STEVENS & ASSOCIATES LAWYERS

SUMMER 2018

SAFETY IN THE WORKPLACE

Welcome to our 2018 Summer Edition of "Safety in the Workplace – WHS Quarterly". In this edition, we summarise recent updates made to the NSW Work Health Safety regime, and examine three separate recent cases in which companies were found to be negligent and/or liable for workplace accidents that caused serious injuries.

NSW Work Health Safety Legislation Updates

1. *New WHS Code of Practice: Managing Risks in Stevedoring*

- Offers useful guidance for Employers in the stevedoring industry to review and update their WHS systems.
- Provides direction regarding management of the safety risks involved with stevedoring activities such as: loading or unloading vessel cargo; stacking and storing on wharves; and receiving and delivering cargo within terminals or facilities.

2. *Work Health and Safety Amendment (Miscellaneous) Regulation 2017*

- References to Australian Code for the Transport of Dangerous Goods by Road and Rail will now always refer to the most recent edition.
- Rail Safety National Law (NSW) is now added to the list of prescribed Acts that certain confidentiality provisions of the WHS Act do not apply to.

3. *Building Products (Safety) Bill 2017*

These new laws were flagged in July 2017 in response to the Grenfell Tower fire in the UK in June 2017, aiming to reduce the serious safety risks posed with unsafe building materials. The new laws provide for:

Enhanced Fair Trade Commissioner Powers

- Power to prohibit the use of building products if it is decided that the product is unsafe;
- Power to request company records to track and locate dangerous building products; and
- Power to block the use of combustible cladding in high-rise residential buildings.

Heavy Penalties

- Breaches of bans will expose companies to fines of $1.1 million and $220,000 for individuals; and
- Failing to comply with a document request will be a criminal offence with fines of up to $11,000.

Should you have any questions regarding the updates to NSW Work Health Safety Legislation in 2017, please do not hesitate to contact Nick Stevens, Megan Cant or Isabella Paganin.

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Unsafe Working Environment Comes Crashing Down for Employer

In a recent case before the NSW District Court, City Projects Pty Limited ('**the Offender**') was fined a large penalty of $167,000 for failing to comply with its health and safety duties under s 19(1) of the Work Health and Safety Act 2011 ('**the WHS Act**'), when it exposed a subcontractor to a risk of death or serious injury contrary to section 32 of the WHS Act. [1]

The Accident

On 17 March 2017, Mr Rami Ealya ('**the Subcontractor**') delivered 10 glass crates weighing a combined total of 8,500 kg to the Offender's premises. Upon arrival, Mr Daniel Kastropil, the Safety Co-ordinator for the Offender, decided to borrow a forklift from Enfrex as the glass would be too heavy for their smaller forklift.

Mr Kastropil instructed Mr Domenico Lombardo, another employee of the Company, to operate the forklift. Neither of the Offender's two employees held the appropriate license to operate the forklift.

Mr Kastropil and the Subcontractor walked on either side of the forklift to guide Mr Lombardo and stabilise the second glass crate, which was unsecured and unstable. CCTV footage from the premises indicates that Mr Lombardo was unable to see in front of him whilst driving the forklift.

Once inside the warehouse the forklift was required to make a left turn. Upon doing so the 850 kg second glass crate tipped forward and started to slide off the forklift. Both Mr Kastropil and the Subcontractor moved in front of the crate to try and manually prevent it from falling. The glass crate continued to slide forward, falling onto and crushing the Subcontractor's leg. Mr Kastropil was able to move backwards and avoid the crate entirely.

Mr Lombardo attempted to use the forklift to lift the glass crate off the Subcontractor's leg. However, due to the angle of the forklift arms, this placed even more pressure onto the Subcontractor's leg. Extra assistance was required from employees of a neighbouring business, and wooden beams were eventually used in a lever system to lift the front of the glass crate off the Subcontractor's leg and first aid was administered.

The Subcontractor required a plate and six screws to be inserted to repair his broken leg. He was in hospital for 10 days where he underwent physical therapy and rehabilitation.

The Verdict

Judge David Russell criticised the Offender's WHS operating system stating, "This was not just an

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accident waiting to happen, it was an accident almost 100% certain to happen."

He determined that the offender's culpability was in the high-end of the mid-range due to a number of factors. Key factors included:

1. Workers were placed in a serious risk of death and/or injury;
2. The Offender permitted unqualified personnel to operate forklifts (a high-risk activity);
3. The Offender's safety coordinator was not adequately trained in unloading, handling and transporting glass;
4. The Offender's Warehouse lacked a comprehensive WHS Policy and WHS Systems; and
5. There were available steps that could have reasonably been taken to minimise the risk.

The appropriate $200,000 fine was discounted by $50,000 to reflect the Offender's guilty plea and a sum of $17,527 was paid for the prosecutor's legal fees.

[1] *SafeWork NSW v City Projects Pty Limited [2017] NSWDC 364*

Similar Case, Lower Penalty?

In a second similar case determined again by Judge Russell, Erect Safe Scaffolding (NSW) Pty Ltd ('**the Offender**') was fined a total of $127,000 after a worker was crushed by scaffolding that had fallen from a forklift driven by an unlicensed driver.[1]

The driver stopped the forklift abruptly when a worker in his way shouted out to warn him, causing approximately 160 scaffolding tubes to fall on top of the worker crushing him. Judge Russell categorised the culpability of the Offender as the high end of the low range.

This incident warranted a lower penalty than the previous case as Judge Russell considered the event to be a 'one-off' rather than a widespread and systematic failure by the Offender, despite the substantial nature of the injuries.

Both cases serve as a timely reminder to companies that it is their duty to ensure that workers and labour-hire workers have the relevant training and qualifications to perform their duties safely and lawfully.

[1] *SafeWork NSW v Erect Safe Scaffolding (NSW) Pty Limited [2017] NSWDC 365*

Please do not hesitate to contact us if you would like to discuss how the team at Stevens & Associates Lawyers can assist with any WHS Policy or WHS Systems queries.

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Employer Negligent and Liable for "Unprecedented Situation"

In a recent case before the Supreme Court of Victoria, Ceva Logistics Australia Pty Ltd ('**the Employer**') was found to be contributorily negligent and liable for 35% of an employee's $2 million damages award.[1]

Mr Ugo Meli ('**the Employee**') was confronted with what Judge McDonald described as an "unprecedented situation" when eight metal load security gates weighing 300 kg crashed down on top of him after being untied in the back of a freighter truck.

The injuries sustained by the Employee included a fractured pelvis, chronic pain and PTSD which was evaluated as a 78 per cent level of disability. The Employee subsequently sued HRX TPT Pty Limited ('**HRX**'), the company responsible for the initial securing of the gates, and the Employer for damages.

HRX's failure to secure the gates safely was held to be the "fundamental cause" of the incident as it was found to have had "total control" over fastening the gates and this created a duty to not expose any person untying them to injury. Accordingly, HRX was found to be 65% liable for the accident.

Judge McDonald found that the eight gates were secured by only one rope, contrary to 'usual practise' for the gates to be tied together in groups of two or three at a time, and held that "It was reasonably foreseeable that if eight gates weighing 300kg were secured by one rope, the gates would be likely to fall onto and injure the person who untied that rope".

The Employer was also found liable (albeit to a lesser amount of 35% of damages) for poor safety protocol in the untying of the gates and not providing adequate lighting.

Judge McDonald awarded the Employee the maximum statutory amount of $598,360 for pain and suffering attributed to the injury and $1,374,370 for economic loss minus the $430,000 he had received in workers' compensation.

[1] *Meli, Ugo v Ceva Logistics (Australia) P/L and HRX TPT P/L [2017] VSC 739*

If you would like to discuss any WHS concern that your company may have, please do not hesitate to contact Nick Stevens, Megan Cant or Isabella Paganin.