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The Question: What price workplace safety?

November 22, 2010

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THE QUESTION: What price a safe workplace?

THE EMPLOYER

GARRY BRACK. Garry Brack is chief executive of the Australian Federation of Employers and Industries.

FOR more than a dozen years, NSW has operated under the most draconian workplace safety regime anywhere on the planet. It has had more prosecutions and fines imposed than all the other Australian states combined.

The prosecutions have been at four times the rate in Britain and even greater than the rate in places such as Alberta, Canada.

It was hoped that the harmonisation of state safety laws would bring NSW back into line with normal legislative standards and that WorkCover would change its spots, focusing more on education, research and advice and reverting to inspectors with practical skills to help employers with useful hints on what they have seen on their inspectorial rounds.

Instead, it focused on fines and prosecutions.

Employers accept the need for workplace safety. However, it is simply impossible to deal with some of the requirements of the current laws as enforced by WorkCover and interpreted by courts. Think of perfect safety and zero risk in the workplace; directors and management of corporations deemed guilty before they even go to court; reverse onus of proof - effectively you have to prove your innocence, they don't have to prove your guilt; and severe limitations on the employers' right of appeal.

Bank robbers get a better deal from the legal system.

Add to that the government's other claim on behalf of unions - the right to launch prosecutions. Unions want this so they can effectively control WorkCover's prosecution policy and keep

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Thought Bubble

O'Farrell on high wire over a black hole

Heath Aston: Watching Barry O'Farrell rail against Labor's supposed \$5.2 billion budget "black hole" was like watching the documentary Man on Wire in which French tightrope walker Philippe Petit crosses the void between New York's twin towers. The difference being that the Premier was carrying his Treasurer, Mike Baird, on his shoulders and he was doing the high-wire act in slip-on shoes and a suit and tie.



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effectively control workers' compensation policy and keep employers on the back foot.

However, employers have too frequently been undermined by courts and tribunals reinstating workers sacked for OHS breaches: employees repeatedly removing hard hats in hard hat areas; employees cheating on drug screening.

Other employees make bad mistakes that can lead to more or less serious accidents. Such mistakes disregard their training, what they've been told to do or not do. We're not arguing for a prosecution regime for them but, where employees act inconsistently with their training and instructions, employers should not be prosecuted either.

There is no doubt that safety-consciousness by employers, by all levels of management and supervision and by employees can pay big dividends in the workplace.

The foundation for the kind of automatic approach to safety that will pay dividends throughout everyone's life should start, not at work, but at the early stages of school.

THE CEO

MITCH HOOKE. *Mitch Hooke is the chief executive of the Minerals Council of Australia.*

SAFETY in the workplace is priceless. In the minerals industry, safety is not just our No. 1 priority, it is our No. 1 value. No fatality or injury is either inevitable or acceptable to the minerals industry.

We know the industry is hazardous but it need not be dangerous. The minerals industry's view is that all fatalities, injuries and diseases are preventable. No task is so important that it cannot be done safely and all hazards can be identified and their risks managed.

The fundamental tenet of industry's approach is that every person has a responsibility for the safety and health of themselves and others and that safety and health performance can always be improved. The industry has a social and moral obligation to provide a safe and healthy workplace for all employees. There is also a compelling business case.

The cost of failing to provide a safe workplace far outweighs the cost of workplace injuries. In the minerals industry, these result in operational shut-downs, lengthy investigations, a loss of individual productivity and declining employee confidence. Self-evidently, this is greatly amplified in the tragic circumstance of a fatality.

Safe and healthy workplaces are productive and, as an added benefit, act as a positive recruitment tool.

The minerals industry has made an enormous effort in removing its employees from hazards. We are, for example, leading the world in remote control mining through the expanding use of driverless trains and heavy machinery.

Many minerals companies devote too much time to meeting the myriad requirements of Commonwealth, state and territory health and safety regulations, diverting our people from the real task of providing a safe and healthy workplace.

A nationally consistent set of occupational health and safety laws would remove the growing burden of paper compliance and enable our companies to get on with managing workplace risks.

It is hard to understand why a truck driver at a Pilbara mine is covered by a different set of regulations from a truck driver in the Hunter Valley. They're both doing the same job - only the geography is different.

Uniform laws would provide site managers, supervisors, employees, contractors, consultants and visitors with the same

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Editor's picks



Sarah Burnside Patriotism and 'our' Queen

The impending nuptials of Prince William and Kate Middleton have precipitated another round in the regular bout of national soul-searching about the royal family's role in the Australian constitutional system.

employees, contractors, consultants and visitors with the same protection regardless of the type of workplace or the type of work is undertaken.

THE UNIONIST

JOHN SUTTON. *John Sutton is the national secretary of the Construction Forestry Mining Energy Union.*

OVER the past 30 years I have seen many occasions where our officials have had to go to the homes of deceased members to comfort grieving widows or traumatised parents as a result of avoidable fatalities at work.

They include the family of Joel Exner, dead at the age of 17 on his third day at work in his first job, after an avoidable accident at Eastern Creek in Sydney's west.

And the family of Dean McGoldrick, killed in the Sydney CBD while also still a teenager.

On average once a week a building worker is killed on the job somewhere in Australia. Words cannot adequately convey the lifetime of trauma, depression, broken marriages and absolute human misery for those left behind.

Across all industries the death rate from industrial accidents and work-related disease in Australia is about 8000 a year, with many deaths not properly counted in the official statistics.

Workplace accidents have a huge economic and social cost, which we all carry. The economic cost of our annual death and injury toll is measured in the tens of billions of dollars, far exceeding the cost of lost production due to industrial action and other causes.

My experience in the construction industry has taught me that too many employers will cut corners on safety to save costs, if they think they can get away with it. That's the unedifying reality of private industry and a good advertisement for the need for a strong union presence.

A better question to pose could be, "What price inferior workplace safety?" Are we prepared to let standards slide so that we incur more human and economic loss? I don't believe our community wants to pay that price.

Our safety standards need to be improved and the death and injury rate driven down. I am concerned that our new so-called harmonised occupational health and safety laws will not lead to improvements but a further deterioration in standards.

Some in our society are educated or assertive enough to stand up to their bosses on safety issues. But many, such as young people and vulnerable migrant workers, are not. That's why we must have a robust workplace safety regime, to protect all workers from the horror of workplace accidents.

Strong safety standards at the workplace (the place we spend the majority of our waking hours) are a mark of a civilised society.

THE LAWYER

JEFFREY PHILLIPS. *Jeffrey Phillips, SC, of Denman Chambers is a Sydney barrister specialising in employment and workplace safety law.*

OUR community has long been prepared to spend a lot of time and money rendering workplaces safe. Failure to do so can result in life-threatening or disabling injuries.

Accidents can result in prosecutions and severe penalties for breach of safety laws and compensation for injuries received. The price is already being paid by the cost of design of safe machinery, processes and systems to avoid risk.

Employers pay for compulsory insurance to cover the medical, economic, emotional and physical results of injuries. A civilised, wealthy society can expect no less.

However, can society pay too much? This important question has long exercised the collective minds of the legal community. Courts are given the responsibility to determine accident liability and assess fair compensation. The constant tension for industry is to strike the proper balance between safety at work, its cost and what might be deemed acceptable risk.

Some workplaces are more dangerous than others; what is acceptable in one may not be in another. At one end of this spectrum might be the professional sports field. One could not imagine a NRL coach saying: "Don't tackle too hard today chaps, I don't want anyone getting hurt." However, it would be unacceptable to physically arrest the progress of a co-worker elsewhere.

Courts have met this challenge by formulating tests as to the foreseeability of harm and whether an employer's response is reasonable by community standards.

The reasonableness has been measured by reference to the chance of an injurious event happening and the cost and effort involved in avoiding its occurrence. This test is a judicial attempt to keep the costs of safety to manageable levels.

The High Court's formulation set out in *Wyong Shire Council v Shirt* has long been followed, although not without its critics, notably the retired judge Ian Callinan. He says the test - which deems a risk foreseeable unless "far-fetched or fanciful" - requires everyone to be Jeremiahs.

Our country cannot afford watertight safety systems or obligations. It cannot afford to let fanciful, fraudulent claims go unchallenged. In a global economy exorbitant, unnecessary costs will cause industry to go elsewhere.

The current attempt to harmonise occupational, health and safety laws on a national basis is a recognition held by nearly everyone that safety laws need a realistic balance.

The Question appears in News Review each Saturday in *The Sydney Morning Herald*.

Comments

31 comments

I was all for safety in the begining but it has gone too far today with simple things being harshly inforced, for example there are confined spaces or if your working right under a concrete slab you have to have your hard hat on just in case the upper floor drops on you or long sleeve shirts in summer on construction sites its turning into a joke.

Posted By: S. | Sydney - November 22, 2010, 9:01AM

Lax OH&S practices have astounded me for a long time. The other day I saw a building site worker pouring concrete wearing thongs. I am also surprised at the number of truckies, who drive wearing thongs, which I do not believe is very safe or sensible.

Not so long ago two men died washing windows on the Gold Coast because they were not harnessed to the building. That is very sad!

I don't know about NSW practices, but I am convinced we urgently need an Australian bill of rights to improve human rights, safety and personal accountability.

Posted By: Jennifer Nash | Logan - November 22, 2010, 9:41AM

No mention above that a large proportion of the proceeds of the hefty OH&S breach fines go to the Unions!!!

I was a Project Manager in the construction industry and spent most of my working day reminding idiots to wear their helmets, wear their harnesses, use tagged electrical equipment etc. At all times they were annoyed that I

was telling them to do these things, and a lot of the time would take off their helmets etc once you were out of their eyesight. I sent one sub-contractor off a site in the city when I observed he was climbing outside scaffolding between floors 7 levels above the street. I was perceived by the "workers" on that site as an "ars-hole" for being so mean. The CFMEU were contacted by the workers and came and insisted the worker be allowed back on the site the next day.

Had he fallen I would have been prosecuted!
I have since left the construction industry.

Posted By: had enough | Sydney - November 22, 2010, 9:44AM

Uh, Jeffrey Phillips, the NRL does outlaw some types of tackles for OHS reasons.

In my working life I've seen a change from where safety was no consideration and it was impossible to get even basic safety gear for our high risk work to one where safety is front of mind for every manager and the gear that can save your life is always to hand.

The possibility of the company's directors going to jail is the major reason for this. At the company picnic after enough drinks the directors and the workers will side together and ask what is top of their minds – the directors ask if we are working safely, we ask if the company is doing anything too financially exotic.

If there is a major pain point it is the huge amount of induction training which covers the same ground. Don't go through the OHAS Act again, tell us instead what is different or unusually risky about this particular job.

Posted By: Glen | dangling high above your head - November 22, 2010, 10:14AM

Workplace safety has come a long way since the first OHS Act in NSW in 1983. Harmonised legislation in 2012 is the next big step. But people still complain about costs of safety without acknowledging that good safety can save an organisation money. It would be useful if organisational managers could do more than just the minimum (which is often less than the minimum) and actually meet their duty of care.

Posted By: ChrisW | Kensington - November 22, 2010, 10:23AM

When is Australia going to wake up to itself - it is not in the interest of either State or Federal Labor government's to have active OH&S laws, acts and legislation?

Under the Gillard Government there is no National Occupational Health and Safety legislation.

The National OH&S Strategy 2002-2012 was signed off on by Tony Abbott, Gordon Nuttall, John Kobelke, Bob Cameron, Greg Combet, Simon, Michael Wright, Paul Lennon, Syd Sterling & Peter Hendy.

Scrapped by the Gillard Government under Julia Gillard and Greg Combet. NSW State Government help close down UNSW Faculty of Safety Sciences & Risk Management. The University is governed by a Council of 22 members including parliamentary and Members appointed by the NSW Minister for Education. Why close down a financially viable Faculty that is serving workers both in Australia and worldwide? Whose interests is this serving?

Hetty

Posted By: Hetty | Centennial Park, NSW - November 22, 2010, 10:42AM

What we are arguing here is what price do you put on a workers life. In my view employers have to be eternally vigilant. People forget that the so called draconian NSW OH & S Laws which include the right for a union to prosecute an employer for breaches to those laws go back to changes to those laws in the late 1990's. Part of the reasoning for the changes go to a desire to reduce insurance costs by taking lawyers out of the system but at the same increasing safety on the job. The ability of unions to prosecute is generally not taken unless Workcover fail to do so. I am not aware aware of many frivolous claims. Indeed the Public Service Association of NSW and the Bank Employees Union have had significant wins. No wonder Gary Bracks is Agitating for the abolition of this workplace safety tool. I like to know how much of the Insurance Premium Savings Gary's members have pumped back into Occupational and Health and Safety Training.

Posted By: Rob | Gymea Bay - November 22, 2010, 10:50AM

OH&S in NSW is a blackmail device used by the unions to extract outcomes desirable to the unions. NSW should fall into line with the rest of the country. The Unions influence in the Labor party is a joke. Bring on Barry to put these thugs back in their place.

Posted By: cwitty | Sydney - November 22, 2010, 11:21AM

What price OHS?? how can you put a price on your loved ones life? be it Manager or Employee, OHS makes sound business sense, improved costs, increased employee attendance, greater morale, reduced compensation

costs etc, the onus should be on employer to ensure safe systems of work, safe plant and equipment, safe work environment as reasonably practicable etc and if not then they should be held to account. There definitely should be a provision that allows a Union the right to (to proceed to)prosecute an employer for a breach of the OHS ACT to my knowledge there have been a very limited amount of vindictive claims, having said that, It is also incumbent on an employee to live up to thier OHS responsibility as well.

Posted By: Northshore Boy | Sydneys Northshore - November 22, 2010, 11:33AM

Unions arnt interested in safety....

They are interested in politics.

OH&S in NSW is mostly all talk. Have the documentation, pass the inspections, then completely ignore it after that.

Or just be a big company, get subbies in and let them worry about it... its even better when they are cash in hand subbies from overseas, that speak little aor no english, are undocumented, uninsured and that dont exist in paperwork in australia. You can then just deny all knowledge of them if they get injured with no risk to yourself. Unions know these people work in the industry but because its worth so much money to the big players they ignore it. Go onto any big building site in NSW and you will find undocumented illegal subbies from korea, china or otherwise working for cash.

Being on OH&S committees for many years i am totally aware that some people completely ignore OH&S because its a pain in the ass for them.

I shake my head sometimes when driving past construction worksites where pallets on forklifts are used as workplatforms 3 metres high with no safety measures at all and shudder at what could happen if things went wrong.

the mentality in australia is a 'She'll be right' and ignore the risks so you dont seem to be soft.

This is how people get injured and die.

this is why conctruction workers are phsical cripples by the age of 40 from overwork, sun cancer or otherwise.

Posted By: Markus - November 22, 2010, 11:38AM

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