GD News

Gillis Delaney Lawyers

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. In this month our feature article deals with a NSW Court of Appeal decision dealing with an accident on a construction site that led to a denial of indemnity by a liability insurer. We can be contacted at any time for more information on any of our articles.

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Accidents on Construction Sites- Breaches of Statutory Duties and denials of Indemnity by Insurers. Where does it all end up?

Construction sites are often the source of accidents. Personal injury claims are regularly made against multiple parties engaged in construction work. Breaches of Occupational Health and Safety Legislation and other statutory duties often go hand in hand with an accident on a construction site. When an insurer finds there has been a breach of a statutory duty it may decline to indemnify its insured arguing breaches of conditions in the policy that require the insured to take reasonable care and relying on exclusion clauses that abrogate responsibility when there are breaches of statutory duties. A complicated situation-yes. But how does it all pan out.

The NSW Court of Appeal has shed some light on these issues in a recent decision in Booksan Pty Ltd, Jaymay Constructions Pty Ltd v Wehbe, Elmir & GIO General and others.

Bilal Wehbe and Salah Eldin Elmir, were young and inexperienced labourers working on a construction site. Booksan Pty Ltd was the owner of the site and Jaymay Constructions Pty Ltd (a related company) the supervisor. They were employees of M K Tiling, which sub-contracted to provide tiling work on three blocks of three-storey home units being constructed on Booksan's site.

Both men were injured when the platform of a materials hoist, on which they were travelling, collapsed and fell to the ground. The hoist was lifting them, two other men and a load of tiles to the third floor of one of the blocks.

The men argued that Booksan, as occupier of the site, and Jaymay, as supervisor of the construction work, owed them a duty of care. They argued that Booksan had breached its duty by inadequately affixing the hoist and Jaymay had breached its duty when its employee operated the hoist whilst it was overloaded.

It was also argued that both companies breached various statutory duties under the *Construction Safety Regulations* 1950 (NSW) and that contributory negligence could not be argued against a breach of a statutory duty. The original District Court Judge did not accept this submission but found there was no contributory negligence.

The District Court Judge held both defendants were negligent but the injured were not guilty of contributory negligence. An appeal followed.

The facts of the case depict a relatively common situation in the construction industry. Nevertheless the judgment is a significant one as it has clarified a number of issues that have troubled the legal profession since the introduction of the Civil Liability Act in NSW.

The judgment of the Court of Appeal confirmed:

- "The obviousness of a risk does not bear upon the existence of a general duty owed by an occupier.
- The obviousness of the risk and Patrick Sahyoun's conduct in requesting the defendants to get off the platform are relevant to the reasonableness of the defendants' response to the risk involved. These matters, however, do not detract from the defendants' duty to the plaintiffs.
- Booksan, as occupier of private land, and Jaymay, as employer, had a continuing duty of care to the plaintiffs. This duty was breached when Booksan failed to adequately affix the hoist and when Patrick Sahyoun, as employee of Jaymay, activated the hoist while the plaintiffs were on it.
- The plaintiffs' actions in getting on the lift and disregarding a specific direction by Patrick Sahyoun were foolhardy. The trial judge erred in determining that the plaintiffs were not guilty of contributory negligence. A proportion of 15% responsibility for their own contribution to damages should be.

Inside

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attributed to the plaintiffs. This takes into account the fact that the most powerful causative factors in the plaintiffs' injuries were the negligence of Patrick Sahyoun in activating the lift and the negligence of Booksan in not appropriately affixing the hoist.

- That since 6 December 2002 in NSW, irrespective of how a claim is formulated, if – in substance – it is a claim for damages for harm resulting from negligence, a defence of contributory negligence may be raised to that claim even if it is based on a breach of statutory duty.
- Contributory negligence is only available as a defence to a breach of statutory duty claim in NSW where the cause of action accrues after 6 December 2002."

Insurance issues also troubled the Court of Appeal. In the proceedings in the District Court the defendants had sued their liability insurer who had declined to indemnify both defendants for the claims.

GIO General the liability insurer denied that it was liable to indemnify Booksan and Jaymay, joint insureds on the ground that each had failed to comply with General Condition 2 and General Exclusion 3 of the insurance policy.

Condition 2 of the policy provided "You must take all reasonable care to maintain the premises, structures, fixtures, fittings, furnishings, appliances, machinery, implements and plant in sound condition. You must take all reasonable care for the safety of the Property Insured and to avoid and minimise loss of or damage to property or injury to persons. You must also ensure that only competent employees are employed and that you and they comply with all statutory obligations, by-laws, regulations, public authority requirements and safety requirements."

Exclusion 3 provided the insurer was not liable for "Loss or damage or liability caused by or as a result of your failure to comply with any relevant statutory obligations, by-laws, regulations, public authority requirements or safety requirements."

The Trial Judge held that Booksan had not breached these conditions and was, therefore, entitled to be indemnified however it was found that Jaymay had not complied with General Condition 2 and General Exclusion 3 and was, therefore, not entitled to any indemnity. Effectively the judge found the words "You" in the general condition included employees of the insured by virtue of definitions in the policy and therefore conduct by the employee which could be seen to amount to a breach of the condition would be result in a breach of the condition by Jaymay. These finding were challenged in the appeal.

The insurers accepted that an employer's vicarious liability to a third party for the negligence of an employee is not relevant to the obligation of an insured. Thus, the fact that Jaymay's employee, Patrick Sahyoun, was negligent did not establish a breach of General Condition 2 by Jaymay. The insurers also accepted that General Condition 2 would only not be satisfied if the conduct of Booksan and Jaymay were such that it amounted to a deliberate decision to expose persons to a risk of injury, or recklessness on their part. An argument that Booksan had breached condition 2 through the actions of Jamay's employee was also rejected and found there was no basis on which it can be said that Booksan's conduct amounted to a deliberate decision to expose persons to a risk of injury or recklessness.

The Court of Appeal also held while Patrick Sahyoun was an insured for the purposes of the Public and Products Liability Section of the policy, he was an insured on the basis that a separate Public and Products Liability Policy is deemed to have been issued to him. His conduct affects only his rights under that deemed policy; it does not affect the rights of the other insureds, such as Jaymay, under the policies deemed to have been issued to each of them. The Court of Appeal held the original Judge erred in attributing the conduct of Patrick Sahyoun to Jaymay.

The Court of Appeal also held that neither Booksan nor Jaymay breached any statutory regulations and that the exclusion clause in the policy did not impact.

Effectively the Court of Appeal determined that both Booksan and Jaymay were entitled to be indemnified by their liability insurer.

Significantly the court also confirmed that a breach of the NSW Occupational Health and Safety Act did not trigger the exclusion clause for the insurer as that Act specifically precludes the insurer from relying on the breach as the Act provides that any breach of the Act does not confer a right of action in any civil proceedings in respect of any contravention or a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings.

A complicated battle with many twists and turns but an interesting result. One hopes that the next construction of three blocks of three-storey home units does not result in the same minefield of litigation and disputes on the application of the law in NSW that two young and inexperienced labourers working on a construction site experienced when they were injured.

Workers Compensation Insurers are Not Liable for Liability Assumed Under Contract.

The High Court of Australia has recently rejected an application for special leave to appeal by Multiplex Constructions and in doing so declined to disturb the decision of the New South Wales Court of Appeal in Multiplex Constructions Pty Ltd v Irving and ors that a workers compensation policy will not respond to damages for breach of contract.

Stuart Irving was employed by a company now known as Canal Building who were subcontractors on a site to Multiplex. Irving was injured

and commenced proceedings against Multiplex who cross-claimed against Canal Building alleging negligence and breach of contract. This is common in New South Wales where stringent thresholds in claims against employers often result in injured workers looking to the head contractor for damages. Canal Building sought cover for the claim from their workers compensation insurer Royal & Sun Alliance. The Court found both Multiplex and Canal Building were negligent. The contract between Multiplex and Canal Building contained an indemnity provision so the Court found that Canal Building was liable to indemnify Multiplex for the entirety of Irving's judgment. It was held the workers compensation policy did not respond to the claim for breach of contract. Effectively Canal Building was uninsured for half of the judgment.

The decision in *Multiplex* was shortly followed by the Court of Appeal decision of *Gordian Runoff Ltd v Heyday Group Pty Ltd* and resulted in a similar outcome.

The decisions of *Multiplex* and *Gordian Runoff* are of major significance. Workers compensation insurers will be liable for a claim brought by an employee to the extent that the employer was negligent. Any additional liability flowing from the assumption of liability under contract will not be covered by the insurer. This additional liability may or may not be covered by the subcontractor's liability policy depending on the terms of the exclusion clauses in the liability policy. Obviously this may create a significant financial liability for the sub-contractor.

This potential lack of insurance cover for the subcontractor in turn creates problems for the head contractor if the subcontractor does not have the funds to satisfy the indemnity. Workers compensation policies will not cover liability arising from a contracted liability under an indemnity provision in the sub-contract. Will a head contractor rely on the financial capacity of a sub-contractor to payout on a liability assumed under contract or better still prefer to ensure the sub-contractor has insurance to meet the claim? The obvious answer is that insurance should be available and head contractors need to ensure that the liability insurance policy of the sub-contractor:-

- has been taken out for the project and/or will cover the project;
- is not restricted in any way by limiting the policy to construction works of a specified value unless the value exceeds the relevant value of the works;
- contain extensions to include contractual liability assumed by the sub-contractor including indemnity provisions that cover claims arising in connection with injuries to employees of the subcontractor;
- does not include an exclusion that contractual liability assumed by the sub-contractor is not covered where the claim relates to or is connected with an injury to the sub-contractor's employees;
- has been taken out in the joint names of the sub-contractor and head contractor and other parties where this is specified in the sub-contract;
- extends cover to the sub-contractors' sub-contractors.

Failure to ensure that the sub-contractor's liability insurance is sufficient may lead to a loss borne by the head contractor - if the sub-contractor cannot pay.

Costs to be paid by Solicitor and Senior Counsel

In what is an ominous decision for the legal profession, the New South Wales Court of Appeal has for the first time ordered that a solicitor and senior counsel indemnify their client pursuant to section 198M of the Legal Profession Act 1987 for the costs arising out of an unsuccessful application for leave to appeal (*Eurobodalla Shire Council v Wells*).

Mrs Aldridge was injured when a bench on which she was sitting collapsed. The bench was in a park occupied by Eurobodalla Shire Council. Mrs Aldrige sued the Council for negligence. At trial Goldring DCJ held that the Council had not been negligent. Further, it was found that Mrs Aldridge had not satisfied the requirements of section 16 of the Civil Liability Act 2002 as she had not established that the severity of her loss was at least 15% of a most extreme case. Therefore, even if the Council had been negligent the only damages were out-of-pocket expenses which were in the vicinity of $1,000.00.
Mrs Aldrige applied for leave to appeal to the Court of Appeal. The application for leave to appeal was unsuccessful. As a consequence of an earlier Calderbank offer by the Council costs were ordered to be paid on an indemnity basis by the claimant. Mrs Aldridge is a 55 year old unemployed Aboriginal woman who had not worked for a number of years. With no prospects of recovering costs from Mrs Aldridge the Council looked to her legal representatives.

Justice Ipp was not satisfied that the claim had reasonable prospects. He stated:

> "There is no entitlement to legal representation in such cases. It is a matter for the client to determine whether to pursue the claim or defence without such services."

In Justice Ipp's opinion the solicitor and senior counsel were reckless, in the light of s 198M, in continuing to prosecute an appeal on Mrs Aldridge's behalf.

The Court showed no hesitation in making a personal costs orders against the solicitor and senior counsel even though there was no suggestion that the claim was fraudulent or vexatious. A decision to appeal an unsuccessful claim presents risks to the claimant's solicitors and counsel as they may well be liable to pay the costs which would usually be paid by their unsuccessful client.

Illegal Workers and Illegal contracts - starting to mean something?

In years gone by, the fact that a worker was working illegally did not seem to ever prevent him or her recovering compensation payments for injury. Two recent cases in the Workers Compensation Commission suggest that a harder line might now be the norm.

In Singh v Taj (Sydney) Pty Limited [2006] NSWWCCPD 7 a worker was injured at a time when his visa allowed him to work in Australia. He received lump sum amounts, and was being paid (voluntary) ongoing weekly payments.

Some time later his visa status changed. The impact of section 235 of the Migration Act 1958 meant that the worker was now prohibited from working in Australia and it would be a criminal offence for him to do so (or for an employer to knowingly employ him).

After becoming aware of the status change, the insurer stopped weekly payments. At Arbitration it was held that as the worker was currently prevented from legally engaging in employment the amount that he 'would have been earning but for injury' (under section 40) must be zero. Hence, there was no compensable loss. An appeal to the Commission confirmed the Arbitrator's decision.

In Zhang v Hu t/as Eden Furniture [2006] NSWSCCPD 15 the worker was injured at a furniture factory. At the time, his tourist visa - which did not allow him to work in Australia - had expired. The worker claimed weekly compensation whilst in immigration detention.

Notwithstanding his 'illegal' status an Arbitrator of the Commission, relying on the NSW Court of Appeal decision of Nonferral v Taufia (1998) NSWLR 312, found there to be a valid contract of employment. On appeal, the Commission said this was wrong.

The Commission thought that the relevant provision of the Migration Act was better interpreted by the Queensland Court of Appeal in Australian Meat Holdings Pty Limited v Kazi (2004) QCA 147. This was said to be a binding authority for the proposition that the Migration Act rendered any contract of employment with an 'unlawful non-citizen' invalid and unenforceable. The worker was such a person - hence the contract was illegal.

Having decided this, the Commission then approved of the use of section 24 of the Workers Compensation Act 1987 in the circumstances to treat the illegal contract as valid. No indication was given as to what factors are relevant for the exercise of this discretion.

The scope then for 'illegals' to recover compensation is narrowing - and employers and insurers should be alert to its impact. In the NSW Workers Compensation scheme it is to be hoped that a liberal use of the discretion in section 24 does not see the restrictions rendered meaningless.

Reasonable Discipline?

In a recent decision in Department of Education & Training - V - Sinclair the NSW Court of Appeal adopted a sensible and practical approach to the question of what constitutes reasonable actions by an employer in workplace psychological/psychiatric injury matters. The Court has decided that in determining whether a valid defence exists, the totality of the actions of the employer should be looked at in assessing whether they are reasonable rather than small individual actions which, in isolation may be considered unreasonable.

In NSW in workers compensation claims for psychiatric or psychological injury the Workers Compensation Commission must decide whether injuries were sustained “in the course of” employment, and whether the employment was a “substantial contributing factor” to the injury to the extent that the employment contributed to the injury, and whether that contribution was wholly or predominantly caused by reasonable action taken with respect to discipline. There must be a causal connection between the injury and the employment and reasonable discipline will not give rise to a valid claim. Sinclair's case involved a psychiatric injury claim of a teacher disciplined for a relationship with a student. The matter was originally determined in the Workers Compensation Commission, wherein Arbitrator McManamey found in favour of the worker and concluded the Department of Education were unreasonable in their disciplinary action.

An appeal was lodged and the Court of Appeal has determined to refer the case back to the Workers Compensation Commission to rehear the case. The worker had claimed that his injury was caused by specific actions of the employer whereas the employer argued that when the employer's actions were viewed as a whole they were reasonable and any injury suffered was the result of the overall actions rather than one or two specific parts. The real error in the decision was the approach adopted by the Arbitrator to examine the nominated specific parts of the overall action without determining whether the injury was caused by those actions or rather the totality of the actions which may have been reasonable.

His Honour Justice Spiegelman CJ commented:

> *"Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the “whole or predominant cause” is the entirety of the conduct with respect to, relevantly, discipline. In my opinion, a course of conduct may still be “reasonable action”, even if particular steps are not. "*

The Court of Appeal found that to determine the reasonableness of the action it was necessary to decide whether the whole process was, notwithstanding the blemishes, “reasonable action". The Workers Compensation Commission had not determined whether the “whole or predominant cause” was the entirety of the disciplinary process.

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In relation to a submission that earlier voluntary payments of workers compensation would bind the employer, the Court commented that although some small weight could be placed on an admission in cases involving simple questions of fact, it was not appropriate to develop that principle to cases as complex as this.

The Court of Appeal's comments in relation to reasonable actions by an employer bring a degree of common sense to the interpretation of psychological and psychiatric claims by the Workers Compensation Commission. An approach whereby the totality of the actions of the employer are considered rather than small isolated unreasonable actions brings a breath of fresh air to psychological/psychiatric cases.

The Court of Appeal also noted that a case should not be remitted to the Workers Compensation Commission unless the error has occasioned some substantial wrong or miscarriage. What will the Workers Compensation Commission decide when it rehears this case? We will see. Stay tuned for the outcome.

NSW OH&S Snapshot

Young Workers Injured On First Day At Work

Two workers aged 20 and 17 years of age were severely injured on their first day of work at the Hunter Galvanising Pty Limited ("Hunter Galvanising") galvanising plant. As a result of the injuries the WorkCover Authority of New South Wales ("WorkCover") brought charges against Hunter Galvanising and its director, Mr Kerry Bartholomew. On the day of the accident the two employees arrived at work each received approximately 30 minutes of induction from Mr Hales, the production manager. The induction included a viewing of the factory floor, a tour of its layout and a warning about the dangerous areas within the factory. The two employees were initially assigned a cleaning task by Mr Hales, however after that was complete Mr Bartholomew asked the two employees to undertake a process known as "jigging", which in essence meant preparing metal products for galvanisation.

The two employees were given brief instructions by Mr Bartholomew as how to correctly prepare metal for galvanisation. The two employees then set about arranging a number of metal bars which weighed approximately 4.3 kgs each for galvanisation. As they were aligning the metal bars a steel head frame, weighing approximately one tonne located 2.3 metres above floor rotated out of its supporting cradles and fell to the floor striking both employees. As a result of the fall one employee suffered a fractured skull and the other employee was struck in the leg and suffered bruising as well as swelling to the back of his calf muscle on his right leg.

Directly after the incident Mr Bartholomew engaged D Hunt & Associates Pty Limited for the purpose of inspecting the galvanising equipment involved in the accident. The galvanising equipment had been fashioned by Mr Bartholomew on designs adopted from other galvanising plants in Australia and overseas. The report indicated that the head frame would become unstable from its cradle if one side was weighed down more than the other. Since the accident the galvanising equipment at Hunter Galvanising had been modified to prevent the head unit sliding off its cradle and injuring further employees.

In reaching its conclusion the Court viewed the accident as most serious given the fact that both employees were only very young and without experience and were given instructions to use heavy equipment and machinery in the factory environment on their first day of work. The Court was in disbelief that they had been at work no more than a few hours and had been asked to engage in the process of galvanising steel products. The Court said *"Given their youth and inexperience it was of critical importance that they be closely supervised and receive detailed instructions and information about tasks that they were directed to perform"*.

Both Mr Bartholomew and Hunter Galvanising entered a plea of guilty at the first possible instance and neither party had any prior convictions. Since the accident the Court took into consideration the fact that Hunter Galvanising had adopted a stringent and detailed occupational health and safety management system, in which a buddy system was adopted and full supervision was provided to junior employees at all times. Further to this, the Court noted Hunter Galvanising and Mr Bartholomew had paid particular attention to the rehabilitation and retraining of the two injured workers and was pleased to see both employees had returned to work.

The Court ultimately fined Mr Bartholomew and Hunter Galvanising $7,000.00 and $100,000.00 respectively.

Found Guilty, But Courts Discretion Used and No Conviction Recorded

In a recent case in the Industrial Court of New South Wales decision, Kwik-Seal Pty Limited ("Kwik-Seal") and its director Mr David Seal were charged under the *Occupational Health & Safety Act, 2000* for failing to provide safe systems of work, emergency proceedings and training to their employees. The charges arose out of an incident in which Mr Seal's son in law, Mr Michael Woodbridge was engaged as a sub-contractor by Kwik-Seal to undertake the sealing of three industrial sized water tanks located at the Park Bay Regis building on Sydney's Park Street. On the day of the incident Mr Woodbridge was assisting Mr Angus O'Brien. On that day Mr Woodbridge and Mr O'Brien were to prime the walls of the water storage tanks with a non-toxic, non-solvent primer.

The incident occurred as a result of Mr Woodbridge entering the water holding tank and attending to the application of a primer, which was

not the original non-toxic, non-solvent product he had initially been instructed to use. Mr Woodbridge attended to the application of a different primer without the use of the breathing apparatus or safety equipment he had been trained and instructed to use. Mr Woodbridge entered the water holding tank without informing Mr O'Brien. When Mr O'Brien went to enter the water tank he noticed Mr Woodbridge had collapsed on the floor of the tank. As a result of the incident Mr Woodbridge did not sustain any permanent injury.

David Seal represented himself before the Industrial Court of New South Wales and entered a plea of guilty at the first possible incidence. Mr Seal indicated to the Judge the deep remorse and significant anguish he had undergone as a result of the potential life threatening situation he had placed his son in law, Mr Woodbridge in. Mr Seal frankly accepted the full responsibility for the lack of attention to detail to the safety of his employee, that had ultimately lead to the incident taking place and simply said he had "stuffed up". As a result of the incident he had outlaid over $30,000 worth of Confined Space Safety Equipment including man down alarms, full 3 to 1 recovery harnesses, correct lifting equipment, two direct feed air breathing apparatus, self contained breather for recovery of man down and each vehicle supplied to contractors now contained chemical graded air filter respirators.

Mr Seal related to the Court that the incident involving Mr Woodbridge had severe consequences to both his business and personal life. As a result of the incident Mr Seal had experienced heart complications, stress, anxiety, panic attacks and was unable to face the world on a day to day basis further to this he had become aggressive and angry both at home and in the workplace. Financially, since the accident Mr Seal's business has depleted significantly and he no longer was a director of the business but instead a consultant for a larger sealant company. He and his wife were both new in considerable debt having a mortgage of some $960,000.

Ultimately the Industrial Relations Court considered that the injuries sustained to Mr Woodberry were not substantial and that both Kwik-Seal and Mr Seal did not have any prior convictions and given the remorse and steps taken by Mr Seal to rectify the problem it was unlikely Mr Seal or the company would re-offend in the future. Ultimately the Court concluded that the offence had been proved but exercised its discretion under Section 10 of the Crimes Sentencing Procedure Act 1999 not to record a conviction. There was no fine imposed.

Youth Workers Safety of Paramount Concern

The Department of Juvenile Justice (the "Department") operated Kariong Juvenile Justice Centre ("Kariong") at Kariong. The purpose of Kariong was to provide educational services to juvenile detainees who were in custody and had been charged with or convicted of criminal offences.

In 2002 the Department employed Mr Dare, Mr Menser, Mrs Schmitzer, Mr Ellen, Mr Hawthorne and Mr Squire as youth officers at Kariong.

The Department was prosecuted by the WorkCover Authority of New South Wales for failing to ensure the health, safety and wellbeing of its employees in relation to two incidents which occurred on 20 October 2002 and 15 November 2002 in which youth officers at Kariong were threatened and physically assaulted by detainees.

On 20 October 2002, Mr Dare, Mr Menser, Mr Hawthorne and Mr Squire were threatened by three detainees with broken mop handles and a long bladed wood chisel. As a result of the assault Mr Menser and Mr Hawthorne stated in interviews they sustained psychological injuries and subsequently had time off work.

On 15 November 2002, Mr Ellen and Mr Dare were assaulted by three detainees. The incident took place when Mrs Schmitzer was asked by one of the detainees for a glass of cold water from the staff room. As Mrs Schmitzer left the room the detainees tied the door shut with a wash bag to prevent the other youth officers entering the area they were in. Following this one of the detainees who was in the possession of a screwdriver, threatened to kill Mr Dare and lunged at him. As a result of the lunge Mr Dare was struck in the right hand as he deflected the blow. Mr Dare was then struck with a broom handle by a detainee across the back of the head, shoulder and lower back. As a result of the incident Mr Dare suffered laceration to his right hand, bruising and stiffness in the left shoulder as well as headaches, flashbacks and difficulty sleeping. Following the incident Mr Dare underwent counselling and received treatment for post traumatic stress.

When the matter proceeded before the Industrial Court of New South Wales it became apparent there were in place detailed educational processes and operation procedure manuals relating to the operation of the Woodwork Vocational Area as well as educational programs through which employers were trained to deal with potential volatile situations.

These procedure included detainee searches upon leaving the Woodwork Vocational Area and a visual check of the shadow board upon which all the tools were kept. This would enable the youth officers to determine whether any tools were missing following work in the Woodwork Vocational Area.

As a result of the two incidents of 2002 Kariong was issued with a number of Improvement Notices. The Department complied with the Improvement Notices and implemented new systems of training and new safety systems for its youth workers. These included reducing the number of tools in the Woodwork Vocational Area, installing double locks on entrances to the woodwork storeroom and lock down procedures in circumstances where tools were missing from the toolshed area. Further to this, a New Tools As Weapons Program was developed and all staff were required to undertake training. Finally, metal detectors were implemented in searches of detainee's rooms in the hope of obtaining concealed weapons.

In determining the correct manner to deal with the Department, the Court noted it was paramount to consider the nature and quality of the

offence, that being its objective seriousness and further subjective factors. Ultimately the Court concluded the Department had no prior convictions before October 2002, and subsequently the Department had put in place a comprehensive system to ensure the health and safety of the youth workers and had become conscious of the risks detainees may create in the possession of tools as well as items such as mop and broom handles. Further to this, the Department had implemented a stringent education program for all its employees to undertake and finally considered that the environment the Department was dealing in was one in which a balance of the welfare of the detainee had to be finely weighed against the health and safety of the staff.

Notwithstanding a total fine of $165,000 was imposed with $70,000 being proportioned to the 20 October 2002 offence and $95,000 to the 15 November 2002 offence.

The Importance Of Action Taken Directly After OH&S Incident

Mr Brian Edwin Goss, an experienced electrical linesman, was fatally injured while working at a property located on Coonamble Road, Gilgandra New South Wales while in the employ of Country Energy. As a result of the fatality, Country Energy was charged by the WorkCover Authority of New South Wales for failing to provide and maintain a safe system of work in relation to electrical line work, failing to ensure that all electrical lines were properly examined, tested, de-energised and isolated prior to employees commencing work.

The incident occurred as a result of Mr Goss and Mr James Wood carrying out work on a 22 kilowatt high voltage circuit located on Coonamble Road, Gilgandra. Mr Goss and Mr Wood attended to what they believed was the correct circuit box and placed the circuit breaker on the switchboard on the off button and lock tagged the circuit accordingly. Following this Mr Wood and Mr Goss attended to work on the power lines. As Mr Goss began working on the power lines, Mr Goss was fatally electrocuted.

Country Energy plead guilty at the first possible instance, and it became apparent before the Court, Country Energy had in the past been the subject of six convictions resulting in fines ranging from $2,000 to $160,000 although these convictions had taken place under different company names.

Following the incident, Country Energy immediately issued an injury advice to all employees concerning the incident and reinforced the need to follow the stringent electrical safety rules provided by their occupational health and safety manual and submitted further documentation to those guidelines. Further to this, Country Energy adopted new procedures and simplified the safety procedure, in which employees were trained to deal with rural power poles.

In reaching its conclusion, the Industrial Court of New South Wales remarked that Country Energy had an extensive and detailed occupational health and safety system which filtrated through the whole of the company. The Court noted that there was a method set down for testing live wires and there were instruction as to how that was to be undertaken to ensure that the lines were de-energised, but for some reason that apparently did not occur on the day Mr Goss was fatally injured.

Country Energy was fined $145,000.

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.

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