a number of times, and discussing matters such as how the work would be done, the environment where the work

### Lessons for employers

- An employer cannot rely on the expertise of a specialist contractor to satisfy itself of its obligations under the OHS Act.
- An employer must take an active role in ensuring safe systems of work used by a specialist contractor are in place, are sufficient and properly implemented.
- Even where the employer does not have expertise in a particular task and so engages a specialist contractor, the employer must still satisfy itself that every element of a safe work system used by that specialist contractor is in place and is in fact safe. This may involve testing the sufficiency of each element of the system with the specialist contractor, or others.



would be done and Qantas safe work practices, including the need for the use of personal protective equipment.

Qantas decided MFD had the necessary experience and expertise and appointed them to undertake the work. In so doing, Qantas relied on assurances that MFD would provide suitably trained personnel; were familiar with the fuel to be transferred; had frequent experience and familiarity with the loading and unloading requirements of the Caltex facility where the fuel was to be moved; had appropriate and safe procedures in place and that it was a routine job for MFD.

On the day of the incident, MFD employees were accompanied by a Qantas employee who was trained in the general procedures and protocols to be followed in the event of an emergency or incident at the airport.

### Charge

Qantas was prosecuted by the WorkCover Authority of NSW under section 8(2) of the *Occupational Health and Safety Act 2000* (OHS Act) for failing to ensure that non-employees were not exposed to risks to their health or safety. In particular, it was alleged that Qantas failed to ensure MFD supplied in writing the appropriate procedures for the transfer of fuel, which included a requirement that MFD nominate a suitably trained supervisor and set out a method of work which, in the view of MFD, eliminated risks as far as possible. Qantas pleaded guilty to the charge.

### Decision

In sentencing, the Court confirmed the absolute nature of the obligations under section 8(2) of the OHS Act. This obligation is not removed by the engagement of specialist contractors.

The Court described the case as “a classic example of an employer relying on a specialist contractor to carry out work that the employer did not have the expertise to undertake”. Although it was accepted that Qantas was not in the position of

directly supervising and controlling the work, in not requiring MFD to provide in writing its procedure for the transfer of fuel, Qantas left itself exposed. By its failure, Qantas could not properly satisfy itself that the procedures laid down by MFD were in fact safe and would be followed.

The Court found that Qantas placed too much reliance on the expertise of MFD, and that Qantas should have taken a more active role in ensuring a safe system of work was employed.

The Court considered the risk of explosion was foreseeable and had potential catastrophic consequences. After taking into account factors specific to Qantas, including its strong commitment to health and safety in the workplace, the Court fined Qantas \$150,000.

WorkCover also prosecuted MFD under section 8(1) of the OHS Act for failing to ensure the health and safety of one of its employees. MFD pleaded guilty to the charge and a penalty of \$240,000 was imposed.

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# New national rail safety laws

A joint effort by the National Transport Commission, State and Territory governments and the Rail, Tram and Bus Union has seen the Australian Transport Council recently approve a template national Rail Safety Bill and associated Implementation Program.

At present, each State and Territory throughout Australia has its own regulatory system in place to address issues relating to rail safety. In June 2006, State and Territory Transport Ministers comprising the Australian Transport Council (ATC) approved a model Rail Safety Bill and accompanying Implementation Program with a view to creating a nationally consistent approach to rail safety throughout Australia. Each State and Territory, along with the Commonwealth, has agreed to enact the model legislation by 1 July 2007. The Rail Safety Acts in each jurisdiction will be complemented by model Rail Safety Regulations, which are currently being drafted for approval by the ATC later this year.

The proposed Acts will cast a wide net. The model Bill defines terms such as 'railway' and 'railway operation' broadly. Railways include all railways other than those found underground in mines, amusement parks, aerial cables or slipways, thereby regulating the operation of systems such as the Sydney monorail and Melbourne tramways. Persons affected by the proposed Acts will include not just railway operators and rail safety workers, but a broad range of related parties such as the designers, suppliers and manufacturers of anything to be used as or in connection with rail infrastructure or rolling stock.

In some instances, the proposed Acts will repeat obligations already in existence under state rail safety laws or OHS laws. Persons familiar with OHS legislation generally will recognise concepts such as the duty to ensure the safety of all relevant persons, and the 'reasonable practicability' of taking certain safety measures. Also present are standard OHS-type requirements to ensure that relevant persons are

adequately trained, that things are safe for the purposes for which they are designed or manufactured, and that procedures and systems are in place to minimise risks to safety.

In other instances, the proposed Acts will introduce new or varied requirements, such as provisions dealing with the procedures and grounds for accreditation of rail transport operators, and the powers of rail safety officers.

The proposed Acts are expressed to operate in conjunction with, and in addition to, OHS legislation in place in each jurisdiction. This means that affected persons will have to comply with obligations under both the local OHS laws and the local Rail Safety Act. Evidence of a contravention of the local Rail Safety Act will be able to be used as evidence in proceedings for contravention of an applicable OHS Act. However, persons cannot be prosecuted for the same offence under both Acts.

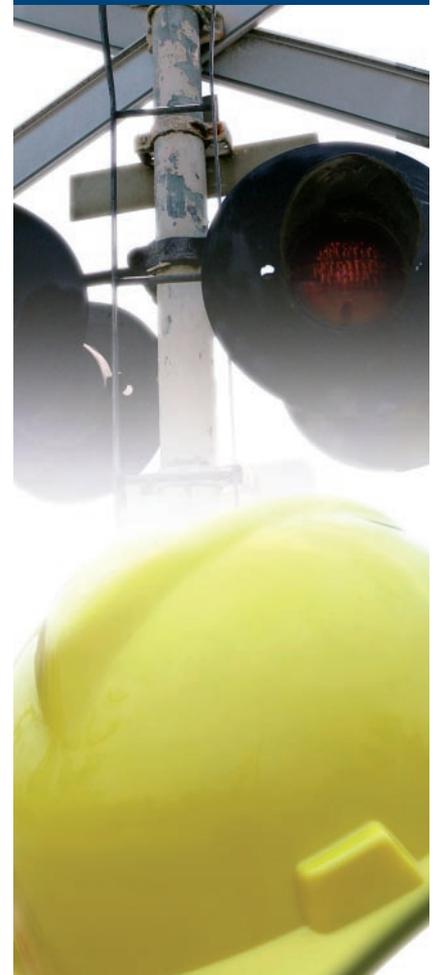
A significant amount of the detail regarding the new national system will be found in the Rail Safety Regulations, which are yet to be approved. It is expected that the Regulations will deal with issues such as mandatory requirements for a Safety Management System, obligations relating to the health and fitness of rail safety workers and further detail on accreditation schemes.

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## Lessons for employers

- Persons in any way connected with railway operations, including persons who design, manufacture or supply equipment used in connection with railways, should look out for a new Rail Safety Act in their State or Territory over the next 12 months.
- Affected persons should review their OHS procedures and policies to ensure that they are doing everything reasonably practicable to ensure the safety of not only their own employees but anyone using their goods or services, including end users of rail services.



# First Australian Code of practice on working hours

The West Australian Government has issued the *Code of Practice on Working Hours (2006) (Code)* under the *Occupational Safety and Health Act 1984 (WA)* and the *Mines Safety and Inspection Act 1994 (WA)*. The Code applies a risk management approach to working hours. It outlines steps for identifying hazards, assessing risks and controlling risks in relation to working hours. It is the first code of practice in Australia on this issue.

A code of practice is not legally binding but employers need good reason to depart from its provisions.

Measures that the Code suggest employers should consider adopting include:

- developing a working hours policy on daily work hours, maximum average weekly hours, total hours over a 3-month period, daily work hours and work-related travel.
- developing procedures for long daily work hours and related travel, where there may be an increased risk of injury or harm (for example requiring adequate breaks when total hours exceed a set limit).
- avoiding overtime arrangements for extended periods.
- addressing risks where employees have an extended period of travel to or from work after working extended hours (for example, ensuring that employees do not drive after working extended hours).
- developing and implementing various policies and programs, including:
  - where applicable, a workplace fatigue and alertness management plan/strategy;
  - a working hours policy statement that demonstrates a commitment to reasonable working hours;
  - a drugs and alcohol policy;
  - a ‘fitness for work’ policy;
  - ‘working in heat’ guidelines, where appropriate;
  - health and fitness programs; and
  - procedures for employees to alert supervisors of potential hazard factors, and for management of fatigued employees.
- conducting training, including training:
  - on the policies and programs outlined above;
  - for managers and supervisors on matters including work schedule demands, fatigue indicators and managing fatigue; and

## Lessons for employers

- **Employers with employees in WA should review the Code and the measures canvassed in it.**
- **The Code suggests that employers should consider adopting a working hours policy statement that demonstrates a commitment to reasonable working hours.**
- **Employers in WA who do not apply the measures in the Code need to be able to demonstrate the measures they have put in place to address any risks associated with working hours and why these measures are appropriate.**
- for employees on matters including relevant health and lifestyle choices and sleep and health management.

The Code does not impose a cap on hours or contain any prescriptive proposals. However, it does include risk management guidelines that refer to specific levels of working hours and periods being “higher risk”.

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## Who is in “control”?

Two recent decisions of the Industrial Court of New South Wales (Court) demonstrate the approach of the Court in determining whether a party has “control” of premises used as a place of work under the *Occupational Health and Safety Act 2000* (NSW) (OHS Act).

### ***Inspector Michael Dall v Brambles Australia Ltd [2006] NSWIRComm 213***

In 2000 BHP Limited (BHP) contracted with Brambles Australia Limited (Brambles) to demolish structures and clean up a BHP site. Brambles subcontracted part of the demolition work, including the demolition of boilers, to Demtech Pty Ltd (Demtech). On 19 September 2002, during the demolition of boiler 6, an uncontrolled collapse occurred causing the death of one employee and injuring two other employees of Demtech.

The WorkCover Authority of New South Wales (WorkCover) prosecuted Brambles under s10(1) of the OHS Act alleging that, as a controller of premises, Brambles failed to ensure, amongst other things, a safe system of work for the demolition of the boiler.

Brambles entered a plea of not guilty to the charge.

The Court commented that the issue of “control” is not a question of presence on a site but rather whether a person had control of a site on a particular day and therefore could direct action in relation to the site.

The Court found that Brambles had control of the work premises as it had the power to compel action to ensure the work method being used was safe, and further had the power to stop work under the relevant contract. In particular, the Court found that Brambles had not ensured safe work premises by failing to ensure that:

- there was an adequate work method for the demolition;
- an appropriate permit was obtained;
- the methodology and calculations for the demolition were investigated and checked;
- a risk assessment was undertaken; and
- a secondary system of restraint for the boiler was in place.

Brambles however argued that it had a defence to the charge as it was not reasonably practicable for Brambles to comply with the OHS Act and that the offence was due to causes over which it had no control and against the happening of which it was impracticable to make provision.

The Court considered both defences and found that the facts and circumstances were such that Brambles had established the

### Lessons for employers

- Under the OHS Act, “control” must have the sense of not mere sway, checking or restraint but rather controlling in the sense of directing action or commanding action which includes the ability to compel action to secure safety.
- Several parties may be simultaneously in control of premises used as a place of work. The Courts will look at contractual provisions in place as well as the conduct of the parties to determine whether a party is in control.



second defence, that is, that the commission of the offence was due to causes over which Brambles had no control and against the happening of which it was impracticable for Brambles to make provision.

The Court found that Brambles had envisaged the dangers arising from the demolition work and had put in place a protocol to ensure safe working and thereby ensuring safe premises. Demtech was aware that it was obliged to inform Brambles of the time, date and methodology of any demolition work but failed to do so on 19 September 2002.

The Court found that the decision by Demtech to demolish boiler 6 on 19 September 2002 was an “unexplained, unexpected act” by Demtech in circumstances where Brambles had no reasonably practicable way of knowing the demolition was to take place. Brambles could not have reasonably foreseen that Demtech would have undertaken the demolition work on that day, without having obtained a permit from WorkCover and without following the protocols agreed between Brambles and Demtech. Accordingly, Brambles could not have made provision against the occurrence of the offence.

### ***Tsougranis v Inspector Carmody (No 2) [2006] NSWIRComm 133***

Mr Tsougranis was engaged by a home owner-builder to provide structural engineering advice in respect of renovations to premises in Redfern. In 1998 a wall at the

rear of the premises collapsed, killing and injuring builders on the site. WorkCover alleged that, in the provision of the structural engineering advice, Mr Tsougranis had failed to investigate or assess the structural integrity of the wall or its footings.

At first instance, Mr Tsougranis was charged under s16(1) of the 1983 OHS Act (now 8(2)) alleging a failure to ensure the safety of persons who were not his employees and, in the alternative, s17 of the 1983 OHS Act (now 10) alleging that he was a person in control of work premises.

The Court initially found that the charge under s16(1) of the OHS Act had been made out. The Court did not therefore consider the charge under s17 of the OHS Act.

On appeal, a Full Bench of the Court found that the charge under s16(1) of the OHS Act had not been made out as the building site was not Mr Tsougranis’ “place of work” at the time of the incident. The Full Bench noted that the fact or existence of a plan that Mr Tsougranis had prepared in relation to any particular location did not necessarily mean that the relevant location was Mr Tsougranis’ place of work at the time of the incident. On the day of the incident, Mr Tsougranis had no employees at the site and did not enter or leave the site. There was also no evidence as to the continuance of Mr Tsougranis’ work on the day of the incident.

In determining whether Mr Tsougranis has “control” of the worksite in relation to the charge under s17 of the OHS Act, the Full Bench considered that Mr Tsougranis had

last been at the premises on 27 July 1998, some 2 months before the incident on 3 September 1998. The Full Bench found the conduct of Mr Tsougranis’ undertaking had no real or substantial connection with the premises and that therefore, Mr Tsougranis had no control over the premises or what was happening at the premises at the time of the incident.

In finding that a charge under s17 had not been made out, the Full Bench noted that:

- Mr Tsougranis was waiting to be notified by the builders in relation to inspecting the formwork prior to concrete being poured for the footings;
- the owner of the premises had never spoken with Mr Tsougranis about the fact that there was going to be an excavation at the rear of the premises;
- Mr Tsougranis had no input into the activities being undertaken at the premises for the weeks prior to the incident; and
- Mr Tsougranis had not been asked to provide any advice at any time after the work on the premises commenced, nor had he provided any advice since the work on the premises commenced.

The case against Mr Tsougranis was therefore dismissed.

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# New child health and safety laws in Queensland

The *Child Employment Act 2006 (Qld) (Act)* and the *Child Employment Regulation 2006 (Qld) (Regulation)* came into effect on 1 July 2006. The purpose of the legislation is to safeguard children (i.e. those under the age of 18 years) working in Queensland by preventing them from performing work that may be harmful to their health or safety or physical, mental, moral or social development. The *Children and Young Workers Code of Practice 2006 (Code of Practice)* and the *Child Employment Guide* published by the Department of Industrial Relations compliment the Act and Regulation.

## “Work” under the Act

“Work” is defined broadly in the Act and includes:

- work under a contract of service;
- work under a contract for labour only or substantially for labour only, whether or not the contract is a contract of service or at piecework rates;
- participation or assistance in a business carried on for profit, even if the child does not receive payment or other reward; and
- unpaid or voluntary work.

“Work” does not include domestic chores, charitable collections, work experience, vocational placements, apprenticeships or traineeships.

## Restricted right to work

The Act requires children to be at least 13 years old to work unless the work is supervised delivery work (for which the child must be at least

11 years), voluntary work, work in the entertainment industry or where the child is working in a business that is totally owned by a close adult relative of the child i.e. a parent, grandparent, aunt, uncle, sibling or step sibling.

Children under the age of 16 who are required to be enrolled at a school (“school-aged children”) may only work with the consent of their parents. The child’s parent must sign a parent’s consent form (which is an approved form) and include details about when the child is required to be at school. If the child’s hours of work change, a new form must be completed by the parent and given to the employer.

It is possible for children to apply for a special circumstances certificate, which, if granted, will allow a child to work in a manner that otherwise would be prohibited under the Act and Regulation.

## Lessons for employers

- **Employers should familiarise themselves with the restrictions on child work and check that any child they engage to work is of a sufficient age and is permitted to work.**
- **Employers should monitor closely the hours of work allocated to child workers, keep records of them and be especially conscious of the particular health and safety risks to children. Risk assessments should consider any specific issues that arise from the engagement of children at the workplace including the restrictions and obligations arising under the Act, the Regulation and the Code of Practice.**



## Restricted hours of work

School-aged children are generally not allowed to work during school hours. Outside of school hours, they are allowed to work the following hours:

- a maximum of 12 hours during a school week or 38 hours during a non-school week; and
- 4 hours on a school day, and 8 hours on a non-school day.

School-aged children must have a one hour break after every 4 hours. They must have a break of at least 12 hours between shifts and are not allowed to perform more than one shift per day. They are not allowed to work between 10pm and 6am. Children between the ages of 11 and 13 carrying out delivery work are not allowed to work between 6pm and 6am.

Additional restrictions on hours of work exist for children who are not yet old enough to attend school.

## Obligations on employers

Employers must:

- not allow a school-aged child to work when the child is required to attend school. Outside of school hours they must not allow a school-aged child to work until they have obtained a parent's consent form or a special circumstances certificate;
- not allow a child to work in a way that is inconsistent with the age and time related restrictions referred to above;
- not allow a child to work unless appropriately supervised by an adult;
- give children induction training, including workplace health and safety training;
- keep certain records about children including details of hours worked and work breaks;
- display a copy of the *Child Employment Guide* at the workplace in a position where it can be easily read by children; and

- take reasonable steps to ensure that a child they employ is not subjected to deliberate or unnecessary social isolation, or behaviour that is likely to intimidate, threaten, frighten or humiliate the child at work.

Failure by an employer to comply with the legislation may result in a prosecution in the Industrial Magistrates Court and fines up to \$37,500 for corporations and \$7,500 for individuals (depending on the particular offence). The executive officers of corporations must ensure the corporation complies with the legislation and may be prosecuted for failing to do so.

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# Bullying developments

Claims about bullying, including through the courts, are increasing. Recently, the High Court in England ordered a company secretary assistant's employer to pay her £800,000 damages. The employee suffered a major depressive disorder from being bullied by colleagues between 1997 and 2001 (*Green v DB Group Services (UK) Ltd*, [2006] EWHC 1898 (QB) 1/08/06, HC1898QB).

In Western Australia, a new *Code of Practice: Violence, Aggression and Bullying at Work* (2006) (Code) has been issued under the *Occupational Safety and Health Act 1984 (WA)*. The Code updates and replaces the *Workplace Violence Code of Practice (1999)* and *Dealing with Workplace Bullying – A Guidance Note for Employers (2003)*.

Bullying was not previously subject to a Code of Practice in Western Australia. The Code describes bullying as "repeated or inappropriate behaviour directed towards a worker, or a group of workers, that creates a risk to health and safety". The Code states that any behaviour that has the potential to harm or offend someone should be identified as a hazard and assessed for its risk to safety and health. Under the Code, bullying is defined by the effect of the behaviour. There need not be a specific intent to bully.

This is a much wider approach to inappropriate workplace conduct than that taken under laws dealing with discrimination and harassment.

Examples of bullying conduct set out in the Code include:

- abusive insulting or offensive language;

- behaviour or language that frightens, belittles or degrades;
- teasing or regularly making someone the brunt of practical jokes;
- interfering with a person's personal effects or work equipment;
- harmful or offensive initiation practices;
- isolation of the worker from others; and
- physical assaults or threats.

The Code differentiates between bullying and legitimate management authority to direct and control how work is done, monitor workflow and give feedback.

The Code sets out the measures that employers can take to prevent and address bullying. These include:

- a bullying prevention plan, including workplace consultation, developing a plan and a policy, and providing information and training; and
- a bullying response plan and associated procedures, including complaint handling and investigation procedures, providing contact and grievance officers, and dealing with unresolved issues.

## Lessons for employers

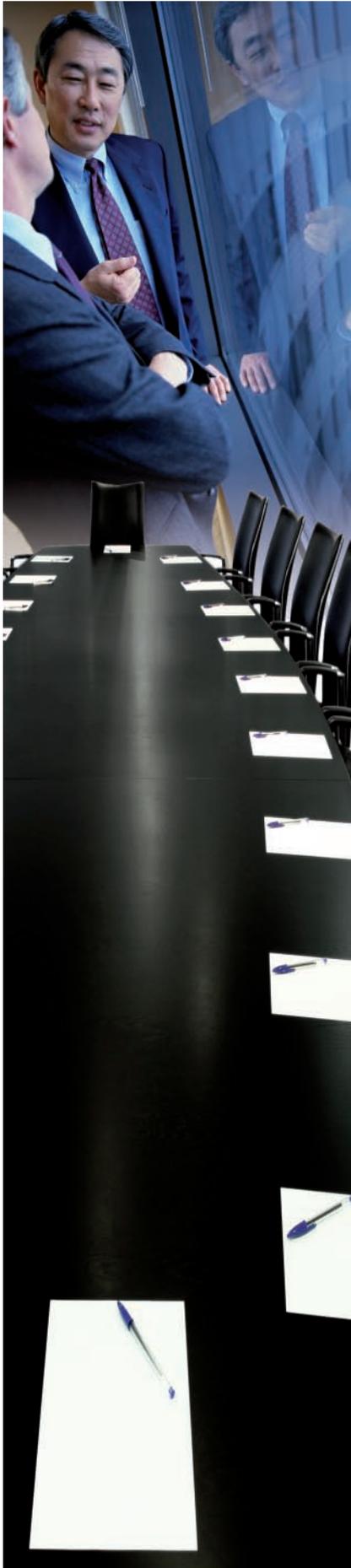
- **Bullying claims are on the rise.**
- **The new code of practice in WA takes a much wider approach to inappropriate workplace conduct than that taken under laws dealing with discrimination and harassment.**

The following guidance on bullying and violence is available in other States:

- Guidance Note on the Prevention of Bullying and Violence at Work – Victorian WorkCover Authority
- Violence in the Workplace-WorkCover NSW
- Guidance on Workplace Violence – ACT WorkCover
- Preventing Workplace Bullying: A Practical Guide for Employers – SafeWork (SA)
- Prevention of Workplace Harassment Advisory Standard 2004 (now a Code of Practice) – Workplace Health and Safety Queensland
- Stress, Bullying, Alcohol and other Drug Misuse. Hidden Hazards: A guide for employers – WorkCover Tasmania

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## Corporate manslaughter in the UK

*A Corporate Manslaughter and Corporate Homicide Bill (the Bill) has been recently introduced in the House of Commons in the United Kingdom.*

Under the Bill, an organisation will be guilty of an offence if the way in which the organisation's activities are managed or organised by its senior managers:

- causes a person's death; and
- amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

The "relevant duty of care" owed by an organisation is defined in the Bill to include duties under the law of negligence in relation to its employees, other persons on the premises and as an occupier of premises.

A breach of the relevant duty of care will be a "gross breach" if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances. The Bill also sets out factors which a jury is to have regard in assessing whether conduct amounts to a gross breach. Such factors include consideration of the extent to which the evidence establishes that there

were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged, or produced a tolerance of, a failure to comply with health and safety legislation.

Under the Bill, an individual cannot be guilty of aiding, abetting, counselling or procuring the commission of the offence of corporate manslaughter or corporate homicide. However, the new offence does not affect an individual's potential liability for any other offences such as the common law offence of gross negligence manslaughter, culpable homicide or health and safety offences.

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The "relevant duty of care" owed by an organisation is defined in the Bill to include duties under the law of negligence in relation to its employees, other persons on the premises and as an occupier of premises.

# An employer must do more than have a safe system of work

The Victorian Court of Appeal in *R v Commercial Industrial Construction Group Pty Ltd (CICG) [2006] VSCA 181* has recently reinforced that an employer's obligation under occupational health and safety laws extends beyond creating a safe system of work.

CICG is a construction company. In May 2002 it was refurbishing a four storey building at the Kew High School in Melbourne. Part of the works required the removal of a first floor roof which also involved scaffolding work.

As it transpired, the Site Manager, Mr Bacon, failed to prepare a Job Safety Analysis (JSA) for the proposed work. One of the employees fell approximately 3 metres. The following day, Mr Bacon directed another employee to perform the work without giving the employee any safety instructions or putting in place any additional safety measures. This employee had no qualification for the scaffolding work to be undertaken. There were also deficiencies with the scaffolding which the Site Manager had failed to detect. None of the employees performing the work had used fall protection equipment.

The company pleaded guilty in the County Court for breaching section 21(1) of the *Occupational Health and Safety Act 1985* for failing to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health. The company was fined

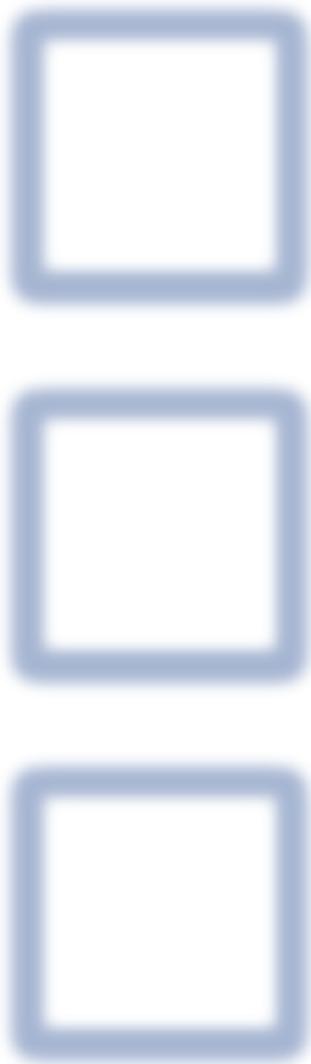
\$35,000. The company appealed this sentence to the Court of Appeal.

On appeal the company argued that it could not have done any more, given that the Site Manager knew that he was required to perform a JSA but had failed to do so in breach of his responsibilities. The Court found Mr Bacon had acted with complete disregard to the safety of his fellow employees. In the Court's view, Mr Bacon's supervisory responsibilities, including his responsibilities for ensuring safety at the site, increased rather than reduced the gravity of the company's breach.

The Court emphasised that the liability for any breach of the Act by an employer is absolute. The issue to be determined is whether a breach of the Act has occurred. Accordingly, on the issue of liability, it is irrelevant to consider the reasons why the failure had occurred. The reasons for the failure are relevant on the issue of sentencing.

The company also argued it had proper systems in place before the accident and referred to various material including a "Safety Management System" it had purchased from the Master Builders'





Association. The Court stressed that an employer's obligation extends beyond simply creating a safe system of work. An employer must ensure that its procedures and instructions are actively and positively complied with by employees. An employer is required to constantly monitor employee compliance. In view of this, the company's argument that it could have done no more to comply with its statutory obligations to provide a safe system of work could not be sustained.

The company's appeal was dismissed. The Court stated a very serious breach of the Act had occurred and that the fine imposed at first instance was very lenient. The company was fortunate that the Crown had in fact not cross appealed the penalty imposed by the County Court.

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## Lessons for employers

- The case highlights the importance for employers to ensure adequate monitoring of compliance with their safety systems and procedures.
- The case also highlights the difficulty for an employer to argue as part of a defence of an OHS prosecution that the relevant managers and supervisors have failed to do what they are required to do in complying with relevant OHS policies and procedures.

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