

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on the employment and insurance market in Australia. We can be contacted at any time for more information on any of our articles.

## Changes to Workplace Relations Commence on 28 March 2008

Times are changing and very quickly. The Federal Government has recently passed its first tranche of industrial relations legislation which will alter the landscape for employment in Australia over the coming years. A federal approach to industrial relations remains a theme of the Rudd Government despite the staunch opposition from Labour State Governments to the Howard Government reforms that usurped the power of the State Governments to legislate on industrial relations issues for employers that were corporations. The change in Federal Government has caused a change of heart for the State Governments. Maybe we will even see the State Governments hand over all industrial relations powers to the Federal Government! Common industrial laws across all States and Territories- that would be a real novelty.

So what is the master plan for workplace relations?

- \* There will be minimum wage rates. The Australian Fair Pay Commission is an independent body responsible for setting and adjusting federal minimum and classification wages. The Commission uses a combination of commissioned research, meetings with stakeholders, public consultations and written submissions to inform its wage-setting decisions.
- \* There will be conditions specified in Awards which will be the minimum standards for employees to whom the awards apply.
- \* All Awards will be modernised by the Australian Industrial Relations Commission and will be required to include 10 National Employment Standards.
- \* The 10 National Employment Standards are to be incorporated in legislation yet to be enacted but due to commence on 1 January 2010. A discussion paper has been published by the Government setting out preliminary views on the standards and the Government is seeking submissions on the standards that should be legislated.
- \* All employees earning less than \$100,000 will have these minimum wage rates and award conditions to protect them. These employees will be at liberty to enter into common law agreements with employers that provide for over award pay and conditions but the common law agreements will need to incorporate the award conditions as a minimum.
- \* Collective agreements and union collective agreements will continue as part of the landscape. These agreements will need to provide no disadvantage to the employee when compared to a relevant award as they will be required to undergo a no-disadvantage test which will compare the agreement to the relevant award.
- \* Employees earning more than \$100,000 will be able to negotiate common law agreements that do not need to take into account Award conditions.
- \* Individual AWAs cannot be renewed after they expire and will not be part of the way forward after 1 January 2010.

Yes there will be additional changes including changes to the current unfair dismissal laws with future unfair dismissal laws to apply to businesses employing more than 15 employees, possibly

### We thank our contributors

David Newey [dtn@gdlaw.com.au](mailto:dtn@gdlaw.com.au)  
Amanda Bond [asb@gdlaw.com.au](mailto:asb@gdlaw.com.au)  
Naomi Tancred [ndt@gdlaw.com.au](mailto:ndt@gdlaw.com.au)  
David Collinge [dec@gdlaw.com.au](mailto:dec@gdlaw.com.au)  
Lou Stojanovski [lsx@gdlaw.com.au](mailto:lsx@gdlaw.com.au)

Michael Gillis [mjg@gdlaw.com.au](mailto:mjg@gdlaw.com.au)  
Stephen Hodges [sbh@gdlaw.com.au](mailto:sbh@gdlaw.com.au)  
Michael Hayter [mkh@gdlaw.com.au](mailto:mkh@gdlaw.com.au)  
Natalie Poretti [nyp@gdlaw.com.au](mailto:nyp@gdlaw.com.au)

April 2008  
Issue

### Inside

- Page 1**  
Changes to Workplace Relations Commence on 28 March 2008
- Page 4**  
Head Contractors Owe Subcontractors A Duty Of Care
- Page 6**  
State Rail Authority Not Responsible For Rape
- Page 7**  
A Delay Can Mean The Loss Of A Right To Bring A Claim
- Page 7**  
No Flashing Hazard Lights Required For Oversized Vehicle
- Page 8**  
Do Adjudicators Need to Consider Jurisdiction In NSW Security of Payment Claims
- Page 9**  
OH&S Roundup
- Page 9**  
Dishonesty Of Employee Justifies Termination
- Page 11**  
Breach Of Company Policy Justified Dismissal
- Page 12**  
Authority To Release Employees' Medical Records

**Gillis Delaney  
Lawyers**  
Level 11,  
179 Elizabeth Street,  
Sydney 2000  
Australia  
T +61 2 9394 1144  
F +61 2 9394 1100  
[www.gdlaw.com.au](http://www.gdlaw.com.au)

the introduction of paid parental leave and other changes which will come from further legislation to be introduced by the Government. Flexibility in working hours will be a hot topic. The threatened return to "pattern bargaining", a form of collective bargaining, is also likely to stir anxiety in employers.

There will be important dates for the legislated changes. 28 March 2008 - the death of the AWA, the introduction of Individual Transitional Employment Agreement and the rise of the no-disadvantage test. 1 January 2010-the introduction of National Employment Standards and completion of the modernisation of awards.

But for now the changes that have commenced will need to be embraced as we move to the new industrial relations regime. So what are the changes from 28 March 2008? The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (the Act) commenced on 28 March 2008 and the Act amends the *Workplace Relations Act 1996* and changes the framework for workplace agreements and implements a process of award modernisation as we transition towards 1 January 2010.

## **AWAs and Collective Agreements**

Australian Workplace Agreements (AWA) cannot be made after 28 March 2008. AWAs made and lodged before that date, or made before 28 March 2008 and lodged within 14 days after that date, will continue to operate until terminated or replaced.

Interestingly the "prohibited content" provisions in the Workplace Relations Act have survived and it is still illegal for a workplace agreement to contain provisions that:

- requires or permits any conduct that would contravene the freedom of association provisions of the Workplace Relations Act 1996;
- requires or permits payment of a bargaining services fee;
- directly or indirectly requires a person to encourage another person (whether or not they are bound by the agreement) to become, or remain, a member of an industrial association;
- directly or indirectly requires a person to discourage another person (whether or not they are bound by the agreement) from becoming, or remaining a member of an industrial association;
- indicates (or requires a person bound by the agreement to indicate) support for persons being members of an industrial organisation;
- indicates (or requires a person bound by the agreement to indicate) opposition to persons being members of an industrial organisation;
- deals with pay deductions and payroll deduction facilities for trade union membership subscriptions or dues;
- allows employees to receive leave to attend union training sessions or paid leave to attend union meetings;
- deals with the rights of employee or employer organisations to be involved in dispute resolution (unless the organisation is the representative of the employer or employee's choice);
- deals with right of entry by unions and employer associations;
- deals with the renegotiation of a workplace agreement;
- restricts an employer from using independent contractors or labour-hire arrangements;
- deals with the foregoing of annual leave or personal/carer's leave credited to an employee bound by the agreement for an amount of pay or other benefit otherwise than at the written election of the employee;
- requires the provision of employee information to trade unions unless required by law;
- deals with the foregoing of paid compassionate leave for an amount of pay or benefit that would not result in a more favourable outcome than the Standard;
- prohibits or restricts disclosure of a workplace agreement's details by parties to the agreement;
- provides a remedy for dismissal for a reason that is harsh, unjust or unreasonable;
- is discriminatory in that it discriminates against an employee bound by the agreement because of or for reasons including race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. A provision is not discriminatory merely because it provides for rates in accordance with the relevant Australian Pay and Classification scale or Federal Minimum Wage; or discriminates on the basis of the inherent requirements of the employment; or it is in respect of employment in an institution conducted in accordance with particular teachings/beliefs of a particular religion or creed and discriminates on the basis of those teachings/beliefs and is done in good faith;
- deals with a matter that does not pertain to the employment relationship (unless it is ancillary/incidental/a machinery matter/or is trivial);
- directly or indirectly restricts the ability of Australian workplace agreements to be offered, negotiated or entered into;

- allows for the imposition of a penalty on an employee for breach of a requirement to provide evidence or notice for the purpose of substantiating:
  - an entitlement to sick or carer's leave; or
  - a reason for absence from work due to illness or injury affecting the employee or the employee's immediate family or household;
- allows for the imposition of a penalty on an employee for being absent from work due to an illness, injury or emergency affecting the employee or a member of their immediate family or household;
- deals with any other prohibited content that is specified in the Workplace Relations Regulations 2006 as amended from time to time.

If an employer lodges a workplace agreement containing prohibited content, they may have a court action taken against them for a civil penalty (a fine) of up to \$6,600 (for individuals) or \$33,000 (for corporations) if they were reckless as to whether the agreement contained prohibited content.

Further, a term of a workplace agreement that contains prohibited content is void and unenforceable.

Roll on 1 January 2010.

## **Award Modernisation**

The Government with the Act hopes to create a modern, simple award system that appropriately protects award-covered employees while allowing greater flexibility for high-income employees. As part of the award modernisation process all awards will contain a flexibility clause enabling arrangements to meet the genuine individual needs of employers and employees.

Employees earning above \$100,000 per annum will be free to agree their own pay and conditions without reference to awards. This will provide flexibility for common law agreements which have previously been required to comply with all award provisions, no matter how highly paid the employee. Employees earning less than \$100,000 per annum will still be able to enter into common law agreements but the Awards will set the minimum standards that will need to be found in those common law agreements.

To embark on the process of Award modernisation the Act introduces a new Part 10A dealing with award modernisation. The new Part sets out the award modernisation function of the Australian Industrial Relations Commission (the Commission) and specifies the objectives of award modernisation and requirements for modern awards.

Modern awards will need to contain terms about 10 allowable modern award matters, known as National Employment Standards ("NES"). The NES will cover the key minimum entitlements for all Australian employees, to apply from 1 January 2010. Currently the NES are subject to public comment before they are legislated and the Government has published a discussion paper and telegraphed initial views on the appropriate standards.

The 10 NES are:

- hours of work;
- parental leave;
- flexible work for parents;
- annual leave;
- personal, carers and compassionate leave;
- community service leave;
- public holidays;
- information in the workplace;
- notice of termination and redundancy; and
- long service leave.

The discussion paper released by the Government has suggested suitable NES standards would include:

- a 38 hour week
- 12 months unpaid parental leave for employees with more than 12 months service. An employee who takes 12 months of unpaid parental leave (the standard period) may request his or her employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the standard

period. The employer must agree to the requested extension, unless the employer has reasonable business grounds for refusing. If the employer refuses the request, the response must include the reasons for the refusal.

- An employee who is a parent, or has a responsibility for the care, of a child under school age may request the employer for a change in working arrangements for the purpose of assisting the employee to care for the child. The employer may refuse the request only on reasonable business grounds. If the employer refuses the request, the response must include the reasons for the refusal.
- 4 weeks paid annual leave based on ordinary hours for employees and 5 weeks for shift workers. Awards will be able to include terms in relation to cashing out annual leave.
- 10 days paid personal/carers leave and 2 days unpaid leave
- 8 public holidays- 1 January (New Year's Day); 26 January (Australia Day); Good Friday; Easter Monday; 25 April (Anzac Day); the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory); 25 December (Christmas Day); and 26 December (Boxing Day);
- An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination. Minimum notice will be required. For a period of continuous service of not more than 1 year- 1 week, between 1 and 3 years- 2 weeks, between 3 and 5 years- 3 weeks, more than 5 years- 4 weeks and increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.
- Redundancy pay for employers with more than 15 employees should be as specified below for the relevant period of service:
  - At least 1 year but less than 2 years 4 weeks
  - At least 2 years but less than 3 years 6 weeks
  - At least 3 years but less than 4 years 7 weeks
  - At least 4 years but less than 5 years 8 weeks
  - At least 5 years but less than 6 years 10 weeks
  - At least 6 years but less than 7 years 11 weeks
  - At least 7 years but less than 8 years 13 weeks
  - At least 8 years but less than 9 years 14 weeks
  - At least 9 years but less than 10 years 16 weeks
  - At least 10 years 12 weeks

Whether these proposed NES prevail will be the subject of much debate over the next year or so. Paid parental leave is likely to a big factor in the debate.

## Summary

The Industrial Relations landscape is changing. AWAs are out. The fairness test is replaced with the no-disadvantage test. We will also see the Australian Industrial Relations Commission modernise all awards with the incorporation of the NES that are ultimately determined by the Government. Modernised awards will apply from 1 January 2010.

Will we return to pattern bargaining and will collective agreements govern the majority of employees? Will the \$100,000 per annum employee find themselves with common law contracts or will union pressure on employers ensure collective agreements apply to some of these employees as well?

More legislative changes are likely as we head towards 1 January 2010 the date heralded for the introduction of the Modern Award System with National Employment Standards. We will keep you up to pace as those changes occur and watch with interest to see if a National OH&S system finds its way onto the agenda.

## Head Contractors Owe Secondary Subcontractors A Duty Of Care.

The NSW Court of Appeal in *Fox - v - Leighton Contractors Pty Limited & Ors* has recently delivered a judgment which highlights the obligations of a head contractor to those that carry out work on a construction site.

Brian Fox was injured on a construction site at the Hilton Hotel. Leighton Contractors Pty Limited ("Leighton") were the head contractors and had contracted with Downview Pty Limited ("Downview") to carry out concreting work. Downview engaged a business known as Aggforce Concrete to supply a pump truck, a driver and an offsider. Fox was the offsider. Neither the driver nor Fox were employees of Aggforce as both were independent contractors.

Pursuant to the terms of the contract between Leighton and Downview, all persons to be engaged in work at the site were required to attend an induction conducted by Leighton. Downview were required to provide written details of secondary subcontractors who were to be engaged in work on the site.

Fox was injured during the cleaning of pipes which had been used to pump cement from level 4 to level 12. The cleaning operation required a polyurethane ball to be blown down the pipe using compressed air. Fox was injured when the bottom end of the pipe which was not properly secured swung and struck him on the head. Fox had not undergone any safety induction training.

Fox originally brought a claim in the District Court against Leighton, Downview and Warren Stewart Pty Limited, the company which had supplied the services of the driver of the concrete pump truck. Fox succeeded in his claim against Warren Stewart Pty Limited but was unsuccessful against Leighton and Downview. Fox appealed.

The Court of Appeal held that the principal contractor was obliged to provide a reasonable level of safety for subcontractors and its responsibilities included an obligation to ensure that induction training was provided and this was part of Leighton's general law duty of care to subcontractors and others coming onto a construction site within its control.

Basten JA found that:

*"Leighton was not vicariously responsible for the negligence of its subcontractors or persons subcontracted to them but it remained the principal contractors with overall responsibility for the safety of the site. The continuing obligations of a principal contractor, even where the work to be performed has been largely or totally subcontracted, are reflected in the Occupational Health and Safety Regulation and in the general law. Thus it has long been accepted that a principal may be liable for the negligence of an independent contractor where the principal has directly authorised the doing of a tortious act. . . . Similarly the principal may be required to co-ordinate the activities of various subcontractors as part of its obligations to set a safe system of work. . . . As an occupier, having control over the premises, it may be necessary for the principal to identify and provide warnings in relation to dangerous features of a partly constructed building . . . Whether a principal contractor will be under such a duty (and, if so, what is necessary to fulfil the duty) will depend on the particular circumstances of the case. "*

The Court of Appeal noted that as time has passed, the need for induction training has become a recognised part of major construction works so much so that it is recognised in contractual provisions between parties engaged in building works. Accordingly, the Court of Appeal concluded that those obligations should probably be seen as part of the general law duty of care to subcontractors and others coming onto the construction site.

In this case Leighton had taken on a supervisory role in checking work method statements and rejecting them where it thought them inadequate. Leighton were essentially a gatekeeper whose job was to allow workers onto the site whilst excluding others. Basten JA noted that:

*"The fact that Leighton took steps does not of course mean that failure to take any such step would have involved a breach of a general law duty of care. Rather, those steps are significant because they indicate the level of control Leighton maintained over the site. Such controls were no doubt desirable for the efficient conduct of the construction works, as well as for the safety of those on site."*

The Court of Appeal ultimately concluded that Leighton failed to ensure that the driver and Fox had undergone induction training.

However, the Court of Appeal did not conclude that a duty to induct was a non-delegable duty of the head contractor. The head contractor should not be seen to be in the same position as an employer who must retain a degree of control over its employees. Rather, the relationship between a principal and an independent contractor, as was this case, was such that the obligation could be delegated. However, the contractual documents in this case did not result in the delegation of that responsibility.

The Court of Appeal noted that although there was sparse evidence that a failure to induct would have contributed to the accident, but there was enough to infer that such an inference should be drawn.

Accordingly, Leighton were held to be liable for the accident as the failure to induct was seen to have contributed to the accident. The same fate fell to Downview as the Court of Appeal also sheeted home liability for the failure to induct to Downview.

A failure to induct can amount to negligence and can result in the imposition of a substantial liability on the head contractor, a subcontractor and those that the subcontractor engages to perform part of the work.

In Fox's case a failure to carry out an induction was seen to have contributed to the ultimate accident. This was a view shared by all judges in the Court of Appeal. Downview was found to be 80% liable for the failure and was required to pay 80% of Leighton's liability to Fox.

Interestingly, however, there was a difference of opinion in relation to an allegation that Fox had contributed to his own demise. Surely Fox knew he should have been inducted and if so was he not to blame in part?

The allegations of contributory negligence were that Fox failed to put himself in a safe position in the sense that he was in a position too close to the pump truck. This argument was rejected. However, Basten JA concluded that Fox had a responsibility under the OH&S Regulations to obtain training and therefore was 15% to blame but noted that the primary responsibility must rest with Leighton and Downview for failing to induct.

The two other judges of the Court of Appeal did not agree. The obligation on Fox to take reasonable care for his own safety did not mean that it was necessary for Fox to ensure he was inducted before he went onto the site or that he decline to take on work because he did not have a green card. Accordingly, there was no reduction in this claim for contributory negligence.

The end result, Leighton and Downview are responsible for Fox's injury loss and damage as he was not inducted and a warning to all businesses involved in the construction industry.

Induct your employees and all contractors and visitors to site or suffer the financial consequences in the event of an accident.

## **State Rail Authority Not Responsible For Rape**

The State Rail Authority of NSW has successfully overturned the decision of a District Court judge in which State Rail was held liable for a claimant's psychological injury allegedly suffered as a consequence of a sexual assault.

Yu-Mei Chu, a Taiwanese citizen, was studying English in Australia when she sustained a fractured ankle as a consequence of a fall down the stairs at Sydenham Railway Station. Chu also allegedly suffered some psychological injury as a consequence of the fall. About six weeks after the fall Chu was sexually assaulted by a man whom she had followed into his parent's house. At the time of the assault Chu was on crutches. The trial judge found that Chu was unable to escape her assailant because of her ankle injury. As a consequence of this finding the trial judge found that State Rail should also be liable for any psychological injury sustained as a consequence of the sexual assault. Substantial damages including a significant allowance for non-economic loss were awarded to Chu.

Not surprisingly, State Rail appealed. State Rail argued that it should not be liable for Chu's psychological injury sustained as a consequence of her assault and her damages should therefore be substantially reduced.

The Court of Appeal agreed with State Rail. Acting Justice Matthews who delivered the leading judgment found that there was a clear break in the chain of causation and State Rail should not be responsible for the criminal actions of another. Nor were the actions of Chu's assailant foreseeable.

But what effect did this have on the damages that had been awarded to Chu? There was some evidence in the medical reports that Chu had suffered some psychological injury as a consequence of her fall down the stairs however the doctors had not attempted to separate the effects of the fall from the sexual assault. One of Chu's doctors had not been provided with a history of the assault. Ordinarily this would be a reason to remit the matter back to the District Court for a further trial so additional medical evidence could be obtained by both parties but unfortunately this was not practical in this case where Chu had remained in Australia without a valid visa waiting for her District Court case and had now returned to Taiwan.

The Court of Appeal therefore reassessed damages substantially reducing the allowance for non-economic loss, but not, perhaps surprisingly in the circumstances, the allowance for past and future economic loss.

The case serves as a reminder that an intervening incident such as a criminal assault that causes injury and loss can not be blamed on the negligence of an entity that caused the original injury.

## **A Delay Can Mean The Loss Of A Right To Bring A Claim**

In NSW personal injury cases filed in the District Court are subject to a strict timetable. A claimant is expected to have as much of their evidence collated as possible before filing proceedings. The matter first comes before the Court for a pre-trial conference where the parties will agree on a timetable as to the service of expert and medical reports. The parties are expected to be ready to take an arbitration or hearing date at the status conference. Undue delays are frowned upon.

Linfox Australia Pty Ltd ("Linfox") have recently learnt the hard way that delays in the District Court can be costly. Michael Khoury commenced proceedings in the District Court as a consequence of an accident on 7 February 2001 when he was injured whilst loading a trailer at premises operated by Woolworths. Khoury was ultimately given leave to commence proceedings against Linfox out of time in April 2006 but a Statement of Claim was first filed on 1 February 2005. On 17 March 2005 Khoury issued a subpoena to Linfox requiring Linfox to produce documents. The documents produced included certain worksheets relating to the repair of the subject trailer. Repairs had been carried out by a company now known as Flexfleet.

On 12 April 2007, two years after the production of this material and a year after Khoury had been granted leave to proceed against Linfox, Linfox filed an application in the District Court to issue a cross-claim against Flexfleet. The application was refused by Judicial Registrar McDonald in whose opinion there was not a sufficient explanation for the delay and any claim by Khoury against Flexfleet would be statute barred.

Linfox appealed. Unfortunately for Linfox there was again a delay. There is 28 days after delivery of judgment to file a summons for leave to appeal. In this case the summons should have been filed by 1 June 2007. However, the summons was not filed until 9 August 2007.

In these circumstances Linfox's appeal failed. In the Court of Appeal's opinion there was no evidence to explain the initial delay or the delay in filing the appeal. The application for leave to file the summons out of time was refused. Linfox did not make the first hurdle.

A costly delay for Linfox who are now left to fight Khoury's claim single handedly and as the only potential tortfeasor. Even if Linfox are only 5% to blame for the accident they will be obliged to pay for the totality of damages that are awarded without any recourse to Flexfleet.

## **No Flashing Hazard Lights Required For Oversized Vehicle**

The Court of Appeal has recently found that it is not necessary for an oversized vehicle to provide an additional warning to draw attention to the fact that the vehicle is travelling below the speed limit (*Kollas v Scurrah*)

William Kollas was injured as a consequence of a collision between the front of the heavy vehicle that he was driving (a Freightliner prime mover with an articulated curtain-sided trailer) and the rear of a heavy salvage tow-truck with heavy rigid tip truck and dog trailer in tow, that was driven by Kenneth Scurrah. The two vehicles were travelling south on the Hume Highway. At the time of the collision, Scurrah's vehicle was travelling at about 35 kilometres per hour.

Kollas sued Scurrah in the District Court alleging that Scurrah was negligent in that he should not have jointly towed the rigid tip truck and dog trailer, Scurrah's vehicle should have been driven as far off the main carriageway as possible and hazard lights and/or flashing emergency lights on Scurrah's vehicle should have been activated to alert following traffic to the slow speed at which it was travelling.

Kollas' claim failed in the District Court. The trial judge found that Scurrah had not been negligent and none of the matters that Kollas had particularised as negligence had been the cause of the collision.

Kollas appealed to the NSW Court of Appeal. On appeal the issue was limited to whether or not the hazard lights ought to have been activated.

Kollas was unsuccessful in this argument. Justice Bell who delivered the leading judgment estimated that at least 98 vehicles would have passed Scurrah's vehicle during the course of his journey prior to the collision. It was noted that, contrary to Scurrah's belief, the Road Transport (Vehicle Regulation) Regulation 1998 did not prohibit Scurrah from using a flashing emergency light attached to his vehicle. This however was not enough for Kollas to succeed. Justice Bell stated:

*"There is no minimum speed for vehicles travelling on the highway and slow vehicles travel on it from time to time. Some slow-moving vehicles such as bicycles or vintage cars are readily identifiable as such. The feature of the respondent's vehicle, which is said to have required the activation of the hazard or flashing emergency lights is that at a distance there was nothing to alert a following driver to its slow speed (apart from the sign).*

*Counsel for the respondent submitted that the hazard lights on the dog trailer were unlikely to have any greater impact from the perspective of an approaching driver than the sign. This is because the hazard lights were located just above the mudguards in a position that was considerably less prominent than the sign. The hazard lights were visible in daylight at a distance of 100 to 150m. The sign was legible at a distance of at least 100m. In these circumstances reasonable care, it is said, did not require their activation. There is merit in that submission."*

Justice Bell also commented that Kollas had not seen the sign attached to the vehicle and in these circumstances it was unlikely Kollas would have seen hazard lights or a flashing light on the vehicle in any event.

With two Justices rejecting the arguments of Kollas the claim failed with a finding that there was no negligence.

Interestingly however Justice Basten was of the opinion that Scurrah had been negligent in failing to use flashing lights but 75% should be deducted for Kollas' own negligence but the views of the majority of the Court of Appeal prevailed to reject the claim.

The case serves as a reminder of the Court of Appeal's attitude to personal responsibility.

## **Do Adjudicators Need to Consider Jurisdiction In NSW Security of Payment Claims If Not Stated in Payment Schedule**

The case of *John Holland Pty Limited v Roads and Traffic Authority [2007] NSWCA 19* is a significant judgment in relation to determinations by Adjudicators under the New South Wales Building and Construction Industry Security of Payment Act 1999 ('Act') and whether adjudicators need to consider jurisdiction if it is not raised in the payment schedule.

### **Facts**

In or about September 2003 John Holland was engaged by the RTA to build a dual carriageway near Kiama. John Holland made a claim for additional costs under the contract because of the Superintendent's direction to carry out additional works in an area known as cut 4. The claim by John Holland included additional time and associated costs. The Superintendent under the contract indicated that his directions constituted a variation and the quantum of the variation was assessed by the Superintendent at approximately \$1.8 million.

John Holland challenged this assessment resulting in the matter going to dispute resolution under the contract. In late 2005 John Holland made a claim for approximately \$8 million for the variation. On 2 February 2006 John Holland delivered a payment claim for approximately \$16.5 million and included the claim of \$8 million for the variation in relation to cut 4. The RTA served a payment schedule proposing to pay \$800,000.00.

John Holland submitted an Adjudication Application and the RTA responded fundamentally stating the Adjudicator had no jurisdiction on the basis that the claim is a contested Extension of Time claim and such a claim is to be determined by an expert in accordance with the contract.

Further the RTA argued that Adjudication of the claim was beyond the object of the Act as the claim had been determined by the Superintendent and referred to expert determination under the contract.

The Adjudicator rejected the RTA submissions on the grounds that they were not included in the payment schedule and determined that the RTA was to pay \$5.5 million.

### **Finding**

The Court found there was no doubt the Adjudicator did not consider the RTA's jurisdiction submissions, stating that they had not been duly made by the RTA within the meaning of Section 22 (2) (d) of the Act.

Further, the Court found that the Adjudicator was not required to consider the RTA's jurisdiction submissions because they were not duly made by the RTA in a payment schedule.

Although there was a failure to take into account the submissions on jurisdiction it did not invalidate the payment claim and therefore would not amount to a jurisdictional error invalidating the decision.

In such circumstances it would be wise to include in a payment schedule an argument that the payment claim is invalid on the basis that the Adjudicator lacks jurisdiction. This would ensure that the Respondent can later raise such a submission in an Adjudication.

## OH&S Roundup

### Double Fatality - \$162,500.00 Fine

Viscount Rotational Mouldings Pty Limited (formerly Linpac Rotational Mouldings Pty Limited) was recently fined \$162,500.00 for a breach of the Occupational Health & Safety Act flowing from the death of two employees. Warren Law and Mark Smith were attempting to demould a plastic water tank from a metal mould and were using an air pressure hose to demould the plastic moulded product from the metal mould. In doing so the plastic tank, under intense pressure, expanded and ruptured. It resulted in the ejection of the tank at a high velocity. A portion struck Mr Law and Mr Smith, fatally injuring them.

The company had no prior convictions and the maximum potential penalty was \$550,000.00. The Court noted that the problem of moulded products becoming stuck in the metal mould was not an occurrence that was rare. Indeed it was one that occurred relatively frequently in the production process of demoulding of the plastic water tanks. Employees of the company had adopted a technique unknown to senior management for extracting the plastic mould from the metal mould when they became stuck. It was self-evident that the use of compressed air to assist in demoulding was fraught with foreseeable and considerable risks to safety. The company entered a guilty plea. Interestingly the Court noted that the process used was not only undocumented but at best was an ad hoc system adopted on a hand-me-down basis and this process had been used many times and had been a process that had been shown to employees by other employees. The Court noted whilst it was said that senior management did not know or endorse of the method of freeing plastic moulds, it was difficult to comprehend how this unauthorised procedure, utilised openly in the workplace on many occasions, was able to escape management's scrutiny and remedial action. The Court noted that this alone was a significant blemish on an otherwise commendable commitment on the part of the company to safety.

Whilst the Court accepted the company generally had a commendable approach to workplace safety, the failure in this case resulted in a fine of \$162,000.00.

### Lucky Escape For Convicted Employer

The Industrial Relations Commission of NSW has recently overturned a conviction of an employer in respect of convictions under the Occupational Health & Safety Act where the prosecutor failed to call evidence to establish why a witness was not called in the prosecution.

The prosecutor in proceedings before the Chief Industrial Magistrate tendered a statement of a witness which was admitted into evidence. The defendant argued that the witness was critical for the prosecution and without the witness's evidence the prosecution was doomed to fail. Apparently the witness received threats on the telephone which caused her to fear for herself and her children if she gave evidence. She had been served with a subpoena but refused to attend Court to give evidence. She was not called by the prosecution nor did the prosecution seek to issue a bench warrant for her arrest. Three witness statements were tendered from the witness and admitted into evidence. Ultimately the defendant was convicted.

The Industrial Relations Commission confirmed that the onus falls on the prosecutor to establish that all reasonable steps have been taken to compel a witness to give evidence or to secure her attendance before witness statements can be admitted into evidence. The prosecutor in this case did not produce evidence that this was the case. In the circumstances the appeal was allowed and the conviction of the Chief Industrial Magistrate was quashed as it was an error to admit the witness statements in evidence without the witness attending Court unless the prosecutor proves that all reasonable steps were taken to secure the attendance of the witness.

A reminder for prosecutors that they must ensure that critical witnesses in a prosecution under the OH&S Act are called or at least all steps available are taken to ensure the witness's attendance at Court otherwise attempts to tender witness statements without calling the witness can lead to an unfair trial and ultimately the quashing of the conviction as was the case in *Mukherjee -v- WorkCover Authority of NSW*.

## **Using A Contract Manager Who Has Set Up His Own Company**

The NSW Industrial Relations Commission has recently fined a company \$50,000.00 and the sole director and employee of that company the sum of \$20,000.00 following an incident where persons were placed at risk when a penetration on a construction site was inadequately secured and guarded.

Mark Griffith was a sole director and employee of a company, Process Engineering Group Pty Limited. Mr Griffith was engaged as a construction manager on a construction site through his service company Process Engineering Group Pty Limited.

The main contractor on site entered into a contract with a roofing contractor as a sub-contractor to install and erect wall and roof cladding at the site. Griffith, being the construction manager, had overall responsibility to implement the health, safety and environment plan of the main contractor. A first-year roof apprentice plumber was on site. The apprentice was working on the ground floor area which had an underground room below it and there were a number of penetrations in the floor. The apprentice fell through a penetration which had been covered by reinforcing bars tied at right-angles into a mesh configuration. The mesh cover had been moved. The Court ultimately concluded it was reasonable to weld the mesh bars as covers even though the covers had to be open for safety purposes. The Court held that the system of covering the penetrations was not safe and led to the known risk namely of a fall through penetrations and it was the responsibility of Griffith as the construction manager on site to ensure safety by properly securing the penetrations, and to properly inspect the covers to identify the ongoing risk and he was liable to warn of the ongoing risk posed by the penetrations.

The penetration covers had apparently been tied by wires, or loosely tied. It was argued that the wires had been cut. That did not trouble the Court, as the Court concluded that on the day of the incident the penetration was not properly guarded.

The company and the director pleaded guilty. The charge against both the company and the individual was the same. The Court noted that Griffith had taxation advantages attached to incorporation of his company but also carried the burden of liability under the Occupational Health & Safety Act as a director and controlling mind of the company. It was noted the corporate defendant had no assets and no income and Mr Griffith inferred it has not and will not continue to operate.

The Court noted that as it cannot be said that a penalty imposed on the corporate defendant would have an impact on the individual defendant the Court refused to give deductions to the individual defendant for the financial circumstances of the defendant company. Ultimately the company was fined \$50,000.00. Whether or not WorkCover recover that fine is a moot point. More importantly the director was fined \$20,000.00 where the maximum fine was \$55,000.00. A significant penalty for a construction manager who conveniently used incorporation as a method for tax minimisation.

Despite setting up a company for tax benefits and possibly attempting to limit liability, the incorporation of a company will not allow individuals who incorporate to escape penalties under the OH&S Act.

Interestingly, Access Roofing the employer of the apprentice was also convicted of an offence under the OH&S Act arising from the same incident and was fined \$60,000.00 in relation to the offence, effectively for failing to warn its employees and secure the penetration.

## **\$180,000.00 In Fines Arising From Trench Collapse**

Donald Park Farming Company Pty Limited ("Donald Park") was recently prosecuted for two offences under the Occupational Health & Safety Act arising out of the collapse of a trench which caused significant injuries to an employee and a contractor.

Donald Park manages farming and grazing operations in Moree and an employee together with a contractor were laying concrete pipes in a trench which was approximately 4.1 metres deep and approximately 2.8 metres wide. The west bank of the trench collapsed, trapping the employee and the contractor. The employee fractured his spine and sustained spinal cord damage. The contractor sustained bruising, concussion and the loss of feeling down one side of his hand, and other injuries.

The Court noted that the trench had not been shored or batted. The western side of the trench had been piled with the soil

that had been removed from the trench by an excavator and the soil was not moved back from the edge of the trench. Whilst laying concrete pipes the trench collapsed.

The Court held that the company failed to implement adequate control measures consistent with the Code of Practice on Excavation which would have ensured the trench's stability. The defendant had an occupational health and safety policy in operation at the time and the employee and contractor were provided with general and task-specific safety induction.

It was argued that it was not entirely clear that if the trench had been properly benched the collapse would not have occurred. Nevertheless the Court found that the method adopted was inherently dangerous. The financial records of the company demonstrated it suffered significant net losses in 2006 and 2007 but despite this the company did not wish to have its financial circumstances considered in the imposition of the fine. Normally such financial circumstances may have moderated the quantum of the fine.

Ultimately the court determined the appropriate penalty for the risk to safety for the employee should be \$150,000.00 and the risk to safety for the contractor should be \$150,000.00 but as the offences had commonality an appropriate fine would be \$90,000.00 for each offence, leading to fines totalling \$180,000.00 for failing to ensure the safety of a contractor and an employee.

## **Dishonesty Of Employee Justifies Termination**

The relationship of employer and employee involves a great amount of trust. The employer places in a number of employees the financial wellbeing of the company. If the employee breaches that trust it can give rise to grounds for dismissal.

In *Baes - v - Federal Express (Australia) Limited* the Australian Industrial Relations Commission ("AIRC") found the dismissal of Baes from his employment was justified. Baes had 10 years of service with the employer. His latest position with the employer was as an operations agent. He had a good record with the employer.

In April 2005, the employer introduced a Life Balance Program which enabled employees to be reimbursed for an amount up to \$99.00 per annum for expenditure on a range of health items for either themselves or their family.

Baes lodged a claim for \$182.00 for swimming lessons. Under the Live Balance Program, he was entitled to reimburse the sum of \$99 from the \$182.00 he allegedly spent.

However, whilst Baes had in fact spent over \$200.00 on swimming lessons for his family, he was only able to locate an invoice for \$82.00. He altered the invoice by putting a "1" in front of the "\$82.00" on the invoice. He submitted the altered invoice for \$182.00 to his employer.

His employer became suspicious and questioned the employee who responded by email claiming the swimming lessons were for himself and confirming the invoice was for \$182.00. The employer checked with the swim school who confirmed the invoice was for his children and was only in the sum of \$82.00.

The employer dismissed the employee on 31 May 2007.

Baes brought an application before the AIRC claiming his dismissal was harsh, unjust and unreasonable.

Baes acknowledged he had engaged in misconduct by knowingly submitting an invoice which he knew was false. He also acknowledged the submission of the false invoice was to gain a financial benefit.

The employer acknowledged that Baes was entitled to a reimbursement up to \$99.00 and the alteration of the invoice only gained the employee a benefit of \$17.00. However, the AIRC noted Baes was willing to submit a false document to obtain a financial benefit. The fact that he may have been entitled to receive part of the money does not alter the dishonesty involved. The Commission noted Baes engaged in a deliberate act of dishonesty designed to obtain a financial benefit. The Commission stated that such "*dishonesty strikes at the level of trust an employer should be able to expect from an employee*".

The AIRC dismissed Baes' application.

Employers should note that in order to establish whether an employee has been dishonest, it is necessary to thoroughly

investigate the circumstances of the dishonest act as well as giving the employee the opportunity of explaining their actions. In the matter of Baes, the employee confirmed by email that he was the recipient of the swimming lessons and that the invoice was correctly noted as \$182.00.

## **Breach Of Company Policy Justified Dismissal**

Company policies are created for a variety of reasons. Some of those reasons are for the smooth financial operations of the company's business whilst others are for safety reasons.

However, where an employee breaches a policy which is well documented and fundamental to the operations of the employer's business, the employee, depending on the circumstances, may be dismissed for breaching the policy.

Recently the Australian Industrial Relations Commission in the matter of *Balhorn - v - Spotlight Pty Limited* upheld an employer's decision to dismiss a worker who had breached its policy regarding the purchase of goods. The employee put through sales of \$1,000.00 for goods the employee's daughter's business required. The sale was reversed in the register. The sale was adjusted at a later point in time so that the employer did not suffer loss.

However, by not paying for the goods at the time the sale was entered into the register, the company's policy was breached.

The Commission found the employee's dismissal was justified. The employee was engaged by the employer to police the company's policy of payment for goods at the time of sale.

Notwithstanding the worker's good record with the employer and the fact the employer had not suffered any financial loss as a result of the employee's breach of the policy, the termination was justified.

## **Authority To Release Employees' Medical Records**

On workers compensation claim forms for employees there is a section within the form which provides authority from the injured employee to the insurer and employer to obtain information including medical records relating to the employee. The authority is not confined to medical information regarding the injury for which the worker is making a claim.

In *Australian Meat Holdings Pty Limited - v - Sayers* the Supreme Court of Queensland determined that a worker must sign an authority which would allow his employer to obtain the whole of his Medicare medical file even though the worker claimed the information contained within the medical file was irrelevant to his claim.

The worker had lodged a claim for a back injury. He had not signed the authority in the claim form allowing for a copy of his medical records from Medicare to be obtained.

Section 275(7) of the Workers Compensation and Rehabilitation Act, 2003 (Qld) provides the Notice of Claim must contain a written authority allowing the insurer to obtain information from providers of medical services to the worker. The section does not differentiate between records that may be relevant and records that do not have any relevance to the workers injury. The Court found the mechanism of obtaining the relevant information may also be to provide the employer with "irrelevant information". The Court noted, however, if any irrelevant information was obtained, the information could only be used in the process for which the authority was provided.

Workers have for a long period complained that the provision of the authority effectively amounted to a fishing expedition allowing an insurer to delve into a worker's past medical history. The Supreme Court of Queensland notes that whilst there will be material contained in various notes from medical providers that are irrelevant to the claim the fact that irrelevant material is available does not, of itself, disentitle the employer or insurer to obtain that information. It is always important to properly investigate a worker's past medical history. Access to the notes of current and prior medical providers regarding previous complaints, treatment or a history of injuries are of critical importance in determining the validity and extent of claims.

---

*Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.*

Gillis Delaney Lawyers specialise in the provision of advice and legal services to businesses that operate in Australia. We can trace our roots back to 1950. The name Gillis Delaney has been known in the legal industry for over 40 years. We deliver business solutions to individuals, small, medium and large enterprises, private and publicly listed companies and Government agencies.

Our clients tell us that we provide practical commercial advice. For them, prevention is better than cure, and we strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service. The changing needs of our clients are met through creative and innovative solutions - all delivered cost effectively. We make it easier for our clients to face challenges and to ensure they are 'fit for business'.

We look at issues from your point of view. Your input is fundamental to us delivering an efficient, reliable and ethical legal service. We like to know your business, and take the time to visit your operation and develop an in depth understanding of your needs. Gillis Delaney is led by partners who are recognised by clients and other lawyers as experts in their fields. Our service is personal and 'hands on'.

Our clients receive the full benefit of our ability, knowledge and effort in our specialist areas of expertise. We provide superior and distinctive services through a team approach, drawing the necessary expertise from our specialists. Our mix of professionals ensures that clients enjoy high level partner contact at all times.

We are committed to delivering a quality legal service in a manner which will exceed your expectations and we maintain a focus on business and commercial awareness whilst delivering excellence in legal advice.

We have a proven track record of delivering commercially focused advice. Whether it is advisory services, dispute resolution, commercial documentation or education and training, a partnership with Gillis Delaney offers:

- practical innovative advice
- timely services
- expert insight
- accessibility
- cost effective solutions

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to [dtm@gdlaw.com.au](mailto:dtm@gdlaw.com.au). Why not visit our website at [www.gdlaw.com.au](http://www.gdlaw.com.au).