

# Safety Matters – Special Edition

July 2007

## Commonwealth OHS Act – When is a contractor in control?

On 30 May 2007, a Full Bench of the Australian Industrial Relations Commission (AIRC) handed down its decision in an appeal by Telstra against the issue of an improvement notice from Comcare. The key issue concerned whether a contractor was in control of a workplace. It was found the contractor was not in control and, therefore, Telstra was required to notify an incident to Comcare in accordance with the *Occupational Health and Safety Act 1991* (Cth OHS Act). We summarise the Appeal Bench's decision in this special edition and, also highlight some important considerations and implications for employers covered by the Cth OHS Act.

### Facts

Silcar Pty Limited and Transfield Services Pty Limited, as a joint venture (the contractor), contracted with Telstra for the provision by the contractor of maintenance services to Telstra. Those services were provided under a contract entitled "Facilities Management and TelePower Services Agreement". On 21 August 2006 an employee of an air conditioning subcontractor engaged by the contractor was injured by a pulley on an air conditioning unit while working in the plant room of the Lidcombe Telephone Exchange in NSW.

Telstra notified Comcare of the injury on 28 August 2006. However, under the Cth OHS Act, there was a requirement to notify Comcare within 24 hours of an incident.

Comcare issued an improvement notice to Telstra requiring Telstra to ensure that employees responsible for notification of incidents at the Lidcombe Telephone Exchange be reminded of the requirement to notify incidents within the prescribed timeframe.

Telstra appealed against the improvement notice and that appeal was dealt with at first instance by Vice President Lawler of the AIRC. Vice President Lawler dismissed the appeal and Telstra appealed to a Full Bench of the AIRC.

### Key issue on Appeal

The key issue was whether Telstra was obliged to notify Comcare of the injury. The issue brought into play the construction of section 14 of the Cth OHS Act. So far as relevant, this section provides as follows:

"Application of Act to workplaces controlled by contractors:

(1) Despite anything in this Act, if a workplace is controlled by a contractor for construction or maintenance purposes:

(a) this Act ... does not apply to that workplace while it is so controlled; and

(b) this Act ... does not apply to work performed by contractors at that workplace while it is so controlled.

(2) For the purposes of subsection (1), a workplace is not taken not to be controlled by a contractor simply because of the presence at the workplace of a Commonwealth employee if that employee has no right to direct the work of the persons working for the contractor".

In short, if the workplace was controlled by the contractor for construction or maintenance purposes, the Cth OHS Act, including the requirement to notify

Comcare, did not apply to that workplace or to work performed by the contractor at that workplace.

### Did the contractor have control?

The AIRC determined that the question whether the contractor had control for the purposes of section 14 of the Cth OHS Act needed to be determined primarily by reference to the terms of the contract between Telstra and the contractor.

The AIRC started from the proposition that the Lidcombe Telephone Exchange was controlled by Telstra and the extent to which Telstra ceded control to the contractor was governed by the terms of the contract.

### What were the factors relevant to control?

In analysing the terms of the contract, the AIRC found that the following factors pointed to control by Telstra:

- the contract did not prevent Telstra employees from entering any part of the Lidcombe Telephone Exchange;
- the contractor was only permitted entry to the premises as was "sufficient to enable it to fulfil its obligations";

- Telstra retained a right to audit the contractor's OHS procedures and to direct that the contractor's health and safety plans be altered;
- the contractor was required to notify Telstra as soon as possible, and in any case, within 24 hours of becoming aware of, an OHS incident;
- the contractor did not have exclusive possession of the air conditioning plant at the Lidcombe Telephone Exchange;
- Telstra was able to operate the plant, inspect it and, if necessary, modify it, provided it did not interfere with the maintenance work.

On the other hand, Telstra did not have the right to direct the manner in which the contractor's employees performed work on the premises.

## Finding on Appeal

The AIRC found that the workplace was not controlled by the contractor. The AIRC went on to say that, unless the employer had unambiguously relinquished control of the premises to the contractor, the exclusion in section 14 of the Cth OHS Act did not apply.

This had the consequence that Telstra was required to notify the incident under the Cth OHS Act.

## Amendments to Regulations

On 26 April 2007, prior to the Full Bench decision, the *Occupational Health and Safety (Safety Arrangements) Regulations 1991* were amended to clarify that certain parts of the Cth OHS Act applied to employees at a workplace controlled by a contractor (section 14) and to employees working

at non-Commonwealth premises (section 15). The parts of the Cth OHS Act which are extended are Part 3 (workplace arrangements), Part 4 (advice, investigations and inquiries), Part 5 (miscellaneous including notification of accidents) and Schedule 2 (civil proceedings and criminal prosecutions).

While this amendment is intended to clarify the situation, the question remains as to whether a contractor is in "control" of a workplace and, if a contractor is in control and an accident occurs, who is the "employer ... conducting an undertaking" (section 68 of the Cth OHS Act) who needs to notify Comcare of the accident.

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## Observations and implications for employers bound by the Cth OHS Act

Many employers bound by the Cth OHS Act have contracts with contractors for construction or maintenance purposes. Those contracts operate in different contexts and situations. It may be that, in many cases, employers have relied on contractors to notify incidents on the understanding that the exclusion in section 14 operates where a contractor is thought to have control of the workplace.

Employers need to consider carefully whether a workplace is really "controlled" by a contractor for construction or maintenance purposes by:

- considering the terms of a contract with the contractor;
- considering whether to review or amend the terms of a construction or maintenance contract with a contractor in light of the factors taken into account in this case if it is intended that the contractor have control. An employer needs to also consider the balance in doing this because the employer may wish to retain control for certain purposes;
- carefully drafting contracts if the intention is that the employer "unambiguously relinquishes control of the premises" to the contractor, at least in relation to the work needed to be done by the contractor;
- considering (if the Cth OHS Act does not apply by virtue of the exclusion in section 14) what this means where regulation has otherwise been by reference to the Cth OHS Act.

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