

**WORKPLACE AND
EMPLOYMENT LAW
ALERT**

MAY 2006

**FOR FURTHER INFORMATION
PLEASE CONTACT**

Christopher Campbell
☎ 07 3223 6403
✉ ccampbell@qmtlaw.com.au

Susan Andersen
☎ 07 3223 6479
✉ sandersen@qmtlaw.com.au

Authorised by:
Christopher Campbell
Managing Partner
QUINLAN MILLER & TRESTON
GPO Box 2500
Brisbane QLD 4001
Telephone: 3223 6403
E-mail: ccampbell@qmtlaw.com.au

**WORKPLACE HEALTH AND SAFETY - BE AWARE
OF HOW MUCH YOUR BUSINESS CAN COST YOU**

Business owners have a strict and ongoing obligation to ensure the health and safety of employees and other persons are not affected by the conduct or undertakings of the enterprise.

The obligations apply to individuals and not just the corporate entity. The obligations are imposed on any number of people and include:

- ✓ a person or persons who conduct a business or undertaking whether as employers, self employed persons or otherwise;
- ✓ persons in control of workplaces;
- ✓ principal contractors;
- ✓ owners of plant;
- ✓ persons in control of relevant workplace areas; and
- ✓ persons in control of fixtures, fittings or plant included in relevant workplace areas.

The obligation is discharged only if the business ensures the relevant persons are not exposed to risk and includes, but is not limited to:

- ✓ providing and maintaining a safe and healthy work environment;
- ✓ providing and maintaining safe plant;
- ✓ ensuring the safe use, handling, storage and transport of substances;
- ✓ ensuring safe systems of work; and
- ✓ providing information, instruction, training and supervision to ensure health and safety.

The financial cost to a small business of failing to comply with its obligations was highlighted in the recent case heard on appeal in the Industrial Court of Queensland, ***Peter Vincent Twigg AND Hughes and Hessey Pty Ltd [2005] QIC 65.***

On 17 November 2005 President Hall of the Industrial Relations Court, increased a fine from \$12,000 to \$30,000 imposed upon a Caboolture window manufacturing company for its failure to ensure the health and safety of one of its workers when the worker severed the tendons in his hand in a copy router accident.

The worker was 54 years of age, had approximately 20 years experience in the use of copy routers and had been employed by the company for about 6½ years. The injured worker was experienced to the extent that he had responsibility for training incoming staff in the use of the router. His right hand came into contact with a moving bit of the copy router as he was trying to position aluminium door jambs to perform certain operations upon them. The machinery was so

**WORKPLACE AND
EMPLOYMENT LAW
ALERT**

MAY 2006

**FOR FURTHER INFORMATION
PLEASE CONTACT**

Christopher Campbell
☎ 07 3223 6403
✉ ccampbell@qmtlaw.com.au

Susan Andersen
☎ 07 3223 6479
✉ sandersen@qmtlaw.com.au

Authorised by:
Christopher Campbell
Managing Partner
QUINLAN MILLER & TRESTON
GPO Box 2500
Brisbane QLD 4001
Telephone: 3223 6403
E-mail: ccampbell@qmtlaw.com.au

designed that the operator could switch it off and bring the bit to a halt before positioning or re-positioning items.

The business was owned by a sole director who was aware of the hazard posed by the unguarded router bit. Some time prior to the accident the business owner contacted the supplier of the router and enquired if there was some form of safety guard available that might be attached to the machine. The supplier had informed the business owner no such guard was available and the owner believed he could take no further steps to guard against the hazard.

In these circumstances the business owner pleaded guilty to the complaint made by the WH&S Investigator and at first instance a fine was imposed by the Industrial Magistrate in a sum of \$12,000 to be paid over a period of 12 months.

In the appeal brought in the Industrial Court, President Hall stated the obligation under the *Workplace Health & Safety Act* is an obligation to prevent injury to workers, not to take reasonable or some steps to do so. The obligations imposed by the Act verge on the absolute and observance of the statutory obligations may require the doing of more than something reasonable and expenditure of more than what is reasonable. The President commented the intention of the legislation was such that if a business could not afford to undertake their operations safely then they should not undertake them at all.

Having said this the obligations set out in the *Workplace Health & Safety Act* do state where there is no regulation in place to prescribe a way to prevent or minimise exposure to a risk then a person will discharge their obligation for exposure to the risk by doing the following:

- ✓ Adopting and following any way to discharge the obligation for exposure to the risk; and
- ✓ Taking reasonable precautions and exercising proper diligence to ensure the obligation is discharged.

In managing exposure the person must:

- ✓ Identify hazards;
- ✓ Assess risks that may result because of the hazards;
- ✓ Decide on appropriate control measures to prevent, or minimise the level of risks;
- ✓ Implement control measures; and
- ✓ Monitor and review the effectiveness of the measures.

To properly manage exposure to risk a person should consider the appropriateness of control measures in the following order:

1. Eliminate the hazard or prevent the risk;
2. If eliminating or preventing the risk is not possible then minimise the risk by:

**WORKPLACE AND
EMPLOYMENT LAW
ALERT**

MAY 2006

**FOR FURTHER INFORMATION
PLEASE CONTACT**

Christopher Campbell

☎ 07 3223 6403

✉ ccampbell@qmtlaw.com.au

Susan Andersen

☎ 07 3223 6479

✉ sandersen@qmtlaw.com.au

Authorised by:

Christopher Campbell

Managing Partner

QUINLAN MILLER & TRESTON

GPO Box 2500

Brisbane QLD 4001

Telephone: 3223 6403

E-mail: ccampbell@qmtlaw.com.au

- (a) Substituting the hazard giving rise to the risk with a hazard giving rise to a lesser risk;
- (b) Isolating the hazard giving rise to the risk from any one who may be at risk;
- (c) Engineering modification;
- (d) Applying administrative measures;
- (e) Using protective personal equipment.

Despite the business owner pleading guilty to the contravention, President Hall commented upon the factors making the owner liable for the penalty. Such factors were although the business owner had identified the hazard posed by the unguarded router bit he took no further action after being advised there was no guard available for that machine. He failed to consider or introduce administrative controls to ensure or to minimise the risk of exposure to the hazard including displaying written instructions about the use of the router until after the incident occurred.

There was some suggestion the window and door frames were commonly positioned whilst the router bit was in motion. The worker's failure to bring the bit to halt was attributed to inadvertence and something in the nature of complacency but it was still the case there seemed to be no attempt to audit or police any instructions to staff to halt the system prior to positioning the window and door frames. Such measures were minimum controls capable of being put into place to minimise or eliminate the risk and it was these minimum controls which were not undertaken.

Further, after the incident occurred and the business owner was served with a prohibition notice by the workplace health and safety investigator the owner purchased an upgraded system which included dead man switches on the operating handles and a guard around the rotating bit. The cost of the upgrade was not specified in the judgment.

In assessing the penalty to be imposed the financial position of the business was produced to the Industrial Magistrate and it was accepted that the relevant company was a *fledgling* company which struggled to make profits and also to pay an appropriate salary to the sole working director. It was appreciated unless the director could draw both a salary and profits he had merely just bought himself a job and had not advanced his prospects at all. On a global assessment however it was considered by the President that the company or the sole director was not in a dire situation such as that of comparative business owners who had been imposed with similar fines in the years previously for contraventions of the Act.

It was acknowledged that the maximum penalty for this type of contravention was \$375,000.00 and that the legislature had recently

WORKPLACE AND
EMPLOYMENT LAW
ALERT

MAY 2006

FOR FURTHER INFORMATION
PLEASE CONTACT

Christopher Campbell
☎ 07 3223 6403
✉ ccampbell@qmtlaw.com.au

Susan Andersen
☎ 07 3223 6479
✉ sandersen@qmtlaw.com.au

Authorised by:
Christopher Campbell
Managing Partner
QUINLAN MILLER & TRESTON
GPO Box 2500
Brisbane QLD 4001
Telephone: 3223 6403
E-mail: ccampbell@qmtlaw.com.au

and over a period of time increased the level of the maximum fine. Whilst the maximum penalty is reserved for the hypothetical worst case scenario it was considered in this case that while the contravention was by no means towards the high spectrum it was not free of blameworthiness and the business owner was not impecunious.

President Hall considered there was no justification for the granting of indulgence to small and struggling businesses so as to undermine the incentive to comply with the obligations imposed by the Act.

The President in assessing the penalty did, however, recognise several significant mitigating factors in that the router had been appropriately serviced, the business owner was a first offender, he had co-operated with investigating officers and submitted a timely plea of guilty. He said there was no suggestion that the business owner had anything other than a *good* industrial record. A further mitigating factor was that the worker was an experienced employee who had *let down* the business owner by attempting to do something, which he knew he should not be doing and had the means of avoiding.

Taking into account the business's financial position and all of the circumstances of the case the President decided that a correct range for the penalty was an amount of between \$30,000.00 to \$40,000.00. The figure sought on appeal however was only the range of between \$25,000.00 to \$30,000.00. The President therefore ordered that the business owner pay a fine in the sum of \$30,000.00 such amount to be paid over a period of two years.

COMMENT:

There has been some criticism of the decision of the President to increase the penalty from \$12,000.00 to \$30,000.00 as placing an untenable burden on small businesses and failing to protect those businesses where reasonable steps to ensure compliance with the Act were taken. That criticism does not, however, take into account the fact that the business owner did in fact plead guilty and did fail to take minimum precautions to minimise the risk of exposure to harm in an environment where it was known that the machinery was dangerous and that there was a common practice being undertaken by the workers which further increased the risk of injury.

The obligations of business owners to provide a safe and healthy environment for employees and other lawful entrants to a premises are complex and does not end with compliance with just the *Workplace Health & Safety Act*. A business owner must be aware they have additional obligations to avoid harm to persons related to the business due to the operation of legislative compensation schemes including the *Workers' Rehabilitation and Compensation Act*, the *Personal Injuries Proceedings Act 2002* and the *Civil Liability Act*.

CONCLUSION:

In conclusion the financial cost to businesses in failing to comply with their obligations to minimise the risk of industrial accidents and ensure the health and safety of individuals demand that business owners be diligent in assessing the adequacy of their workplace health and safety practices.

**WORKPLACE AND
EMPLOYMENT LAW
ALERT**

MAY 2006

**FOR FURTHER INFORMATION
PLEASE CONTACT**

Christopher Campbell

☎ 07 3223 6403

✉ ccampbell@qmtlaw.com.au

Susan Andersen

☎ 07 3223 6479

✉ sandersen@qmtlaw.com.au

Authorised by:

Christopher Campbell

Managing Partner

QUINLAN MILLER & TRESTON

GPO Box 2500

Brisbane QLD 4001

Telephone: 3223 6403

E-mail: ccampbell@qmtlaw.com.au