CHIEF INDUSTRIAL MAGISTRATE'S COURT

NEW SOUTH WALES

JURISDICTION: Criminal

PARTIES:
Informant: TRANSPORT WORKERS UNION OF NEW SOUTH WALES (Mr Anthony Sheldon)

Defendant: FLETCHER INSULATION (NSW) PTY LTD

Case No: 20014071/07/2

Hearing Date: 28 November 2008

Date of Decision: 28 January 2009

Legislation: Occupational Health and Safety Act 2000, S136

Magistrate: G J T Hart

Representation: Solicitor for the Prosecutor
Mr N Keats
W G McNally Jones Staff
Solicitors

Counsel for the Prosecutor
Mr B Docking

Solicitor for the Defendant
Ms K Thomas
Middletons
Solicitors

Counsel for the Defendant
Ms W Thompson

REASONS FOR DECISION

1 By decision dated 30 May 2008, the Defendant herein was found guilty of a breach of S136 of the Occupational Health and Safety Act 2000. The Defendant had entered a plea of not guilty to the charge, and the decision of May 2008 followed a contested hearing over a number of days in late 2007 and early 2008.

2 The relevant background facts and circumstances are set out in some detail in the earlier decision, and I do not propose to duplicate them in this decision. For the purposes of this decision as to sentencing, it is sufficient for the relevant facts to be briefly summarised as follows.

3 The Defendant is a large business enterprise employing approximately 5,000 employees at a number of different work sites throughout Australia. As at September 2006, it operated a factory at Minto in the State of New South Wales. In September 2006, two authorised officials of the Transport Workers Union of New South Wales attended at the factory premises for the purpose of conducting a safety inspection exercising powers provided by S78 of the Occupational Health and Safety Act 2000. The then Factory Manager, a Mr McIntosh, had greeted the two officials and initially provided them with every assistance and cooperation, taking them on a guided tour of the factory over a period of approximately two hours during which he provided information to the two officials concerning the occupational health and safety policies and procedures of the Defendant company. After approximately two hours, Mr McIntosh had formed the view that the inspection was taking longer than he had expected, and longer than he thought was reasonably necessary. He also believed that he detected an attitude on the part of at least one of the officials which was arrogant and aggressive. He had then left the inspection party and made a phone call to his head office at which time he was given a direction to inform the officials that they were to leave the premises forthwith. Upon his delivering that message to the two officials, a verbal altercation took place, tempers flared, aggressive words were used, and the two officials left the site in compliance with the repeated verbal directions given to them by Mr McIntosh that they should do so.

4 In my earlier decision, I found that the company was not entitled to curtail the inspection after a period of two hours, and that the company's decision and conduct requiring the two men to leave constituted a breach of S136 of the legislation.

5 On 28 November 2008, the matter returned to the Court for sentencing hearing, and further evidence was provided through affidavit and oral evidence of Mr Don Outzen, the National Environment, Health and Safety Manager of the corporate Defendant. The Court was also provided with submissions by Mr Docking of Counsel for the prosecuting Union, and Ms Thompson of Counsel for the Defendant.

6 The legislation provides that the maximum penalty for a breach of S136 by a corporation is $55,000. In the earlier case of WorkCover of New South Wales v Ourcorp Pty Ltd (31 January 2008 unreported) I made the following comments concerning the maximum penalty:-

"The primary task of the Court is to give consideration to the objective seriousness of the offence. The Defendant has been found guilty of two breaches of S136, each of which carries a maximum penalty of $55,000. The maximum penalty is a substantial one signifying the intention of the Parliament to make clear that the offence is considered a serious one, warranting a substantial fine. The maximum of $55,000 for each offence is however reserved for conduct at the most extreme end of the spectrum. The task of the Court is to determine a penalty which is appropriate, given the seriousness of the conduct without being oppressive or unreasonably heavy in all of the circumstances." (paragraph 5).

7 In paragraph 6 of the same decision, I made the following additional comments:-

"The Occupational Health and Safety Act 2000 is so drafted as to make clear beyond doubt the determination of the Parliament of New South Wales to establish and enforce laws designed to ensure the safety of persons at every workplace within New South Wales. An essential element in that purpose is to facilitate the detection of breaches of safety laws. The Act give considerable statutory power to duly authorised inspectors of the WorkCover Authority of New South Wales, as well as to other authorised persons, to enter into workplaces without notice for the purpose of investigating any suspected breaches of the safety laws. The Parliament has made clear that such persons are not to be hindered or obstructed in any way in the performance of their statutory tasks. Employers who ignore that statutory scheme or are too disinterested to make appropriate enquiry, must expect to be prosecuted for such conduct."

8 At the sentencing hearing, Ms Thompson of Counsel, reminded the Court that an unusual feature of this case, when compared with other S136 matters, was that the initial impulse of the Factory Manager, Mr McIntosh, was to be entirely cooperative and to facilitate the inspection. Whilst he had no notice of the inspection, he had immediately put his other work to one side and accompanied the two Union officials on a safety inspection for a period of approximately two hours, affording them free access and total cooperation. It was only after he became concerned at the time the inspection was taking and contacted his head office that the offending conduct occurred. On behalf of the Defendant, it was frankly acknowledged that the company had given an incorrect direction to Mr McIntosh, and that the company was at fault in that members of its senior management team had not acquainted themselves with the requirements of the legislation, and had therefore directed Mr McIntosh to bring the inspection to an end when such conduct was in fact a breach of the Act. In his evidence Mr Outzen made clear that the Defendant company took responsibility for that error, apologised for it, and had taken appropriate steps in relation to the education and training of management staff, and staff involved in occupational health and safety matters, to ensure that such an error could not again be made.

9 Given the importance of such safety inspections being carried out without delay and without hindrance and obstruction, I am satisfied that there should be a general deterrence factor in any penalty imposed by the Court. It is appropriate that attention is drawn both to the fact that the legislation provides authorised Union officials with considerable statutory powers to conduct such safety inspections without notice, and also to the provision in the legislation for substantial fines to be imposed upon those who hinder or obstruct such officials when exercising their statutory tasks.

10 Given that the Defendant remains a substantial participant in industry with multiple sites and a large number of employees, there should also be a specific deterrence factor in any penalty imposed by the Court. However, I accept the evidence of Mr Outzen in relation to the steps which have been taken subsequently to improve the requisite knowledge of key management staff, including those who were ignorant of the provisions of the legislation at the relevant time, and were responsible for misdirecting

Mr McIntosh as to what he was entitled to do in the circumstances he faced. Given the attitude and the actions of the Defendant following the breach, I am satisfied that the specific deterrence factor can be substantially reduced.

11 In the event that there was some evidence to suggest that there were serious safety breaches occurring at the factory at the relevant time, and that the safety inspection was obstructed for the deliberate purpose of preventing the detection of such breaches, such circumstances would, in my view, constitute serious aggravating features of the offence. That is clearly not the case here. No serious safety breaches were detected at the premises either on the day of the breach, or two weeks later when a further safety inspection was conducted under the auspices of the WorkCover Authority of New South Wales. Indeed, as indicated earlier in these Reasons for Decision, the first impulse of Mr McIntosh was to provide the two officials with every possible cooperation, and accompany them on a safety inspection for a period of some two hours.

12 There are subjective matters which mitigate in favour of the Defendant company. Having heard the evidence of Mr McIntosh at the liability hearing and the evidence of Mr Outzen at the sentencing hearing, I am satisfied that the Defendant has generally a diligent and conscientious approach to occupational health and safety matters. It has adopted a *"zero harm"* programme, designed to ensure the health, safety and welfare at work of its approximately 5,000 employees. The Defendant comes before the Court with no prior convictions which is an excellent industrial record. That record is achieved in a context which includes a large number of employees, multiple sites and the use of industrial machinery, forklifts and other equipment and processes that are hazardous. The industrial record of the Defendant supports my conclusion that the Defendant is generally diligent in relation to its occupational health and safety responsibilities.

13 On behalf of the corporation, Mr Outzen expressed to the Court the contrition and remorse of the Defendant. It was also made clear that the Defendant, notwithstanding its decision to plead not guilty to the breach, has accepted the decision of the Court, has

accepted that the legislation was breached, and takes full responsibility for the offence. Mr Docking of Counsel in his submissions has reminded the Court of the need for the Court to be satisfied that a defendant has accepted responsibility for its conduct before accepting a pronouncement that there is remorse and contrition. Mr Docking took the Court to the decision of the President of the Industrial Court of New South Wales, Mr Justice Boland, in Cahill v State of New South Wales (Department of Community Services) (No 4) [2008] NSW IRCom 201. At paragraph 57 of that judgment, his Honour the President said:-

"As to the questions of remorse or contrition, one must have regard to the provisions of S21A(3)(i) of the Crimes (Sentencing Procedure) Act. That is to say, the Court may only take into account remorse shown by the offender if the offender has provided evidence that he or she has accepted responsibility for his or her actions and the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both)."

14 In this case, I am satisfied that the test has been satisfied, and that this Court may take into account the expression of contrition and remorse made on behalf of the Defendant by its representative, Mr Outzen.

15 Having considered the maximum penalty set by the legislation, and having considered both the objective seriousness of the offence, and the subjective matters which mitigate in favour of the Defendant, I find that the Defendant herein should be fined the sum of $15,000. Costs have not been agreed as between the parties, and in those circumstances, there should be an order that the Defendant pay the reasonable party/party costs of the Prosecutor as agreed, or failing agreement, as assessed by this Court.

16 The orders of the Court are as follows:-

1 The Defendant is convicted and fined the sum of $15,000 with a moiety to the Prosecutor.

2 The fine is to be paid within 28 days at the Level 4 Registry of the Court, Downing Centre, 143-147 Liverpool Street, Sydney.

3 The Defendant is to pay the Prosecutor's reasonable party/party costs as agreed, or failing agreement, as assessed by this Court. In the event that an assessment is required, the parties have liberty to apply.

17 I publish my reasons for decision.

G J T Hart
Industrial Magistrate

28 January 2009