

*Boland v Big Mars Pty Ltd* [2016] SAIRC 11

**MAGISTRATES COURT OF SOUTH AUSTRALIA  
(INDUSTRIAL OFFENCES JURISDICTION)**

BOLAND, Marie

v

BIG MARS PTY LTD

**JURISDICTION:** Prosecution

**FILE NO:** 8589 of 2015

**HEARING DATE:** 17 March 2016

**JUDGMENT OF:** Industrial Magistrate SM Lieschke

**DELIVERED ON:** 27 April 2016

**CATCHWORDS:**

*Prosecution - Guilty plea - Failure by labour hire employer to provide a safe system of work - Failure to provide information, instruction, training and supervision - 21 year old temporary migrant worker fell into a bath of sodium hydroxide (caustic soda) and suffered severe burns - Defendant took no safety precautions - **Held:** Fine of \$240,000 (after 20% reduction) and conviction - Ss 16, 19 & 32 Work Health and Safety Act 2012*

**REPRESENTATION:**

Counsel:

Informant: Ms E Handshin

Defendant: Mr C Liu

Solicitors:

Informant: Crown Solicitors Office

Defendant: Cathay Lawyers

- 1 On 6 November 2013 a temporary migrant worker from Taiwan fell into a bath of sodium hydroxide (caustic soda) while working at the Murray Bridge abattoir. 21 year old Yu-Hsiang Hsiao suffered burns to all skin below the waist, with full thickness burns to 32% of his total body surface area.
- 2 Mr Hsiao was then employed by Big Mars Pty Ltd, a labour hire company, to perform labouring duties for Thomas Foods International Murray Bridge Pty Ltd, the abattoir's owner and operator.
- 3 Big Mars is owned by Lin Xian Rong, who is also the company's sole director. The business of Big Mars was to provide temporary migrant workers from Taiwan or China to work in Thomas Foods' abattoir. Ms Rong's relevant experience is that she had previously worked for a different labour hire company, before deciding to set up her own similar business.
- 4 Following an investigation by SafeWork SA, Big Mars and Thomas Foods were charged with offences under the *Work Health and Safety Act 2012*.
- 5 Big Mars has entered a guilty plea to the following charge, and is now to be sentenced.

“3. On 6 November 2013 at Murray Bridge in the State of South Australia, the second defendant [Big Mars], being a person conducting a business or undertaking, and who had a health and safety duty, failed to comply with that duty, and that failure exposed Yu-Hsiang Hsiao to a risk of death or serious injury.

Contrary to section 32 of the *Work Health and Safety Act 2012* (SA).

This is a minor indictable offence.

#### Particulars

- 3.1 At all material times the second defendant conducted a labour hire business.
- 3.2 At all material times Thomas Foods International Murray Bridge Pty Ltd conducted an abattoir and meat processing business at Lagoon Road, Murray Bridge ('the premises').
- 3.3 At all material times the second defendant employed Yu-Hsiang Hsiao ('Hsiao') and in that capacity influenced or directed Hsiao in his activities.

- 3.4 Prior to 6 November 2013 the second defendant [Big Mars] entered into a contract or agreement ('the contract or agreement') with Thomas Foods International Murray Bridge Pty Ltd for the supply of labour at the premises.
- 3.5 On or about 14 May 2013 Hsiao was assigned to work in Thomas Foods International Murray Bridge Pty Ltd's business.
- 3.6 On 6 November 2013, Hsiao performed work for Thomas Foods International Murray Bridge Pty Ltd in the Mutton Slaughter Floor Hook Room, cleaning hooks which had been used on the Mutton Slaughter Floor in a bath containing heated water and sodium hydroxide, pursuant to the contract or agreement.
- 3.7 On 6 November 2013, Hsiao was exposed to a risk of death or serious injury, and he was seriously injured, when he was in the Mutton Slaughter Floor Hook Room cleaning hooks in the bath containing heated water and sodium hydroxide and he fell into the bath, requiring immediate treatment as an in-patient in a hospital for serious burns to his lower body.
- 3.8 The second defendant [Big Mars] failed to provide so far as was reasonably practicable safe systems of work in that it:
  - 3.8.1 failed to implement any or any adequate system of site specific hazard analysis and risk assessment of the premises.
  - 3.8.2 failed to implement any or any adequate system of checks or audits to ensure that Thomas foods International Murray Bridge Pty Ltd provided and maintained adequate written safe operating procedures, in particular a written safe operating procedure that:
    - 3.8.2.1 referred to the appropriate use of gates which had been installed around the bath, in particular that the gates must be closed when not in use to facilitate movement of a hook tree over the bath and that the worker is to stand behind a gate when opened; and
    - 3.8.2.2 referred to the use of a metal hook to facilitate movement of a hook tree over the bath.
  - 3.8.3 failed to provide a written translation of the work instruction 'WI Slides Cleaning – Hook Room' dated 19 May 2010 in Hsiao's native language (Mandarin

Chinese), or ensure that a written translation was otherwise provided.

3.8.4 failed to implement any or any adequate system to assess the effectiveness of the training and supervision provided by Thomas Foods International Murray Bridge Pty Ltd to Hsiao.

3.9 The second defendant [Big Mars] failed to provide such information, instruction, training and supervision as was reasonably necessary to ensure that Hsiao was safe from injury and risks to health in that it failed to provide any or any adequate information, instruction or training to Hsiao regarding:

3.9.1 generic occupational health and safety matters relevant to his job;

3.9.2 Thomas Foods International Pty Ltd and the work tasks that he would be performing there, including hazards that were present in the workplace and how they were controlled”.

- 6 As the particulars of the offence explain, Mr Hsiao had been assigned by Big Mars to work in the Hook Room. Here all the used meat hooks were cleaned of residual animal tissue and sterilised by immersion in a floor level bath that contained a sodium hydroxide solution heated up to 65°C. He had been tasked to perform this job function on his own, and with only sporadic supervision.
- 7 Sodium hydroxide, or caustic soda as it is commonly known, is very effective at dissolving animal tissue. That is why it is so dangerous to people.
- 8 When Mr Hsiao started work at the abattoir he received no information or training from his employer Big Mars.
- 9 The on-site Big Mars supervisor, Min Zhu, had not ever been inside the Hook Room and had not received any information or instruction regarding how that work was to be carried out. He had not been asked by his employer Big Mars to check any safety procedures or the work areas where their workers were going to be placed. He had no assigned safety responsibilities.
- 10 Big Mars admits it did not have any work health and safety policies regarding risk management. It left all considerations of safety up to Thomas Foods.

- 11 Big Mars further admits it took no steps to deal with the obvious communication issues for employees who did not read or speak English, and/or who worked alone in the abattoir.
- 12 Mr Hsiao did receive a written work instruction in English and some on-the-job training for working in the Hook Room from Thomas Foods. But as at least Big Mars knew, Mr Hsiao did not read or understand English. Mr Hsiao asked a Mandarin speaking supervisor employed by Thomas Foods to interpret the document for him. Mr Hsiao was told to interpret the document himself in his own time with an online translation dictionary.
- 13 The written work instruction was not only not translated into a language the worker could understand, but its value was limited as it failed to mention the gates around the bath, as they were installed after the instruction was written.
- 14 Mr Hsiao's Hook Room training by a Thomas Foods employee included being told to shut the 1m high gates at the end of each shift. He was not told to keep the gates shut while processing the hooks. He learned to leave both gates secured open while he performed his duties. He did this by looping a spare hose over the gates in their open position, to override their spring closers. This is how he always performed the job. His method of performing the work was readily observable by any supervisor. He was never told to perform the job any differently.
- 15 Mr Hsiao was not told the bath contained any dangerous substances, was not told it contained a solution of sodium hydroxide, and he was not given any instructions of what to do if he came into contact with the liquid in the bath.
- 16 The Hook Room had an overhead rail system from which a 'hook tree' that held up to 200 meat hooks was suspended. After packing the tree Mr Hsiao pushed it through the open gateway and over the bath. By using pendant controls he mechanically lowered it into the solution. After fifteen minutes he raised the tree then pulled it through the second gateway to a rinsing station where the solution was sprayed off. Mr Hsiao did not use a metal hook, as referred to in particular 3.8.2.2, to facilitate movement of the frame.
- 17 The account obtained from Mr Hsiao of the incident is as follows:

“I had the tree out of the bath and it was placed in the rinse area and then I tried to lift another tree into the bath off the metal rail. I was standing to the right of the shower on the concrete ledge at the entrance of the bath. I was pressing the button of the pendant to lift the tree with my left hand and then place the tree into the bath. The tree was fully in the bath. I then slipped off the concrete ledge into

the bath. I do not know how I slipped in but I slipped in up to my waist. The bath water was hot and I was in a lot of pain. I tried to lift my legs out of the bath quickly by placing my hands on the concrete ledge and lying down on the concrete. I rolled over onto my stomach with my head towards the entrance of the hook room. My rubber boots filled up with hot water. I took off my clothes, leaving my underwear on.”<sup>1</sup>

- 18 Mr Hsiao urgently needed help. He called out to other workers he could see through a void in the ceiling, and waved his arms to get their attention. Because it was very loud in the slaughter room he was not noticed for about three minutes. He was then attended to and rinsed down with water. An ambulance was called.
- 19 This prolonged skin contact with the caustic soda solution before removing the soaked underwear and being rinsed off would have been unlikely had he been told what he was dealing with.
- 20 Mr Hsiao was taken to the Murray Bridge Hospital and then airlifted to the burns unit of the RAH. He suffered chemical burns to his lower body, including full thickness burns to 32% of his total body surface area. He required numerous skin grafts including seven surgeries under general anaesthetic. His recovery was complicated by infection. He was finally discharged from hospital on 10 February 2014. His parents came out to Australia to care for him until he was able to return home to Taiwan.
- 21 The workers compensation system paid his medical expenses, and limited income maintenance until he returned home. He will be entitled to ongoing medical treatment and compensation for permanent non-economic loss.
- 22 Mr Hsiao completed a victim impact statement on 17 September 2014. This details some of the ordeal he has endured, and refers to some significant ongoing problems with his skin and the extensive scarring, in that it does not breathe or maintain moisture or sweat. Mr Hsiao is working in casual jobs in Taiwan but he needs to avoid sun exposure while doing so. The offence has had a profoundly adverse effect on Mr Hsiao’s physical and mental well-being.
- 23 Victim impact statements from his mother Wu Chia Chen and his father Hsun-Ho Hsiao were also provided to the Court. His parents talk of their family’s great distress over their son’s trauma and resulting impairments. The parents seek an award of compensation for travelling expenses and lost income from their employment. However as no supporting information has been provided by the prosecutor the Court is unable to

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<sup>1</sup> Tr p 8

make any award of compensation. In any event Mr Hsiao and his parents may well have an entitlement to sue Thomas Foods for damages.

24 In determining sentence I must take account of the actual injuries suffered by the victim, as well as the severity of potential injuries arising from the obvious risk of injury Mr Hsiao was unreasonably exposed to. That is a risk of even worse burns and organ damage, or death.

25 The legal framework underpinning the charge clearly places an obligation on the labour hire employer to take all reasonably practicable steps to ensure that Mr Hsiao was safe from injury while working for the host business. This duty cannot be ignored or delegated to the host business. Section 16 of the Act spells out that if

“more than one person does have a duty for the same matter, each person –

(a) retains responsibility for the person’s duty in relation to the matter; and

(b) must discharge the person’s duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.”

26 As a labour hire business Big Mars had a duty to assess the abattoir, including the Hook Room, before it sent Mr Hsiao to work there. It had a duty to provide an appropriate safety induction in Mr Hsiao’s language. It had a duty to take all reasonable practicable steps to ensure that risks to safety were controlled, and it had a duty to regularly monitor and review the workplace’s safety standards. It was also obliged to consider the safety aspects of Mr Hsiao’s youth and language barrier.

27 Identifying the large floor level bath of caustic soda solution in the Hook Room, and then checking the safety measures in place and how these were to be conveyed to its employee, were simple tasks for the labour hire business. Big Mars was well placed to do this due to its familiarity with the abattoir from having about 40 employees placed there.

28 While Big Mars was not responsible for the configuration of the Hook Room or the design of the work tasks, there were many reasonably available inexpensive steps it could have taken. Big Mars should have obtained details of the tasks that its worker would be required to carry out. It should have obtained information from Thomas Foods or made its own enquiries, about all specific foreseeable hazards and resulting risks of injury, together with the adequacy of hazard control measures. Big Mars should have ensured that Thomas Foods provided and maintained appropriate written safe operating procedures that referred to and

required maximum use of the gates, and use of an aid to move the hook tree along the rail over the bath. If all this was not provided Big Mars should not have placed its employee in that role. Big Mars should have provided a written translation of all relevant safety and work instructions, and it should have ensured that Mr Hsiao was told of the dangerous chemicals he was to work with, and of the appropriate first aid measures. Big Mars should also have had some system to assess the effectiveness of the training and supervision provided by Thomas Foods to Mr Hsiao.

- 29 As indicated above, Big Mars took none of these straightforward steps. It failed miserably to carry out any of its fundamental safety responsibilities. If it had done so Mr Hsiao is highly unlikely to have been injured.
- 30 In response to the incident Thomas Foods revised its written safe operating procedure to make it relevant to the actual configuration of the hook room and the tasks being undertaken there. It also provided a version in Mandarin. Thomas Foods also barred Big Mars employees from the hook room. But these were not responses of Big Mars.
- 31 Big Mars responded by providing Mandarin translations of a range of general induction and safety considerations, and provided bilingual copies to its employees. It also provided a dedicated Chinese speaking manager for the induction of its employees, and to perform a site assessment of some unspecified type.
- 32 Neither Ms Rong nor any other officer of Big Mars attended the sentencing hearing. No statement of regret or contrition was made by Big Mars' lawyer. No reparations were made by Big Mars to Mr Hsiao for his uncompensated losses. The only support offered was that Mr Zhu attended on Mr Hsiao while he was in hospital.
- 33 Big Mars submitted a very brief financial statement for the six months to 31 December 2015. This showed a turnover of \$1.8 million and a substantial accounting loss. The limited information provided is an inadequate basis for considering any incapacity to pay submission.
- 34 After considering Big Mars' submissions in mitigation of penalty, and the further material it submitted after the hearing, I have little confidence it will comply with its work health safety obligations in the future. Accordingly individual deterrence must be an important aspect of this sentencing.
- 35 General deterrence for labour hire businesses is also an important sentencing consideration.
- 36 For the reasons I have explained the offence is an extremely serious breach of Big Mars' obligations to its young employee Mr Hsiao. As

very little can be said in mitigation, other than that Big Mars did plead guilty, a severe penalty is warranted. The maximum penalty in the case of an offence committed by a company against s 32 is a fine of \$1.5 million.

- 37 For its admission of guilt Big Mars is entitled to a reduction of the fine I would otherwise have imposed. The prosecutor indicated its acceptance of a reduction of up to 40% despite the guilty plea not being intimated until the second court hearing. In my view a discount of that magnitude is not appropriate as it would be so disproportionate to the seriousness of the offence, “that it would shock the public conscience.”<sup>2</sup> I also take into account the guilty plea as being the only indication of contrition. I will allow a reduction of 20%.
- 38 Having regard to all the circumstances of the offence and of Big Mars I commence with a fine of \$300,000, being 20% of the maximum. After application of the reduction I impose a fine of \$240,000.
- 39 A conviction will be recorded against Big Mars Pty Ltd.
- 40 In addition to the fine, I order Big Mars to pay the following victims of crime levy, prosecution legal costs and court filing fee:

Penalty (after allowing 20% reduction)	\$240,000
Court filing fee	\$125
Prosecution legal costs	\$800
Victims of Crime levy	<u>\$160</u>
<b>Total</b>	<b><u>\$241,085</u></b>

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<sup>2</sup> S 10B(4)(a) *Criminal Law (Sentencing) Act 1988*