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.

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Changes for Independent Contractors

The *Independent Contractors Bill* 2006 has now been introduced into Federal Parliament. The bill will pass through parliament shortly and introduce a new legislative regime to regulate issues between principals and their independent contractors.

The principal objects of the Bill are:

- to protect the freedom of independent contractors to enter into service contracts;
- to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; and
- to prevent interference with the terms of genuine independent contracting arrangements.

The Minister for Employment and Workplace Relations, Kevin Andrews, in his second reading speech on the Bill on 22 June 2006 stated the Bill was to ensure that independent contracting was encouraged without excessive regulation. Mr Andrews noted there had been a rise in the number of independent contractors which was one of the most important shifts in the history of the Australian labour market. He estimated there could be as many as 1.9 million Australians working in independent contractor-type arrangements. The Productivity Commission placed the figure of independent contractors at 800,000 nationally.

Mr Andrews stated the Bill was built upon the principle that genuine independent contractual relationships should be governed by commercial and not industrial law. As a result there is a stand-alone Bill to regulate independent contractors rather than include the reforms in the recent Workplace Relations legislation.

However, the Bill does not define the term "independent contractor". The definition of independent contractor has evolved under the common law and tests laid out in various leading cases. Consequently, unless the definition of independent contractor is more clearly defined, there will always be competing arguments in the future as to whether persons are really independent contractors or employees. Obviously events can occur after arrangements have commenced which may lead to the parties in that relationship arguing at a point later on as to the proper interpretation of their relationship. Events such as injury to a person or dismissal of that person will lead to competing arguments between the persons that are party to a service arrangement as to whether or not they are independent contractors or employees.

The Bill uses a range a constitutional powers, including the Corporations Power, to override provisions of State law to remove restrictions on the use of independent contractors. The Bill overrides State provisions which deem certain classes of independent contractors to be employees, however there is a three year transition period before the State's deeming provisions will be overridden which allows time for "deemed" employees and the businesses that engage them to understand and make appropriate adjustments to their arrangements. However the Bill does not override State protection for contract outworkers.

The Bill also excludes the operation of some State laws on independent contractors that are corporations or where independent contractors are engaged by constitutional corporations, the Commonwealth or a body incorporated in a Territory.

Inside

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It is interesting to note that the legislation will apply to independent contractors who are incorporated and also those independent contractors who are not incorporated where the unincorporated independent contractor is dealing with a corporation. The Act will apply if one of the parties to the arrangement is a corporation. In this way the application of the Act could have a larger impact than was originally contemplated.

The legislation will impose penalties on employers who seek to avoid their obligations under employment law by disguising their employees as independent contractors or who coerce their employees to become independent contractors. The *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* explicitly prohibits employers from terminating employees only to re-hire them as independent contractors.

Employers will also be penalised for misrepresenting a genuine employment relationship as an independent contracting relationship. There will be fines for employers who dismiss or threaten to dismiss workers in a bid to re-hire them as independent contractors.

The Bill removes Federal unfair contractor provisions from the *Workplace Relations Act* and puts them under the ambit of the *Independent Contractors Bill*. State unfair contract jurisdiction will be overridden, as far as constitutionally possible, primarily using the Corporations power. There will be one single Federal unfair contracts jurisdiction.

The intention of the proposed legislation is to govern disputes with independent contractors where it is alleged that the contract has been unfair.

The proposed legislation identifies the State and Territory legislation which will have no application to independent contractors. The State and Territory legislation which will have no application is identified by specifying the areas of law which are effectively covered by the new regime for disputes independent contractors. Those areas are:

- remuneration, allowances or other amounts payable to employees;
- leave entitlements of employees;
- hours of work of employees;
- enforcing or terminating contracts of employment;
- making, enforcing or terminating agreements (not being contracts of employment)
- determining terms and conditions of employment;
- disputes between employees and employers, or the resolution of such disputes;
- industrial action by employees or employers;
- any other matter that is substantially the same as a matter that relates to employees or employers and that is dealt with by or under:
    - the Workplace Relations Act 1996(Cwth); or
    - a State or Territory industrial law;

There are however State and Territory laws that will continue to apply to independent contractors. Those State and Territory laws are the ones which address the following issues:

- prevention of discrimination or promotion of EEO, but only if the State or Territory law concerned is neither a State or Territory industrial law nor contained in such a law;
- superannuation;
- workers compensation;
- occupational health and safety (including entry of a representative of a trade union for a purpose connected with occupational health and safety);
- child labour;
- the observance of a public holiday, except the rate of payment of an employee for the public holiday;
- deductions from wages or salaries;
- industrial action affecting essential services;
- attendance for service on a jury;
- professional or trade regulation;
- consumer rights;
- taxation.

The commencement of the legislation once the Bill passes through Parliament will bring a real change to disputes with independent contractors however the contractors will still be faced with a myriad of State and Federal legislation that will apply to their business activities.

Compensation Payments Are Assessable Income

In a decision handed down by the Australian Appeals Tribunal (AAT A 614-2006), Ms Ettinger of the Administrative Appeals Tribunal (AAT) has determined weekly compensation payments earnings paid in arrears as a lump sum were assessable income.

The appeal related to a taxpayer who sustained various injuries at work. In March 2003 the Compensation Court of New South Wales awarded the taxpayer two aggregated lump sums for weekly payments totalling $4,587.00 for the period August 2000 to January 2001 and $27,080.00 for the period January 2001 to July 2003. The Tax Commissioner assessed the payments as ordinary income in the 2003/2004 income year. The taxpayer sought a review by the AAT arguing that the lump sum compensation payments were not taxable income because they represented an “undissected lump sum” paid to redeem an entitlement to weekly compensation payments.

The AAT affirmed the decision of the Tax Commissioner. The AAT stated the receipts were income because they were payments of earnings to substitute for what the injured worker might have been earning had he not been injured. The AAT concluded the payments were periodic weekly payments and were paid in a lump sum simply because they were in arrears. As the worker received separate award payments for permanent impairment in the Compensation Court, the AAT considered the payments of arrears of weekly compensation were not an "undissected lump sum". Furthermore, the AAT concluded that as the arrears of weekly compensation payments were paid to the taxpayer in July 2003 as part of the Compensation Court Award they should be assessed on a receipt basis and they were assessable in the 2003/2004 income year. This is despite the fact they are related to a past income period.

This decision seeks to remind us of the obligation to deduct taxation from payments of weekly compensation even when they are paid on a lump sum arrears basis. A tax declaration should be provided by all workers before any payments of weekly compensation are made to ensure the correct rate of taxation is applied and deducted before the weekly compensation payments are paid. We are also of the view that workers’ solicitors are likely to agitate that minimal compensation be paid under a structured settlement as arrears of weekly compensation. Given the payment of the arrears of weekly compensation are to be assessed in the year they are received, the worker will only receive the benefit of the $6,000.00 tax-free threshold for the year the arrears were received under the settlement/judgment. For claims where the arrears stretch over many years, this will represent a significant reduction in the compensation actually received by the worker due to the inability of the worker to claim the tax free threshold for each year.

Alleged injury? Check your security video!

The Deputy President of the Workers Compensation Commission in NSW recently ruled on an Appeal in a matter where the alleged injury had been caught on a surveillance video. The worker had alleged he suffered an injury on 1 October 2004 whilst he was mopping the ground floor of a building. The worker claimed he had slipped on the wet tiled floor and struck the back of his head. The injury occurred in the foyer of the building and the injury was captured on the security surveillance system of the building. The video recorded the worker dropping to his knees, falling backwards and putting his right hand behind his head to prevent any blow to his head. The video evidence was in complete contrast to the worker’s claim that his feet had slipped from under him and he struck his head directly on the floor in the fall. The Arbitrator at first instance determined the fall was “contrived” and entered an Award for the Respondent (employer). Despite no submissions being called from the parties as to costs, the Arbitrator also determined that the worker was to pay the employer’s costs.

On appeal, the worker challenged the video surveillance on the basis it was illegal pursuant to Sections 7 and 8 of the *Workplace Video Surveillance Act* 1998. These provisions are related to covert video surveillance being carried out of an employee by an employer in a workplace. The provisions also provide that any video surveillance "unrelated to the security of the workplace is not to be admitted into evidence in any disciplinary or legal proceedings against an employee unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence." Deputy President Snell firstly declined to allow this argument to be put forward on appeal as it had not been advanced at the Arbitration. However, the Deputy President made comments in relation to the admissibility of the video evidence in any event. He accepted the video was obtained as a result of security surveillance and did not fall within the auspices of the *Workplace Video Surveillance Act*. The Deputy President also noted the current proceedings were not “disciplinary or legal proceedings against an employee” and the video was admissible.

The reasons provided by the Arbitrator in the original decision in favour of the employer were brief and the worker also took this aspect on appeal. Consistent with earlier Commission decisions, the Deputy President determined that an Arbitrator was

not required to give lengthy and detailed reasons for a decision, nor to recite and analyse in detail the content of the evidence and submissions. The standard by which adequacy of reasons must be determined was related to the nature of the decision itself and the decision maker. The Commission was not a Court and its proceedings were conducted with little formality and technicality. In particular, the worker claimed as the Arbitrator did not specifically determine the truthfulness of the worker as a witness, the worker's evidence of the injury should have been accepted. The Deputy President considered the Arbitrator's brief comments that the fall was "a contrived one" amounted to a rejection of the worker's evidence and sufficient to rule on his level of truthfulness.

However, the Deputy President overturned the costs order in favour of the employer on the grounds that the worker was not afforded the opportunity to make submissions in relation to costs and there was an inadequacy of reasons for the decision. The Deputy President determined the worker was denied procedural fairness. Despite the Deputy President's decision, we should point out that the costs are likely to be determined by way of a separate application to the Commission wherein the worker can make submissions in reply.

The increasing use of video surveillance for security purposes does present the opportunity for employers to obtain video evidence to substantiate or dispute the occurrence of the alleged injury. Provided the video is obtained for purposes unrelated to the covert surveillance of employees in a workplace, it presents another tool in trying to defeat a claim for compensation.

This decision also confirm the Commission will not be burdened with technicalities and detailed reasons in its decision making process. However, it will still seek to afford all parties procedural fairness irrespective of its claimed informality.

What is the Employer's Liability?

It is a common situation that an employee is injured in circumstances where both the employer and a third party have been negligent. As discussed in our January issue, the Court of Appeal in New South Wales has held that where an employee's injuries are such that the employee does not reach the threshold to bring a claim for work injury damages under the *Workers Compensation Act 1987,* a negligent third party who has contributed to the employee's injuries will not be able to obtain any contribution from the employer. This was decided by the Court of Appeal in the decision of *Forstaff Blacktown Pty Limited - v - Brimac Pty Limited*.

What happens when there is undoubtedly negligence on the part of the employer but the employee does not reach this threshold? What does this mean in relation to the proportionate liability of the third party?

The Court of Appeal has recently considered this issue in the decision of *Maricic - v - Dalma Formwork (Australia) Pty Limited & Anor*. Zoran Maricic was injured on 20 August 2001 when working on a construction site at Pyrmont. Maricic was carrying a large sheet of plywood when he put his foot in a box-like "penetration" in the concrete floor on which he was walking. Maricic fell and suffered injury. The project manager on the site was Bovis Lend Lease Pty Limited ("Bovis"). Bovis had entered into a contract with Dalma Formwork (Australia) Pty Limited ("Dalma") pursuant to which Dalma would undertake the completion of formwork on certain levels and stripping of existing works where concrete had been poured. Maricic was employed by Dee Why Enterprises, a labour hire company. Maricic originally commenced proceedings against Bovis, Dalma and Dee Why but ultimately discontinued the proceedings against Dee Why when it became evident that Maricic's degree of permanent impairment would not be at least 15% the threshold for a work injury damages claim. Dee Why did however remain a party to the proceedings by virtue of cross-claims maintained between the defendants.

At trial His Honour Judge Hughes found in favour of the defendants. His Honour found that there had been no breach of duty of care by either defendant and in these circumstances the plaintiff's claim and the cross-claims must fail.

Maricic appealed.

The Court of Appeal overturned the Trial Judge's finding in respect to liability. This led to the question of what was the negligence of Bovis, Dalma and Dee Why respectively. There could be no damages payable by Dee Why as Maricic did not reach the requisite threshold but it was still necessary to consider Dee Why's liability as this had to be taken into account when determining the liability of Bovis and Dalma.

The Court of Appeal noted that in other cases involving labour hire companies such as *TNT - v - Christie* liability of an employer has been fixed at 20%. The Court of Appeal did however note that this should not be treated as a standard and the liability of an employer must be assessed on the facts of each case. In this case an apportionment of 20% liability to Dee Why

was however appropriate.

In essence this meant that even though Dee Why is not liable for any damages to Maricic, the liability of Bovis and Dalma to Maricic is reduced by 20%.

Importantly, the Court of Appeal determined that the defendant bears the onus of proving the liability of the employer when the claim is brought by the defendant rather than the employee.

The Court of Appeal also considered the issue of contributory negligence. The Court determined that the duty of care of that is imposed on an employer or occupier may extend to the taking of reasonable steps to avoid injury caused by inadvertent conduct on the part of an employee. Inadvertence can involve a failure to take reasonable care for a person's own safety but this is not necessarily the case. In this particular case there was no basis for finding that Maricic was not taking reasonable care for his own safety and therefore there should be no deduction for contributory negligence.

In Work Injury Damages claims the only damages that may be awarded are damages for past and future economic loss. In this case there could be no award of damages against the employer as the claimant did not make the threshold.

The employer has no need to make further compensation payments to Maricic as there is a common law judgement against another party. Whether or not the employer recovers any money on cross-claims between all negligent parties is a matter to be decided at a later time. Theoretically if the workers compensation payments are less than the payments that must be made under the judgment by Bovis and Dalma, the employer will recover the totality of the workers compensation payments with the workers compensation payments being deducted from the judgement against Bovis and Dalma.

An important decision by the Court of Appeal where effectively proportionate liability has come into play.

The decision will not find favour with plaintiffs as a consequence of a significant reduction in their damages where an employer is negligent and the plaintiff does not reach the 15% threshold as well as a deduction of workers compensation payments from their judgement.

A win for employers who will see compensation payments reimbursed where payments are less than payments payable by other negligent parties as long as the plaintiff does not meet the threshold for Work Injury Damages.

Yes, a complicated scenario, but not one which is uncommon.

Dependant or Not Dependant - That is the Question.

In NSW when a worker is injured their workers compensation entitlement to weekly compensation is effected by the number of their dependents. After an initial period (usually 26 weeks but a maximum of 52 weeks) the worker's weekly payments of compensation reduce to a statutory rate. The statutory rate increases for each dependant of the worker.

Section 37 of the *Workers Compensation Act, 1987 (NSW)* has particular relevance to the issue of dependency payments. The question of dependency has more recently arisen in the Court of Appeal decision of *Coles Myer Limited v Rudzinski* [2006] NSWCA 161.

The case of *Jolanta Rudzinski - v- Coles Myer Limited* was originally heard in the Workers Compensation Commission by an arbitrator. The spouse of the injured worker and father of the children earned substantially more than the injured worker. The insurer argued the children were therefore not dependant. This argument failed and the Arbitrator found the children were dependant.

What is of vital importance is that the legal duty of a person to support a person's spouse and children goes beyond establishing a financial relationship. Questions of dependence are questions of fact rather than questions of law. Parents are under an equal and coordinate obligation to support a child and the obligation is a joint one.

Pursuant to *Section 37(4)* of the *Workers Compensation Act, 1987* a person is a dependant wife, husband, de-facto, spouse or other family member, child, brother or sister in relation to a worker if the person is totally or mainly dependant for support on the worker at the date compensation becomes payable to the worker (whether married to the worker or born before or after that date) or becomes so dependant after that date.

Mr Rudzinski's income was used primarily to make the monthly payment on the family's mortgage and Mrs Rudzinski's income was used for household expenses including all the day to day needs of the children. The subtraction of either Mr or Mrs Rudzinski's incomes would have dire consequences for the household finances.

The arbitrator's decision was challenged by the insurer firstly in an appeal within the Workers Compensation Commission and when that challenge failed, the Court of Appeal was asked to consider the issue.

The Court was critical that the appeal had been brought on a somewhat misconceived challenge on legal issues where in reality the appeal was no more than a challenge to factual findings.

The Court of Appeal confirmed that the obligation of each parent to support a child is a joint and several one and a child may be totally dependant upon one parent for support notwithstanding they are totally dependant upon the other parent. Total dependence is not incompatible with the receipt of support from someone else.

Whether a worker's children are totally or mainly dependant is a question of fact. The compelling argument in Rudzinski's case was that the children were dependant upon both parents. The income level of one parent does not discount the financial or other support provided by the other.

Reality in Future Economic Loss

Often the most significant component of a damages award for personal injury is compensation for future economic loss. Often also, amounts awarded under this head - particularly when described as a 'cushion' or a 'buffer' - seem to have little basis in reality, at least for defendants and their insurers.

Tran v Younis [2006] NSWCA 188, 14 July 2006 is just such a case. The plaintiff suffered serious injuries in a motor vehicle accident. Liability was not in issue.

The medical evidence accepted by the District Court was that the plaintiff, 47 years old, could no longer perform the manual tasks of a builder, but that he had a residual capacity for sedentary work and some building and supervisory work. Neither party led any evidence as to the availability of suitable work. There was also difficulty in assessing the plaintiff's past income because of the way his tax affairs were structured, and due to his part time work in a family business.

The District Court awarded the plaintiff $250,000 for future economic loss.

On appeal this was reduced to $106,250. The Court of Appeal found:

- it was wrong for the trial judge to hold that the defendant had an onus to lead evidence as to the availability of suitable work
- damages for future economic loss are for lost earning capacity - not earnings as such
- the award for future economic loss was inconsistent with the findings as to residual capacity
- where there is no evidence as to probable future earnings, the use of average weekly earnings as a guide is appropriate.

The reduction by the Court of Appeal almost halved the plaintiff's award. The decision should serve to remind trial judges of the proper approach in this area.

The case also reminds defendants that the best way to ensure reality in future economic loss awards is to assemble and present cogent evidence - in dollar terms - of future earning potential.

Indemnity Costs Not Capped

In New South Wales Section 338 of the *Legal Profession Act, 2004* provides a cap on costs that can be recovered by a plaintiff where damages recovered are less than $100,000. The maximum costs for legal services provided to a plaintiff are fixed at either 20% of the amount recovered or $10,000, whichever is greater. Section 340 of the Act provides that where a party to a claim for personal injury damages makes a reasonable offer of compromise in a claim and the offer is not accepted, then the *Legal Profession Act* does not prevent the awarding of costs against another party to be assessed on an indemnity basis in respect of legal services provided after the offer is made. Section 340(2) specifies that an offer of compromise is

reasonable if a Court awards a judgment that is no less favourable to the party than the terms of the offer.
Rule 20.26 of the *Uniform Civil Procedure Rules, 2005* provides for the making of offers of compromise. Rule 42.14 of the *Uniform Civil Procedure Rules, 2005* provides that where an offer is made by the plaintiff but not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the terms of the offer, then the plaintiff is entitled to indemnity costs after service of the offer. Rule 42.15 contains equivalent provisions for defendants.

In *Shellharbour City Council - v - Johnson*, the Court of Appeal has recently had the opportunity to consider the interaction between an offer of compromise and the provisions in the *Legal Profession Act.*

In *Shellharbour City Council - v - Johnson* the plaintiff was successful in the claim at trial.
The defendant had appealed and the plaintiff had served an offer of compromise in the Appeal on the basis that the plaintiff offered to accept approximately $3,000.00 less than the judgment. The Appeal was dismissed. The plaintiff subsequently made an application that the plaintiff's costs be paid on an indemnity basis from the date of service of the offer of compromise. Such a costs order was particularly important for the plaintiff as the plaintiff's damages were in the vicinity of $48,000, well below the $100,000 cap.

The Court determined that the plaintiff was entitled to costs on an indemnity basis after service of the offer of compromise.

The Court of Appeal also made the following important comments in relation to costs:

- Where an offer of compromise has been made the application for indemnity costs must be made pursuant to the relevant rules of Court, and not pursuant to the Legal Profession Act.
- Where both the offer and rejection of the offer occurred before the Uniform Civil Procedure Rules, 2005 commenced on 15 August 2005, then the issue as to whether the offer of compromise complied with the requirements of the Supreme Court Rules and whether exceptional circumstances justified the defendant's failure to accept the offer should be determined in accordance with the Supreme Court Rules, but the consequences of the defendant's rejection of the plaintiff's offer are to be determined pursuant to the Uniform Civil Procedure Rules, 2005. (It should be noted both sets of rules are substantially in the same terms).
- Where costs are assessed on an indemnity basis they are excluded from the maximum amount of costs permitted by the Legal Profession Act, 1987 and Legal Profession Act, 2004.
- The prohibition contained in Section 198D(4)(b) of the Legal Profession Act, 1987 that relates to a Court ordering the payment to one party by another party costs in respect of legal services provided that party in an amount that exceeds the maximum allowed, does not apply to the general order made at the time the Court delivers judgment which does not specify the amount. The order to which it does apply is the Certificate of Assessment of Costs filed in the Court having jurisdiction. This certificate is taken by statute to be a judgment by the Court to pay that amount.

The decision again reiterates how important it is for parties to serve well pitched offers of compromise early in the proceedings. If the offer is not bettered then a party can obtain indemnity costs from the date of the offer, and so escape the costs limitations contained in the *Legal Profession Act 2004.*

OH&S Snapshot

Second Offence and Proceedings in the Industrial Commission.

A second offence under the OH&S Act recently led to an $85,000 fine and the prosecution of a company in the Industrial Relations Commission.

In the judgment the company was reminded that a prior record does not warrant the Court increasing the objective seriousness of the offence by its penalty, but rather focuses the Court's attention on retribution, deterrence and in the usual criminal courts, what is referred to as the protection of society, and what might be required by way of a more severe sentence.

On 13 June 2003 Consolidated Extrusions Management Pty Limited experienced an incident at its Ingleburn operation. On that day, there was a hot metal spill that was ultimately the subject of an investigation by the WorkCover Authority.

A remelt unit consisted of three electrically operated melting furnaces, two holding furnaces, which each had attached two horizontal continuous castors, and a moving log saw. The melting furnaces had a capacity of 10 to 14 tonnes and were located on the top deck of the remelt unit approximately 3.5 metres from ground level. The holding furnaces were located on

ground level and had a 10 tonne capacity. The remelt unit contained a 10 tonne runout pit under the outlet of the holding furnace. Next to the runout pit was a service trench which contained natural gas and compressed air pipe lines.

The remelt unit contained a fully enclosed control room/hut positioned on the deck of the remelt unit which contained controls and emergency stop buttons for the melting furnace. The furnace man operated the melting furnaces from the hut. A control room/hut was also located near the holding furnace approximately 3m from the runout pit. The castor operator operated the castor from the hut.

The spill resulted in approximately 8 tonnes of brass overflowing from the Horizontal Continuous Caster into the pit, over the floor and into trenches.

An explosion resulted from the spill. It is suspected that this was due to molten metal coming into contact with water/ moisture in the trenches and an airline in the trench. The explosion resulted in a steel plate approximately 500mm wide, 1.2m long and 12mm thick, which had been placed over the trench, lifting and hitting the roof and then causing approximately 8 metres of roof sheeting to be lifted. No person was injured from this.

Immediately following the incident the defendant's employees isolated the electricity and gas lines. Flames were still seen in the area of the spill. The continuing flames were seen to be coming from an oxy acetylene cylinder which had been left on the casting deck adjacent to the water control panel of the cast house and was venting as per its design.

The fire brigade was called. The defendant's employees hosed the area to reduce the temperature of the molten metal until the fire brigade arrived.

The oxy-acetylene tank which vented during the incident had been placed in the caster area the day prior to the incident. During the run out the oxy-acetylene cylinder had been vented due to the heat and caught alight. The cylinder has been left approximately 5 metres from the working furnace by an employee who had been carrying out maintenance work using the oxy torch shortly before the incident. The employee had used oxy acetylene equipment in the area several times prior to the incident and was not aware of any policy excluding such equipment being in the vicinity of a working furnace.

The company did not have in place an exclusion zone for flammable gas cylinders near any source of molten metal in the casthouse.

Run outs had occurred on approximately eight previous occasions over several years. No one had been injured on any of these occasions.

The court found that the company "had a significant existing system of safety and this particular incident showed perhaps what might have been somewhat unexpected, although there was a history and an expectation that there would be spills of the molten metal. Nevertheless, there were significant existing safety systems and the defendant is entitled to have those taken into consideration in mitigating the penalty as well as the steps taken to address this particular risk. I accept also that there was cooperation with the WorkCover Authority and that is a significant matter to be dealt with in the Court's consideration of fixing a penalty. The defendant is also entitled to be regarded as a good corporate citizen that has shown contrition in relation to this offence."

The company was fined $85,000 where the maximum penalty was $825,000.

Fatalities lead to fines totaling $449,000

Caines Pty Limited (now in liquidation) operated an edible oil refinery and a seed oil extraction plant, or seed-crushing mill. The seed-crushing mill was used to extract seed oil from a range of seeds including cottonseed, sunflower seed, canola and soya bean.

Frank Heagney was the general manager and company secretary and Graham Hislop was the managing director of the company.

At approximately 6:20 am on 6 December 1999 there was an explosion in the seed meal storage bin known as bin D. The explosion in bin D occurred as three employees of the company (Robert Anderson, Ronald Brooker and Geoffrey Terry) were opening an inspection hatch located at the base of bin D.

At about 2.00 am an employee noticed a strong, unpleasant odour in the vicinity of the storage bins and noticed heat coming from in between two bins. The employee put his hand onto the western side of bin D and noticed that it was very hot adjacent to the air cannon, an air operated device for dislodging meal from the interior walls of the bin. A gas monitor, used for detecting gas leaks in hydrogenation plant, was used to check the odour near the storage bins. According to an employee that was operating the monitor when walking back down toward the storage bin area, the meter of the monitor went “off the dial”.

At 3:32 am Ronald Jenkins, Captain of Telarah NSW Fire Brigades, received a call on his NSW Fire Brigades pager. Captain Jenkins was alerted to a “fire in drum" at the companies Rutherford site. Captain Jenkins arrived at Telarah Fire Station at 3:39 am and proceeded to the site with Telarah’s pumper and crew.

The explosion occurred whilst the fire brigade was on site and measures were being undertaken to bring the situation into control. Mr Anderson, Mr Brooker and Mr Terry were at the base of bin D when an inspection hatch cover was opened. As the inspection hatch opened, there was an influx of cold, oxygenated air into bin D. This influx of air was followed by an explosion inside bin D and a fireball that emanated from the hatch opening to engulf all three men.

The evidence suggested that the explosion was a backdraft event in the sense that opening the hatch allowed cool oxygen-rich air to enter the bin where it mixed with the explosive gases trapped within the bin in the presence of a source of ignition such as a remnant of the hot “charcoalised” meal.

As a consequence of the explosion in bin D, the three employees received fatal burn injuries.

The company was prosecuted for failing to ensure health, safety and welfare of their employees and failing to ensure that persons not in the employer’s employment are not exposed to risks to their health or safety arising from the conduct of the employer’s undertaking while they are at the employer’s place of work. The persons exposed to risks who were not employees in this case were the Fire Brigade officers attending the event.

Where a corporation contravenes the OH&S Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is deemed to have contravened the same provision unless he or she satisfies the court that:

- he was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- he being in such a position, used all due diligence to prevent the contravention by the corporation.

Heagney and Hislop were prosecuted as persons concerned in the management of the company.

At the time of the hearing the company was in liquidation and was without funds and did not appear at the proceedings. The fine imposed on the company was not likely to be paid.

The Court found that the design of plant, including the product transportation system, the seed storage silo, the meat bin and the meal bins took little account of risks associated with dust explosion and/or fires that might occur in association with the transportation and/or storage of seed meal.

For example:

- the design did not include venting and/or dust explosion hatches;
- the design did not include any form of spark arresters in the hammer mill, or any form of spark or fire detection system in the conveying line from the hammer mill to the meal bins;
- the electrical fittings within the mill at the site were specified and installed on the basis that canola and sunflower milling activity was to take place, but the electrical fittings as specified and installed were not appropriate for cotton-seed milling activity – dust associated with the processing of cotton-seed being highly combustible (see AS 2430.2-1986);
- the existence of horizontal flat surfaces on the interior of the walls of the "receival section" of the expeller building permitted the build-up of combustible dust, in particular cotton-seed meal dust – leading to an increased risk of dust explosions and/or fires;
- the fire fighting plant and equipment at the site was extremely limited and did not include any form of fixed fire fighting system in and/or around the meal bins; and
- The design of the meal bins did not make provision for monitoring the temperature of seed meal whilst stored in the

bins.

Further as the Court found that:

- There were no written work procedures and no training for employees with respect to the management of seed meal that had heated whilst stored in meal bins. In particular, there were no procedures of any kind with respect to the management of seed meal once it had started to smoulder or partially combust inside a meal bin.
- There were no written work procedures or any training regarding the actions to be taken by staff members in the event of a fire in the seed crushing mill, the product transportation system and/or the meal storage bins.
- There was no training on what to do in the case of an emergency arising.
- Adequate information, instruction or training about the chemical characteristics of the substances associated with the seed crushing process was not provided.
- There were no systems, documents or plans designed to supply members of the NSW Fire Brigades with adequate information about the properties of cotton-seed meal, spent bleaching earth and other products stored on its site – including their capacity to spontaneously combust, smoulder and give off pyrolytic vapours and gases when subjected to heat.
- There was no instruction or training in relation to fire fighting, either generally or in relation to fires in the meal bins.
- A practice had developed amongst the company's employees at the site of banging the sides of meal bins to attempt to determine if the meal bins were empty. The banging of the sides of meal bins gave rise to a risk of the creation or excitation of clouds of combustible dusts within the meal bins.
- The Company failed to put in place sufficiently rigorous housekeeping rules and practices, such that there were present in and about the product transportation system, particularly the elevator boot, and in other parts of the plant, particularly the receival bay, significant build up of combustible dust. The presence of the build up of dust in and about various parts of the plant increased the risk of dust explosions and/or the communication of fire through the expeller plant and its associated buildings, silos and meal bins.
- The company also failed to provide its employees with any training with respect to the use of personal protective equipment, in particular, personal protective equipment to be utilised in the event of a fire or dust explosion.

The Court was critical of the lack of understanding and knowledge of the company's processes which could be directly attributed to the company's failure to have in place:

- A documented safety policy;
- A documented occupational health and safety program;
- Any written work procedures with respect to the handling of meal that had started to heat within the storage bins;
- Any written emergency procedures with respect to fires or heating within the meal bin complex;
- Any training in emergency procedures with respect to fires or heating within the meal bin complex.

Heagney was never a Director of the company and only received the payment of wages as an employee.

Mr Hislop appeared in person. Apparently, he did not have sufficient funds to engage a lawyer and was unable to obtain legal aid or *pro bono* assistance. Mr Hislop tendered no evidence of his own except when asked about his capacity to pay any fine he stated that he did not "have a cent." Following the demise of the company was he was left with nothing and was living with a friend who paid him $100 per week for "doing chores" and that was his only source of income.

The company was convicted of the two offences and faced a maximum penalty of $550,000 for each offence and Heagney and Hislop were also convicted of two offences each with a maximum penalty of $55,000 for each offence.

The fines imposed were

- Caines Pty Limited (in liquidation) a fine of $190,000 in relation to the offence with respect to employees;
- Caines Pty Limited (in liquidation) a fine of $210,000 in relation to the offence with respect to non-employees;
- Heagney a fine of $12,000 in relation to the offence with respect to employees;
- Heagney a fine of $10,000 in relation to the offence with respect to non-employees;
- Hislop a fine of $12,000 in relation to the offence with respect to employees;
- Hislop a fine of $15,000 in relation to the offence with respect to non-employees.

Actions Of Subcontractor Beyond Control Of Contractor So No OH&S Conviction

BHP Limited contracted with Brambles Australia Limited through its trading name Gardner Perrott Industrial Services to

demolish structures and clean up a site located at the BHP Newcastle Main Site. Gardner Perrott then contracted out part of the demolition work, the demolition of seven boilers and chimney stacks, to Demtech Pty Ltd. Demtech was a company which had been formed by two former employees from the demolition branch of Gardner Perrott in its Newcastle operation, for the purpose of subcontracting the particular work. Five smaller boilers had already been demolished by Demtech when on 19 September 2002, it began the controlled demolition of Boiler 6, which weighed over 300 tonne and was 31 metres in height. Instead of an induced collapse, an uncontrolled collapse occurred which caused the death to one employee and injured two other employees of Demtech.

As a consequence of the incident Gardner Perrott was charged with a breach of the OH&S Act for failing to provide a safe system of work for the demolition of Boiler No. 6 ("boiler") at the site, in that:

- it failed to ensure that redundant demolition material which had accumulated on the site was removed.
- it failed to ensure an adequate work method was prepared for the demolition of the boiler at the site.
- it failed to ensure that a permit pursuant to clause 332 of the Occupational Health and Safety Regulation 2001 was obtained prior to demolition work being performed for the collapse of the boiler in a westerly direction at the site.
- it failed to undertake a sufficient investigation or provide sufficient information concerning the structure of the boiler prior to demolition work being performed upon it for the purpose of ensuring that any calculations concerning the structural capacity of the columns of the boiler to sustain loads imposed during the demolition process for the collapse of the boiler were accurate and did not give rise to the risk of unexpected collapse of the boiler.
- it failed to take any steps to ensure that calculations that were undertaken in respect of the structural capacity of the columns of the boiler to sustain the loads imposed during the demolition process for the collapse of the boiler were accurate and did not give rise to the risk of unexpected collapse of the boiler.
- it defendant failed to undertake a proper risk assessment in relation to the demolition process for the collapse of the boiler.
- it failed to ensure that a suitably qualified and experienced engineer was engaged who was able to properly undertake with appropriate skill and care all of the calculations necessary for the induced collapse of the boiler.
- it failed to ensure that the system associated with the induced collapse of the boiler was failsafe and that risks to health and safety were eliminated by reason of the implementation of a secondary system of restraint so as to prevent unexpected collapse.

Gardner Perrott pleaded not guilty to the charge.

The charge in essence was that Gardner Perrott put at risk the safety of named persons, not its employees, by the unexpected collapse of Boiler 6 due to the implementation of an unsafe system of work which system left the premises unsafe and a risk to health. For Gardner Perrott to be guilty of the charge it must have had "control" of the site on 19 September 2002. Control was therefore a threshold issue in respect of an offence under s10(1) of the Act.

The Court noted "The applicable meaning of "control" in the context of s 10, by reference to its ordinary meaning, must have the sense of not mere sway, checking or restraint but rather controlling in the sense of directing action or commanding action. Therefore the ability of a defendant to compel action and/or corrective action to secure safety is necessary in order to ensure the safety of the premises."

There was the requisite element of control. Gardner Perrott, notwithstanding it subcontracted out part of the work under a separate contract, was still a licensee of the relevant site. Gardner Perrott was along with the subcontractor, a licensee of the premises by the terms of its contract. While under the contract Gardner Perrott was able to subcontract out the work to the subcontractor, it did not pass over its obligations to ensure safe working to the subcontractor.

A demolition permit was required for the work.

Gardner Perrott submitted a WorkCover Demolition Permit did not allow third party interference on the premises and it could not be a controller of the premises in those circumstances. The court rejected the submission and held that a Permit does not have the power to remove from a person his status as a controller of the premises. There is nothing in s 10 of the Act which would prevent several persons from simultaneously being in control of premises used as a place of work.

The Court found that Gardner Perrott:

"failed to ensure a safe work premises by failing to ensure an adequate work method was prepared for the demolition of Boiler 6 on 19 September 2002; it failed to ensure the appropriate permit for that demolition work was obtained; it failed to

investigate the methodology proposed including checking on the calculations used to determine the structural capacity of the columns; it failed to undertake a risk assessment of the process for the collapse of the boiler; it failed to ensure a secondary system of restraint to prevent the unexpected collapse of Boiler 6.

Each of these failures are elements of the defendant's basic failure to ensure the implementation of its protocol in place to ensure that premises under its control were safe for work. It failed to ensure its paper system was implemented".

Despite these findings the company was not convicted of the offence as it successfully argued one of the defences in the Act.

It is a defence to any charge brought pursuant to the OHS Act or Regulations if it can be proved that:

- it was not reasonably practicable for the person to comply with the provision; or
- the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

The Court found that the commission of the offence was one over which Gardner Perrott had no control and against the happening of which it was impracticable to make provision.

The judgment stated:

"The circumstances on 19 September 2002 revealed a subcontractor performed a demolition on a structure weighing 300 tonnes and 31 metres in height based on faulty calculations as to the load bearing strength of the structure's columns; by implementing a system without bracing or a secondary support for the demolition of a structure by conducting a demolition without a permit from WorkCover Authority; implementing a work method which did not contain a secondary support for the structure and without a risk assessment and failing to inform with Gardner Perrott in order to comply with the protocol.

I find it was not reasonably foreseeable the subcontractor would conduct a demolition on 19 September 2002 in such a circumstance. Gardner Perrott on 19 September 2002 did not know, nor could it have known, of the risk to safety on premises over which it had control on 19 September 2002.

. . . If the happening of an event is not reasonably foreseeable it is not practicable to make provision against it. When considering the matter of foreseeability, one should be careful not to substitute reasonable hindsight for reasonable foresight. . . .

The subcontractor performed on 19 September 2002 the demolition in breach of the Act, its Regulations, in defiance of the Australian Standard 2601 and without complying with an agreed protocol. The procedures the subcontractor adopted led to an unexpected, uncontrolled collapse.

I find the defendant on 19 September 2002 had used all due diligence to ensure it would know of the time for, and review the proposed methodology of, the collapse of Boiler 6. Gardner Perrott had no knowledge of the acts of the subcontractor despite its due diligence. I find it was not reasonably foreseeable that the subcontractor would conduct the demolition in such a circumstance. It was therefore not practicable for Gardner Perrott to make provision against it. I find therefore the commission of the offence was due to causes over which the defendant had no control and against the happening of which it was impractical for it to make provision on 19 September 2002."

The Court found that it was arguable that in the circumstances it was not reasonably practicable for the person to comply with the Act but did not need to make a conclusive finding on the issue as the second limb of the offence had been made out.

Interestingly two of Demtech's directors pleaded guilty to offences under the OH&S Act from the incident and were convicted and fined $18,000 each and a consultant engineer engaged by Demtech to oversee the demolition was also convicted and fined $22,500.

Fall from Roof and a Fatality

Mr Gleeson is a 69 year old man who after a five year apprenticeship in carpentry and joinery which he began at 15 years of age, established, at the age of 20, his own business as a sole trader, licensed builder and carpenter. He incorporated this business into D J Gleeson Pty Ltd in 1973 and remains as the sole director of the company. He worked with Geoffrey Raymond Bates as his sub-contractor carpenter on multiple building sites from late October 2002.

D J Gleeson was contracted to construct an extension to and refurbishment of an existing two-storey cottage at Mosman. On 18 February 2003, Geoffrey Bates, a carpenter, attended the site having been sub-contracted by D J Gleeson in order to undertake work at the site.

D J Gleeson instructed Mr Bates to prepare the driveway side of the site for scaffolding. D J Gleeson instructed Bates to take down the fascia using a rod hook from the ground. On 18 February 2003, the date of the incident, Bates was pulling down the fascia, eaves and guttering using a rod hook.

Upon completion of this task, Bates set up a ladder or ladders and began pushing tiles back from the roof edge. At approximately 2.00pm John Hawkes, a plumber employed by Sommerville Plumbing and working at the site, discovered Bates laying on the ground when he came to ask him for a battery for a cordless drill. Bates was semi-conscious and incoherent, having apparently fallen from the ladder.

There were no eyewitnesses to the incident.

Hawkes saw Bates on the ladder prior to the incident. He estimated the height above the ground that Bates was working as being about 2 metres. Hawkes stated that the ladder Bates was working off was still in position, when he found Bates.

Bates was semi-conscious and incoherent, having apparently fallen from the ladder. An ambulance was called and after some delay in its dispatch, Bates was transported to Royal North Shore Hospital. He subsequently passed away on 5 March 2003.

D J Gleeson did not ensure that scaffolding was in place prior to Bates commencing work at a height; did not provide site induction to Bates, Hawkes or Mr Evans; did not provide any instruction, supervision or training to Bates prior to him undertaking work at the site; and there was no written Safe Work Method Statement in relation to the job. D J Gleeson did not undertake a risk assessment prior to Bates commencing work at the site. Following the incident scaffolding was erected to install the fascia.

D J Gleeson Pty Ltd was charged under s8(2) of the Occupational Health and Safety Act 2000 for failing to ensure that people not in the defendant's employment, and in particular, Bates, were not exposed to risks to their health or safety arising from the conduct of the defendant's undertaking while they were at the defendant's place of work.

It was claimed that DJ Gleeson failed to conduct a risk assessment in relation to the work being undertaken by Geoffrey Bates at the site; failed to provide an adequate fall prevention system whilst working at heights and to ensure that such a system was use; failed to provide such information, instruction, training and supervision as was necessary to ensure that persons contracted in relation to work conducted at heights could safely undertake that work; failed to provide any stable and securely fenced work platform such as scaffolding, walk boards or other form of portable work platform for people undertaking roofing work at the site.

The company pleaded guilty and was fined $30,000. A very low penalty. But what was the reason for the low penalty?

The court noted that

> "for nearly 50 years Gleeson has provided employment within the State. Mr Gleeson has worked in the building industry for all those years with no prior convictions. Mr Gleeson formed a corporation in 1973 and it has significantly contributed to employment within NSW. I note the corporation has been involved in community affairs and for the last five years sponsored State Rail Rugby League. This sponsorship is not tax deductible and should be read as an acknowledgement that I accept the defendant company has contributed to our society as a good corporate citizen.
>
> Mr Gleeson before the court expressed his most sincere contrition and described the effect of the loss of Bates, a personal and dear friend. On behalf of the corporation he offered a clear and unequivocal apology. Mr Gleeson has attended upon Mrs Bates. Mr Gleeson himself suffered severe stress arising from the incident and for that stress had to be hospitalised."

Personal factors will influence the ultimate penalty imposed.

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