

# Breaking Workers in Before Breaking New Ground

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The need for implementing effective training and induction systems is placed sharply in focus when it is considered that because the expanding Queensland mining industry has led to a steady increase of workers and contractors being brought into the industry to address labour shortages, these new workers and those working with them are particularly exposed to potential harm if they are not properly trained and inducted.

The legislation requires the safety of all workers, including contractors, to be ensured. This includes a requirement to ensure they are appropriately inducted before they begin work on a site and are trained in safety systems. It cannot be assumed that these obligations can be avoided by contracting out of them.

When it comes to legal proceedings, the importance of ensuring adequate training and induction systems are in place is highlighted when considering apportioning responsibility in:

- (a) workplace health and safety prosecutions, where duties owed for inducting workers under health and safety legislation are primarily in issue; and
- (b) civil claims, in which statutory, common law and contractual obligations are all relevant.

In this presentation I will focus on some recent case law and will provide practical tips when dealing with the legal issues that apply to induction and training. By way of outline for this discussion, I will address:

- (a) the legislative framework;
- (b) the extent of the duty of care owed by mine operators and contractors;
- (c) the impact of contracts on defining the obligations;
- (d) what training and induction responsibilities cannot be delegated; and
- (e) the importance of training and inductions as part of the wider site safety plan.

## **The legislative framework**

In general terms, the mining safety and health legislation places obligations on all participants in the industry to prevent exposure to unacceptable levels of risk.

Aside from the general duties specified in mining safety and health legislation, specific obligations for inductions are set out in the regulations.

For coal mine workers, section 82 *Coal Mining Safety and Health Regulation 2001* (Qld) requires the health and management system to provide for a training scheme that must include induction training for coal mine workers and others at the mine. Section 83(1) then goes on to provide:

*A person starting work at a coal mine must not carry out any task at the mine unless the person has completed induction training for the mine.*

For other mines, sections 91 and 92 *Mining and Quarrying Safety and Health Regulation 2001* (Qld) provide as follows:

### **91 Induction training and assessment**

*The site senior executive must ensure each worker at the mine is given appropriate induction training and periodically assessed to ensure the worker has adequate knowledge of the following, having regard to the work to be carried out, or carried out, by the worker at the mine:*

- (a) *the nature and layout of the mine's operations;*
- (b) *the mine's organisational structure and communication procedures;*
- (c) *the mine's site procedures and practices;*
- (d) *the risk management process mentioned in part 2, division 2;*
- (e) *emergency procedures and basic first aid;*
- (f) *the Act and this regulation.*

### **92 Persons who have not completed induction training**

*The site senior executive must ensure a person who has not completed induction training under section 91 is:*

- (a) *supervised by a worker who has completed the induction training when the person is in a workplace at the mine; and*
- (b) *given sufficient information on, and instruction in, the following matters to enable the person to respond appropriately in an emergency situation:*
  - (i) *the mine's work practices and emergency procedures;*
  - (ii) *the use of protective and emergency equipment; and*
- (c) *made aware of the person's safety and health obligations under section 36 of the Act.*

Operators of both coal and other mines must ensure that risks are at an acceptable level and to ensure the Site Senior Executive discharges their responsibility for developing and implementing a safety and health management system for the mine.<sup>1</sup> As such, where induction training forms part of the overall health and safety system, operators will be required to ensure the Site Senior Executive develops and implements the induction training.

### **The extent of the duty of care**

The terms of the legislation are clear, but it should be remembered that duties are owed not only under statute, but also under common law and pursuant to contractual arrangements.

The New South Wales Court of Appeal has recently found that a principal contractor and its subcontractor breached their duty of care by failing to induct a worker at a major building site. In the course of delivering the judgement, the Court has provided a useful analysis of the extent of the duty of care in relation to inductions in the construction industry.<sup>2</sup> Those comments can be applied when considering the nature of the obligations in the Queensland mining industry.

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<sup>1</sup> See section 41 *Coal Mining Safety and Health Act 1999* (Qld) and section 38 *Mining and Quarrying Safety and Health Act 1999* (Qld)

<sup>2</sup> See the full text of the decision at [\[2008\] NSWCA 23](#)

## Factual background

In 2003, Mr Brian Fox (**Fox**), was injured on the site of major building works at the Hilton Hotel in Sydney.

The Principal Contractor had contracted with Downview Pty Ltd (**Downview**) to carry out concreting work.

Downview engaged Aggforce Concrete which supplied a pump truck with a driver and an offsider to operate it. Mr Warren Stewart (**Stewart**) was the driver and Fox was his offsider. Both were independent contractors.

A pipe that was used to pump cement between floors was in the process of being cleaned. The pump was not properly secured and, during the cleaning process, it struck Fox in the head, causing him serious injuries.

Fox had not undergone any induction training at the site before commencing work. Under the contractual arrangements between the Principal Contractor and Downview, induction training was to be a joint responsibility. Downview was obliged to provide the Principal Contractor with written details of secondary subcontractors who were to be engaged in work on the site.

The Principal Contractor had not been informed by Downview that Fox and Stewart were on site, nor was it otherwise aware that they were on site.

Fox originally brought proceedings in the District Court against the Principal Contractor, Downview and Warren Stewart Pty Ltd, the company that supplied the services of Stewart. At trial, Fox was successful against Warren Stewart Pty Ltd and recovered damages. However, Fox was unsuccessful against the Principal Contractor and Downview and appealed the judgment.

## The Principal Contractor's liability

Pursuant to the *Occupational Health and Safety Act 2000* (NSW) and the *Occupational Health and Safety Regulation 2001* (**Regulation**), the Principal Contractor had statutory responsibilities in addition to any duty of care arising at general law.

Failure to give instructions at induction relating to pipe cleaning operations was seen as a cause contributing to the accident.

Although it was found that the Principal Contractor conducted induction training at the site, the Principal Contractor depended on Downview to inform it of the individuals who were going to work at the site. The Principal Contractor was found to be liable on the basis that it had not ensured that all workers on its site underwent induction training. This was notwithstanding that the Principal Contractor did not know Fox and Stewart were on site.

Senior Counsel for the Principal Contractor suggested that its obligations of training and supervision were delegated to Downview. However, the contractual provisions between Downview and the Principal Contractor did not support that conclusion, nor did the Regulation provide support for the Principal Contractor to delegate responsibility in that manner.

The Principal Contractor was found to owe Fox a duty of care at common law. By allowing Fox (and Stewart) to work on the site without either having undergone induction training, it was in breach of that duty. Commenting on the development of this duty, Justice Basten stated:<sup>3</sup>

*The older case-law concerning accidents on construction sites does not indicate that a general law obligation to provide training in matters of safety to subcontractors working on a site was envisaged as falling within the requirements of the duty of care of a principal contractor. It is also clear that construction sites were relatively dangerous workplaces in the past. The obligation to*

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<sup>3</sup> Ibid at paragraph 48

*ensure a reasonable level of safety is, however, now well-recognised. The need for induction training is now a recognised part of major construction works.*

### **Downview's liability**

Downview had responsibility for the concreting work on the site, including the pumping and pipe cleaning, pursuant to the contract with the Principal Contractor.

It was found that Downview had failed to take any steps to ensure that persons coming on to the site had undergone training. Downview's obligations extended to those participating in carrying on its contracting work to conduct operations safely. To do this, Downview was obliged to contract with competent and properly trained operators. However, Downview left it up to its own subcontractors to engage other labour and equipment and by doing so, was found to have abandoned its responsibilities.

### **Fox's contributory negligence**

Justice Basten found Fox's attribution of responsibility for his own injuries to be 15%. Justices Giles and McColl disagreed with this, instead finding that Fox's conduct did not constitute a departure from the standard of care of a reasonable worker in his circumstances. This was because he was employed as a semi-skilled labourer acting on the instructions of the contractor responsible for concreting. It was therefore held that reasonable care for his own safety did not require Fox to raise the necessity for induction before he went onto the site.

### **The Principal Contractor's cross-claim against Downview**

The Principal Contractor filed a cross-claim against Downview based on the contractual understanding. The Court found that the failure by the Principal Contractor to provide appropriate induction training was largely due to Downview's failure to organise its subcontractors in a manner consistent with the Principal Contractor's requirements.

As a result, of the \$472,562 damages found to be payable to Fox by the Principal Contractor and Downview, Downview was found to be 80% liable for that amount and the Principal Contractor was responsible for the remainder.

### **Implications**

While the law in the Queensland mining industry differs to that applying in the New South Wales construction industry, the principles considered in Fox's circumstances are readily applicable in terms of the requirements for mine inductions.

In this regard, while there is no doubt that a failure to induct would result in a breach of a Site Senior Executive's statutory obligations, it should also be considered that:

- Justice Basten's comments regarding the development of the duty of care towards contractors in terms of induction can be applied to the obligations under Queensland law;
- Site Senior Executives, operators, contractors and subcontractors should be in no doubt that those exercising control of a mine site owe a duty of care to all those coming onto the site to take reasonable steps to ensure their safety at common law and not just under the legislation;
- contractual terms can reflect or extend those duties and in a civil claim will go a long way to determining responsibility; and
- a high standard is required in discharging the duty of care. So far as an induction is concerned, this requires a system to ensure no workers can enter or work on a mine site without being inducted.

## The impact of contracts on defining the obligations

As can be seen from the Fox decision, contractual terms have an impact on the obligations owed, but cannot be relied upon to remove all liability.

For example, the fact that Downview had a contractual obligation to notify the Principal Contractor of every worker coming onto site did not mean that the Principal Contractor could completely escape liability when Downview breached that obligation. However, drafting such a requirement into the contract at least had the effect of assisting to minimise the exposure to civil claims against the Principal Contractor by clearly defining what the obligations were.

So far as questions of negligence are concerned, properly drafting the boundaries of what conduct is authorised is extremely important. This is because a principal can be held liable for the negligent acts of a subcontractor where their actions were authorised.<sup>4</sup> A failure to limit authorised conduct could therefore result in exposure to claims based on the negligence of contractors.

Care also needs to be exercised in creating contractual controls given that the 'control test' remains relevant to the determination of whether a contractor is truly an independent contractor or is, for legal purposes, an employee. However, so far as safety considerations are concerned, it is recognised that co-ordination of contractors may be required when discharging the obligation to set a safe system of work.<sup>5</sup> The existence of statutory duties that cannot be contracted out of would no doubt go some way towards discounting contractual obligations aligned with those statutory requirements as being relevant when applying the control test.

Parties often draft contractual obligations by reference only to statutory safety and health considerations. However, the strict nature of obligations at law should not blind parties to the commercial reality that obligations can be drafted into the contract to provide protection against civil claims.

Another important factor to bear in mind is that it is possible to agree to do more than you may be required to do at law, thereby increasing exposure to civil claims. Clearly it would be desirable to avoid this outcome wherever possible.

The impact of contractual provisions dealing with induction and other safety and health requirements is therefore extremely important and proper thought should be put into drafting them.

## What cannot be delegated

The legislation does not allow for health and safety responsibilities to be completely delegated. It is clear from the manner in which the Queensland legislation is drafted that the buck stops with the Site Senior Executive when it comes to ensuring that proper training and induction systems are in place. Operators will share this responsibility to the extent they are required to ensure the Site Senior Executive performs their duties.

As a result, the Site Senior Executive must always supervise and coordinate the activities of all workers as part of discharging the obligation to ensure safety and health, and operators must ensure that the Site Senior Executive is discharging this responsibility as part of the overall system.

While the Site Senior Executive has overall responsibility, it is possible for obligations to be imposed on others by appropriate drafting of the safety and health system. If this was done, because the full responsibility cannot be avoided, steps would need to be in place to ensure the requirements are being observed.

Notwithstanding that there is some ability to require contractors to put in place their own systems for ensuring proper training and induction of their workers or others they engage, obvious risks arise if they are given sole responsibility for site inductions. In those circumstances a Site Senior Executive would

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<sup>4</sup> see for example *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366 per McHugh J

<sup>5</sup> see *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 31 per Mason J.

want to be very sure that their systems were robust enough to detect non-compliance quickly and effectively.

Given the strict nature of the induction duties placed on Site Senior Executives, the better approach would be to retain control over site inductions but draft the safety management system so as to require others to implement checks and balances to ensure no work is performed without an induction having been undertaken.

Separate to the above considerations, there are broader duties imposed by the legislation on all workers for ensuring safety and health. These apply in addition to specific duties for induction and training. Such general requirements can come into play when determining responsibility for an incident. It can therefore never be assumed that because a Site Senior Executive holds ultimate responsibility for mine inductions that a failure to induct could not also be a breach of these general duties by contractors or other workers.

In the Fox decision the worker was found to not be responsible for his own failure to be inducted as part of the civil proceedings. When it comes to a statutory breach, it may be unlikely that such a defence would succeed against a health and safety prosecution, especially if worker can be shown to have prior experience in the mining industry and therefore have an awareness of induction requirements.

Regardless of the legal issues, if an effective safety and health system is in place, there will always be a collective responsibility for ensuring the proper training and induction of workers.

### **The importance of training and inductions as part of the wider site safety plan**

Induction training is only one part of the puzzle when it comes to an effective safety and health system. Putting in place soft barriers such as training and systems will not succeed unless properly integrated with hard barriers, such as changes to physical design of plant and equipment to make it safe to use. A true safety culture demands attention to all aspects of safety and health.

However, there is no doubt that inductions are a key player in discharging the statutory duty and moral obligation to ensure workplace safety and health.

To be successful, inductions must be made relevant. Some factors to consider are:

- are your current systems designed to ensure induction is received by all workers – including contractors?
- does the induction effectively impart safety information or is it simply an exercise in filling in a form without determining proper comprehension? Or worse, does the induction more resemble an advertisement than a safety and health induction?
- is the induction conducted in a manner that everyone can understand, or is it 'one size fits all'? Bear in mind that you will be inducting people who will not be familiar with the site and may never have worked in the mining industry before. There will be people with varying levels of education and ability to absorb training. There may also be people who are coming onto site who do not have English as their first language and therefore may have comprehension difficulties. As such, a one size fits all approach is unlikely to deliver training that achieves the goal of making sure workers are properly inducted onto site.
- is enough time spent on the induction to ensure the content is understood, or is the focus instead on ensuring inductions are kept short so as to get workers on site as fast as possible?
- are inductions delivered by personnel who understand the issues and care about ensuring an effective outcome?
- consider when your induction program was last reviewed – have you ensured it is kept up to date?

If your answers to any of the above questions makes you uncomfortable about your induction process, it is time for change and for updated training to be delivered.

## **Conclusion**

The resources boom shows no signs of slowing and it can therefore be anticipated that the stream of newcomers into the Queensland mining industry will continue unabated, at least for the foreseeable future.

Induction is the first port of call when coming onto site and is an important factor in helping establish a safety culture and an effective safety and health management system. Aside from these considerations, it is clear from a legal perspective that a lot can be on the line if you do not discharge statutory, common law and contractual obligations for inductions.

As a result, there is a clear imperative before you break new ground to ensure your workers are properly broken in.