



HEALTH AND SAFETY MONTH 2016

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Recent decisions in OHS prosecutions



Enforcement Group

- Receives referrals from the inspectorate
- Investigators conduct a comprehensive investigation
- Brief of evidence forwarded to legal
- Legal assess brief – decision made to prosecute, not prosecute or caution

VWA General Prosecution Guidelines

- Publicly available document – provides guidelines regarding the prosecution of offences under Victoria's OHS and workers compensation laws
- Target areas for prosecutions:
 - ❑ Work-related fatalities
 - ❑ Incidents involving allegedly high degrees of culpability
 - ❑ Published strategic focus areas (e.g. high-hazard and high-risk industries)
 - ❑ Failure to comply with notices or directions issued by inspectors
 - ❑ Offences against inspectors
 - ❑ Offences against HSRs
 - ❑ Offences against or by ARREOs
 - ❑ Discrimination or threats to discriminate for any OHS-related action

- Target areas for prosecutions (cont.):
 - ❑ Coercion in designated workgroups negotiations
 - ❑ Failure to notify WorkSafe of a 'notifiable incident' and failing to preserve incident sites when required to do so
 - ❑ Certain alleged offences under the *Dangerous Goods Act 1985*
 - ❑ Offences under the *Equipment (Public Safety) Act 1994*
 - ❑ Other targets areas as published

VWA General Prosecution Guidelines (cont.)

- Enforcement Criteria – where the investigation reveals evidence of a breach, the decision to prosecute, not prosecute or caution is made in accordance with the following considerations:
 1. Sufficient evidence to support a prosecution
 - ❑ Prosecution Policy of the Commonwealth
 - ❑ Reasonable prospects of a conviction
 - ❑ Admissibility, relevance and strength of evidence
 - ❑ Witnesses
 2. The public interest

DPP -v- Thiess Services Pty Ltd

- In April 2012, Thiess was carrying out conservation and maintenance works along the banks of the Patterson River in Patterson Lakes
- Tugboat 'Argie' and barge 'Bargie' – owned by Melbourne Water. Thiess oversaw design, construction and surveying of the vessels
- Importantly, Bargie was to have capacity to carry a 5 tonne excavator
- April 2010, Certificate of Survey issued Bargie to be operated in accordance with loading conditions in an approved Stability Book
- Bargie's designer recommended that a Stability Book be obtained
- As at April 2012, Thiess had not obtained a Stability Book – estimates had been obtained (\$1,300 and \$3,300)

Argie and Bargie



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DPP -v- Thiess Services Pty Ltd

First 'near miss' incident

- On 19 April 2012, independent contractor loaded his 15 tonne excavator onto Bargie
- Bargie was stuck on the river bank – IC was asked to use the excavator's boom to push off the bank
- As he pushed off the bank, Bargie tilted dangerously
- IC repositioned the boom of the excavator to counteract the tilt

DPP -v- Thiess Services Pty Ltd

Second incident

- On 27 April 2012, three Thiess employees loaded a 13 tonne excavator onto Bargie
- One excavator operator, one spotter on barge, one operating Argie
- Again, Bargie was stuck on the river bank – excavator operator was asked to use the excavator's boom to push off the bank
- Again, as he pushed off the bank, Bargie tilted dangerously
- Bargie capsized (taking Argie with it) – the excavator of the operator was still in the cabin

Argie and Bargie



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DPP -v- Thiess Services Pty Ltd

The Stability Book

- The stability of Bargie would be affected by more than the weight of the load – stability was affected by a combination of the vertical centre of gravity on Bargie and its payload
- This information was communicated to Thiess, pre-incidents
- The Crown alleged that, in respect of both incidents, had a Stability Book been on board Bargie, a person trained in its use would have been able to identify that Bargie was incapable of safely transporting both excavators across the Patterson River
- After both incidents, a Stability Book was produced for Bargie

Trial & Sentence

- By jury verdict, Thiess found guilty of both charges
- Sentence
 - ❑ The first incident was a 'warning incident' – the second incident aggravated the overall offending because Thiess did not review or change its procedures after the first incident
 - ❑ The failure to obtain a Stability Book was a basic failure in the overall system of work – the extent of the departure from the duty owed to its employees and contractors was significant
 - ❑ The relevant risk was the that Bargie would capsize, exposing persons to risk of drowning or serious injury. The likelihood of such consequences was obvious, and was demonstrated by the injuries suffered by the excavator operator
 - ❑ First incident – section 23 (1) – convicted and fined \$250,000
 - ❑ Second incident – section 21(1) – convicted and fined \$350,000

Thiess takeaways

- State of knowledge is critical in assessing culpability of an alleged OHS offender
- The occurrence of actual harm is not an element of health and safety duty offences – the ‘near miss’ can be as serious as the incident resulting in injury or death
- The cost of eliminating or minimising a risk is relevant to reasonable practicability – however, it goes both ways



Thank you.

