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. We can be contacted at any time for more information on any of our articles.

High Court Overturns NSW Court Of Appeal - Good News For Councils

In our January 2006 issue of GD News we highlighted a decision of the NSW Court of Appeal that concluded that Leichhardt Council owed a non-delegable duty of care to road users. The decision raised concerns for all Road Authorities as the case determined that road authorities were liable for the actions of contractors even though an act of negligence was not committed by the road authority. A road authority was held to have a special duty, more onerous than the traditionally imposed duty. An appeal to the High Court followed and the high bar has been lowered with the High Court unanimously rejecting the imposition of a non delegable duty on road authorities.

Montgomery sustained a severe injury to his left knee in the form of a ruptured anterior-cruciate ligament and a tear to his medial meniscus as a result of falling into a pit owned by Telstra in a footpath along Parramatta Road, Leichhardt. At the time of the incident, the pit was covered by a broken cover which was in turn covered by synthetic carpet. Leichhardt Municipal Council had engaged Roan Constructions Pty Limited to carry out the repair work on the pit. Part of the specific instructions given to Roan was to provide an artificial grass or carpet to be placed over the top of the pit to provide clear access to surrounding commercial properties. The Council engaged an independent contractor to undertake the road work and the accident was caused by negligence of a staff of the independent contractor. Though the Council was not at fault in causing the accident, was it still liable to the injured pedestrian by reason of a breach of the duty of care owed by Roan. Was this strict liability for the Council and not fault-based?

The High Court examined the nature of the duty of care owed by the Council, and held the Council only owed the ordinary duty to exercise reasonable care to prevent injury to the pedestrian plaintiff, as opposed to a special non-delegable duty of care.

NSW courts had been following a line of English authority which was criticised by the High Court as departing from the general principle of tort liability recognised by the common law of Australia. "Deep-rooted" notions of Australian common law of negligence include the following:

- a person should not ordinarily be held liable to others in tort without being at fault
- where the accident is caused by negligence of an independent contractor, the injured party should generally establish its claim against that contractor, not the principal
- non-delegable duty of care only applies to exceptional cases concerning limited categories of relationships well recognized by the laws

Leichhardt Council was a "roads authority" under *Roads Act 1993*("Act"). Power of the Council to carry out road work was given by the Act, accordingly, the starting point to determine its duty of care when exercising the statutory power was the legislation itself. The Act did not contain any provisions requiring a particular standard of care to be attained by a roads authority such as the Council. Silence of the Act left issues concerning liability of roads authorities to be decided in accordance with general principles of the common law of tort.

The High Court confirmed that the liability of the Council was to be determined by the ordinary principles of negligence law as applied to a statutory authority. The High Court considered the statutory scheme and concluded that there was a general duty in roads authority to take reasonable care to prevent injury to road-users occasioned by carrying out of road works, as opposed to a special duty to ensure no worker of the contractors behaved carelessly. Traditionally, certain relationships give rise to a non-delegable duty of care. Employer / employee,

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April 2007 Issue

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hospital / patient, school / pupil, are some of the categories well-recognized by the common law to create a special relationship and therefore a special duty. The special and exceptional duty is imposed on persons in circumstances which require them to take precautions for the safety of the other party to the relationship due to their dependence or vulnerability. A road authority does not fall into the same category.

The High Court in the last few years has grappled with the concepts of non-delegable duties, personal responsibility and strict liability. In this Leichhardt Council's case, the High Court refused to add roads authority / road user to the category whereby the legal onus of a non-delegable duty of care was to be imposed. The High Court Judges commented that to impose a non-delegable duty on the roads authority for the acts and omissions of a contractors where the road authority had no control over the way the independent contractors carried out the road would be unreasonably burdensome and costly to the authority work particularly where road user's individual needs were infinite in their variety.

Councils can now breathe easier. Using contractors to repair roads will not result in a liability for the Council unless the Council's own actions contribute to the situation.

But further issues may confront Councils who fail to take action to repair roads. Montgomery's case will have no real application to claims based on a failure to act. Nevertheless Councils can take further comfort from Section 45 of the Civil Liability Act 2002 in NSW which provides that:

> *"A roads authority is not liable in proceedings for civil liability for harm arising from a failure of the authority to carry out roadwork, or to consider carrying out roadwork, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation which resulted in the harm".*

Inaction by a road authority in NSW will not lead to liability where there is absence of knowledge of the particular risk. As highlighted in our last edition of GD News the NSW Court of Appeal has recently concluded that actual knowledge of the particular risk requires that the relevant knowledge exist in an officer responsible for exercising the power of the authority to mitigate the harm. The knowledge of others without such responsibility will not constitute actual knowledge for the purposes of Section 45 of the Civil Liability Act.

Is the blame game changing? The High Court's recent decision adds a further obstacle for compensation seekers. Road users need to be careful about blaming others for their injuries. Injured road users will need to recognise that:

- A road authority does not have a non-delegable duty and is not liable for the actions of its contractors who are engaged to repair roadworks
- section 45 of the Civil Liability Act provides that a failure of the road authority to carry out roadwork, or to consider carrying out roadwork, cannot be maintained unless at the time of the alleged failure the road authority had actual knowledge of the particular risk
- findings of contributory negligence are trending towards larger deductions with the focus on personal responsibility playing an ever increasing role in the defence of claims

High Court Supports The Right Of Optus To Exit The Victorian Workers Compensation Scheme

Workers compensation insurance in each state and territory has traditionally been controlled by state and territory governments. Nevertheless the Commonwealth Government has a workers compensation scheme known as Comcare for:

- Commonwealth corporations;
- corporations that were previously a Commonwealth authority; and
- corporations that carry on business in competition with a Commonwealth authority or another corporation that was previously a Commonwealth authority.

The federal scheme is proving to be an attractive option for employers who compete against Australia Post, Qantas and Telstra. LinFox, Toll, Pacific National, National Australia Bank and CSL Ltd are among a succession of big companies that have shifted from state compensation schemes to the federal regime.

But the State Governments are not entirely happy. The Commonwealth Government's approval of Optus to join the Commonwealth scheme was met with criticism from State Governments and resulted in a High Court challenge to the validity of the Comcare Scheme in its application to non-Commonwealth authorities. So what happened to the challenge?

The High Court, in a 5:2 majority upheld the Federal workers compensation laws which allows corporations to opt out of compulsory state workers compensation schemes.

Optus was interested in a change and applied to the Minister for Industrial Relations to be declared an eligible corporation and to be licensed under the Federal Safety, Rehabilitation and Compensation Act. Eligibility was declared by the Minister and a licence was granted to Optus by the Safety Rehabilitation Commissioner effective from 30 June 2005. Under the licence Optus was required to organise its own insurance cover in respect of its liabilities for death or injury of workers. The Victorian Government and Victorian WorkCover Authority were not happy with the exit of Optus from the state workers compensation scheme and mounted the challenge which ultimately found its way to the High Court.

Optus expected to save $186,000.00 a month by opting out of the Victorian WorkCover Scheme and joining the Comcare scheme. The Victorian Government and Victorian WorkCover Authority challenged the validity of the Comcare scheme insofar as it related to non-Commonwealth entities. It was argued that provisions in the Federal Safety, Rehabilitation and Compensation Act were not constitutional.

The Victorian WorkCover Authority had initially issued proceedings in the Federal Court of Australia seeking a declaration that the licence granted to Optus was invalid. The Federal Court had dismissed that application. Subsequently the same issue came before the High Court for determination. The State of Victoria argued the case against the Federal Government with the States of New South Wales, Western Australia and South Australia intervening in the proceedings.

The High Court effectively found that the Comcare provisions were supported by constitutional powers such as the Corporations powers in the Constitution. The High Court held that a state law requiring Optus to meet liabilities under a state compensation scheme would alter, impair or detract from a Federal scheme, so the state law would be invalid to the extent of the inconsistency.

The Court held that the Victorian workers compensation provisions which are rendered invalid to the extent of inconsistency with Federal licensing provisions, which share the character of laws with respect to workers compensation. The High Court also noted that the Federal law did not otherwise impair Victoria's capacity to conduct insurance business.

So where to from here? Is there likely to be a mass exodus from state workers compensation schemes?

The threshold for a non Commonwealth corporation to be declared eligible for Comcare is to satisfy the Minister for Industrial Relations that the corporation is in competition with a Commonwealth authority. In making this judgment on competition, the Minister must have regard to evidence provided by the corporation, or available in the public arena, in the following areas:

- The market in which the corporation and the Commonwealth authority operate, including composition of the market and/or the market share of the corporation and the Commonwealth authority.
- The substitutability between the goods, services and other provided/produced by the corporation and those of the Commonwealth authority.

The Minister has discretion to make a judgment on the above areas and on any other factors the Minister considers relevant.

Corporations that have been declared to be eligible to be granted a self-insurance licence under the Comcare Scheme include:

- Australian Air Express Limited
- Chubb Security Services Pty Limited and Chubb Security Personnel Pty Limited
- JR Biosciences Pty Limited
- CSL Limited
- K&S Freighters Pty Limited
- Linfox Armaguard Pty Limited
- Linfox Australia Limited
- National Australia Bank
- Network Design and Construction Limited
- Optus Administration Pty Limited
- Pacific National (ACT) Limited
- Snowy Hydro Limited
- Telstra Corporation Limited
- Toll IPEC Pty Limited
- Toll North Pty Limited
- Toll Transport Pty Limited
- Vision Stream Pty Limited

Companies must convince the Minister that they are in competition with current or former commonwealth authorities to be eligible to join Comcare.

Does this mean that the flood gates will open? Clearly, companies who are in competition with those corporations in the Comcare Scheme will be at a competitive disadvantage if workers compensation premiums in the Comcare Scheme are less than under state workers compensation schemes.

Another significant issue for employers that opt out of the state workers compensation scheme is that state workers compensation occupational health and safety laws will not apply to employers who have opted into the Comcare scheme. This may be an additional incentive for corporations to opt into Comcare. There would not be a duplication of OH&S laws. Commonwealth employers, non-Commonwealth employers and employees that are subject to the Comcare legislation will be subject to the Federal OHS laws and exempt from the operation of state/territory occupational health and safety laws. Corporations with national operations will need to comply with the Federal OHS laws rather than the myriad of OH&S laws in each state and territory.

Employers involved in road and transport, construction, telecommunications, perhaps even labour hire will need to give consideration to the Comcare Scheme. With the Optus High Court decision employers may now consider Comcare as a real option provided they can satisfy the Minister that they are in competition with current or former Commonwealth authorities.

Times are changing. How far does the Federal Government intend to go? We will wait and see.

Personal Responsibility Continues To Be A Real Issue For Injured Claimants

Contributory negligence continues to play a significant role in the assessment of personal injury damages. Take care of yourself or suffer the consequences. If you have a role in your own demise you will be accountable at least to some extent for your own loss. But is there a trend developing that findings of contributory negligence should be higher?

The New South Wales Court of Appeal recently confirmed that the damages awarded to an injured plaintiff should be reduced by 50% as a consequence of that person's failure to take care for their own safety and keep a proper lookout.

Ms Brock, who was 69 years of age, was a former president of the Hillsdale Bowling and Recreational Club. She had been at the Club for most of the day and was assisting at a function and socialising. Between 8.00 pm and 9.00 pm she decided to leave. The president of the Club suggested that she use the rear exit as it was "dark out there". Her car was in the car park close to that exit. The main exit from the Club was in the front of the building but members sometimes used the rear exit.

Ms Brock walked through the rear doors onto a verandah. A sloping ramp led from the verandah over a flower bed to a concrete path. The edge of the ramp was not flush with the verandah and was approximately a 156 mm below the verandah and sloped down to the concrete path. Ms Brock had very occasionally walked down the ramp. She had seen it many times although she had never been there at night time. There was only a single light in the area. As Ms Brock commenced walking across the verandah towards the ramp she then "walked into mid air". As noted by the Court of Appeal, plainly she was not looking where she was going and had forgotten about the drop from the verandah to the upper part of the ramp. She lost her balance and fell to the bottom of the ramp.

In the proceedings in the District Court the Trial Judge dismissed the claim finding that any negligence on the part of the Club was not causative of the injuries. The Judge did not believe Ms Brock had proved that the fall resulted from inadequate lighting or the nature of the exit.

The Court of Appeal did not agree. The Court of Appeal held that the design and configuration of the ramp amounted to a breach of duty on the Club's part and that was causative of the fall as was the lack of attention by Ms Brock.

The Court confirmed that the Club, acting reasonably, should have had regard to the fact that some persons leaving the Club might not be as careful of their own safety as would ordinarily be expected. It was accepted that there was a real possibility that some entrants to the club might be inadvertent, thoughtless or even careless.

The Court of Appeal held the Club could not rely on all entrants taking reasonable steps for their own safety. The Court of Appeal found that the negligence of Ms Brock and the Club was equal and the damages awarded should be apportioned 50/50. Ms Brock's damages were reduced by 50%.

The Court of Appeal has once again reaffirmed the principle that a person whose actions contribute to their demise must bear responsibility for their own actions and their damages must be reduced to reflect the extent of their contribution to the accident.

One wonders whether findings of contributory negligence are trending towards larger deductions?

If There Are No Merits The Lawyer May Have To Pay

In New South Wales the Legal Profession Act contains provisions that permit a court to order a solicitor or barrister to personally pay another party's costs if the claim is brought "without reasonable prospects of success." The provision puts considerable pressure on claimant's lawyers. It is no longer the case that the worst that can happen is that a client - who has no money anyway - has a meaningless costs order made against them if they lose their case. The New South Wales Court of Appeal has recently reminded claimant's lawyers that bringing futile claims can have severe consequences.

In Firth v Latham, the Court of Appeal confirmed that the claimant's lawyers had to pay up for a claim that had no prospects. The claimant was injured when struck by a motor vehicle on a pedestrian crossing when she was almost two years of age. The claimant had been playing behind a chevron sign next to the pedestrian crossing before she moved onto the crossing where she was struck. Proceedings were commenced against the driver of the motor vehicle and Pittwater Council. The Council was a defendant to the proceedings because it was alleged that the Council had not constructed the pedestrian crossing properly due to the location of the chevron sign.

The claim against the driver and the Council was heard in the District Court. At trial the claimant succeeded in the claim against the driver. However, during the course of the trial, the claimant consented to a verdict in favour of the Council as the claimant did not adduce evidence to implicate the Council. The claimant was ordered to pay the Council's costs. The Council then made an application to the trial judge that the plaintiff's solicitor should personally pay the Council's costs of the proceedings as the claim against the Council had no reasonable prospects of success. The trial judge agreed with the Council.

The trial judge was of the opinion that although when the claim was commenced there may have arguably been a case against the Council pending further investigations, this was not the case at the time of the hearing. The obligation on a solicitor to only bring claims that have reasonable prospects is an ongoing one and it was evident during the course of the trial that the claimant had no evidence to implicate the Council and the claimant had maintained the claim against the Council in the hope that some evidence against the Council might come up in the driver's defence of the claim. The Court of Appeal agreed with the trial judge. The claim was "so lacking in merit or substance as not to be fairly arguable."

Yes, another warning for all claimant's lawyers. A lawyer must be sure throughout a claim that there are reasonable prospects of success. To run a claim where there are no reasonable prospects can have serious consequences. Interestingly in this case the hearing did not proceed to a judgement as the claimant gave up and agreed to the win for the council but this did not save the lawyers. The claim against the Council had no reasonable prospects and the claimant's lawyers were obliged to pay the Council's costs.

You Can't Sue A Dead Person

What happens to a claim for damages for personal injury when the person that caused the harm has since passed away?

It is quite common for solicitors to commence proceedings against defendants without ascertaining whether or not a personal defendant is still alive. What happens if a person has passed away and proceedings are commenced against the deceased? An injured person can amend their claim to proceed against the estate of the deceased defendant but what happens if they do not?

The New South Wales Court of Appeal recently confirmed that proceedings commenced against a dead person are a nullity. A dead person cannot give instructions to prosecute or resist a claim and proceedings cannot be maintained against or in the name of a deceased defendant.

Michael Askar was injured in a motor vehicle accident in February 1998. By Statement of Claim he commenced proceedings against Terry Deveigne. Terry Deveigne had died on 1 December 1998 prior to the commencement of proceedings, a fact known to all involved in the case. At the time of the alleged accident Terry Deveigne had been driving his father's car. His father held a comprehensive third party policy of insurance issued by the NRMA. Solicitors retained by NRMA purported to act on behalf of Terry Deveigne in the proceedings. On 30 April 2001 the solicitors filed a Notice of Motion seeking to have the proceedings dismissed based on procedural issues (not including the issue that Terry Deveigne was deceased). Ultimately the proceedings were dismissed and a Costs Order was made in favour of Terry Deveigne. Subsequently NRMA made an application to amend the Costs Order to be an order in favour of the NRMA. Ultimately NRMA could not effectively pursue the Cost Orders as a consequence of matters raised during the assessment of costs by the Supreme Court.

NRMA appealed firstly in the name of Terry Deveigne and also sought leave that the NRMA should be joined as a party to the Court of Appeal proceedings.

Ultimately the Court of Appeal confirmed that proceedings are a nullity if they suffer from a fundamental defect in their commencement.

Proceedings cannot be brought by a non-existent person and cannot be brought against a non-existent defendant and if they are the proceedings are a nullity.

The Court of Appeal concluded that the Cost Orders made in the proceedings in favour of Mr Deveigne were either true nullities or had no effect or were improperly made and given.

The correct course of action in the proceedings was for the insurer to seek to be joined as a party at the outset. The NRMA did not do so. It could have cured any defect at an early stage. If it did, substantial costs would not have been incurred.

At the end of the day the Court of Appeal ruled that the Cost Orders in favour of the deceased were not valid.

One has to question why the claim was not amended to be brought against the estate of the deceased and why the insurer did not raise this issue and alternatively why the insurer did not seek to be joined as a party in the proceedings from the outset. In this case legal costs in excess of $100,000.00 will not be recovered by NRMA despite what NRMA thought was a Cost Order which would benefit it. A lesson learnt. You can't go after a deceased, but you can go after the deceased's estate or its insurer.

Fatalities At Work- Workers Compensation Act in NSW Does Not Limit Damages For Psychiatric Injury To Family Members

The New South Wales Court of Appeal has recently confirmed the proposition that in NSW the threshold in the Workers Compensation Act 1987 that applies to injured workers does not apply to claims for psychological or psychiatric injury brought by, for example, relatives of the injured or deceased worker fatally injured during the course of their employment. It is not necessary for a relative who suffers psychiatric injury to demonstrate that they have a whole person impairment of at least 15% to bring such a common law claim against the employer and the damages are not assessed pursuant to the Workers Compensation Act.

The NSW Court of Appeal recently handed down its decision in *Gifford v Strang Patrick Stevedoring Pty Ltd*. Barry Gifford, the father of Darren, Kelly and Matthew Gifford, was fatally injured during the course of his employment in June 1990 when he was run over by a forklfit. Darren, Kelly and Matthew brought claims for nervous shock against Gifford's employer. After a lengthy battle involving two trials in the District Court, two Court of Appeal hearings and a trip to the High Court the Court of Appeal (following the second hearing) determined that all three children suffered nervous shock as a consequence of their father's death and were entitled to damages that would be assessed at common law.

At the second trial in the District Court the trial judge had determined that all three children had suffered nervous shock but applied the thresholds contained in the Workers Compensation Act 1987 as it existed in 1990. This meant the general damages of the children were reduced in accordance with a formula that was in existence at the time. It also meant that none of the children were entitled to damages for economic loss as once this formula had been applied none of the children had been awarded sufficient general damages to be awarded economic loss as a consequence of a cap that was in place at the time.

All three children had their damages increased by the Court of Appeal. The damages were assessed at common law. This meant that two of the children, Kelly and Matthew were entitled to economic loss (in Darren's case, there was no economic loss awarded as he did not suffer a loss).

Any claim for nervous shock brought against an employer arising from an employer's negligent acts which cause the death of a worker will now be subject to the threshold contained in the Civil Liability Act 2002 but this threshold - 15% of a most extreme case - is far easier to satisfy. Damages will be assessed subject to the Civil Liability Act and not the Workers Compensation Act.

Annual Review Of Workers Compensation Commission

The Workers Compensation Commission has recently published its annual review for 2006. The report confirms the downward trend of litigated workers compensation matters. A total of 10,435 Applications were registered with the

Commission during 2006. This was a reduction of over 18% from 2005. The Commission averaged 870 disputes per month until the significant legislative changes were introduced in November 2006. These changes which placed a greater onus on insurers before claims are disputed, resulted in lodged claims falling to under 400 per month. This trend has continued through early 2007.

The review has revealed only 35 Commutation settlements were approved by the Workers Compensation Commission in 2006. The stringent guidelines imposed on insurers before they can resolve an ongoing claim by way of Commutation including 15% whole person impairment, exhaustion of rehabilitation options etc, appear to be rigorously enforced by WorkCover who review any applications for Commutation prior to the Workers Compensation Commission registering the agreement. 2006 completes the Commission's fifth year of operation and in that time less than 150 Commutation agreements have been registered. Given there are tens of thousands of long tail workers compensation claims with no prospect of returning the worker to employment, one wonders how long the current Commutation approval process can continue.

The Commission's aims of expediting the timetable for litigated matters has been achieved in 2006. Over 50% of matters were resolved within 13 weeks and 85% of matters were resolved within 26 weeks. This compares with the Compensation Court (prior to 2002) where matters were resolved generally in a time frame of 52 weeks. However, consistent with the old Compensation Court system, one tenth of the applications are decided by an Arbitrator or Judicial Officer with the vast majority either being resolved by way of agreement between the parties or the applications being discontinued.

The Commission reported that only 11 notices of Appeal were lodged against Commission Presidential decisions during 2006. 27% of appeals resulted in a decision to remit the matter back to the President for further determination. 31% of applications to the Supreme Court for judicial review following the decision of a Registrar or medical appeal panel were set aside by the Supreme Court during 2006.

It would appear the common law aspect of workers compensation claims is on the increase. For claims that solely involve the negligence of an employer, matters are subject to compulsory mediation in the Workers Compensation Commission. In 2004 only 50 applications for mediation were registered with the Commission, 244 applications for mediation were registered in 2005 and this has increased to 415 applications in 2006. Almost 90% of these common law matters were resolved through the mediation process.

Finally, we note there were a number of initiatives put forward by the Workers Compensation Commission User Group. This will include the testing of electronic filing by the Commission's new information technology system in 2007. We note the Commission has already made extensive use of electronic notification for communications, submissions and notification of the parties for various teleconference dates, etc. Although a proportion of documentation will still have to be registered by way of hard copy, the Commission's electronic and information technology initiatives may result in a few trees being saved as the Commission celebrates its sixth year of operation.

NSW OH&S Roundup

Two Companies - Two Penalties

An employee of Boral Constructions was injured whilst dedagging a concrete truck owned by Boral Resources. Mr Ford had commenced cleaning hardened concrete from the barrel of a concrete truck that he had been driving. He had a remote control to turn the barrel of the truck if required, which controlled the speed and direction of the barrel. He was standing on a platform above the ground chipping away at the concrete when the barrel suddenly started to turn. Plant and equipment used by the employee was owned by Boral Resources. The moving barrel grabbed a hand chisel he was holding and the airline of the pneumatic hammer wrapped around his wrist and dragged him into the barrel of the truck where he was thrown around inside the barrel for 3 to 7 minutes. He suffered multiple lacerations and bruising to his entire body and chemical burns to both eyes and a fractured hand. He required a corneal stem cell transplant to both eyes.

Both Boral Construction and Boral Resources were prosecuted for breaches of the Occupational Health and Safety Act. Both companies pleaded guilty. Ultimately each company was fined $50,000.00.
The Court noted that although the risk was not obvious, a system which gave the employee discretion to place their arms within the barrel to dedag using cleaning equipment, which included a pneumatic hammer, air hose and compressor, with the employee working alone, was deficient. The risk was avoidable by removing the discretion from the employee to place their arm in the barrel.

The Court accepted the risk was serious as reflected by the injuries ultimately suffered. Both defendants had identified that there was a risk having employees inside the barrel to dedag and had discontinued that work. Nevertheless, it was open for

the drivers to dedag as far as their arms could reach. This discretion was the ultimate problem with the system.

This case illustrates once again that companies who have structured their affairs where plant and equipment is owned by one company and employees are engaged by another face multiple penalties and each penalty must reflect the culpability of each defendant involved. A fine will not be struck by determining an appropriate penalty and sharing that penalty between the two companies, rather, an assessment of penalty will be made for each company.

You Can't Be Too Careful On A Balcony

Kent Transport Industries Pty Limited was recently fined $110,000.00 after two workers were injured when they fell from a first floor balcony after a railing on the balcony collapsed. The company had pleaded guilty to breaches of the Occupational Health and Safety Act.

Two employees of the company were at a private residence and were in the process of lowering a two-seater lounge chair over a balcony railing located on the first floor of the residence. During the operation the railing collapsed causing the employees to fall between 4 and 4.5 metres onto a spiked metal garden fence. The employees suffered serious injuries. The lounge chair, when it fell, also brushed against a third employee who was standing at ground level directly beneath its path.

At the time of the offence the company operated a furniture removal, storage and delivery service and had 448 employees. At the time of the offence the company did not have a documented safe system of work or a safe work procedure for the assessment of the structural integrity of balcony railings or for the manual lifting or lowering of furniture using structural ties over the balcony of a multi-storey building. Nor had the company undertaken a risk assessment to determine the appropriateness of manual lifting and lowering of furniture over balconies. The company had relied on its employees to satisfy themselves that the balcony and the balcony railings were sufficiently safe performing the task.

The Court concluded the risk of falling from the balcony was obvious and reasonably foreseeable. In this case there was no doubt the railing was defective by reason of substandard workmanship of the original builder and that in turn must have exacerbated the risk of failing and that the company could not be held responsible for the substandard work which was performed by someone else in relation to which it could not reasonably be expected to be aware. This was a factor taken into account by the Court but nevertheless the simple issue was there was absent a risk assessment. The steps implemented by the defendant after the accident were reflective of the straightforward approach that could have been adopted, namely:

- prohibiting all balcony work
- formulating a risk assessment team to develop and implement long term control measures;
- instituting a procedure of only removing furniture over a balcony by means of a mechanical device such as a vehicle mounted crane;
- conducting training on site-specific risk assessment for each removal.

Despite substantial and ongoing assistance to the accident victims, an early plea of guilty and a commitment to change, the company received a substantial fine of $110,000.00.

Company Manager In Charge Of Operations And Office Secretary Who Became A Director. Yes They Are Liable

In Inspector Jones - v - Anywhere Tower Cranes Pty Limited & Ors, WorkCover has recently prosecuted a company and a number of individuals arising out of breaches of the Occupational Health and Safety Act. The Commission imposed a fine of $100,000.00 on Anywhere Tower Cranes Pty Limited and fines totalling $39,000.00 on three individuals.

A mobile crane had been made available by Anywhere Tower Cranes Pty Limited to Karimbla Construction Services Pty Limited which had been engaged by Meriton Apartments as a builder of an apartment development at Parramatta. Nouh was the sole director of Anywhere Tower. Anywhere Tower arranged for a labour company, Cash Bend NSW Pty Limited to provide a crew to operate the crane. Wayne Missingham was the sole director of Cash Bend. Three employees were lent on hire to operate the crane.

The outriggers of the crane were not fully extended because of a traffic management plan which had left only a limited space for the footprint of the crane. During the course of the day, whilst the crane was operating, the nature of material loaded changed to much heavier material. The weight of the material that was on one load exceeded the safe working load of the crane. During the course of moving the load the crane toppled and fell into the street. Fortunately no-one was injured when this accident occurred. Tom Gabris was a manager of Anywhere Tower and had overall responsibility to implement the company's occupational health and safety system. Gabris was ultimately fined $9,000.00 after pleading guilty.

Nouh had agreed to be a director of Anywhere Tower despite the fact that she was involved in office work, invoicing, pricing dockets, computer work, letters and general office duties. She took no part in the operations of the crane or any contractual work. Over a 3 year period her duties did not change. The company employed Gabris as the manager and he was in charge of all operations. Nouh was the sole director of the company. She was not a shareholder of the company.

The Commission noted in the circumstances Nouh was a controlling mind of the company with respect to its day-to-day affairs, subject only to the overriding but extraordinary control at the hands of a sole shareholder. A sole director must therefore know that she exposes herself to the responsibility and she accepts the liability for prosecution under the Act if the company was convicted of a breach of the Act. Nouh was fined $9,000.00. One wonders whether Nouh truly understood her obligations when she signed on as a director.

Missingham was prosecuted as the company, Cash Bend NSW, was in administration and Missingham was fined $15,000.00.

One has to question Nouh's decision to become a director in the company if she had no financial interest in the company. An expensive lesson learnt by Nouh and substantial penalties for individuals who did not profit from ownership of the company.

Duty To Ensure Safety As Well As A Duty To Consult

The Occupational Health & Safety Act in NSW provides that an employer must ensure the health and safety and welfare at work of all employees. In addition, the Act requires an employer to consult with employees of the employer to enable employees to contribute to the making of decisions affecting their health, safety and welfare at work.

In a recent decision of the Industrial Relations Commission of NSW, the Commission has imposed a penalty of $95,000.00 on Tweed Byron Scaffolding Services for failing to ensure the health and safety at work of one of its employees and a further fine of $12,000.00 for failing to consult its employees in respect to safety. The prosecutions arose subsequent to an accident when a worker was injured whilst dismantling scaffolding.

Sam Miles was injured when he was carrying span deck along the roof after dismantling some scaffolding. He inadvertently stepped onto an unsupported skylight panel, falling through it to the concrete floor approximately 5 metres below. The skylight panel was not able to support the weight of Miles. There was no safe work method statement or any formal risk assessment prepared for the task of dismantling the scaffolding. The risk of falling through the skylight panels was identified and assessed during the initial construction of the scaffold but the only control measure put in place by the company was to verbally instruct its employees to not go near the brittle areas on the roof, constituted by a skylight panel. It was also noted the company had no formal consultation process in place prior to the incident.

The Commission held the risk of injury was so obvious and correspondingly foreseeable that steps should have been taken to avoid the risk of injury.

The maximum penalty for the offence of failing to ensure the safety of the worker was $550,000.00. The penalty imposed was $95,000.00. In respect to the offence of failing to consult employees, the maximum penalty was $55,000.00 and the fine imposed was $12,000.00.

The Industrial Relations Commission notes that OH&S legislation makes it clear that consultation required to be undertaken must be carried out in accordance with the Act and the Regulations made under the Act. The consultation must be undertaken in a manner that will allow employees to contribute to the making of decisions by the employer that affect the health, safety and welfare at work of the employees. Consult means the seeking of information, advice and feedback from employees and is something more than the mere dissemination of information. The Commission noted there must be a degree of proximity between the consultation process and any decision taken by the employer that may impact upon the occupational health, safety and welfare of employees. Employees' views must be taken into account.

The Commission noted that prima facie the legislation compels consultation with each and every employee. Obviously an employer with a large workforce might be expected to encounter logistical and other difficulties in complying with this requirement. Nevertheless the Commission concluded that the legislation intended that each and every employer in New South Wales engage in a consultative process with each and every employee. The obligation extends to all employers no matter what industry in which they are engaged. This will include industries which are obviously more likely to create risks to health and safety such as construction, mining and the like, as well as industries which are not regarded as inherently dangerous by way of, for example, financial accounting and law practices. In this case the defendant was held to have completely failed to comply with its obligations to consult. Failing to consult employees in this case resulted in an additional offence and an additional penalty.

Fall Through Penetration

The New South Wales Industrial Relations Commission has recently fined a company $45,000.00 and a director $15,000.00 for breaches of the OH&S Act arising out of an incident when a sub-contractor fell through a penetration.

Full Brick Homes Pty Limited engaged a sub-contractor to perform work at a building site. The sub-contractor had been given the task of finishing off the brickwork on the garage on the ground floor and to replace chipped bricks from the garden bed. There was no work planned to be conducted on the first floor slab of the building on that day. Nevertheless a load of bricks arrived and the sub-contractor moved the load of bricks from the ground floor to the first floor using a brick buggy. The working director was on site at the time assisting the sub-contractor. As the sub-contractor pulled the buggy up over the top step onto the first floor, he stepped backwards falling through a void that was positioned directly opposite the staircase about 1.6 metres away. He fell backward about 3 metres to the concrete slab floor below and suffered a significant head injury as well as fractures of his spine.

The company argued that it had scaffolding and a handrail system which it had planned to install the day after the incident and there was no work scheduled to commence on the first floor that day. Notwithstanding, he presence of the penetration and the absence of fall protection was sufficient for the offence to be proven. There was a guilty plea from both defendants.

The penalties of $45,000.00 for the company and $15,000.00 for the director are not that substantial when one considers there was a significant injury. Nevertheless the company was only a relatively small company which had a turnover of $2 million and principally employed five family members in the business to generate that revenue. The size of the company impacted on the fine imposed and moderated the fine to a figure which was less than one normally expects for such a significant accident.

Employee Time Records- New Employer Obligations

Amendments to the Workplace Relations Regulations 2006 requiring employers to keep specific details regarding their workers' employment came into full effect on 27 March 2007. The amendment was originally planned to operate from 27 October 2006. There was a further grace period to allow employers to ensure their records were compliant.

All businesses covered by WorkChoices as well as all businesses operating in Victoria and the Territory are legally required to keep accurate and complete time and wage records and also to issue pay slips to each worker. The obligations are very similar to those which existed before WorkChoices in the various other state and federal systems.

Employers must keep all time and wage records for each worker for at least 7 years.

An employer must keep the following wage and time records:

- Worker's name.
- Date commenced.
- Whether full-time, part-time, temporary or casual.
- Rates of pay.
- Gross and nett amounts of pay including details of deductions, any monetary allowances, penalty rates, loadings, bonuses or incentive-based payments.
- Copy of any written agreement if a worker has agreed to an averaging of hours.
- Leave accrued.
- Details of any leave the worker has elected to forego, a copy of the written election and date of payment.
- Superannuation payment and contribution details.
- Termination details including the name of the person who terminated the employment, how it was terminated and date of termination.

Pay slips must be issued to each worker within 1 day of payment of wages.

The pay slips must contain the following information:

- Name of the employer.
- Worker's name.
- Date of payment.
- Period of payment.

- Gross and nett amounts of payment.
- Any loadings, monetary allowances, bonuses, incentive payments, penalty rates or separately identifiable entitlement paid.
- For workers paid an hourly rate, the ordinary hourly rate and the number of hours worked.
- For worker's paid an annual salary, the rate as at the last day of the payment period.
- Any deductions from the worker's pay. All deductions from the worker's pay must be authorised in writing by the worker.
- Employers required to make superannuation contributions for the benefit of workers and should include the details on the pay slip identifying the amount of each superannuation contribution an employer has made or is liable to make during the period and the name of the superannuation fund into which the contribution was made or is to be made.

The Office of Workplace Services inspectors are empowered to issue infringement notices for identified breaches of the time and wage records and pay slip requirements. Infringement notice penalties are currently $55.00 for an individual and $275.00 for a body corporate.

However, a Court can impose ten times these amounts ($550.00 for an individual and $2,750.00 for a body corporate) for proven breaches of the record keeping obligations.

Union Fined For Telling Workers They Must Be Union Members

The CFMEU has been fined $20,000.00 by the Federal Court of Australia after workers were told that they were obliged to become financial members of the union to keep their jobs at work sites in New South Wales.

In January 2004 workers at a site in Fairy Meadow, NSW, were told by the site safety officer that they were obliged to become members of the CFMEU or its NSW branch in order to work or continue to work at the site. Workers were also told, a month later, by union delegates they needed to join the union to work at the Fairy Meadow site or any other Wollongong site. The site safety officer and the union delegate who made the representations to workers were also ordered to pay $1,250.00 and $2,000.00 in penalties themselves.

Interestingly, the Court also ordered the union to pay for a full page advertisement in a Sydney newspaper to inform employees working or wishing to work on building sites that they could decide whether or not they joined the union and there was no prohibition to working on sites if they were not members of a union.

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'.

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