

# NEWSLETTER

NOVEMBER 2011

## Employment & Industrial Relations Newsletter

### Cornwall's E&IR Team News

Although we did not celebrate any milestones within the team this month, we did seem to be working on a number of OHS matters. This month we have decided to dedicate the entire newsletter to health and safety in order to mark National Safe Work Australia Week. Although compensated injury fatalities are down on previous years, I am reminded of something a lecturer told me – the number of recorded fatalities may not seem like many, unless one of those fatalities is your loved one. 137 people across Australia went to work and did not come home last year. It is a sobering thought.

Over 60 Victorian companies were prosecuted last year, with the majority of those prosecutions resulting in a conviction and fine. All of those companies are now listed on the WorkSafe Victoria website. There are very obvious serious legal consequences for breaching OHS legislation. We encourage you to read this newsletter and consider where you could make improvements and, where appropriate, seek guidance.

We would also like to mention the commencement of Cornwall Stodart's E&IR team's breakfast HR Discussion Forums on November 10. We had a great response from clients. Stay tuned for our 2012 calendar of forums.

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### FWA finds compulsory drug and alcohol testing 'reasonable' employer direction

The mandatory testing regime has been a contentious issue in the Victorian building industry for some time, particularly because the Victorian Building Industry Alcohol and Other Drugs Policy (**Policy**), which was regularly attached to Victorian building industry enterprise agreements, did not provide explicitly for testing. The Construction, Forestry, Mining and Energy Union (**CFMEU**) sought to challenge an employer's mandatory testing regime as being inconsistent with the Policy, which was founded on concepts of consultation and cooperation.

However, a Fair Work Australia (**FWA**) full bench has ruled that compulsory drug and alcohol testing can be a reasonable employer instruction, notwithstanding that an employer's policy or agreement is silent on the issue.

### Background

In this case, Wagstaff Piling Pty Ltd (**Wagstaff**) was subcontracted to Thiess Pty Ltd (**Thiess**) to undertake work on the Tulla-Sydney Alliance Project. Thiess had a comprehensive 'Fitness for Work' policy, which included requirements for drug and alcohol testing for both its own employees and the employees of its subcontractors. It was also Thiess' policy to subject employees to random drug and alcohol testing during a preannounced period each month. Wagstaff was contractually obliged to facilitate participation by its employees in this testing.

In May 2011, the CFMEU and at least one other union confirmed that Wagstaff and various other subcontractors would not cooperate with the announced testing for that month. Wagstaff agreements had common provisions regarding drugs and alcohol, but did not require random drug and alcohol testing of its employees. On referral of the dispute to the Victorian Building



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Industry Disputes Panel (**Panel**), the Panel concluded that the employees of the subcontractors should not be subjected to involuntary random testing, and made a recommendation that the random testing cease for the employees of the subcontractors that were party to the dispute. This decision was referred by Wagstaff to FWA for review.

At first instance, it was held that the drug and alcohol clause in the Wagstaff agreement and their drug and alcohol policy did not enable them to conduct voluntary or involuntary drug and alcohol testing. The Commissioner stated that you cannot read an entitlement into an agreement that is clearly not there.

## Appeal

Not surprisingly, the decision was appealed. Wagstaff and Thiess argued that the Commissioner erred by proceeding on the premise

that, as the Wagstaff agreement did not expressly or implicitly entitle Wagstaff to conduct drug and alcohol testing, it could not do it. Wagstaff submitted that compulsory drug and alcohol testing represents a lawful and reasonable instruction and reflects the occupational health, safety and welfare obligations imposed upon both it and Thiess to take appropriate steps to protect employees from safety risks.

The full bench agreed, stating that the agreement and Policy did not operate to limit drug and alcohol testing, or for that matter, other safety initiatives. Although it clearly endorsed a cooperative and collective approach to the management of drug and alcohol issues, it could not be read as prohibiting mandatory drug and alcohol testing. Moreover, compulsory drug and alcohol testing is, of itself, not so extraordinary that it could not be argued to be a reasonable employer instruction.

## For employers

This decision confirms what many employers would likely have already thought about drug and alcohol testing. It is incumbent on employers to manage the health and safety risks a drug or alcohol affected employee might pose to safety. Accordingly, employers are able to direct an employee to undergo testing. We recommend that your drug and alcohol policy addresses the issue of testing.

The CFMEU has hinted that it will appeal the decision, and has issued a circular in which it states its belief that the ruling by FWA is wrong at law (see further [here](#)). The union has suggested that this decision does not mean that random drug and alcohol testing can be introduced without consultation, which may be a breach of the consultation provisions of the OHS Act.

For assistance in drafting a comprehensive drug and alcohol policy, or to review your current policy, contact the E&IR team.

## Fraudulent workers' compensation claim lands worker nine month jail term

A tip-off has led to the discovery and prosecution of a worker fraudulently obtaining workers' compensation payments. The truck driver had received \$40,000 in workers' compensation benefits but had continued to work for two years, earning \$640 gross each week. Magistrate Wakeling said the offending conduct involved significant dishonesty and undermined the integrity of the workers' compensation scheme, especially because it relied on people self-reporting on the level of their injury or illness.

The worker had submitted certificates of incapacity and received direct payments. His doctor had no knowledge of his return to work, believing the worker was undergoing re-training organised by his claims agent.

The worker was sentenced to nine months' imprisonment, sending a strong deterrent message. The most common sentence imposed last year for offences against the *Accident Compensation Act 1985* was a conviction, fine and order to pay restitution. This sentence highlights that the courts are taking this type of offence seriously.

## Model work health & safety harmonisation – are the model laws stalling?

Once upon a time it was hoped that all states and territories would harmonise health and safety laws in Australia, by implementing



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the federal government's Model Work Health and Safety Bill 2011 by 1 January 2012. However, with a number of jurisdictions not having passed the model Act, it would seem the January deadline will not be achieved.

The West Australian government has advised the federal government that it will be unable to achieve the 1 January target and has sought a reconsideration of the implementation date in order to analyse the full impact of the laws. The Victorian government has also advised that it does not have the information necessary to fully assess the impacts of the laws, because the harmonisation package as a whole has not yet been finalised. It has commissioned WorkSafe Victoria to undertake an assessment of the legislation.

South Australia, Tasmania and the Northern Territory have introduced the model legislation into their respective parliaments and assemblies, but it has not yet been passed. All have expressed an intention to operate under the new legislation from 2012.

New South Wales, Queensland and the ACT have all passed the harmonised legislation. Consequently from 1 January 2012, we may see some of the country singing from the same hymn sheet.

## Planking workers prosecuted

WorkSafe has prosecuted two Victorian factory workers for planking. One worker was photographed planking across the tyres of a forklift, while the other was photographed on top of a spray booth – both were about four metres above the ground.

Both workers pleaded guilty, acknowledging their actions were 'stupid'. Neither worker wore safety harnesses or used any other form of fall protection.

Despite the seriousness of their offending and the high risk of serious injury or death involved, the two men were spared conviction because of their exemplary references, lack of prior offending and solid work history. Both men had lost their jobs as a result of their stunt. The Magistrate imposed a fine of \$1500 on each worker.

## For employers

This prosecution is uncharacteristic for two reasons – it targeted the workers involved and is an example of WorkSafe initiating a prosecution for breaches of OHS legislation in circumstances where no injury has occurred.

Enforcement by WorkSafe is heavily weighted towards employer prosecutions. Employers are responsible for monitoring/supervising

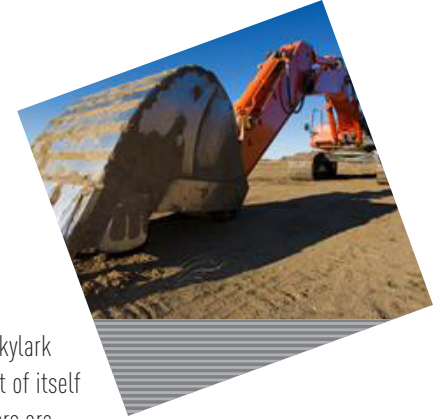
their employees. If an employee is observed as having a tendency to skylark or otherwise behave carelessly, that of itself is a workplace hazard, and employers are required to take appropriate risk control measures.

## Model Codes of Practice

Employers should note the closing of the consultation period of Friday 16 December for a number of Codes of Practice, including:

- Safe design of building and structures
- Excavation work
- Demolition work
- Spray painting and powder coating
- Abrasive blasting
- Welding and allied processes
- Safe access in tree trimming and arboriculture
- Preventing and managing fatigue in the workplace
- Preventing and responding to workplace bullying

The Codes of Practice, when finalised, will be admissible in court as evidence of whether a duty under the Work Health and Safety Act has been complied with. Moreover, the court may use the Codes to determine what steps were reasonably practicable for a business to take in relation to particular risks. Therefore, we recommend that businesses take the time to review these drafts and consider making comments before the deadline.



## Employer suffers heavy fine for OHS breach despite no injury

A Victorian bricklaying company has been fined \$100,000 and ordered to pay \$4,000 in costs after pleading guilty to breaching the Victorian OH&S laws. In this case it was found that over 6,000 bricks were stacked onto scaffolding, which is twice the safe work limit, and were not evenly spaced.

Despite the fact that no one was injured, the court held that this was a risk to the workers on-site and to the public.

The punishment was handed down by the Melbourne Magistrates Court, and demonstrates that an injury does not have to occur before a breach of the OH&S laws will result in a heavy penalty.

## Fair Work Australia finds a dismissal for a high BAC to be unfair

Fair Work Australia (FWA) has reinstated an employee and held his termination was unfair, despite the employee returning a blood alcohol content (BAC) of 0.076 while at work and operating machinery.

The employee submitted that he had been drinking the night before but did not believe he was under the influence of alcohol when he got into his car, drove to work and commenced his duties.

A random breath test was conducted where the employee submitted that he agreed with the reading of 0.076 BAC taken by the employer. Witnesses claimed the employee smelt of alcohol and was 'nervy' when undergoing the drug and alcohol test.

Despite this, the Commissioner made due note of other factors including that the employee was 55 years of age with few qualifications, little education, lived in a regional area with low employment opportunities and his 16 years of unblemished service.

The Commissioner ruled that the employee's termination was unfair and that he be reinstated with no loss in continuity of his employment. However, no order was made with respect to lost remuneration from the date of termination to the date of reinstatement.

## For employers

These decisions often seem contradictory with the employers' duty to ensure a safe workplace. When employers take steps to discipline an employee for breaches of their safety policies, the employee must still be afforded procedural fairness. Termination may not always be reasonable in the circumstances and employers should seek advice if they are uncertain.

## 2010-11: A snapshot on safety

Throughout Australia:

- there were **137** work-related notified fatalities (including bystanders) during the 2010-11 financial year
- vehicle incidents caused **22** of the total number of work-related fatalities
- the most common cause of work-related fatalities was being **hit by a falling object**, accounting for 21 fatalities
- industries that accounted for the highest number of fatalities were **agriculture, forestry and fishing** (37 fatalities), **construction workplaces** (30 fatalities), **manufacturing workplaces** (22 fatalities) and **transport & storage workplaces** (14 fatalities)
- the highest number of worker fatalities were recorded in **Queensland**, followed by New South Wales and Victoria
- of the 137 work-related fatalities, **123 were men**.

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