

# Landmark decision clarifies who influences and controls workplaces

***SafeWork NSW v Assign Blue Pty Limited* [2020] NSWDC 756**

15 FEBRUARY 2021

## AT A GLANCE

- In this case, labour hire employer Assign Blue successfully defended criminal charges that it failed to comply with its safety duty as a joint duty holder following the serious injury of one of its employees.
- For the first time under the work, health and safety harmonised regime, the concept of the capacity to “influence and control” a workplace has been explored with the *Assign Blue* case.
- The Court’s decision gives authoritative guidance on the competing duties and complex workplace relationships under safety legislation.
- For insurers and insureds, *Assign Blue* highlights the importance of having robust contractual arrangements that address safety between joint duty holders.

## LEGAL FRAMEWORK

Unlike almost any other jurisdiction, safety regulators have the power to prosecute multiple entities for breaches arising from the same incident. This is not exclusive to the labour hire and host employer relationship. It could equally apply to joint duty holders in any workplace, for example: builders and subcontractors; schools and groundkeepers; and clubs and contracted cleaners.

Safety legislation imposes an obligation on joint duty holders to consult on safety risks. In the event of an incident, particularly one resulting in serious injury, all parties may be individually prosecuted. Relevantly, section 16 of the *Work, Health and Safety Act* (NSW) 2011 recognises that joint duty holders do not always have equal bargaining power when it comes to exercising influence and control over safety decisions and practices.

## The facts

In the *Assign Blue* case, the joint duty holders – the host employer and the labour hire employer – were both prosecuted. The host employer entered a plea of guilty. But this did not stop the case proceeding against the labour hire employer, Assign Blue.

Assign Blue conducted a business supplying the labour of its employees, under labour hire agreements, to businesses in Western Sydney across a number of industries. Assign Blue placed Mr Daniel William to Bullock MFG Pty Limited, a business that manufactured sheet metal components for use in air conditioning systems out of a factory in Rydalmere. The factory had separate sections for assembly work, machinery operation and warehousing.

Assign Blue's evidence, which was accepted, was that it was never informed that Mr William would be operating machinery, rather that he would only be working in the assembly or the warehouse areas. However, on 31 August 2017, Mr William was directed by Bullock to operate a 40 tonne Wallbank Press. In the course of operating that press, he suffered a partial amputation of three fingers. He has no recollection of the circumstances surrounding the injury, and there were no witnesses.

Both Bullock and Assign Blue were charged with Category 2 offences under the WHS Act. Category 2 charges are only pressed in circumstances where the alleged safety breach may result in a risk of death or serious injury. Serious injury includes an incident requiring immediate treatment, hospitalisation or an amputation.

## Consultation

Assign Blue presented evidence, which was ultimately accepted, that it had consulted with Bullock regarding safety. This included site visits, completing safety questionnaires and audits. Assign Blue's ability to consult was limited by the information it was provided by Bullock, most relevantly, Bullock's failure to inform Assign Blue that the injured worker would be operating machinery.



**Because of this case, safety regulators will be required to carefully consider the individual circumstances of joint duty holders.**

Importantly, Bullock was contractually bound to Assign Blue to:

- provide induction, training and safety consumables to Assign Blue workers
- conduct risk assessments on all workplace activities
- establish and maintain safe work procedures addressing all risks
- communicate safe work procedures to the temporary employee
- comply with safety standards, and
- comply with all health and safety legislation and regulations.

The Court ultimately determined that Assign Blue was entitled to rely on the terms of the contract that required Bullock to take specified steps to manage safety risks. However, this alone would not be sufficient for Assign Blue to have discharged its own safety duties. As a joint duty holder, Assign Blue was also required to manage the safety risks to which its employees may be exposed on site at Bullock's premises.

But when considering the extent to which Assign Blue had capacity to "influence and control the work at the premises", the Court listed six critical factors which led to its determination that Assign Blue's capacity to influence and control the work of the labour hire workers was different to Bullock's. The factors were that Assign Blue:

- did not have day-to-day supervision of the labour hire workers
- was not in control of the workplace
- did not have any experience in operating the machines on the factory floor
- did not have the expertise in operating the machines sufficient to identify the hazards posed by them or to identify and implement appropriate control measures
- did not have the knowledge required to formulate appropriate training and instruction to be provided to the operators of the machine, and
- did not have access to the machines to ensure that they were configured in a way that was safe for use, by ensuring that the interlocking guarding was operated correctly.

On that basis, Assign Blue was found not guilty.

## SIGNIFICANCE OF THE CASE FOR INSURERS AND INSURED

Because of this case, safety regulators will be required to carefully consider the individual circumstances of joint duty holders. It will not be sufficient to allege that the duty is the same, when one party clearly exercises a greater level of influence and control over the workplace.

This is not to say that labour hire employers have no duty. They do, and it is non-delegable. However, contractual arrangements and evidence of due diligence – such as regular consultation, site inspections and safety audits – are relevant considerations as to how the duty is discharged.

As contractual arrangements between joint duty holders are a key consideration in safety matters, insurers and insureds alike should ensure that contracts are robust. They must include provisions that address each party's respective safety duties.

All parties must be able to satisfy the regulator, and the courts, that they have exercised due diligence in assessing and managing risks at the workplace, even if the workplace is not under their direct control. The extent to which a party influences and controls a workplace will be a material consideration for any party faced with a safety incident. This degree of influence should also be carefully considered when dealing with the regulator.

## Need to know more?

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