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Editorial

At the top of our legislative changes stories this week is a reminder that from 6 July this year, commercial outdoor dining areas in NSW are now “smoke free areas”. This is the final implementation of the *Smoke Free Environment Act* that was passed way back in 2000.

Readers will quite possibly be aware of the award made by a Court last week – also in NSW – of compensation to a woman who was returning to her car with her young child after shopping. Her shopping trolley hit a pothole and as a result of the injuries she suffered was (eventually) awarded more than a quarter of a million dollars in damages after successfully suing the Council who was responsible for the car park where she was parked.

Although, of course, this was not a WHS prosecution, it is a timely warning that even small things – such as potholes – can lead to serious injuries – and serious compensation payouts.

We’ll report on the case in full in next week’s Alert.

Kim Schekeloff
Director
Workplace Safety Australia Pty Ltd

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Lead Story...

The Primary Duty of Care Under the NZ Reform Bill and the Concept of a “PCBU” – Part 1

Relevance: New Zealand

Industries: All Industries; all Businesses

Keywords: Legislative change; ‘PCBUs’; duty of care; PCBUs – definitions

This material was sourced in large part from WorkSafe NZ and SafeWork Australia

With the impending changes to the NZ WHS legal framework that governs workplace health and safety we continue our look at the changes that are likely to be part of the new system.

Core to the new WHS system will be a concept imported from the Australian system, where the harmonisation of Australian WHS laws has seen the concept of the “PCBU” – a person conducting a business or undertaking – take centre stage as the “primary duty holder” in workplace health and safety systems. A PCBU as a duty holder is now recognised in every Australian State and Territory, as well as at a Commonwealth level – except for Victoria and Western Australia.

All PCBUs have a primary duty of care in relation to the health and safety of workers and others affected by the work carried out by the PCBU.

The wording of the Health and Safety Reform Bill is very similar to the wording of the Australian law. The main Commonwealth level WHS authority – SafeWork Australia has issued an interpretive guideline *The Meaning of a PCBU* along with a *Guide to the WHS Act* both of which provide some guidance as to how the NZ Act will be interpreted.

The Guideline states that:

The duties of a PCBU are all associated with the carrying out of work. The definition of a ‘workplace’ is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. The definition of a ‘worker’ is a person who carries out work in any capacity for a person conducting a business or undertaking.

This is relevant in understanding the nature of the duty. The primary duty of care requires all PCBUs to ensure, so far as is reasonably practicable:

- The health and safety of **workers** employed or engaged or caused to be employed or engaged, by the PCBU or those workers who are influenced or directed by the PCBU (for example workers and contractors);
- That the health and safety of **other people** is not put at risk from work carried out as part of the conduct of the business or undertaking (for example visitors and customers).

The PCBU’s specific obligations, so far as is reasonably practicable, is to:

- Provide and maintain a work environment, plant and systems of work that are without risks to health and safety;
- Ensure the safe use, handling and storage of plant, structures and substances;

- Provide adequate facilities at work for the welfare of workers, including ensuring access to those facilities;
- Provide information, training, instruction or supervision necessary to protect workers and others from risks to their health and safety;
- Monitor the health of workers and the conditions at the workplace for the purpose of preventing illness or injury.

A self-employed person is a PCBU. In addition to the primary duty of care, they must also ensure, so far as is reasonably practicable, his or her own health and safety while at work.

PCBUs may also have other specific and ongoing duties, depending on what they manage or provide:

- A PCBU who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace, the entry and exit to the workplace and anything arising from the workplace do not put anyone's health and safety at risk the fixtures, fittings or plant at workplaces
- A PCBU who manages or controls must ensure, so far as is reasonably practicable, that the fixtures, fittings and plant do not put anyone's health and safety at risk:
- A PCBU who provides accommodation (for the purposes of the job and which is owned or under the control of the PCBU) must ensure that accommodation is maintained so that it won't expose the worker to any health and safety risks.

Who is a "worker" under the Bill?

Working relationships have changed a lot in the last 20 years, which is why the Bill talks about workers instead of just employees. A PCBU's primary duty is to workers it directly employs or engages and the workers it influences or directs.

A worker is a person who carries out work in any capacity for a PCBU. This includes employees, contractors, sub-contractors, employees of contractors or sub-contractors, outworkers, labour hire workers, volunteers, trainees and people gaining work experience.

What is a "workplace" under the Bill?

The Bill defines a workplace as a place where work is carried out for a business or undertaking, and includes any place where a worker goes or is likely to be while at work. This includes a vehicle, vessel, aircraft, ship or other mobile structure. The important thing to remember here is that the duties in the Bill are linked to the work of the business or undertaking, not simply the physical location of the work.

What is the PCBU's duty to others under the Bill?

PCBUs have a duty, so far as is reasonably practicable, to ensure that the health and safety of other persons, not just of workers, is not put at risk from the work carried out as part of the conduct of the business or undertaking. It's important to note that this duty is not limited to the physical location of the workplace, or of the actions or inactions of employees, but is about the risk from the work carried out as part of the business or undertaking.

PCBUs have to think broadly about who is working in their business or undertaking – including their contractors and not just their employees. PCBUs have to think broadly

about who they affect through the conduct of their business or undertaking, rather than just direct employees or contractors. The duties in the Bill are linked to the work of the business or undertaking, not simply the physical workplace.

In our next Alert we will look at *how* a PCBU should go about fulfilling the primary duty under the Act.

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Legislative Changes and Proposed Legislative Changes...

Smoke-Free Outside Areas Changes Commence in NSW – Commercial Outdoor Dining Areas

Relevance: *NSW*

Industries: *Hospitality; restaurants and bars*

Keywords: *Cancer; smoking; smoke-free area laws*

Commencement: *6 July 2015*

Delayed changes to the *Smoke Free Environment Act 2000* have become operational in NSW.

Section 6A of that Act is headed “Smoke-free areas—outdoor public places”. The section is reproduced in full below, as it is a useful reminder of the bans already in place. The sections that commenced on 6 July (the rest has been operational for some time) are highlighted in red.

- (1) An outdoor public place is a *smoke-free area* for the purposes of this Act if it is any of the following places (or part of any of those places):
 - (a) a place that is within 10 metres of children’s play equipment but only if the children’s play equipment is in an outdoor public place,
 - (b) a swimming pool complex,
 - (c) an area set aside for or being used by spectators to watch an organised sporting event at a sports ground or other recreational area, but only when an organised sporting event is being held there,
 - (d) the platform of a passenger railway or light rail station,
 - (e) a ferry wharf,
 - (f) a light rail stop (with *light rail stop* to include any area where persons queue or gather when waiting at a light rail stop),
 - (g) a bus stop (with *bus stop* to include any area where persons queue or gather when waiting at a bus stop),
 - (h) a taxi rank (with *taxi rank* to include any area where persons queue or gather when waiting at a taxi rank),
 - (i) a place that is within 4 metres of a pedestrian access point to a building (as provided by subsection (2)),**

Note. A place within 4 metres of a pedestrian access point to licensed premises or a restaurant was not a smoke-free area until 6 July 2015. Therefore places that were within 4 meters of an a pedestrian access point to places other than licensed premises or a restaurant were already smoke free areas prior to the latest changes.
 - (j) a commercial outdoor dining area,**

Note. A commercial outdoor dining area was a smoke-free area from 6 July 2015.

- (k) a place at a public hospital, health institution or health service under the *Health Services Act 1997* that is designated as a smoke-free area by a by-law or regulation under that Act and notified by signs displayed in, or at an entrance to, any such area,
 - (l) any other outdoor public place that is prescribed by the regulations as a smoke-free area.
- (2) A *pedestrian access point* is an entrance to or exit from a building for use by pedestrians, but does not include:
- (a) an entrance to or exit from a building that is used only for residential purposes (including a boarding house and a building in a caravan park), or
 - (b) an entrance to or exit from a building that is used partly for residential purposes and partly for other purposes if the entrance or exit concerned is used solely for entry to or exit from that part of the building that is used for residential purposes, or
 - (c) an emergency exit that is locked to entry.
- (3) It is a defence to a prosecution for the offence of smoking in a smoke-free area that is a light rail stop, bus stop, taxi rank or within 4 metres of a pedestrian access point to a building if it is established that the accused was smoking only while passing through the smoke-free area and did not remain in the smoke-free area while smoking.

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Changes to Commonwealth Regulations

Relevance: All harmonised jurisdictions

Industries: Diving; construction; work encompassing earth moving; plant - design

Keywords: Plant; plant safety; residential premises – used for work purposes; diving work competencies; protective structures on earth moving machinery; external verification requirements for in-house plant design

Commencement: 27 June 2015

The *Work Health and Safety Regulations 2011* (the WHS Regulations) provide a comprehensive system of subordinate work health and safety duties which support and supplement the primary duties set out in the *Work Health and Safety Act 2011* (the WHS Act). The WHS Act and the WHS Regulations are based on model work health and safety laws which were developed under the *Inter-governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA).

On 11 April 2014, the Select Council on Workplace Relations endorsed a number of changes to the model work health and safety laws that had been agreed by Safe Work Australia.

The Commonwealth *Work Health and Safety Amendment Regulation 2015 (No. 1)* makes amendments to the WHS Regulations to implement these changes to the model work health and safety laws in the Commonwealth jurisdiction. Most of the amendments are technical in nature and either clarify or correct the operation of the WHS Regulations without any change in the intended policy or substantive operation. However, two of these corrections involve substantive changes in the operation of the WHS Regulations by:

- Exempting the operation of plant for the purposes of loading or unloading plant from a vehicle or equipment used to move the plant within the workplace from the requirement to hold a license for high risk work; and
- Disapplying certain requirements in Part 8.3 in relation to domestic premises used for residential purposes.

The amendments also implement three substantive policy changes, which are:

- The recognition of an additional Australian Standard for diving work competencies;
- The removal of existing requirements for protective structures on earth moving machinery; and
- The removal of external verification requirements for in-house plant design.

The Government did not consult in relation to the Regulation. However, the Regulation implements changes developed and agreed to by Safe Work Australia, which is composed of representatives from the Commonwealth, each State and Territory, the Australian Council of Trade Unions, Australian Industry Group and the Australian Chamber of Commerce and Industry. The changes were endorsed by Commonwealth, State and Territory workplace relations ministers under the IGA.

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Plant Registration Requirement Arrangements Extended in NSW

Relevance: *NSW*

Industries: *All Businesses involving plant that requires registration; Mining*

Keywords: *Plant – registration; mining - plant*

Commencement: *1 July 2015*

The object of the *NSW Work Health and Safety Amendment (Transitional Provisions) Regulation 2015* is to extend until 1 July 2016 the operation of transitional arrangements under which the application of certain provisions of the *Work Health and Safety Regulation 2011* (relating to the requirement to register items of plant) is delayed and relevant provisions of the former *Occupational Health and Safety Regulation 2001* continue to be in force.

This extension does not apply to specified mining items of plant (which will be matters covered by the *Work Health and Safety (Mines) Regulation 2014*). This Regulation also makes an amendment of a statute law revision nature.

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Road Safety Changes in Victoria

Relevance: *Victoria*

Industries: *Road transport; livestock*

Keywords: *Road safety; livestock crossing*

Commencement: *1 July 2015*

The objective of the *Road Safety Road Rules Amendment (Stock Crossings) Rules 2015* is to amend the *Road Safety Road Rules 2009*:

1. To amend the definition of *animal under control*;
2. To insert definitions of *municipal road* and *coordinating road authority*;

3. To revoke the definition of *temporary stock crossing site*;
4. To make minor amendments of a technical nature.

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Road Levies and Fines Annual Increase in ACT

Relevance: ACT

Industries: Road transport

Keywords: Road safety; victims services levy; infringement penalty notices

Commencement: not yet operational

The purpose of the ACT's *Road Transport (Offences) Amendment Regulation 2015 (No 1)* is to increase the infringement notice penalties.

Infringement notice penalties are being increased by 6% (in accordance with the 2014–15 Budget decision that the Government will set the Traffic and Parking fines indexation to 6% in 2014-15 and over each year of the forward estimates). An additional one-off 57 cent increase was applied in 2014–15 to transport related fees and charges, including infringement notice penalties, to provide ongoing funding for the alcohol interlock program.

An increase in the Victims Services Levy from \$30 to \$40 was announced in the 2015–16 Budget. Most road transport infringement notice penalty amounts include a component, not identified separately, accounting for the Victims Services Levy.

Offences to which the Victims Services Levy is intended to apply have generally been increased by an additional \$10 to account for the increase in the Victims Services Levy.

All infringement penalty amounts are rounded down to the nearest dollar. The *Road Transport (Offences) Regulation 2005, Schedule 1*, lists the offences contained in each Act and Regulation that form part of the road transport legislation. If an offence may be dealt with by infringement notice, the schedule prescribes the infringement notice penalty amount that is payable. Government policy is that, in general, the infringement notice penalty for an offence should not exceed 20% of the maximum fine that may be imposed by a court for that offence (the 20% level). The 20% level is based on a penalty unit of \$150 for an offence committed by an individual.

The 20% limit was fixed at a level that makes it an attractive alternative to disputing the matter in court, while still providing an effective deterrent against re-offending. Where an existing penalty is not approaching the 20% limit the indexation has been undertaken by deducting \$30 from the existing penalty, indexing that amount by 6% and then adding \$40, and rounding that amount to the nearest whole dollar. The amount of \$30 is the previous Victims Services Levy and \$40 is the new Victims Services Levy.

Where the existing infringement notice penalty for an offence is already at or above the 20% limit, there is no increase in the prescribed penalty by this regulation, other than the addition of \$10 to account for the increased Victims Services Levy. Where the existing infringement notice penalty amount is near the 20% limit and would exceed that limit if the amount were increased by the full 6% plus \$10, the penalty is increased by a lesser amount so that it equals 20% of the maximum court imposed fine for the offence plus \$10 to account for the increased Victims Services Levy.

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Motor Cycle License Changes (and Others) in Victoria

Relevance: Victoria

Industries: Road transport

Keywords: Motor cycle – assessments – licensing; learner permits – cancellation

Commencement: 1 July 2015, except for Regulation 8(2) comes into operation on 1 September 2015.

The objectives of the *Road Safety (Drivers) Amendment (Driver Licence) Regulations 2015* are to amend the *Road Safety (Drivers) Regulations 2009*;

1. To exempt drivers of motor cycles from licensing requirements while they are undergoing an assessment; and
2. To prescribe circumstances where a person ceases to be exempt from the requirement to hold a Victorian driver licence or learner permit; and
3. To prescribe the period for which a person whose driver licence or learner permit is cancelled under Section 27 of the *Road Safety Act 1986* is disqualified from obtaining a new licence or permit; and
4. To make consequential amendments following the enactment of Part 2 of the *Road Legislation Amendment Act 2013* regarding demerit points.

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In Other News...

WorkSafe Victoria Investigates Horse Racing Death

A woman track rider died after a fall from a horse at Caulfield racecourse on Wednesday (8 July) morning.

The woman, 25, was riding the horse around the track at about 5.20am when she was either thrown or fell from her mount. She was found unconscious and taken to the Alfred Hospital but died soon after. WorkSafe is investigating.

It is the second workplace fatality this week, following the death of a man who was crushed by a commercial oven being unloaded from a truck in Pakenham on Monday. The woman's death takes the number of confirmed workplace fatalities in Victoria this year to eight, compared to 10 at the same time last year.

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Queensland Reminder on Workers Comp Insurance Policy Renewals

Queensland accident insurance policy—which covers businesses for the cost of any work-related injuries—is due for renewal. To ensure you are covered for another year, you need to declare your wages information by 31 August 2015 so we can calculate your premium.

Declare your wages early to help you budget for your premium, and take full advantage of our flexible payment options, including discounts. If you wish to set up a payment plan, declaring your wages early allows you to spread your payments over more time.

Discount and some payment options will not be available if you make changes to your wages information after 31 August 2015.

It's important to understand who you should cover for workers' compensation as it impacts your premium. Remember, when declaring your wages, you need to include superannuation and fringe benefits. You can use WorkCover Queensland's Declaration of wages guide to help you determine the wages you need to declare at:

https://www.worksafe.qld.gov.au/data/assets/pdf_file/0013/52132/Declaration-of-wages-guidance-for-employers.pdf

Visit www.worksafe.qld.gov.au/premium to find all you need to know about who to cover and what to include when declaring your wages information, and read about the changes we've made to improve how we calculate your premium.

To declare your wages information online, log into our new look online services using your policy number and account number. The improved online services makes policy renewal simpler and gives you access to more information and industry data. You can login at:

<https://www.worksafe.qld.gov.au/online-services/premium-online>

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Open for Comment...

NZ EPA Seeks Submissions on Chemical Review 2012–2014

The New Zealand Environmental Protection Authority (EPA) is calling for submissions on its application for a modified reassessment of a range of substances under its Chemical Review 2012–2014. This reassessment covers hazardous substance approvals for which new information has become available during that period.

The new information for a number of approved hazardous substances was identified from internal and external sources, which indicated changes were required to some or all of the following aspects of the approvals:

- The approval name of the substance;
- The hazard classification(s) applied to the substance'
- The controls applied to the substance.

The chemical review is intended as a means of making changes to a number of approvals at once, taking into account the new information available. The application details the changes to approvals that are proposed as a result of the new information.

The EPA encourages companies using substances with approvals listed in this reassessment to determine the impact of the proposed changes. In particular, if the proposed changes could result in a hazardous substance no longer matching an approval, we encourage submissions on the impact of the proposals on the approval status of the substance.

This application includes changes that are required as a result of two reassessments – the reassessment of organophosphate and carbamate pesticides in plant protection products, and the antifouling paints reassessment. Changes were made to the classification of a number of pesticide active ingredients in these reassessments, and these changes need to

be applied to substances containing these active ingredients that were not part of the reassessments.

View the application details and information at:

<http://www.epa.govt.nz/search-databases/Pages/applications-details.aspx?appID=APP202482>

The submission period for this application started on 16 June 2015 and will end on **28 July 2015 at 5pm**.

Submissions are an opportunity to provide further information and raise issues about an application. They will inform a decision-making committee that will decide whether to approve the application.

Find more information on submissions and the hearing process at:

<http://www.epa.govt.nz/about-us/have-your-say/Pages/default.aspx>

For some substance approvals, the EPA does not have the full composition of all substances using that approval. As a result, the EPA has proposed a preliminary updated classification and resulting controls changes for those substances. The EPA encourages companies using these approvals to provide the full composition of the substance using the approval.

A public hearing may be held before a decision is made. The EPA will provide at least 10 working days' notice of the hearing date, time and place and will provide this information to all submitters.

The proposals made by EPA staff in this application may or may not be supported by the decision-making committee and the committee can choose to accept, reject or modify the recommendations. Note that a modified reassessment under Section 63A of the Hazardous Substances and New Organisms Act 1996 may not revoke an approval given to a hazardous substance under this Act to import or manufacture the substance (Section 63A (2)(b) of the Act).

The EPA's role is to decide on applications under the HSNO Act to import and manufacture hazardous substances. We put controls in place to manage the risks of hazardous substances to safeguard people and the environment.

APVMA Consultation on the Formation of its Policy on the Use of International Data, Assessments, Standards and Decisions

The Australian Pesticides and Veterinary Medicines Authority (APVMA) is inviting written submissions from interested stakeholders on the formation of its policy on the use of international data, assessments, standards and decisions.

The Australian Government has set the guiding principle **that if a system, service or product has been approved under a trusted international standard or risk**

assessment, Australian regulators should not impose any additional requirements unless it can be demonstrated that there is a good reason to do so.

APVMA have developed criteria to clearly indicate how international data, standards and assessments can be better utilised as part of the risk assessment processes that we are required to undertake as part of the approval of an active constituent, registration of a product or approval of a label. These criteria are listed in our draft policy document APVMA's approach to use of international data, assessments, standards and decisions found at:

<http://apvma.gov.au/sites/default/files/images/node-14181-use-of-international-data-consultation.pdf>

The draft policy also outlines:

- Existing standards already in use;
- Circumstances in which international standards may not be used;
- APVMA's position on the use of overseas regulatory decisions;
- Requirements for the protection of intellectual property.

Guidance to applicants on the use of international data is outlined in Use of international data, assessments, standards and decisions—a guide for applicants can be found at:

<http://apvma.gov.au/node/14186>

The consultation period is open until **close of business on Friday 10 July 2015**.

Following consideration of comments received during the consultation period the policy will be finalised and made available on the APVMA website.

Please lodge your written submission by email, post or fax to:

Scientific Assessment and Chemical Review
Australian Pesticides and Veterinary Medicines Authority
PO Box 6182
Kingston ACT 2604

Email: consultations@apvma.gov.au (link sends e-mail)

Fax: +61 2 6210 4776

NSCA National Safety Awards Open Until 11 July

The NSCA Foundation National Safety Awards of Excellence are Australia's longest running, independent awards, recognising outstanding Work Health and Safety initiatives. Now in their 23rd year, these awards continue to celebrate organisations and people that actively promote Work Health and Safety (WHS) as a cornerstone of elite business performance.

The awards are open to any Australian operating business, organisation, and alliance or individual in the public or private sector, with a workplace health and safety initiative that complies with one of the eight categories:

- Category 1: Best Continuous Improvement of a WHS Management System;
- Category 2A: Best Solution of a WHS Risk (small business);
- Category 2B: Best Solution of a WHS Risk (medium – large business);
- Category 3: Best WHS Training Program;
- Category 4: Best Communication of a Safety Message;
- Category 5: Ian Chisholm Award for Best Individual WHS Achievement;
- Category 6: Best Safety Leadership Program/Initiative;
- Category 7: Best Health and Wellbeing Program;
- Category 8: NSCA Foundation Member of the Year.

Nominations for 2015 have opened and nominations close on **11 July 2015**.

Through a formal judging process, organisations that have achieved excellence in their field of work by the introduction, development or improvement of health and safety standards, are recognised for their initiatives. Finalists are formally recognised with winners announced at the National Safety Awards of Excellence gala luncheon on 15 October 2015 in Sydney.

Winners will have their stories told nationally through NSCA Foundation's National Safety magazine and the broader media and also have the exclusive use of finalist and winner logos for building and promoting their brand to their stakeholders.

For more information and for instructions on how to enter see:

<http://www.nationalsafetyawards.com.au/>

WorkSafe Tasmania Awards Open

This year WorkSafe Tasmania is showcasing achievements in safety excellence and innovation since the awards program was introduced in 1996. Interested parties can become an [Awards Sponsor](#) to show their support of the Awards Program.

Celebrate the 2015 winners at the Awards Presentation Dinner with MC Glenn Archer on Saturday 24 October 2015.

The awards this year have several new categories – including a micro and small business category, more chances to be recognised and win prizes for an entry or nomination and this year's Overall Winner now receives a \$5,000 prize to promote and develop their winning initiative.

Entries close **on 24 July, 2015**.

More information can be found on the Awards website at:

<http://www.worksafe.tas.gov.au/awards/home>

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In the Courts...

Complacency Results in Tragedy

Inquest Into the Death of Peter Raymond Fenton

Brisbane Coroners Court

June 2015

Extract from Judgment and commentary – The link to Transcript can be found at the end of summary

Peter Fenton was 67 years of age when he died on the afternoon of 15 December 2011. He had been working on and around boats for 52 years.

On 15 December 2011, Mr Fenton was the master of the tug, *Kiandra*. He had been engaged to provide stores to the *British Beech*, an oil tanker that was berthed at Pinkenba in Brisbane. The crew of the *British Beech* were unloading stores from an unpowered barge (BT7), which had been positioned alongside the port side of the ship by the *Kiandra*. The *British Beech* crew were using a provision crane located on the *British Beech's* port side deck.

At approximately 2:20pm on 15 December 2011, a large insulated plastic stores container was being returned from the ship to the barge. It came away from the slings that were used to support it and fell 12-13 metres to the barge below. Mr Fenton was directly below the falling container, which struck him causing severe chest, spinal and head injuries. Despite emergency efforts from his crew and ambulance paramedics he died from his injuries while being transported to hospital.

An investigation into the circumstances leading to the death of Mr Fenton was conducted by Workplace Health and Safety Queensland (WHSQ), Maritime Safety Queensland (MSQ), the Queensland Police Service (QPS), the Australian Maritime Safety Authority (AMSA) and the Australian Transport Safety Bureau (ATSB). The range of investigations reflects the complex matrix of Commonwealth and State laws that regulate safety in the environment in which Mr Fenton was working.

Mr Fenton commenced work as a deckhand aboard ships in Moreton Bay at the age of 14 and continued in similar roles for the next 20 years. In 1964 Mr Fenton qualified as a master/engineer and from that time had been operating ships along the eastern Australian coast and as far north as Port Moresby.

Mr Fenton was a heroic figure during the 2011 Brisbane floods. Together with Doug Hislop he operated the tugboat, *Mavis*, to manoeuvre a 300-tonne slab of concrete of the Brisbane City Riverwalk that had been torn from its foundations by the flooding river. Their efforts prevented the walkway from colliding with the Gateway Bridge, amid concerns that the Riverwalk could cause the bridge to collapse and damage other port infrastructure. He was awarded a posthumous commendation for bravery.

Mr Fenton commenced work with Bowen Tug and Barge (BTB) in 2000 and was employed by them as a master for the subsequent 11 years. He also held the role of Workplace Health and Safety Officer for BTB. It is clear that he was widely respected within his workplace and, properly, seen as a senior member of staff.

The plastic insulated stores container involved in this incident was of a design, which had been in production since the mid-1970s. It was made of food grade polyethylene in a sandwich construction of varying thickness. The container had a capacity of about 1 cubic metre and 1,000 kg. The empty container was weighed after the incident at 98 kg, of which the lid weighed about 16 kg.

Captain Dalvi – the captain of the *British Beech* – gave evidence that the usual steps involved in re-provisioning the ship were followed on 15 December 2011. This involved him giving orders via the Chief Mate to the relevant Third Mate to supervise the re-provisioning.

It also entailed the Captain authorising a Job Hazard Analysis (JHA). This document was based on a pro-forma or “common” JHA and the contents are to be discussed with all crew members involved in the prospective task during a planning meeting. The meeting for this particular re-provisioning task had occurred earlier on 15 December 2011. Each of the crew involved signed the JHA acknowledging they had read it.

The JHA focused on the lifting phase of the transfer from the barge and included the following recommended actions and procedures to mitigate hazard:

- Always remind the boat person to stay clear from the weight to be lifted.
- Always keep the tag line tight and keep adjusting the tag line to avoid swinging of the stores/provision and/or pallet.

According to the ATSB report, BTB’s documentation included a safety management system, including a document entitled *Job Hazard Analysis Task loading and unloading ships stores*. Included in this JHA were the following:

- Please be aware of containers or other hazardous items falling or being knocked from the ship.
- You must at all times be wearing your lifejacket and helmet.
- When stores are lifted off deck all persons are to retire to a safe distance in case of a spill.
- At no stage should any persons stand under or near an empty container being returned from the ship to the deck of the barge until it has reached below shoulder height.
- At all times a crew member from the ship should observe the lifting and lowering operation.

The MSQ investigation found the following casual factors resulted in the incident:

1. The container was inappropriately slung (by the crews of both vessels) in a manner preventing the load from slipping and falling out of the slings.
2. Peter Raymond Fenton remained within the danger zone during the craning activity.
3. Effective communication between crews was not utilised to alert each other of the crane and load movements.
4. There was no dedicated crew member of the *British Beech* performing the function of lookout or spotter during the craning activity as per their JHA procedures.
5. The Bosun of the *British Beech* did not follow procedures set out in the JHA to ensure that the load was stable in the slings after adjusting it and before swinging it out over the handrail of the *British Beech*.

6. The Bosun of the *British Beech* did not follow procedures set out in the JHA to ensure that no person was directly beneath the path of the load before swinging the load out over the handrail of the *British Beech*.
7. There was no situational awareness as to the progress of the operation exercised by any of the Bowen Tug and Barge crew at the time of the incident.
8. One of the following four scenarios developed resulting in the container falling from the sling:
 - i. The near empty container, after its slings had been adjusted, had one sling caught under the centre foot of the container and when raised became unstable and subsequently fell from the slings (possibly aggravated by the inclusion of the boxes of fish rejected by the chief cook of the *British Beech*); or
 - ii. The near empty container being slung through the open slots, parallel to the feet, had the slings move in towards each other towards the centre of the container, altering its centre of gravity and ultimately making it susceptible to fall from the slings (possibly aggravated by the inclusion of the boxes of fish rejected by the chief cook of the *British Beech*); or
 - iii. The near empty container being manoeuvred over the side of the ship, hit or clipped the hand railing causing it to overbalance and fall (possibly aggravated by the inclusion of the boxes of fish rejected by the chief cook of the *British Beech* or
 - iv. The near empty container being once manoeuvred over the side of the ship, bounced off the ships side causing it to overbalance and fall (possibly aggravated by the inclusion of the boxes of fish rejected by the chief cook of the *British Beech*).

The Report also found the following contributing factors:

1. No instructions were placed on the insulated container to identify appropriately safe lifting points and to indicate recommended techniques for safe lifting in compliance with the manufacturer's specifications.
2. Peter Raymond Fenton was not wearing personal protective equipment in the form of a hardhat which was compliant with the *Australian Standard AS/NZS1801*.
3. No prohibited or safety zone was created on the deck of the barge to restrict the movements of crew into the danger zone and ensure their safety while loads were being lowered or raised.
4. Every crew member of the *British Beech* was actively involved in the activity with no person taking on a solely supervisory capacity to oversee the safety of the operation and ensuring adherence to set procedures outlined in their JHA.
5. The crew members from the *British Beech* involved in the operation did not read the Common Job Hazard Analysis (JHA) which outlined all of the specific risks and procedures.
6. Bowen Tug and Barge possessed no written procedures outlining craning operations in either their OH&S Policies or their Safety Management System Plan.

The Coroner found that:

The overwhelming impression left by the events is one of complacency on the part of the Bosun and Mr Fenton. As the most experienced men involved in the movement of goods between the barge and the ship, they are likely to have been involved in thousands of such manoeuvres without incident. This is likely to have

led to complacency, which manifested itself in basic errors of judgement from both men, resulting in tragedy.

The same conclusion was reached in the ATSB report into this death:

It is likely that both the ship's and the barge's crew viewed the storing operation as a mundane task and had, therefore, become complacent and developed a false sense of security about the dangers associated with loading and unloading stores. Consequently, the practices followed by both crews during the storing operation resulted in the breakdown of several identified risk minimisation controls contained in the respective JHAs.

The Full Transcript of the Court's Judgment can be found at:

http://www.courts.qld.gov.au/_data/assets/pdf_file/0011/426467/cif-fenton-pr-20150619.pdf

Yours Faithfully,

Workplace Safety Australia Pty Ltd

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