



Insight

Occupational Health & Safety

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High Court Rules on OH&S Obligations and Negligence Claims

The High Court has recently reaffirmed that a principal, when engaging an independent contractor, is not required by common law to provide training in safe work methods for the specialised activities carried out by the contractor at the workplace. In the decision of *Leighton Contractors Pty Limited v Fox; Calliden Insurance Limited v Fox* [2009] HCA 35, the Court unanimously held that, in the absence of specific legislative or contractual requirements to the contrary, there is no common law duty of care on a principal to “provide training in matters of safety to sub-contractors”. While the decision limits the exposure of a principal to claims for negligence arising out of the conduct of a contractor, it does not remove the statutory obligation imposed on principals under Occupational Health & Safety (OH&S) legislation to ensure safety of all persons at the workplace.

Facts

On 7 March 2003, Mr Brian Fox was working as a labourer at the construction of the Hilton Hotel in Sydney. Leighton Contractors Pty Limited (**Leighton**) was the principal contractor at the site and had contracted with Downview Pty Limited (**Downview**) to undertake specialist concrete work. In turn, Downview sub-contracted the pumping of the concrete to secondary sub-contractors, including Mr Fox and Mr Stewart.

Mr Fox was injured when he was struck by a concrete delivery pipe that was in the process of being cleaned following pumping work. At the time of the injury, the pipe was not secured safely by Mr Stewart in accordance with the relevant pumping industry Code of Practice.

Mr Fox sued Mr Stewart, Downview and Leighton in negligence for damages.

Initial judgment

At first instance, Mr Stewart was found liable for damages in the order of \$500,000. The Court identified the cause of the accident to be Mr Stewart’s failure to secure the pipe and found evidence that he knew about the danger and the need to secure the end of the pipe.

The Court noted that the contract between Downview and Leighton required Downview to ensure that all its workers and sub-contractors were properly inducted in relation to the “*particular procedures and requirements relevant to that work*”. Further, Leighton, as principal contractor under the NSW OH&S Regulations, had a statutory duty to ensure it was satisfied that relevant OH&S induction training was provided to Mr Fox and Mr Stewart. The Court was not satisfied, however, that either factor supported a finding of a common law duty of care owed by Leighton or Downview to Mr Fox.

Court of Appeal

The Court of Appeal reversed the first instance decision regarding Leighton and Downview and ordered them to pay damages. The Court found that a common law duty was imposed on a principal “*to provide training in matters of safety to sub-contractors*”. In particular, the Court found that the site specific induction training provided by Leighton should have extended to the safe method of line cleaning provided for in the relevant pumping industry Code of Practice.

High Court Rules on OH&S Obligations and Negligence Claims cont.

High Court Appeal

The High Court overturned the Court of Appeal and accepted the argument from Leighton and Downview that there was a distinction made under the common law between the obligations of an employer to its employees and the obligations of a principal to independent contractors. While an employer owes a personal, non-delegable duty to take reasonable care of its employees, the High Court confirmed that the duty imposed on a principal does not extend to a duty to avoid any risk of injury to a contractor – it only extends to a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury.

In particular, the Court found that a principal will discharge its duty if it takes reasonable care to engage independent contractors who are competent to control their own systems of work. The Court did note that a different standard will apply if it engages independent contractors to do work which is readily done by employees and the principal is required to direct and co-ordinate the various activities being undertaken.

In the present case, the Court found that the concrete pumping activity was a separate, specialised activity over which Leighton and Downview did not exercise any control of direction or co-ordination. Further, the Court also rejected the view that the specific statutory obligation of Leighton's under the NSW OH&S Regulations extended beyond satisfying itself that sub-contractors had undergone OH&S induction training.

Lessons learnt

The High Court decision makes clear the extent of any common law duty of care owed by a principal towards independent contractors. However, employers need to exercise caution when considering the effectiveness of their safety systems as the decision still leaves open potential claims for damages in jurisdictions where a breach of statutory duty can be argued or if an accident occurs where the principal directs and co-ordinates the various work activities being undertaken. Importantly, the decision also does not reduce the potential for prosecution by the OH&S regulator for a breach of statutory OH&S obligations.

Changes to Right of Entry Law in New South Wales

Recent legislation in New South Wales will provide that right of entry for union officials to workplaces extends to all employees of unions and not just those involved in union management. The Occupational Health & Safety Amendment (Authorised Representative) Bill 2009 (**Bill**) seeks to overturn a recent decision of the Federal Court in which those rights were limited to management union officials.

In *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (NSW branch)* [2009] FCA 645, the Federal Court interpreted the meaning 'authorised representative' in the Right of Entry provisions under the NSW Occupational Health & Safety Act 2000 (**Act**) as being limited to officers of employee organisations who were concerned in, or took part in the management of the organisation. The effect of this decision, which we discussed in our last *OH&S Insight*, was that union employees, even if not elected as officers of the union or involved in the management of the union, would not necessarily have been authorised under the Act to enter workplaces to investigate suspected breaches or consult with workers.

The Bill will introduce amendments to the Act so as to include within the class of individuals able to become authorised representatives any employee of an employee organisation who is not involved in management activities of those organisations. Further, the amendments are retroactive so as to ensure that powers exercised by non-management union officials prior to the commencement of the Bill will be held to have been validly exercised.

The Minister of Regulatory Reform in New South Wales, Mr Tripodi, has said that the amendments to the Act are consistent with Federal Occupational Health and Safety Laws and are designed to restore New South Wales' right of entry provisions to the accepted position prior to the decision of the Federal Court. This Bill will also be consistent with the scope of the draft exposure of a national Model OH&S Act, called Safe Work Act 2009, which enables right of entry permits to be granted to employees of a union.

New uniform OH&S laws becoming a reality

A significant step towards the harmonisation of OH&S laws throughout Australia took place on 28 September 2009 when the Federal Government released its exposure draft of the national OH&S Model Act for public comment. The Federal Government also released a Discussion Paper setting out the terms of reference for a 6 week public consultation period commencing on 28 September 2009 and concluding on 9 November 2009, during which time public submissions on the OH&S Model Act must be lodged.

Public Consultation Period

Safe Work Australia (**SWA**), which is responsible for harmonising OH&S in Australia, will consider the public submissions on the OH&S Model Act. The Discussion Paper released by SWA identifies over 40 specific areas which invite public comment. Some of the key areas include the following:

- The scope of the duty imposed on managers of a business to ensure safety;
- The type of activities that should be excluded from the primary duty of care owed by a "person conducting a business or undertaking";
- The meaning of "reasonably practicable" steps and the extent to which it will provide an exclusive limit on matters that can be considered by a Court;
- The treatment of volunteers under the OH&S Model Act and whether they should be exposed to any penalties;
- The range and levels of penalties to be imposed on duty-holders;
- The extent of the duty to consult with employees and other workers at a businesses' place of work;
- Whether a health and safety representative should be required to complete approved training before having the power to direct that work cease or issue a provisional improvement notice;
- How union OH&S entry rights should operate; and
- Whether guidelines issued by the various OH&S regulators under the OH&S Model Act should have a legal status such as providing a defence to any prosecution.

In December 2009, following the review by SWA of public submissions, a final version will be provided to the Workplace Relations Ministers' Council. At the same time, both the draft Model OH&S Regulations will be developed progressively by SWA and national compliance and enforcement protocols will be developed by the OH&S regulators.

Action by employers

The release of the draft OH&S Model Act for public consultation provides an historic opportunity for businesses to proactively shape the direction of OH&S regulation in Australia. There is a limited 6 week consultation period in which written submissions will be accepted and reviewed by SWA. The consultation extends to some key issues in OH&S regulation, including the extent of personal liability of managers. For a more detailed analysis of the OH&S Model Act and the implication for your business, or for assistance in preparing a written submission, please contact our office.

The link to the draft Model OH&S Act and Discussion Paper is: <http://www.safeworkaustralia.gov.au/swa/ModelLegislation/Public+Comment.htm>.



Removal of rural industry exemption for Queensland

In 2008 the *Workplace Health and Safety Regulation 2008 (Qld)* was introduced in order to phase out rural industry exemptions from occupational health and safety obligations. From 1 September 2009 the second stage of the exemptions were removed meaning that the following parts of the Regulation now apply to the rural industry:

1. Part 4, which regulates prescribed activities (and in particular, demolition);
2. Part 16, which regulates hazardous substances; and Part 20 (div 3, sdiv 9), which regulates excavation work.

It is essential that employers engaged in the rural industry, who would have previously been exempt from this regulatory framework, are aware of these additional occupational health obligations that are now applicable to them. Remaining exemptions will be phased out on 1 September 2010. If you would like any further information regarding the phase out of the rural industry exemptions please contact us.

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