



Best defences in OHS prosecutions

Key Points

- A safe system of work that properly addresses reasonably foreseeable risks to employees or others is key in successfully defending OHS prosecutions.
- Employers must be able to argue they did all that was reasonably practicable to meet their obligations.
- Compliance with relevant standards or codes will not automatically protect an employer from a conviction.

The key to a successful defence in an OHS prosecution is a safe system of work that properly addresses any reasonably foreseeable risks employees or others may be exposed to.

If organisations have placed themselves in a strong position with respect to available statutory defences, a successful prosecution against them may be less likely. Prosecutions in recent years, however, have made it clear caution must be exercised when attempting to use statutory defences. Merely asserting an accident was due to the operator's carelessness, or that safety was the responsibility of another party, cannot successfully make out a defence.

Seeking expert advice may help to minimise the chance of an organisation facing unexpected legal liabilities related to OHS risks.

Legal defences

Occupational health and safety laws in all Australian States and Territories make provision for employers to use certain defences if they are prosecuted following a work accident or injury.

In New South Wales, for example, under sec 28 of the *Occupational Health and Safety Act 2000*, the available defences may be of use to employers who can demonstrate:

- it was not reasonably practicable to comply with the relevant provision of the legislation; or

- the offence was committed due to causes the person had no control over, and it was impracticable for the person to make provision against it.

To use these defences, employers must be able to argue they did all that was reasonably practicable to meet their obligations.

“Practicable” means reasonably feasible with regard to a range of considerations, including the degree and probability of the risk, the state of knowledge about the risk and means of controlling it, as well as the availability, suitability and cost of those means.

Employers in other jurisdictions are in a similar position — prosecutions may fail or convictions may be overturned by higher courts if employers can show it was not reasonably practicable for them to control the risk.

Under Queensland legislation, following relevant guidance material — such as the relevant regulation, advisory standard or code of practice — may also enable employers to establish a successful defence.

To best position an organisation with regard to possible defences, it is important to understand what is required to use these defences. The cases outlined in this report illustrate situations where an employer who was prosecuted considered it had done all that was reasonably practicable to eliminate the risks but, when the courts tested these assumptions, they were revealed to be unfounded.

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What the courts say

Risk not reasonably foreseeable

In the Court of Petty Sessions at Perth, an employer was convicted for failing to provide and maintain a safe working environment, after a temporary employee was killed when he was struck in the chest by a steel beam. The decision was overturned on appeal, however, as the majority view of the Supreme Court of Western Australia held the risk had not been foreseeable and the work system in place had made the accident unlikely (*Troon Holdings Pty Ltd t/as Kewdale Engineering and Construction v MacCarron*, Supreme Court of Western Australia, Full Court (*Pidgeon, White and Wheeler JJ*) (No 980572) 5/10/98).

Not reasonably practicable to comply

A common ground for believing it was not reasonably practicable to comply is the notion that safety is the responsibility of another party. This may be the contractor's view, for example, when a contractor is working at the premises of a host employer. In a case heard before the Industrial Relations Commission of New South Wales in Court Session, a company contracted to construct a mineshaft was prosecuted after the contractor's project manager was killed in a rock fall in the mine. The company argued control over the premises had remained with the mine owner and it had not been reasonably practicable for the company to drill shafts to make the premises safe.

The Court argued the contractor did have some control. The fact the contractor had taken some precautionary measures demonstrated it had exercised some control over the site. The Court held the contractor could also have exercised control by refusing to work

in the unsafe conditions. The contractor, therefore, had no defence because it had not done all that had been reasonably practicable to eliminate the risks (*Morrison v Akula Pty Ltd, formerly known as RaiseBore Australia Pty Ltd* [2004] NSWIRComm 41, Industrial Relations Commission of New South Wales in Court Session (*Boland J*) (No IRC 2983 of 2002) 9/3/04).

Injured person responsible for his own actions

In a South Australian case, a company which owned a licensed fishing vessel was prosecuted after one of the crew drowned while assisting with a fishing operation. The drowned man had not been wearing a lifejacket, though the company had provided one.

The company argued there was no case to answer, claiming the drowned man was not an employee but a fully independent, self-employed person engaging with the company and crew in a "joint purpose" exercise, and it had been his own choice not to wear the lifejacket provided. The Court did not accept this argument, finding instead that the drowned man had enjoyed the same status as the other deckhands and that, if they were employees, so was he. The Court found the company should have asserted its authority and controlled the risk by insisting all the crew wore lifejackets. The case was held for the prosecution (*Stevenson v A Lukin Nominees Pty Ltd*, Industrial Relations Court of South Australia (*Cunningham IM*) (M.14/1996) 26/4/96).

Operator carelessness

A worker's reckless or inappropriate behaviour is frequently held up as the cause of an accident, and companies subject to prosecution have often claimed such "operator failure" was

unforeseeable and therefore beyond their control. This was the contention, for example, in the prosecution of a company owning a farm, after the farm manager was killed when an all-terrain vehicle (ATV) overturned.

The company and its director pleaded not guilty. They maintained there had been no inherent risk associated with using the ATV on the farm, as long as it was operated properly, and therefore there had been no breach of the legislation. They claimed the system of safety at the farm had been adhered to at all times, with the exception of the farm manager's actions on the day of the accident. His use of the ATV that day had been reckless and completely unforeseeable, as it had been inconsistent with the warnings in the owner's manual. The defendants referred to the relevant section of the legislation, which stated that plant was not properly used, if used without regard to information on its safe use that had been made available by the employer.

The Court, however, pointed to the inadequate instruction for employees and contractors in the safe use of the ATV. Though information on safe use of the ATV was available in the manual, the operator's attention had never been drawn to the risks of overturning the ATV. The Court explained it was not a question of whether the farm manager's potentially careless use of the ATV had been foreseeable, but whether the risk of it overturning had been foreseeable. That risk had been mentioned in the manual, so it had quite clearly been foreseeable. Because the use of the vehicle had involved a foreseeable risk, the legislation had required the employer to establish a safe system for its use.

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The Court did not accept it had not been practicable for the company to guard against the risk of the ATV overturning and, by delegating all responsibility for OHS to the farm manager, the company had breached the duties imposed on it by the legislation (*WorkCover Authority of New South Wales (Inspector Childs) v Kirk Group Holdings Pty Ltd & Anor* [2004] NSWIRComm 207, Industrial Relations Commission of New South Wales in Court Session (*Walton J*) (No IRC 1730-33 of 2004) 9/8/04).

Compliance with standards

As noted above, compliance with relevant standards may help protect an organisation from the risk of prosecution and conviction. It does not automatically follow, however, that an organisation following a relevant standard or code of practice cannot be found guilty of an OHS offence and convicted.

For example, after a contractor's employee was injured when trapped in a moving conveyor at a lime stabilisation plant at Manly, NSW, the plant owner was prosecuted. The plant owner pleaded not guilty, arguing there had been a proper system in place for dealing with the conveyor and for contact with moving machinery. The contractor's employee had been familiar with and fully trained in the system but knowingly stepped outside it in a way ("a frolic of his own") that could not have been foreseen. The company also argued the conveyor's emergency stop mechanism had complied with the relevant Australian Standard.

The Industrial Relations Commission of New South Wales in Court Session explained the plant owner's reliance on reasonable foreseeability and Australian Standards was misplaced. The issue was not whether the

worker's behaviour and injury had been foreseeable but whether the plant owner had failed to ensure that a non-employee was not exposed to risks to health and safety arising from its undertaking. While Australian Standards set minimum safety requirements and function as guides, the fact that an employer's system of work, machinery or other equipment complies with a standard will not of itself mean the employer has met its obligations under the Act (*Inspector Woodington v Thiess Services Pty Ltd* [2004] NSWIRComm 20 and NSWIRComm 126, Industrial Relations Commission of New South Wales in Court Session (*Boland J*) (No IRC 4142 of 2002) 19/2/04 and 24/5/04).

While defendants may claim particular risks were not foreseeable, or that they had done all that was reasonably practicable to guard against health and safety risks, clearly the courts do not always agree.

The assessment of risks and the development and implementation of a safe system of work can — and should — be done before any incident or accident occurs. If this is done, an organisation will be in the best position to defend itself against prosecution, in the event of an accident or injury.

For specific advice in relation to your business, contact Delta OHS Systems:

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