

WORKPLACE FATALITIES CONT...

Currently the Act only prescribes up to 2 years imprisonment for individuals, whether or not that offence results in a fatality.

For corporations (and this includes family companies), the proposed penalties are \$1.1 million for the first offence and \$1.65 million for subsequent offences.

The Bill also imposes mandatory considerations the Court must take into account as specified aggravating factors when sentencing. These include:-

- (i) whether the risk to safety was reasonably foreseeable;
- (ii) whether there were foreseeable measures reasonably available to prevent or mitigate risk;

(iii) whether the breach could have led to serious injury or death;

(iv) whether the death or serious injury was caused by reckless or negligent conduct;

(v) whether the offender gained a financial advantage by not implementing safe systems of work; and

(vi) any other relevant aggravating factor.

One of the primary criticisms of the Bill is that the criminal sanctions it provides do not apply equally to all parties, as employees (other than directors and those involved in management) are exempt, despite their existing obligation to take reasonable care for their own safety and that of others at work.

Peter Frazer - Associate

WATER SUPPLY EASEMENT

In the May 2003 issue of the Rural Brief we reported on the case of *Biki & Anor v Chessells* which involved the question of whether the grantee of a registered easement 10 metres wide for the purpose of construction repair and maintenance of a delivery channel could enter onto the land of grantor of the easement outside the 10 metre wide easement to repair and alter the channel.



As reported in that issue, the Court said that the grantee could not enter onto the land outside the easement area as, given the terms of the easement, it was clear that the parties had contemplated that access for repair and maintenance would be via the easement strip and not the adjoining land of the grantor of the easement.

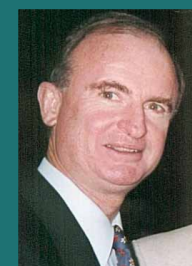
The grantee then appealed this decision and lost. The Victorian Court of Appeal:

- looked at the usual arrangements for irrigation channels in the area and determined that the 10 metre wide easement would allow for the usual 3 metre wide (in that area) channel and an access strip;

• looked at the express terms of the easement and noted that they included the right to construct, use and repair the channel together with the right to pass over the easement land for those purposes.

• considered that as the easement terms dealt with repair and access it was not reasonable to imply further terms which would allow access over the grantor's land outside the 10 metre wide easement strip, except in exceptional circumstances where such access was necessary (e.g. large tree falls from outside the easement land across channel).

Those negotiating terms of easements must, therefore, be careful to include in the terms of the easement clear provisions as to what rights of access, and obligations, the grantee of the easement has. If those rights and obligations are not clearly expressed, the landholder who has granted the easement may find he is in dispute with the user of the easement seeking access to the grantor's land outside the easement area.



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DEATH ON A FARM

The 2004 case of *WorkCover Authority of NSW v Kirk Group Holdings Pty Limited & Anor* highlights the need for proper risk assessment and skills training to manage occupational health and safety on farms.

The prosecution was brought under the *Occupational Health & Safety Act, 1983* ("the Act" and the forerunner of the current *Occupational Health & Safety Act*) against the company which owned the farm and its managing director, arising out of the death of the farm's manager when he was crushed by an all terrain vehicle ("ATV") owned by the company when using the ATV to deliver a bundle of steel to a paddock for fencing work. The ATV overturned whilst being driven on a track down the side of a hill.

The case report is a long and detailed one and it is not our aim to bring out all of the issues in this article. Suffice it to state that the conclusions of the Court were:

- if the ATV was not used properly there was a risk to the driver.
- there was a risk (evident indeed from the Owner's Manual) that the ATV could overturn in various circumstances – off-road driving on hilly land was a problem and risks were increased when a load was being towed.
- these risks necessitated the "exercise of a managerial mind to establish a safe system" of use for the ATV.

- it was the company's obligation under the Act to eliminate these risks to health and safety, for example, by restricting access to the ATV to those employees who were sufficiently qualified and experienced to ride it, by instructing and training employees as to safe use of the ATV, by ensuring they read the Owner's Manual and by warning employees about the potential for the ATV to overturn.

- although there was some evidence that those using the ATV had read the Manual, the Court found that this was not enough to excuse the liability of the company which, the Court found, did not have in place any system to ensure the ATV was being used safely and had not undertaken any risk assessment in relation to the use of the ATV on the farm.

Accordingly, the Court found the charges brought against the company for failing to ensure the health, safety and welfare of its employees were proved; and it also found that the company's director, being "the mind and actor of the company" who "controlled the relevant actions of the company" and was "the instrument of the company's failure" was guilty of the same contraventions of the Act.

[See later article, 'Workplace Fatalities']

REAL ESTATE AGENTS – AND MISREPRESENTATION

The High Court has considered the issue of whether a corporate real estate agent unwittingly engaged in misleading or deceptive conduct under the *Trade Practices Act, 1974* where a sales brochure contained untrue or misleading statements supplied by the vendor. The case is *Butcher v Lachlan Elder Realty Pty Limited*, decided in December 2004.

The case revolved around the sale of a waterfront property and the brochure included a copy of a survey purporting to depict a swimming pool as lying wholly within the property boundaries – in fact, the pool was partly located on adjoining crown land held under a permissive occupancy.

Although the case related to a city property, the issue is relevant for all agents, particularly those engaged in rural sales where the owner of the property may use adjoining lands under a grazing licence or other authority from the Crown or where

some other particular relating to the property is specified in advertising material but is wrong – for example, the capacity of a dam or the area of land developed for irrigated farming.

In fact, the High Court in this case held (three judges to two) that, on the particular facts of the case, the agent had not engaged in misleading or deceptive conduct. However, the decision was a close one and reinforces the rule that agents should ensure that sales brochures and other such material contain accurate information.

TREE REMOVAL – WAS LANDOWNER LIABLE?

Coffs Harbour City Council v Hickey was a case heard in 2004 by the NSW Land & Environment Court and dealt with prosecution of a landowner for removal of trees to which a Tree Preservation Order (“TPO”) applied, without development consent under the Environmental Planning & Assessment Act, 1979. Any tree with a girth of less than 300 mm measured at 1.5 metres above ground level was excluded from the TPO.

The landowner engaged a contractor to carry out certain clearing work on the land. Trees, including many in excess of 300 mm in circumference, were knocked down by machinery driven by the contractor’s employee. Evidence was given to the effect that the landowner told the contractor – “I need the block cleaned up. I want to get rid of all the lantana and regrowth off the block”. The term “regrowth” was not defined in the conversations. In evidence the contractor did state that the landowner asked him not to remove or damage the bigger trees on the site. The contractor’s employee who was in charge of the tractor gave evidence that the landowner’s representative on the site pointed out the land to be cleared and directed him to slash the paddock, clear around all sheds, clear lantana and all rubbish and clean all of the “stuff” right back to the boundary fence. The representative also pointed to the southern part of the property and told the tractor operator to “clear all that around the boundary”. He did not specifically tell the operator to cut down or knock over any trees.

In fact, the operator cleared trees from the area the subject of the TPO including clearing from within 50 metres of a creek on the property. The felled trees included paperbarks, swamp mahogany, swamp oaks, cheese tree, eucalyptus and banksia. In all, 22 trees of girth greater than 300 mm were felled.

When questioned, the landowner said “...this had been nothing more than a big mistake. I am sorry about this”.

The landowner gave evidence that in discussions with the contractor before the clearing commenced the contractor had said that he was an experienced operator and had said “we like to be careful of trees over 300” (millimetres). “We do this sort of thing all the time – the driver has a pretty good eye”.



Although the landowner in discussions told the contractor to “take good care of the trees” he did not raise objections when he saw the results of some of the clearing, including piles of saplings that had been knocked down.

The judge found that the contractor was clearly an independent contractor – that is, he was engaged as an expert to clear the area and was left to his own devices as to how he carried out the job. He was not instructed to remove trees – merely to clean out lantana, regrowth, dead trees and rubbish, much of which infested the area in which saplings and larger trees were located. While a landowner could be liable for the actions of his contractor if he exercised a sufficient degree of control over his activities, that, according to the Court, did not occur here. Indeed, for most of the time during clearing, the landowner was absent from the site.

Accordingly, the judge found that the landowner was not responsible for the contractor’s actions and had not breached the TPO. He said that he was not satisfied beyond reasonable doubt that the landowner’s directions to the contractor included an order to fell the trees in question.

We believe that the matter has now gone on appeal to the Court of Criminal Appeal.

DEFECTIVE DAM ENLARGEMENT

Last month the South Australian Supreme Court heard an appeal from a magistrate’s decision awarding damages to a landowner for defective dam construction. The case was **Reed & Ors v Peridis & Anor**.

The plaintiff (landowner) engaged the contractor Reed to increase the capacity of his dam. Before the contract was made, the contractor’s employee said that he would use clay near the dam site to line the dam after the capacity had been enlarged. This was done and the dam subsequently leaked.

There were several issues to be determined. The magistrate found that the clay was too porous and also found that the method of compaction of the clay used to line the dam was not in accordance with Australian Standard No. 3798 “Guidelines for Earthworks for Commercial & Residential Development”. The magistrate found for the plaintiff and awarded damages.

The contractor appealed on the basis that he had not “supplied” the clay – it was the owner’s clay on the owner’s land. Further, the contractor argued that the magistrate was wrong in holding that Australian Standard No. 3798 was a term of the contract.

The Supreme Court found against the contractor on both counts:

1. As to the clay, the Court found that it was the contractor who was responsible for selecting the clay. He should have satisfied himself it was of appropriate quality before using it, or at least should have alerted the landowner to the fact that the clay may not have been suitable. He did neither.
2. As to the Standard, the Court held that the magistrate had not found that the Standard was a term of the contract – but merely considered whether the method of compaction undertaken by the contractor was in accordance with documented good practice for construction of farm dams, and this included consideration of the Standard.

Accordingly, the Supreme Court dismissed the appeal and the magistrate’s determination of damages was confirmed.

WILLS & WATER

Those irrigators who hold access licences are reminded that they should review their wills to ensure that their water entitlement, now separated from the land, goes to the appropriate beneficiary. It is quite possible that under “old” wills the water access licence could end up with a beneficiary who has nothing to do with farming the property, contrary to the intention of the testator.

The same comment applies where a water access licence is held by a company – the testator should ensure that he bequeaths the shares in the company to the appropriate person.

WORKPLACE FATALITIES

The Occupational Health & Safety Act 2002 (NSW) (“the Act”) imposes far reaching duties and responsibilities to ensure health and safety not only upon employers, but on directors of employer companies and other persons involved in management and employees. In October last year, New South Wales Commerce Minister, John Della Bosca, released a draft exposure bill titled the Occupational Health & Safety Legislation Amendment (Workplace Fatalities) Bill 2004 (“the Bill”).

In a farming workplace, where serious work-related accidents sometimes occur, the proposed changes are an important reminder of the need for extreme vigilance on the part of employers.

The intent of the Bill is to:

1. Amend the Act to create a new offence where contravention of the Act causes the death of an employee or other relevant persons; and

2. Increase the maximum gaol term and double the current maximum financial penalties imposed by the Act for such an offence.

For individuals, including directors and managers, the maximum penalties proposed are \$110,000 for the first offence and/or 2 years imprisonment. Subsequent offences would attract penalties of up to \$165,000 and/or imprisonment of up to 5 years.

LEGAL BRIEFS

A woman was being questioned in a slander case.

BARRISTER: Please repeat the slanderous statements you heard, exactly as you heard them.

WITNESS (hesitating): But they are unfit for any respectable person to hear.

BARRISTER: Then just whisper them to the judge.

Acknowledgement “The Jokes on Lawyers” (Ross)