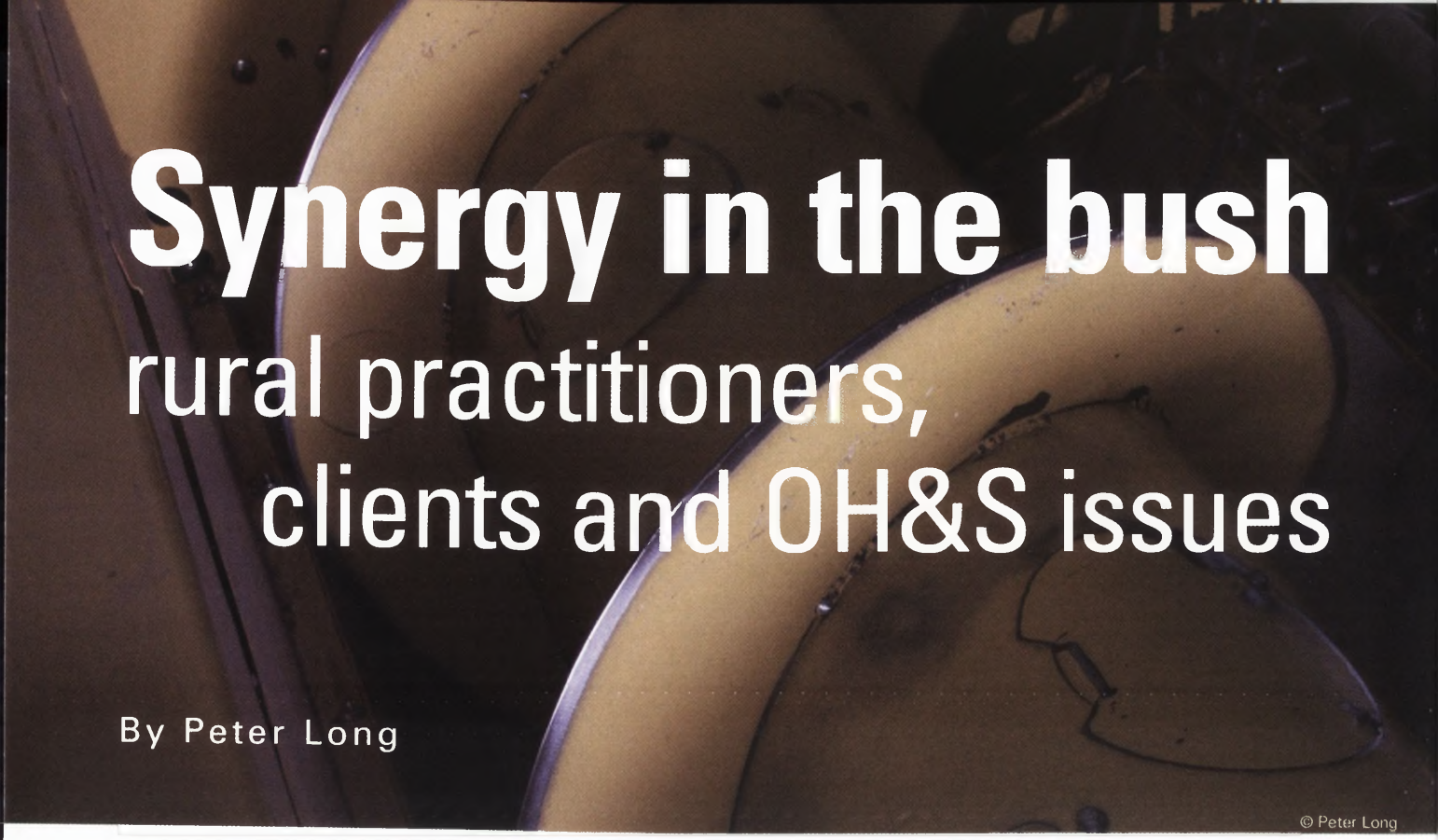
Synergy in the bush

rural practitioners, clients and OH&S issues

By Peter Long



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Personal injury (PI) practitioners are well-placed to deliver occupational health and safety (OH&S) advice at a time when the business community is in great need of such services. This is especially so in rural Australia where other OH&S agencies are somewhat thin on the ground.

The experience gained from analysing workplace accidents over the years, and proffering advice in pleadings and expert reports on how to avoid them, should not be allowed to wither and die on the vine of declining PI regimes throughout this nation. PI lawyers can re-apply their knowledge to develop a new area of practice, advising businesses of their OH&S obligations.

AUSTRALIAN OH&S LAW

Workplace safety obligations have been variously expressed around the country, mostly reflecting the sort of concepts that practitioners became so familiar with when assessing common law industrial damages claims. Under the Northern Territory *Work Health Act* (s29) and the Western Australian *Occupational Safety And Health Act* (s19), those supervising work have to, so far as is practicable, provide and maintain a working environment in which others are not exposed to hazards. The Queensland *Workplace Health and Safety Act* (s28) requires employers to ensure that those in the workplace are not exposed to risks to their health and safety, but also looks at whether the employer took reasonable precautions and exercised proper diligence. The South Australian *Occupational Health, Safety and Welfare Act* (s19) obliges employers to ensure, so far as is reasonably practicable, that health and safety are maintained. The Victorian *Occupational Health and Safety Act* (s21), the ACT *Occupational Health And Safety Act* (s37) and the Tasmanian *Workplace Health and Safety Act* (s9) all apply a test of what is reasonably practicable.

PI lawyers who assist rural employers, distributors and manufacturers to focus on their OH&S obligations in such complex legislative environments should find that this work dovetails with their existing PI practices, and helps to reduce workplace injuries in the long term.

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NSW

Practitioners in NSW face a less rewarding task than those in other states because the legislative regime and its interpretation by the courts are such that there is effectively a strict liability for breaches of the *Occupational Health and Safety Act* 2000 (the OH&S Act). Lawyers seeking to add OH&S consultancy to their NSW practice may need to adopt a different approach to practitioners in other states, focusing on mitigation of penalty rather than complete defences.

The OH&S Act (s8) states that employers must ensure the health, safety and welfare at work of all their employees. This obligation extends to any premises controlled by the

employer, including access points; any plant or substance used at work; systems of work; the work environment; all necessary information, instruction, training and supervision; adequate facilities for the welfare of employees; and covers any non-employees at the place of work. A person who has control of any premises used by people as a place of work, or any plant used by people at work, must ensure that it is safe and without risks to health. Further, self-employed people are similarly obliged to ensure that they do not expose others to health and safety risks at their place of work. Also, a person who designs, manufactures or supplies any plant for use by people at work must ensure that it is safe and without risks to health when properly used, and provide adequate information about the plant to the persons to ensure its safe use.

'Ensure' has been interpreted as 'guarantee, secure, make certain'.[1]

A web-search of the NSW Industrial Relations Commission's published judgments for just the month of August 2005 will convince any rural practitioner of the opportunity that exists in this area to assist clients; the majority of prosecutions being for rural-based breaches.

RECENT NSW CASES

Inspector Ruth Buggy v Lyco Industries Pty Limited[2]

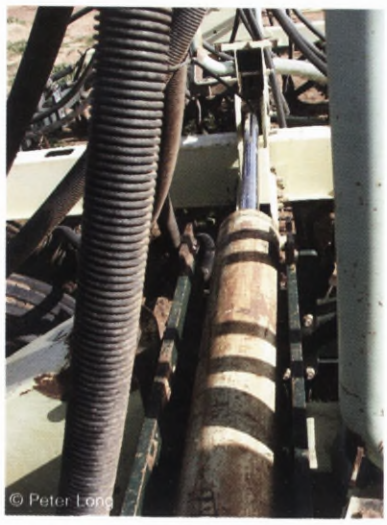
Lyco was the manufacturer of a hydraulically powered post-driving machine. Munton purchased one of its machines from a supplier of agricultural equipment, Kentan. In May 2001, Hayward, one of Munton's employees, was killed while using the machine to erect a fence. Lyco pleaded not guilty to two charges of supplying plant for use by persons at work, which it failed to ensure was safe and without risks to health when properly used, and failing to provide adequate information to ensure its safe use.

While the cause of death was not precisely known, the opinion of those investigating the accident was that Hayward must have operated the hammer on the machine in order to attempt to straighten a post. While doing so, he put his head on the post, reached around the machine's guard and accidentally engaged the lever which released the hammer, resulting in a fatal injury, when the 600lb hammer came into contact with his head.

His Honour, Schmidt J, found that, on the evidence, there could be no doubt that the machine was unsafe and the offence charged was made out to the necessary standard. Lyco argued that it was not reasonably practicable for it to comply with the provision of this Act or the regulations the breach of which constituted the offence. It relied upon the evidence showing that the machine was a new model, which introduced a new system of guarding. The old model's hydraulic hammer was completely encaged, thereby ensuring that neither the operator or anyone else could place a body part under the hammer while it was being operated. The defendant had conducted a survey that showed that the vast majority of those who purchased the machine removed the guard, finding it inconvenient. However, his Honour stated that: 'Given the earlier design of the guard, it cannot be concluded that it was not 'reasonably practicable' for the defendant to have complied with the requirements of s18. That the WorkCover Authority has not taken steps to issue improvement or prohibition notices in relation to the machine, cannot take away from this conclusion.'[3]

Inspector Stephen Campbell v James Gordon Hitchcock[4]

A director of a private company was found to have breached the OH&S Act; employees were taking drugs to counter fatigue in the course of long-haul truck-driving. The director was sentenced to pay fines of $42,000. In addition, Walton J, Acting President, ordered Hitchcock to pay the prosecution's costs in the sum of $290,500. This was in addition to his own legal costs of $644,363.36. >>



For practitioners seeking to market their services to small business operators in their district, quoting these penalties is likely to ram home to such prospective clients the need for professional advice. Few in rural communities can afford to pay out over a million dollars for one prosecution.

This case also helps explain why so many of those charged with an offence under the Act simply plead guilty. The likelihood of a successful defence is slim and the fine and costs ramifications are enormous. Furthermore, one cannot get insurance against such a situation.

Inspector Brett Martin v Encore Tissue Pty Limited[5]

Jones was seriously injured while working to clear a paper blockage from an electric conveyor system at the defendant's Albury paper-recycling plant, sustaining severe injuries to his right arm and hand when they were caught in a nip point on the machine. His arm was later amputated. The defendant pleaded guilty to the charge brought against it under s8 of the OH&S Act.

The defendant was ordered to pay a penalty of $123,750 with a moiety to the prosecutor; and the prosecutor's costs.

The rule of thumb is that the prosecutor receives half of each fine imposed. Prosecutions can be brought by WorkCover or a union. In an era of self-funded government authorities and falling union membership, the fiscal pressure to run prosecutions in an environment where few are unsuccessful can be overwhelming.

Inspector Mason v Telecommunications Infrastructure Pty Ltd[6]

In May 2003, Keepa-Hunuhunu was seriously injured while working with two other employees, demolishing a telecommunications mast at Moree. He was working on the mast, 12 metres above ground level. He fell with the mast, which was attached to three guy wires when his supervisor detached one of the guy wires. The defendant, who entered a plea of guilty to the charge under s8(1) of the OH&S Act, was ordered to pay a fine of $71,250 with a moiety to the prosecutor and the prosecutor's costs.

Inspector Templeton v Haddon Rig Pty Ltd[7]

Staff J dealt with a situation where Vial was employed as a jackeroo at Haddon Rig Pty Ltd, a rural farming and livestock property located 30km west of Warren in western NSW. On 6 November 2002, Vial was assigned to feed sheep with grain, using an auger from a silo into a Mitsubishi feeder truck. At about 1.00pm Vial sustained fatal injuries when he was crushed between an auger and the doorframe of the silo. There were no witnesses to the incident, as Mr Vial was working alone at the time. The defendants pleaded guilty and the corporate defendant and a director were fined the sum of $78,000 and $6,000 respectively, with a moiety of each fine to the prosecutor, and costs.

The Act does provide two defences in s28; namely, that it was 'not reasonably practicable to comply with the provision of the Act', or that the commission of the offence was due to causes over which the person had no control and against the occurrence of which it was impracticable for the person to make provision. The likelihood of succeeding in proving these defences is virtually zero. An examination of the reported decisions of the NSW Industrial Relations Commission reveals a disturbing paucity of successfully defended cases.

Inspector Paul Wade v Yore Contractors Pty Ltd[8]

This is one case where the court did admit a defence. The Chief Industrial Magistrate of NSW dismissed a charge brought against an employer by WorkCover for a breach of the Act. Yore Contractors Pty Ltd ('Yore') was alleged to have failed to ensure that persons not in its employment, and in particular, Danny Buckley, were not exposed to risk to their health or safety arising from Yore's conduct while they were at the Windale Sewerage Treatment Works, Belmont North, in the Central Coast district of NSW.

On 24 August 2000, James Cobcroft, an employee of Yore, and Mr Buckley, a subcontractor working for Yore, were in the process of laying part of a pipeline. On the morning in question, Buckley was in a trench excavated for the purpose of the pipeline and Cobcroft was operating the excavator with a digging bucket attached, but without the locking pin inserted. The inevitable happened and the bucket fell, falling on to Mr Buckley in the trench and injuring him.

WorkCover alleged that Yore failed to provide such information, instruction, training and supervision to its employee, Cobcroft (the excavator machine-operator) as was necessary to ensure that the quick hitch-locking pin on the excavator was correctly installed and in a proper place at all times while the machine was being used.

The magistrate found that:

1. Buckley and Cobcroft initially lied to those investigating the accident about the manner in which the accident occurred. The evidence further disclosed that at the relevant time, the quick-hitch mechanism attached to the boom complied with all relevant standards. It is a well-known practice in the excavating industry that a locking pin is an indispensable fail-safe device, essential when operating digging equipment.
2. Cobcroft had not put the locking pin in place as he was going to use a different bucket later that day from the one on the machine, which he had used the day before, and he was aware he had contravened Yore's safety policy.
3. Yore ensured that all its men were inducted on to the site, and the subject of using the locking pin was included in the induction course.
4. The site manager spent two-thirds of his day supervising on site and did a weekly audit of the site in accordance

with Yore's site safety inspection sheets.

5. The Department of Public Works conducted a monthly audit of all plant and equipment, which included the use of locking pins, and had a full-time supervisor on site.
6. In May 2000, an issue regarding the non-use of safety pins on excavators had arisen. A memo was issued by Yore and read by the site manager to all operators.

On the basis of these facts, the magistrate found that Yore had implemented a safe and proper system regarding the safe use of locking pins. It provided such information, instruction and training to Cobcroft as was necessary to ensure that the quick hitch-locking pin on the excavator was correctly installed and in its proper place at all times while the machine was being operated.

The situation facing business operators in NSW could have got substantially worse this year if the government had proceeded with the introduction of its draft Occupational Health and Safety Amendment (Workplace Deaths) Bill under which, if a breach of the Act substantially contributed to the death of a person, the offender could be found guilty of industrial manslaughter.

This took the penalty for breach of workplace safety obligations well beyond s18 of the *Crimes Act* 1900 (NSW), which required a malicious act to found manslaughter and stipulated that no punishment or forfeiture would be incurred by any person who kills another by misfortune only.

Fortunately, the government bowed to intense political pressure and brought the legislation back in line with reality and into accord with to its 'Long Title', the *Occupational Health and Safety Amendment (Workplace Deaths) Act* 2005: it amended the OH&S Act to make it an offence for a person who owes a duty under Part 2 of that Act to engage in reckless conduct that causes death at a workplace. The government also amended the *Criminal Appeal Act* 1912 to provide for appeals in connection with a conviction for such an offence to the Court of Criminal Appeal, rather than to the industrial courts.

HOW CAN BUSINESSES PREVENT OH&S PROSECUTIONS?

Practitioners may well ask: what can I tell a small business operator in such a legislative environment? There is no single all-encompassing solution, and the guidance from WorkCover is pathetic to say the least. For example, there is no course that a farmer can send his employed farmhand on in order to learn to drive a tractor. Yet if someone is to drive a forklift, WorkCover provides extensive education direction. However, some useful advice to clients could include:

(a) Each operator must ensure that persons are inducted into the operator's OH&S policy for the task, the project and the workplace. The prospects that most rural-based businesses will have such a policy are slim, and that is where the practitioner can play a role. If the client does not have a policy, draft one. They are not difficult or complex. Defending a prosecution or seeking to mitigate a penalty will be greatly enhanced if the client has such a policy in writing.

(b) If the workplace is on premises under the control of a third party, the operator must ensure that the third party performs a similar induction with the operator.

(c) Each operator must do a risk assessment in relation to the task and identify the hazards, the controls that need to be adopted to prevent harm, and the seriousness of the risk.

(d) Each operator ought give the third party a Safe Work Method Statement for the task. This sets out the job to be done, identifies any hazards and the controls that are in place to prevent harm, and the person responsible.

(e) Each operator must consult with the third party as to how the task will be conducted, including all of the preparation work, and identify who will be responsible for each task.

(f) Each operator must ensure that s/he then consults with each employee who will be involved in the task about health and safety matters and allow those employees to make recommendations for improvements in these areas.

(g) Each employee must be apprised of the risks involved and the control measures that will be put in place to prevent harm, and asked for their input.

(h) Each operator must ensure that all those who attend their workplaces are inducted into the workplace and the OH&S policy and Safe Work Method Statement.

(i) Each operator must ensure that the OH&S policy and Safe Work Method Statement are followed throughout >>

the conduct of the task. The operator needs to be able to say that he or she conducted a regular audit of compliance throughout the operation.

(j) There should be a meeting after the task is completed between the principals and the employees involved to discuss how it went and whether any improvements could be made.

Following these steps ought give the rural-based small business operator the best chance of avoiding an OH&S prosecution or at least mitigating the penalty, if not being able to successfully defend a charge of breaching the Act. Finances are tight in the bush, so it is a matter of convincing a client who is often overwhelmed by the prospect of drafting policy, doing risk assessments and drawing up safe work method statements[9] that the task is akin to a pygmy eating an elephant: just do it one bite at a time.

Inspector Russell Webb v Nowra Truck & Farm Equipment (Holdings) Pty Ltd t/as Banoon Pastoral Co

It is worth reminding rural clients of the words of Justice Boland in the above case:

> 'I had the impression from certain of the defendants' evidence and their submissions that somehow the obligations falling on employers who operate rural properties or farms in respect of occupational health and safety should be viewed differently from employers in other industries; that there was not the same obligation on farm owners to provide a system of work or information, training, instruction or supervision of employees regarding the safe operation of farm vehicles. This was because employees had been working on the property for many years; they had learned to drive farm equipment even as children and they knew the risks and how to avoid them.'[10] ■

Notes: **1** *Carrington Slipways Pty Ltd v Callaghan* (1995) 11IR 467, at 469-70. **2** [2005] NSWIRComm 298, 25 August 2005. **3** [2005] NSWIRComm 298, 25 August 2005 at para. 46. **4** [2005] NSWIRComm 281, 12 August 2005. **5** [2005] NSWIRComm 271, 2 August 2005. **6** [2005] NSWIRComm 282, 11 August 2005. **7** [2005] NSWIRComm 284, 12 August 2005. **8** 20 October 2003. **9** For those wanting to look at available software that may assist clients with this task, a program providing a reasonably holistic approach is the BOS program produced by Peppin Planners at Deniliquin in south-west NSW: www.peppin.com.au. **10** *Inspector Russell Webb v Nowra Truck & Farm Equipment (Holdings) Pty Limited t/as Banoon Pastoral Co* (2004) NSWIR Comm 78 (31 March 2004), at para. 17.

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