Work Health and Safety Legislative and Case Law Update
Welcome to the fourth issue of the WHS briefing for 2014. This briefing tracks significant legislative and case law changes which have occurred between 1 October 2014 to 31 December 2014 which may affect your business.

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|                  | • Employer fined $100,000 for fatal crushing from unguarded robot |
Would you like to discuss any of these matters or do you have any comments about the Briefing Update? We welcome your feedback and involvement in the development of this Briefing Update – please contact us if you have any additional matters you would like to be covered.

**KEY LEGISLATIVE UPDATES**

**ACROSS AUSTRALIA**

**SWA guidance material to replace Code of Practice on cranes**

Safe Work Australia (SWA) members have agreed in principle on the guidance material that will replace the draft model Code of Practice on cranes.

The next members meeting will be held in February 2015.

**Inadequate guarding identified as the primary cause of design-related fatalities**

A report by Safe Work Australia (SWA) dated November 2014 examined the extent to which unsafe design contributed to 639 work-related fatalities over the period 2006 to 2011 which involved machinery, plant and powered tools. 36% of those fatalities were considered definitely or possibly design-related.

The report broadly categorised the circumstances of the design-related fatalities, indicating aspects of unsafe design which were common across many types of machinery and plant. The most common categories were inadequate guarding and lack of roll-over protection structures / seat belts. Other categories included lack of residual current device, lack of interlock and driver obstructed vision.

A copy of SWA’s report is accessible [here](#).

**SWA reports on the Australian WHS ten-year strategy**

Safe Work Australia (SWA) has released its first annual progress report on the Australian Work Health and Safety Strategy 2012-2022. This 10-year plan directs employers, unions, governments and other organisations to focus on seven action areas across seven high priority industries in order to achieve the vision of ‘healthy, safe and productive working lives’.

The progress report, covering the period 1 October 2012 to 30 September 2013, as well as case studies on the SWA website [here](#), provide a snapshot of the diverse and innovative activities undertaken by SWA, SWA members, WHS regulators, employer organisations and unions.

A copy of SWA’s progress report is accessible [here](#).

**Workplace visits by regulators increasingly proactive**

Safe Work Australia (SWA) has released the Comparative Performance Monitoring Report (16th Edition) dated October 2014. The report which examined, among other matters, work health and safety compliance and enforcement activities, found that in 2012-2013, in New South Wales, the number of proactive workplace visits by regulators increased by 55% while the number of reactive workplace visits decreased by 6%. The number of proactive visits in Queensland and South Australia also increased, albeit to a lesser extent than in NSW. In 2012-2013, the total number of proactive workplace visits around Australia was 82,047 and the number of reactive workplace visits was 54,914.

A copy of the SWA report is accessible [here](#).
COMMONWEALTH

Government revises proposed building and construction code

On 28 November 2014, the Federal Government published a revised version of its proposed Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 (Revised Proposed Code) (which amends the earlier version that was released on 17 April 2014), which will replace the Building Code 2013 if and when the Building and Construction Industry (Improving Productivity) Bill 2014 passes through Parliament. The Revised Proposed Code excludes the detailed health, safety and rehabilitation requirements of the current Building Code 2013.

A copy of the proposed Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 (dated 28 November 2014) is accessible [here](#) and a copy of the revised Explanatory Statement is accessible [here](#).

Government cuts red tape – less regulation of international standards

Prime Minister Tony Abbott and Parliamentary Secretary to the Prime Minister Josh Frydenberg have announced the Federal Government’s intention to ‘adopt a new principle that if a system, service or product has been approved under a trusted international standard or risk assessment, then our regulators should not impose any additional requirements for approval in Australia, unless it can be demonstrated that there is a good reason to do so’. This is intended to ‘foster a lower cost, business friendly environment with less regulation’.

A copy of the joint press release on 14 October 2014 is accessible [here](#).

Government response to the Home Insulation Program Royal Commission

In December 2013, the Abbott Coalition Government established the Royal Commission into the Home Insulation Program (HIP) which ran from 2009 to 2010 and resulted in the tragic loss of four young men, damage to many existing businesses and houses destroyed by fire.

On 23 December 2014, in response to the Royal Commission and to address the failings of the previous government, the Government announced its commitment to taking action by addressing six areas:

(i) payments for families of the deceased installers;
(ii) payments for pre-existing insulation businesses adversely affected by the HIP;
(iii) improving safety for workers in roof spaces by seeking to achieve a harmonised approach to roof space safety across all States and Territories;
(iv) ensuring Commonwealth programs minimise work health and safety risks;
(v) improving Government processes to avoid similar situations arising in the future; and
(vi) addressing Public Service Code of Conduct matters.

A copy of the media release is accessible [here](#).

Employers free from AS/NZS 4801:2001 requirement

As of 1 January 2015, employers are no longer required to obtain AS/NZS 4801:2001 certification before tendering for Commonwealth construction projects under the Australian Government Building and Construction OHS Accreditation Scheme (Scheme). Parliamentary Secretary to the Prime Minister, Josh Frydenberg, welcomed the announcement as a commonsense approach to minimising the regulatory burden for the building and construction industry.

A joint statement of Mr Frydenberg and the Federal Employment Minister, Eric Abetz, about changes to the Scheme is accessible [here](#).
Road Safety Remuneration Tribunal publishes third annual work program

The Road Safety Remuneration Tribunal (Tribunal) has prepared its third annual work program (AWP), identifying the following matters which the Tribunal proposes to inquire into in the next year:

(i) road transport and distribution of goods, wares, merchandise, material or anything destined for sale or hire by a supermarket chain;
(ii) long distance operations;
(iii) the cash in transit industry;
(iv) oil, fuel and gas sectors of the road transport industry;
(v) wharf and port sectors of the road transport industry;
(vi) the waste management industry.

A copy of the full decision is accessible here.

NEW SOUTH WALES

New WHS laws for NSW mining

Harmonised WHS laws for the New South Wales mining sector will commence on 1 February 2015. The new laws are the Work Health and Safety (Mines) Act 2013 (NSW) and the Work Health and Safety (Mines) Regulation 2014 (NSW). These new laws, together with the Work Health and Safety Act 2011 (NSW) (WHS Act) and the Work Health and Safety Regulation 2011 (NSW) (WHS Regulation), will provide for health and safety in mining in NSW. The news laws have been developed to align with and build on the WHS Act and WHS Regulation in order to facilitate consistent approaches across mining and non-mining operations.

The new laws will repeal and replace the Coal Mine Health and Safety Act 2002 (NSW) and the Mine Health and Safety Act 2004 (NSW) and their supporting regulations.

The regulator has published a factsheet on the news laws which is accessible here and an overview of the transitional arrangements for and guidance on the new laws which is accessible here.

Complying with dangerous goods WHS notification requirements made easier

As of 1 January 2015, NSW employers who store or handle dangerous goods (known as ‘hazardous chemicals’ in the Work Health and Safety Regulation 2011 (NSW)) no longer need to provide annual notifications to WorkCover. Employers will only have to notify WorkCover once about the dangerous goods they store or handle. Further notifications are only required if the employer changes their contact details or the way they use, store or handle the dangerous goods.

A copy of WorkCover’s guidance note on notification of hazardous chemicals and abandoned tanks is accessible here.

Requirement to provide audiometric testing postponed

WorkCover NSW has announced that a person conducting the business or undertaking (PCBU) who frequently requires a worker to use personal protective equipment (PPE) to protect the worker from the risk of hearing loss and who provides the PPE as a control measure is exempt from 1 January 2015 to 31 December 2015 from the requirement to provide audiometric testing for the worker under clause 58(2) of the Work Health and Safety Regulation 2011 (NSW).

Change to high-risk work licences required for boiler operations

WorkCover NSW has announced that as of 1 January 2015, existing boiler licence classes (basic (BB), intermediate (BI) and advanced (BA)) have been compressed into two licence classes: Standard boiler (BS) and Advanced boiler (BA).
If you have an existing boiler licence, no action is required to operate a boiler with standard features. You will be considered a Standard boiler operator and the licence card will be updated to Standard boiler on the next renewal.

To operate a boiler with advance features, enrol with a Registered Training Organisation (RTO) to undertake Advanced boiler operation training and assessment.

Search for a RTO [here](#).

**QUEENSLAND**

**Water regulation reform affecting Qld coal mining and petroleum industries**

The *Water Reform and Other Legislation Amendment Act 2014 (Qld) (Act)* commenced in December 2014, amending various legislation across the petroleum and gas and coal mining sectors, among others. In particular, the Act makes amendments to the *Coal Mining Safety and Health Act 1999 (Qld)* and the *Petroleum and Gas (Production and Safety) Act 2004 (Qld)*.

A copy of the *Water Reform and Other Legislation Amendment Act 2014 (Qld)* is accessible [here](#).

**WHS regulations relating to asbestos and concrete placing booms commenced**

As of 1 January 2015, design registration for concrete placing booms is required under section 779 of the *Work Health and Safety Regulation 2011 (Qld) (WHS Regulation)*.

Additionally, in relation to asbestos, as of 1 January 2015, there are notification requirements under sections 454 – 457 of the WHS Regulation, clearance inspection and clearance certificate requirements under sections 473 – 474 of the WHS Regulation, and removal licence requirements under section 489 and 491 of the WHS Regulation.

**VICTORIA**

**Victorian Labor Government promised OHS review**

Victoria’s new Labor Government made a pre-election promise to review the effectiveness of occupational, health and safety legislation and enforcement by the Victorian Workcover Authority, in order to ensure high safety standards in Victorian Workplaces.

Labor also promised, among other things, to ensure that labour hire arrangements could not be used by employers to avoid responsibility for workplace accidents, return to work obligations or compromise workers’ safety.

A copy of Labor’s pre-election platform document is accessible [here](#).

**Victorian WorkCover Authority advice on exposure standards**

The Victorian WorkCover Authority (VWA) has released information about exposure standards and atmospheric monitoring to assist employers to understand their obligations relating to hazardous substances contained in the *Occupational Health and Safety Regulations 2007 (Vic)*.

VWA’s information sheet is accessible [here](#).

**New building code**

includes a drug testing regime and Federal Employment Minister, Eric Abetz, claims that the new Code imposes higher safety standards. Mr Abetz has accused the Labor Party of falsely claiming the new drug-testing rules wouldn’t improve workplace safety and effectively promoting a pro-drugs-on-building-sites policy.

A copy of a press release by Mr Abetz about the Code is accessible [here](#).

**AUSTRALIAN CAPITAL TERRITORY**

**WorkSafe ACT releases guidance for construction industry**

WorkSafe ACT has published three new guidance notes for the construction industry:

(a) ‘Workplace Induction for Construction Workplaces’ advises builders, principal contractors and other ‘persons conducting a business or undertaking’ (PBCUs) about what should be included in workplace-specific inductions and task-specific training. A copy of this guidance note is accessible [here](#).

(b) ‘Safe Work Method Statement for High-Risk Construction Work’ advises PCBUs about the function, content and application of safe work method statements for the 18 high-risk construction work activities defined in the *Work Health and Safety Regulation 2011 (ACT)*. A copy of this guidance note is accessible [here](#).

(c) ‘Construction Work – Work of a Minor Nature’ outlines what could be considered ‘work of a minor nature’ when testing, maintaining or repairing a building or structure. A copy of this guidance note is accessible [here](#).

In addition, WorkSafe ACT recently published guidance on enforceable undertakings (an alternative to prosecution under the *Work Health and Safety Act 2011 (ACT)*). A copy of these guidance materials is accessible [here](#).

**ACT joins national rail safety regime**

The *Rail Safety National Law (ACT) Act 2014 (ACT)* commenced on 20 November 2014, making the Australian Capital Territory the sixth Australian jurisdiction to join the national rail safety regime. South Australia, New South Wales, the Northern Territory, Tasmania and Victoria were already part of the regime. Western Australia last year introduced mirror national rail safety laws to Parliament, while the Queensland Government is in the process of drafting a bill that is expected to be introduced to Parliament this year.

**New asbestos laws in ACT commenced 1 January 2015**

As of 1 January 2015, the management, control and removal of asbestos in the workplace is governed by the *Work Health and Safety Regulation 2011 (ACT)* and two supporting Codes of Practice. The ACT has largely adopted the model laws on asbestos, meaning that the management of asbestos in ACT workplaces will largely be harmonised with that of other model jurisdictions, but with some differences.

A copy to the *How to Safely Remove Asbestos Code of Practice* is accessible [here](#).
A copy of the *How to Manage and Control Asbestos in the Workplace Code of Practice* is accessible here.

**SOUTH AUSTRALIA**

**Code of Practice for Working Hours revoked**
The South Australian Government has revoked its ‘Approved Code of Practice for Working Hours’ (Code), which was developed in 2010 and continued to operate under transitional arrangements after the *Work Health and Safety Act 2012* (SA) commenced on 1 January 2013. The Code was made obsolete by Safe Work Australia’s November 2013 ‘Guide for Managing the Risk of Fatigue’. SWA also published a ‘Workers’ Guide to Fatigue Management’ in November 2013.

**WHS regulations commenced and expired on 1 January 2015**

As of 1 January 2015, two new regulations have commenced and five transitional provisions have expired in the areas of asbestos, mining, plant and structures, and high risk work.

A list of the transitional changes at occurred on 1 January 2015 is accessible here.

**WESTERN AUSTRALIA**

**WHS and dangerous goods legislation in WA**

The Government has announced that *Dangerous Goods Safety Act 2004* (WA) (*DGS Act*) and the incoming work health and safety Act (*WHS Act*) in Western Australia will remain separate. This is intended to avoid diluting the intent and achievements of the DGS Act and confirm that all people who control or manage dangerous goods have a duty to prevent unreasonable harm to people, property or the environment, and this duty is not restricted to a workplace context. Additionally, the six dangerous goods regulations will be consolidated into one single regulation. These are two of the 16 recommendations that have resulted from a statutory review of the DGS Act.

A copy of the review is accessible here.

**Structural reform of safety laws for mining, petroleum and major hazard facilities**

A consultation paper published on 3 November 2014 outlines five proposed options to reform the safety aspects of mining, petroleum and Major Hazard Facilities (*MHF*). The preferred option of the State Department of Mines and Petroleum (DMP) involves introducing a unified safety Act for mining, petroleum and MHF. The period for submissions on the consultation paper concluded on 19 December 2014. Marsden Jacob Associates is now reviewing all submissions received from stakeholders in the preparation of the Decision Regulatory Impact Statement which is expected to be completed around the end of January 2015. The Minister will consider the Regulatory Impact Statement around March 2015.

A copy of the consultation paper is accessible here.

**Harmonised WHS Bill open for public comment until 30 January 2015**

The *Work Health and Safety Bill 2014* (WA) (*Bill*), which was introduced to Parliament on 23 October 2014, is open for public comment to WorkSafe WA until close of business on 30 January 2015.

The Bill is a Western Australian version of the model work health and safety laws, with some modifications to suit the Western Australian working environment. The Bill includes the same high
penalties as in the model work health and safety legislation.

A copy of the Bill, a list of differences between the Bill and the model legislation, and a template for public comment on the Bill is accessible [here](#).

**WA to join national rail safety regime**

The *Rail Safety National Law (ACT) Bill 2014 (WA)* is currently being considered before Parliament. If it commences as an Act it will be the seventh Australian jurisdiction to join the national rail safety regime. South Australia, New South Wales, the Northern Territory, Tasmania, Victoria and the Australian Capital Territory are already part of the regime. The Queensland Government is in the process of drafting a bill that is expected to be introduced to Parliament this year.

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**NORTHERN TERRITORY**

**Transitional arrangements for plant, diving work and asbestos expired**

As of 1 January 2015, transitional arrangements in the Work Health and Safety (National Uniform Legislation) Regulations relating to plant, diving work and asbestos management in the workplace have expired.

NT WorkSafe has prepared bulletins outlining the transitional arrangements which have expired.

A copy of the bulletin relating to transitional arrangements for plant is accessible [here](#).

A copy of the bulletin relating to transitional arrangements for diving work is accessible [here](#).

A copy of the bulletin relating to transitional arrangements for asbestos management in the workplace is accessible [here](#).

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**TASMANIA**

**WHS regulations removed, deferred and amended as of 1 January 2015**

WorkSafe Tasmania has announced that, on 24 December 2014, the following changes to the *Work Health and Safety Regulations 2012* (Tas) (*WHS Regulations*) came into effect:

(i) regulation 217 relating to protective structures on earth moving machinery has been removed;

(ii) a requirement (in Schedule 5) for prefabricated formwork to be design registered has been removed;

(iii) all other uncommenced regulations (relating to diving work and asbestos) have been deferred further and will commence on 1 January 2017; and

(iv) technical amendments have been made to clarify, correct and improve the WHS Regulations.

A more detailed list of the changes outlined by WorkSafe Tasmania is accessible [here](#).
SIGNIFICANT CASES

COMMONWEALTH

$360,000 penalty for hi-rail off-tracking fatality

Two hi-rail entities in a major construction corporate group were conducting engineering works on railway tracks in Western Australia. On 30 December 2011, a hi-rail vehicle was located on a decline during the off-tracking process. The vehicle lost its braking capacity whilst still on the rail tracks. It descended, gathering momentum, and fatally struck a worker who had not heard the warning horn or shouts because he was wearing ear plugs.

The entities pleaded guilty to breaching the now-repealed Commonwealth Occupational Health and Safety Act 1991 by failing to take all reasonably practicable steps to protect the health and safety of its employee, ensure the vehicle was designed and constructed to be safe for use by employees and inform the related entity of adequate information to ensure the vehicle would be safe for employees. The Federal Court fined each entity $180,000, which is a total penalty of $360,000. The Court noted that there were serious defects in the structure and implementation of the entities’ safety systems for the manufacture and operation of hi-rail vehicles, and a penalty should be imposed at a high level in order to remind the entities and warn other employers of the need for constant vigilance when it comes to workplace health and safety.

A copy of this case, Comcare v John Holland Pty Ltd [2014] FCA 1191, is accessible here.

NEW SOUTH WALES

Inspectors’ WHS investigation powers clarified

In September 2014, an employee was killed while he was working at a quarry operated by his employer. An inspector from the Department of Trade and Investment (Department) attended the site and sought to exercise power granted to inspectors under section 171 of the WHS Act (ie the power of inspectors to require immediate production of documents and answers to questions upon entry to a workplace) in order to determine whether there had been a contravention of the Work Health and Safety Act 2011 (NSW) (WHS Act).

The employer sought to restrain the Department from obtaining information under section 171 on the basis that the appropriate course for the inspector to pursue his investigation to obtain information about possible contraventions of the WHS Act was by exercising the regulator’s powers under section 155 of the WHS Act (ie subject to the power being delegated by the regulator to the inspector, and subject to the inspector already possessing information sufficient to form an opinion that the information, evidence or documents requested either relates to a contravention of the WHS Act that has occurred or will assist the regulator to monitor or enforce compliance with the WHS Act, the power of inspectors to issue a written notice requiring the production of such information, evidence and documents).

The Court held that it was appropriate for the inspector to exercise its power pursuant to section 171 of the WHS Act. If the inspector was required to exercise power under section 155, this would impede the effective operation of the WHS Act. The Court declined to grant the relief sought by the employer and dismissed the case.

A copy of this case, Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment) [2014] NSWSC 1580, is accessible here.
Employer fined twice for emergency stop breaches

On two separate occasions in 2011 and 2012, cleaners at an abattoir in Dubbo have sustained serious injuries to their arms when they were cleaning a conveyor belt, their arm became trapped and there was no emergency stop switch within their reach. In relation to the first incident, the employer pleaded guilty to failing to provide an emergency stop within the worker’s reach and was fined $75,000 (after a 25% for its early plea, cooperation and contrition). In relation to the second incident, the employer again pleaded guilty and was fined $150,000 (after a 25% for its early plea, cooperation and contrition). The court considered that after the 2011 incident the company had been on notice that a similar injury may result from failure to provide appropriate stop switches.


A copy of the case (Re Boles) WorkCover Authority of NSW (Inspector Pile) v Fletcher International Exports Pty Ltd [2014] NSWDC 181 is accessible here.

Transport company and director fined over $250,000 for breach of fatigue laws

A transport company and its director have been fined $236,721 and $16,875 respectively, for 235 breaches of heavy vehicle fatigue laws. The offences included false or misleading diary entries, excessive driving hours and preparing unlawful schedules for drivers. This decision highlights that courts will not tolerate parties in the supply chain putting pressure on drivers to speed or drive when fatigued, and that employers can be held liable for the conduct of employees under the chain of responsibility legislation.

$202,500 enforceable undertaking for injured labour hire worker

In February 2013, a worker employed by a labour hire company as a fitter was attempting to realign a roller on a broken-down conveyor belt when he fell three metres from a scissor lift onto the concrete floor. WorkCover alleged that the company had breached the Work Health and Safety Act 2011 (NSW) (WHS Act) by failing to ensure so far as reasonably practicable the health and safety of the injured worker.

In lieu of prosecution, the company entered into an enforceable undertaking at a cost of $202,500 which involved committing to comply with the WHS Act in future (including by implementing an executive management due diligence program, delivering training, reviewing and amending policies and procedures relating to high risk activities, providing safety leadership and supervision training, and introducing a ‘stop the job’ policy to reinforce the importance of hazard identification and taking action), providing details of its existing safety management system including its auditing processes, making a statement of regret that the incident occurred (as opposed to an admission of guilt), and providing details of any rectifications made as a result of the contravention (which included training, holding toolbox talks, reviewing procedures and safety controls, developing and reviewing job safety and environmental analyses, and engineering and installing ignition type locks for the scissor lift).

A copy of the enforceable undertaking is available here.

QUEENSLAND

$236,338.50 enforceable undertaking for injured worker

On 23 January 2012, a worker was washing the head roller of a conveyor with a hose whilst the conveyor was in operation. The hose became caught in the conveyor, pulling the worker’s arm into the conveyor, and resulting in the worker sustaining lacerations and fractures to his right arm.

In lieu of prosecution, the company entered into an enforceable undertaking at a cost of $236,338.50
which involved committing to comply with the WHS Act in future (including by installing plant guarding, employing an additional HSE advisor, implementing procedures for regular inspections and compliance checks, reviewing and implementing alternative work methods, delivering tool box talks and training), providing details of its existing safety management system including its auditing processes, making a statement of regret that the incident occurred (as opposed to an admission of guilt), and providing details of any rectifications made as a result of the contravention (which included installation of fencing and guarding).

VICTORIA

Company fined $250,000 for fatal wall collapse

In March 2013, a brick wall at a Melbourne building site, which risked the lives of many people who walked past it, ultimately collapsed, killing three people. The construction company had failed to ensure that its subcontractor, Aussie Signs, had taken steps to ensure the advertising hoarding attached to the wall was safe. The advertising hoarding did not cause the collapse but increased the chances of the wall collapsing.

Melbourne Magistrates Court found that the legislation requires persons to be proactive in eliminating risk, and such a duty cannot be subcontracted. The construction company pleaded guilty and was fined $250,000.

AUSTRALIAN CAPITAL TERRITORY

First WHS enforceable undertaking in ACT

An engineering company is the first ACT employer to enter an enforceable undertaking under the Work Health and Safety Act 2011 (ACT). On 23 May 2013, a worker was struck on the head and neck with a high speed roller shutter door. In lieu of prosecution, the employer entered into an enforceable undertaking at a cost of $625,000. As part of the undertaking, the company has created work health and safety training resources, implemented work health and safety training programs, reviewed its work health and safety policies and procedures, established a WHS Executive Review Committee, developed new induction procedures and hazard checklists, developed an injury management / early intervention program, implemented a reporting program to identify safety hazards and manage risks, donated $50,000 to the neurosurgical unit of Canberra Hospital and sponsored a $20,000 education program for ACT community members to achieve a WHS qualification.

A copy of the enforceable undertaking is accessible here.

WESTERN AUSTRALIA

Employer fined $100,000 for fatal crushing from unguarded robot

In August 2012, a labour hire worker employed as a machine operator at a fertiliser factory was fatally crushed after he was trapped between the arm of a robot palletiser and a conveyor. When the company had installed a perimeter fence around the robot palletiser in 2008, it had left a gap in the fence where workers could pass through and risk being struck by the robot. The worker had inadvertently activated a light sensor, which caused the arm to move and trap him against the steel rollers of the pickup station.

The court found that the company was reckless in maintaining a fence with unsafe access points and the company was fined $100,000. (The labour hire company was not charged over the incident.) If the fence had been fixed earlier, the worker would probably not have died. Guarding is absolutely essential and it is never safe to allow moving parts of machinery to remain unguarded.