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 employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Strict Liability for Labour Hirers

The New South Wales Court of Appeal has recently handed down the decision of *Galea v Bagtrans Pty Limited & Ors* which will have a substantial impact on damages claims which arise as a consequence of an injury to a labour hire employee whist working for a host.

In the recent decision of Unilever v Swire the Court of Appeal found 100% liability on the part of the labour hirer where a labour hire company provided a "whole service" rather than simply supply labour, a significant shift in the way that the Courts approached the liability of a labour hirer for its employees. The recent decision of Galea continues the shift.

John Galea was employed by Adecco Industrial Pty Limited ("Adecco") a labour hire company. Galea was lent on hire as a truck driver to Bagtrans Pty Limited ("Bagtrans"). From late 2003 Galea would, during the course of his employment, drive a Mack truck owned by Bagtrans from Sydney to Tarcutta. The seat in the Mack truck caused Galea discomfort when driving and in about November 2003 Galea complained about the seat to Roy and Pat, employees of Bagtrans. Roy directed Galea to make a complaint in the defect book about the truck. On 13 May 2004, Galea was told by Pat to drive a truck to Tarcutta and exchange it for a Mack truck that was to be brought back to Blacktown. Galea asked Pat which Mack truck it was and was advised by Pat it was the same truck. Galea asked Pat if the seat had been fixed and Pat advised that it had been. Galea drove to Tarcutta and collected the Mack Truck at 2:00am on 14 May 2004. Between 3:00am and 5:00am on 14 May 2004, Galea drove the truck from Tarcutta to Yass and a defect in the truck's seat caused Galea discomfort whilst driving. Galea had driven around 60 to 70 kilometres when he came to 5 or 10 kilometres of road with potholes. On three occasions Galea felt a significant jolt and also heard his neck crack. Galea contacted Bagtrans from Yass and refused to drive the truck the rest of the way home.

The Mack truck was fitted with a new driver's seat after being brought back to Sydney.

At trial, the trial judge found neither Bagtrans nor Adecco liable. The CTP insurer of Bagtrans, Allianz Australia Insurance Limited, was on its own application joined as third defendant to Galea's claim and Allianz also achieved a verdict in its favour.

Galea appealed.

The appeal was successful. The Court of Appeal found that Bagtrans breached its duty of care owed to Galea in failing to correct the defective seat and in giving Galea the incorrect information that the seat had been fixed.

The Court of Appeal then went on to consider the liability of Adecco and the apportionment of liability between Bagtrans and Adecco. Significantly, the Court of Appeal noted that an employer has a non-delegable duty to exercise reasonable care to provide employees with a safe place of work, a safe system of work and safe plant and equipment. This duty extends to maintenance and repair of plant and equipment. The Court also held that where an employer entrusts another with a task of providing the employee with the place and/or system of work, and/or with plant and equipment, the employer will generally be vicariously liable for failure by the other person to

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exercise reasonable care in those matters.

In this case, where as a consequence of the negligence of Bagtrans the seat had not been properly repaired, Adecco was vicariously liable for the negligence of Bagtrans in failing to have the seat repaired. The Court of Appeal also found Adecco was vicariously liable for the act of negligence by Bagtrans when Pat had failed to provide the correct information, as the provision of information concerning safety of equipment is part of the task of providing a safe place and system of work and safe plant and equipment.
Justice Hodgson in the leading judgment stated:

> *"An employer has a non-delegable duty to exercise reasonable care to provide employees with a safe place of work, a safe system of work and safe plant and equipment. Where an employer entrusts another with the task of providing the employee with the place and/or system of work, and/or with plant and equipment, the employer will generally be vicariously liable for failure by that other person to exercise reasonable care in those matters."*

Perhaps even more significantly, President Allsop with whom Justice McFarlan agreed held that the non-delegability of an employer's duty means the employer is liable for any breach of duty and the non-delegable duty involves the imposition of strict liability upon the employer. In this case Adecco's non-delegable duty was breached if Bagtrans failed to exercise care in the provision of safe a place of work, system of work and safe plant and equipment. The concept of strict liability is a tough pill for labour hirers to swallow.

There was however some good news for the labour hire company and the labour hire industry in general. Traditionally, following decisions such as TNT v Christie, the liability for injury to an employee lent on hire has been apportioned between the host and the labour hirer with the labour hirer picking up 20% to 25% of the responsibility. The Courts have accepted each case turns on its own facts as does any apportionment of liability between the host and the labour hirer however generally liability would be allocated to the labour hirer at 20% to 25%. In this case the Court of Appeal found that liability should be apportioned 85% to Bagtrans and 15% to Adecco. This will no doubt result in a push back from workers compensation insurers claiming that their liability for an injury to a worker lent on hire is only 15%.

The Galea decision will bring about a completely different approach by the Courts when assessing the apportionment of liability between a labour hire company and the host employer. Of course, it is correct to say that each case must be examined on its facts. However labour hirers are likely to be found to be vicariously liable for the hosts acts or omissions. If the host provides an unsafe system of work or unsafe plant and equipment the quid pro quo will be vicarious liability for the labour hirer for that failure.

No doubt Galea's case will be frequently cited by employers seeking to maximise the liability of the host and claimant's who are eager to minimise the liability of employers due to the work injury damages scheme. Some may say the case will work to reduce the labour hirer's potential liability and increase the burden for the host and its public liability insurer. Others will say the case has introduced concepts of "strict liability" and "vicarious liability for the acts and omissions of the host"

There have been two significant decisions handed down by the Court of Appeal in the latter half of 2010 relating to liability for injury sustained by workers employed by labour hirers. In the Unilever decision, the Court of Appeal found that where the labour hirer was providing a "whole service" it was 100% liable for the injury. In this case, in a departure from traditional approach of apportioning liability to a labour hire company in the vicinity of 20% to 25% the Court of Appeal has apportioned liability at 15%. The use of the labour hire model continues to be popular in Australia and it will be interesting to see how the law develops further.

No doubt the concepts of ""strict liability" and "vicarious liability for the acts and omissions of the host" are sure to raise concerns for business operating the labour hire industry.

Injury Caused by Defective Seat in Truck- Is it a Motor Accident?

The New South Wales Court of Appeal has recently determined that an injury caused by a defective seat in a truck that jolted whilst driving over potholes is a motor accident within the meaning of the Motor Accidents Compensation Act 1999.
In New South Wales the Motor Accidents Compensation Act 1999 governs motor accidents claims. In May 2004, when this incident occurred (the definition changed to delete the reference to defect in 2006), motor accident was defined as "*an accident or incident caused by the fault of the owner or driver in the use or operation of the vehicle which causes the death of or injury to a person.*"

Injury was defined as:

(a) *Personal or bodily injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle if, and only if, the injury is a result of and is caused during:*

i) The driving of the vehicle, or
ii) a collision, or action taken to avoid a collision, with the vehicle, or
iii) the vehicle's running out of control, or
iv) *such use or operation by a defect in the vehicle*.

In the Galea decision, which we have also discussed above, apart from considering the employer's liability, it was necessary for the Court of Appeal to consider whether or not Galea's accident could be classified as a motor accident. It did not really matter to Galea whether or not the claim was a motor accident as his permanent impairment was assessed at greater than 10% and so he was entitled to non-economic loss whether or not damages were assessed under the Motor Accidents Compensation Act 1999 or the Civil Liability Act 2002 (in motor accidents claims in NSW there is a threshold of 10% permanent impairment that must be satisfied prior to the award of damages for non-economic loss).

This was however a critical issue for the liability insurer and CTP insurer of Bagtrans. If the accident was not a motor accident then the liability insurer would be liable to indemnify Bagtrans. If however the accident could be classified as a motor accident then the CTP insurer would have to indemnify Bagtrans in relation to Galea's claim.

At trial, as there was a verdict in favour of Bagtrans, the claim against the CTP insurer who were the third defendant failed.

The Court of Appeal however found in favour of Galea so this therefore became an issue for the two insurers. The Court of Appeal was of the opinion that Galea did suffer an injury caused by the fault of the owner of the motor vehicle in the use or operation of that vehicle, as a result of such use or operation by a defect in the vehicle.

The question that then arose was whether or not it was an "accident or incident" that caused the injury and whether the injury was "caused during" the use or operation of the vehicle. Justice Hodgson who delivered the leading judgment on this issue stated:

> *"In my opinion, the common sense conclusion, consistent with Dr Conrad's evidence, is that it is more probable than not that the tearing of the ligament was caused by one or more of the three major jolts which caused the neck to crack and which were sufficiently serious to be specifically noted by Mr Galea, rather than by more general and less severe jolting over the five to ten minute period.*
>
> *On that conclusion, there were one, two or three incidents causing injury; and the injury was caused during the use and operation of the vehicle. Even if I were wrong on that factual conclusion, in my opinion the jolting of the truck for a five to ten minute period over a five to ten kilometre stretch of potholed road is a sufficiently circumscribed unity to be considered as a whole to be an "incident", so that the two requirements I have identified would still be satisfied on that basis.*
>
> *Accordingly, in my opinion the Motor Accidents Compensation Act does apply, and Allianz is liable to indemnify Bagtrans in accordance with the compulsory third party policy."*

This is a significant decision for all CTP insurers. It is the law in New South Wales that if a truck driver drives a truck over a lengthy period of time and sustains injury as a consequence of a defective seat and there is no specific incident the claim does not fall within the definition of motor accident. The time period and facts of each case will therefore be critical to determine whether or not an incident can be classified as a motor accident.

Can You Sue Your Child If They Injure You

Can circumstances arise where a parent sues their child for injuries caused by the negligence of their child? The simple answer is yes, as was seen in the recent NSW Court of Appeal judgment in *Zanner v Zanner*. The Court of Appeal in that case determined that a 11 year old child who was driving a motor vehicle at the direction of his mother, owed his mother a duty of care and breached that duty of care when his foot slipped whilst driving the motor vehicle, propelling the vehicle forward and striking his mother who was standing in front of the vehicle.

In *Lukas Zanner & Anor v Kathleen Zanner* the NSW Court of Appeal was called on to consider a claim for damages for

injuries sustained by a mother caused by her son. The mother sustained serious injuries when she was struck by her motor vehicle which was being manoeuvred by her son at her direction into the carport of the family home. The boy was 11 years of age at the time of the accident. His foot slipped off the brake onto the accelerator causing the vehicle to surge forward and collide with his mother who was standing directly in front of it. The CTP insurer of the vehicle denied negligence and denied that the son owed his mother a duty of care.

The vehicle only needed to be driven a distance of 3-4 metres. The boy had asked his mother whether or not he could park the car in the driveway when they had returned home with the car and it was his keenness to drive the car that resulted in his mother's decision to let her son drive the car. The boy had very limited prior experience in driving vehicles having moved his father's vehicle 5 or 6 times in the past moving his car into the carport. On some of those previous occasions the mother had been present in the passenger seat of the vehicle. So does an 11 year old driver of a motor vehicle owe a duty of care and what is that duty?

The CTP insurer argued that the child did not owe a duty of care. The insurer argued that the mother had given control of her motor vehicle to her 11 year old child and did not remain within the vehicle to strictly supervise his conduct and if necessary re-take control of the vehicle. It was argued that the child was obviously lacking in competence and experience and the mother in letting him take control meant that she could not expect any duty of care to be owed.
The Court of Appeal rejected the arguments.

The Court of Appeal noted that the boy had successfully and without mishap driven his father's motor vehicle into and out of the carport on five or six occasions and was competent to perform the same exercise with respect to his mother's vehicle. After all he was only required to drive the vehicle 3 or 4 metres in to the carport. The vehicle was an automatic. The Court of Appeal noted there was no reason to believe that he would be unable to perform the move.

The Court of Appeal noted that:

> *"A driver of a motor vehicle of any age (and certainly an 11 year old boy) owes a duty of care."*

The real issue was the scope or content of the duty.

Effectively the Court of appeal determined that the duty was the standard expected of an 11 year old who was to drive the vehicle over a distance of 3 to 4 metres.

The Court of Appeal noted:

> *"The standard of care expected of him required that once he had put the vehicle into drive, he should keep his foot on the brake owing the vehicle to inch forward to the point where he was required to bring it to a halt. He failed to adhere to that standard by permitting his foot to slip off the brake onto the accelerator thereby causing him to lose control of the vehicle as it accelerated forward."*

The Court of Appeal noted that as her son had driven his father's vehicle in the past without mishap she was entitled to expect some small degree of driver competence on the part of her son albeit of a basic and rudimentary kind. In particular she was entitled to expect that he would be capable of safely edging the vehicle into the carport.

The Court of Appeal determined:

> *"The act of negligence in the present case was the failure of the (son) to keep his foot on the brake and to prevent it slipping onto the accelerator. That was not an activity whose importance would be beyond the understanding of an 11 year old. It is a mistake that could happen to an adult as well as to a child of the first appellant's age. There is no reason, in my view, why the first appellant was not bound to exercise reasonable care not to permit his foot to so slip. There is nothing to suggest that he did not understand the purpose of the brake or the effect of depressing the accelerator. It would not be unreasonable to infer that an 11 year old, who had successfully manoeuvred his father's vehicle into and out of the carport on five or six previous occasions, understood the purpose of the brake and how it fitted into the function he was undertaking and that it was important that he not take his foot off the brake as the car would then move forward (or back if he was in reverse) more rapidly."*

The Court of Appeal held that a duty of care was owed and there had been a breach of the duty. The Court of Appeal then turned to consider whether or not that breach of duty had caused the injury.

The mother was standing in front of the vehicle and had placed herself in a position of danger. The original trial judge had determined her actions amounted to contributory negligence and reduced her damages by 50%. The Court of Appeal noted that the case involved two necessary conditions that contributed to the injuries. The first was the son's control of the vehicle and the second was his mother permitting him to control the vehicle and then standing in front of it. The Court of Appeal noted that it was not possible the circumstances to determine that the mother and her son were equally culpable for the accident. The overall facts militated a higher apportionment to the mother. The mother had contributed to the injuries and the Court of appeal determined that an appropriate apportionment would be 80% to the mother. Accordingly the Court of Appeal determined that her damages should be reduced by 80% rather than 50% as was determined by the trial judge.

There are circumstances where a mother can sue her son for negligence and recover damages. An insistent child who hassles his parents to drive a motor vehicle will owe a duty of care when he drives the vehicle, the scope of which is commensurate with their age and experience.

In Zanner's case after deduction for contributory negligence the Mrs Zanner recovered an award of $140,000 plus costs from the CTP insurer. So what will you do when your child asks you to let them drive your vehicle?

A Discretionary Bonus May Not Be So Discretionary

Employers often look to incentivise employees by including terms in an employment contract which provide for a bonus upon satisfaction of key performance indicators.

Sometimes employment agreements express bonuses to be at the discretion of the employer. Sometimes employment contracts will specify that bonuses will be provided if set objectives are met whilst not documenting those objectives in the agreement.

So what can go wrong with a discretionary bonus?

The New South Wales of Court of Appeal in *Silverbrook Research Pty Limited v Lindley* was called on to consider a claim by an employee against their employer following termination which alleged that the employer had breached its employment agreement by:

- failing to review their remuneration annually or at all which resulted in her losing the opportunity to increase her remuneration;
- failing to formulate a set of objectives relevant to her ability to receive a bonus; and
- failing to review her performance against those objectives at the end of each quarter for the purpose of determining her entitlement to the bonus.

The employment contract provided for fortnightly remuneration of $210,000 and an annual review of that salary but Silverbrook was not obliged to increase the rate of remuneration at any time. The agreement also contained a provision concerning an annual performance bonus of $40,000. The agreement provided that Silverbrook would assess the employee's performance against set objectives at the end of each quarter and provided her performance satisfied the set objectives, one quarter of the bonus would be paid within 21 days of the end of each quarter. The agreement also provided that the decision as to whether the employee should receive the bonus was entirely within the discretion of Silverbrook.

The employee terminated her Service Agreement. During the life of the Service Agreement her salary was never increased. She never received a bonus. Prior to her termination the employee received her final two weeks pay and an ex gratia payment of $48,165.13.

The employee then commenced proceedings in the District Court claiming damages from Silverbrook on the basis of Silverbrook's failure to review her remuneration and set the objectives relevant to the bonus and review her performance against them. A claim was also made based on misleading and deceptive conduct on contravention of the Trade Practices Act 1974 although this claim was abandoned at trial.

The trial judge found that Silverbrook had breached the Service Agreement in the respects alleged. In assessing damages for the loss of opportunity to increase her remuneration, the judge determined that there was no loss of any commercial opportunity of any value and awarded no damages. However on the issue of the bonus, damages were awarded in the sum of $74,000 as the Court determined that it was probable that had the employer set objectives the employee would have met the whole of them during the period. The trial judge determined not to take into account the ex gratia payment.

An appeal followed.

The principal judgment was handed by President Allsop with whom Beasley JA agreed. President Allsop noted:

> *"Here the employer promised … that it would establish objectives at the end of the each quarter, assess the (employee's) performance against those objectives and, subject to the (employer's) discretion if the set objectives were satisfied a bonus would be paid. This was not a promise to pay the bonus. ….The (employee) was promised the setting up and undertaking of a process of assessment of performance with the contractual opportunity or chance of obtaining bonuses should the results of the process be favourable and subject to the exercise of any discretion."*

President Allsop then turned to how the "discretion" impacted on the entitlement and commented:

> *"That the decision as to whether the (employee) should receive the bonus was "entirely within the discretion of" the (employer) should not be construed so as to permit the (employer) to withhold the bonus capriciously or arbitrarily or unreasonably; it should not be construed so as to give the (employer) a free choice as to whether to perform or not a contractual obligation. The relevant discretion should be understood against the proper scope and content of the contract. This was a bargained for bonus to be assessed against set objectives. Such a clause should receive a reasonable construction and not permit the (employer) to choose arbitrarily or capriciously or unreasonably that it need not pay money the set objectives having been satisfied."*

President Allsop noted:

> *"The discretion is to be exercised honestly and comfortably with the purpose of the contract. There may be many circumstances in which it would be legitimate and comfortable with the purpose of the contract not to pay the bonus. There may be financial stringency or misbehaviour by the (employee) or some other consideration. It is unnecessary to explore the possibilities in detail. What however would not be permitted is an unreasonable arbitrary refusal to pay anything, what come what may. This would be a denial of the very clause that had been agreed. If these parties wish to make payment under the clause entirely gratuitously and voluntary such that payment could be withheld capriciously, notwithstanding the compliance with soundly set objectives they needed to say so clearly."*

The Court of Appeal noted that it was incumbent on the Court to determine what was the loss of opportunity or chance measured by the probabilities and possibilities but it was not to be valued on the basis of the employer acting capriciously. It was noted the employer did not lead evidence which would allow the Court to determine that there would be some reason why the employer would exercise its discretion and not pay a bonus. Whilst President Allsop concluded the primary judge's assessment of that loss of a chance at $74,000 was less than he would determine there was no cross appeal or notice of contention that would allow that award to be varied and it was not appropriate to interfere with the trial judge's award of $74,000.

However the Court of Appeal determined that the ex gratia payment must be taken into account and applied that at payment as an offset the damages claim. The payment was not gratuitously conferred by some private source as a mark of sympathy or assistance. The ex gratia payment was not directly referrable to wages. The Court of Appeal concluded that if the ex gratia payment was not taken into account the employee could effectively be double compensated for the loss. The Court of Appeal noted there was no basis to conclude other than that the ex gratia payment related to the contractual claims made by the employee and if the ex gratia payment was not taken into account the employee would be overcompensated.

Accordingly the Court of Appeal reduced the award of damages of the trial judge by the ex gratia payment.

Even though a bonus is expressed to be a discretionary bonus an employer will not be able to act in a capricious way and determine that a bonus is not payable absent reasons for an adverse exercise of that discretion.

An employment agreement that contains a clause that provides for a bonus subject to key performance indicators can cause problems where no key performance indicators are set. What was bargained for is a bargained for bonus to be assessed against set objectives- a failure to set those objectives can amount to a breach of the employment as the employee has not received what they have bargained for namely a bonus scheme with set key performance indicators. When the Court comes to consider the damages which would flow from any failure to provide what was bargained for it is the loss of the opportunity of securing bonuses that must be valued.

If a bonus is to be truly discretionary it is essential that the terms of the employment contract make it abundantly clear that the

bonuses in the discretion of the employer and references to key performance indicators even if not set may well result in the bonus not being "so discretionary".

Employment Contracts - Implied Terms - Good Faith and Reasonable Notice

A recent decision of the Supreme Court of Western Australia has confirmed that an employment contract contains an implied term of good faith requiring an employer to act fairly during the course of the employment although the term will only apply to conduct during employment and not to any dismissal. The Court also determined that it is appropriate that a period of "reasonable notice" of termination be implied into an employment contract.

Ms Rogan-Gardiner was employed by Woolworths Limited as a State Accountant. She worked for Woolworths for 8 years. Whilst on the maternity leave, a restructure resulted in her position being abolished. Before her return from maternity leave she was offered alternative positions of comparable scope to her previous role but declined each of them on the basis that they were outside her expertise or that they were lesser positions. On her return to work Woolworths continued to make offers of employment to her which were declined and Woolworths then terminated her summarily.

Rogan-Gardiner commenced proceedings against Woolworths claiming damages on the basis that the employer had the following duties:

- The duty to act reasonably, fairly and good faith,
- the duty to provide her with reasonable notice;
- and the duty to provide her with severance benefits in the event of redundancy.

Rogan-Gardiner argued that these terms were implied terms of her contract of employment.
Woolworths accepted that it was required to provide reasonable notice but argued that it had done so. It also argued that her refusal to accept alternative positions amounted to a repudiation of her contract which would disentitle her to any notice and that she did not meet preconditions in a policy for redundancy payments.
It has been said that there must be trust and confidence between an employer and an employee, and this is a basic component from employment contracts.

Justice Hall concluded:

- An employment contract will generally include an implied term that an employer will not, without reasonable and proper cause, act in a manner calculated or likely to cause serious damage to the relationship of trust and confidence between it in its employ;
- Such a term applies to conduct during the currency of the employment;
- The term does not apply to dismissal or the manner of dismissal;
- When an employee claims for loss on the basis of an alleged breached of the good faith term it will be necessary to prove that such loss was caused by conduct of the employer which proceeded, and was independent of any subsequent dismissal.

The court determined that the employment contract contained a term that each party would act in good faith and would not without reasonable and proper cause act in a way that was calculated to destroy or seriously damage the relationship of confidence and trust between them. That term however did not apply to the termination of the contract.

The Court determined that the conduct of Woolworths and its senior executors were explicable and adequately justified by them and there was no breach of the duty of good faith.

The claim for redundancy was also rejected. An entitlement to severance pay upon redundancy can arise as a result of the incorporation of provisions in a company's policies or procedures into the employment contract however whether the terms form part of the agreement must be determined on the facts. The evidence in this case was inadequate to establish that the redundancy policy of Woolworths was current or it had ever been incorporated into the contract. In any event the redundancy policy included preconditions. Those preconditions were that efforts to find an alternative suitable position had been unsuccessful. The evidence in this case was to the contrary therefore the employee did not meet that precondition and would not be entitled to a redundancy payment under the redundancy policy even if it had been incorporated into the terms of the employment contract. It was therefore not necessary to determine whether or not the redundancy policy was incorporated into the employment contract as the claim would fail even where it did form part of the terms of the contract.

The Court also noted that the contract in question was one of indefinite duration. Justice Hall noted:

> *"it has long been accepted that, in the absence of any evidence to the contrary, a contract of service will contain an implied term that either party can bring the contract to an end by giving a reasonable period of notice to determine."*

What is a reasonable period of notice depends upon the circumstances of the case. Summary termination did not amount to reasonable notice in this case. Rogan-Gardiner was a financial services manager whose position was abolished while she was on maternity leave. In 2003 her base salary was $103,000 per annum with superannuation, a vehicle and eligibility to incentive plans. She was 44 years of age at the time of termination and was a qualified accountant and had over 30 years of experience in the finance sector.

Justice Hall noted:

> *"that the purpose of the notice is to give employees a reasonable opportunity to reorganise their lives. This means a reasonable period in which to secure alternative employment. A court should not impose a period of notice that is longer than the period of notice that either party would have considered reasonable had they turned their minds to it at the time."*

Bearing in mind the facts in this case, the Court determined that 4 months was a reasonable period to imply of notice. Accordingly Woolworths breached an implied term that it would provide reasonable notice and the damages suffered were equivalent to 4 months pay.

The issues which were relevant to that determination included the nature of the position, the role of the position in the organisation, the salary, the duration of service, the professional qualifications of the employee, the employee's age, the capacity to move jobs within the industry, availability of other employment and the time that it would take for an employee to find an alternate job.

At the end of the day a reasonable period will be the period that the employer and the employee would have determined if they had turned their minds to that question.

It is now generally accepted that employment contracts will contain an implied term of good faith. This term will apply during the course of the employment contract but has no application that does not apply to an act of dismissal. Further, employment contracts will contain an implied term that either party can bring about the termination of a contract by giving reasonable notice with the period required being determined by the circumstances of the relationship.

To avoid uncertainty employers need to ensure that their contracts of employment clearly deal with issues including reasonable notice and redundancy for senior employees. The absence of express terms will expose employers to uncertainty and potential litigation.

In addition it is prudent to continually review notice provisions in employment contracts as job changes and length of service may dictate that a term in the initial contract no longer has relevance with the relationship shifting to a position where the notice clause no longer applies and there is therefore no written term stipulating the notice period and instead there will be an implied term that the notice will be reasonable.

New National Laws On Personal Property Securities Are Now Likely To Be Deferred Until October 2011

The commencement of the Personal Property Securities Act 2009 ("PPSA") is likely to be deferred from May 2011 until October 2011. The Coalition of Attorneys-General (representing the Australian states and territories) is likely to accept a recommendation by its business unit to give business more time to prepare for these new laws. We will learn whether this extension is to be granted during February 2011. Regardless of the extension, the business community has only a limited time to prepare.

What are these new laws?

This new federal legislation will cover transactions affecting almost every kind of property except land. The new laws will apply where security is taken over property (except land) to secure payment of money or to secure performance of another obligation. The legislation will also create new types of deemed securities and will thus affect many more kinds of transactions than the present law. The legislation will replace hundreds of state and territory Acts concerning personal property.

Examples of personal property affected by these new laws

- Trading stock
- Materials used to manufacture trading stock
- Plant, equipment, vehicles, aircraft and ships
- Business bank accounts with credit balances
- Debts owing to a business
- Shares
- Units in unit trusts
- The right to sue a person or company
- Intellectual property rights
- Proceeds of insurance claims

Security interests

The new laws require that "security interests" be registered on a new single national register, which will replace all existing registers in the states and territories (including the registers for company charges, Register of Encumbered Vehicles, register of bills of sale and so on).

This is a revolutionary change. At present securities such as company charges and some specific kinds of securities such as goods mortgages are either registered on a number of different registers or are not required to be registered. The new laws mean almost every security interest in property other than land must be registered as well as some deemed security interests. We explain the serious consequences for business of not registering under PPSA, below.
Directors and/or shareholders of family companies who have lent the company money must review their security over company assets and ensure they comply or risk becoming unsecured creditors if the company fails.
Members of the public and the business community will be able to search and update the new national register online for a fee. Searching and updating the register will become a daily occurrence for many businesses.

Examples of security interests that will need to be registered when PPSA starts

- Retention of title clauses
- Consignment sales e.g. floor stock arrangements
- Commercial leasing of vehicles, plant and equipment
- Contracts to supply and erect formwork and temporary fencing where the goods are to remain on site for more than 1 year or for an undefined period
- Third party logistics arrangements – the owner of freight must register their interest in the items as against the warehouse and transport provider

Which industries are most at risk?

The new laws particularly affect financiers. Others impacted include fleet managers, suppliers of floor stock such as furniture or vehicles, suppliers who use retention of title clauses and suppliers and the building industry. The franchising sector will also be substantially affected, depending on the supply and IP licensing arrangements between the franchisor and its franchisees. Insolvency practitioners must understand the new laws because they will impact on the conduct of each kind of formal appointment under the Corporations Act, and the assets available to creditors on an insolvency and remuneration.

How do I get ready?

It is vital that businesses conduct a full review of their contracts with suppliers, sub-contractors, customers and franchises now. A full review of financing arrangements is also recommended to determine whether lenders will be requiring them to sign new finance documents.

There is the potential for business to breach obligations in new finance documents if they retain their existing agreements with suppliers, sub-contractors, customers and franchises after PPSA starts.

Management will need to quickly gain a working knowledge of the new laws to assess the risk of dealing with new customers who obtain goods or services on credit.

Staff will need to be given new procedures and checklists, and be trained to work to those. Familiarity with the new national register and how to search it will be vital.

What if I am not ready when PPSA starts?

If you are not registered when PPSA starts, your rights against the goods or other property may not be enforceable.

PPSA overrides the concept of ownership. As such, unless you are registered under PPSA a customer in possession of stock you have supplied, or the customer's Administrator or Liquidator, will probably be able to sell the stock without your consent even if the customer has not paid you because your retention of title clause will not protect you. This has occurred in New Zealand where similar legislation has operated for several years. In that scenario, your business will become an unsecured creditor of the customer and might not be able to recover the debt or any part of it if the customer goes into Administration or Liquidation.

Non-registration under PPSA will also mean that you lose rights against a third party which has also dealt with the same customer. Another supplier, if registered under the new laws, will be secured and will take priority to the goods you have supplied ahead of your priority. That other supplier can take possession of and sell those goods if the goods are subject to the other supplier's security.

We can help

Gillis Delaney is already well on the way to preparing some of our clients, including major financial institutions, for these new laws. For assistance contact Nicholas Dale, Partner, on 02 9394 1129 or Gerald Carides, Senior Associate, on 02 9394 1136.

OH&S Roundup

Employee's Actions Do Not Diminish An Employer's Liability

In Inspector *Morgenthal v Houghton*, the NSW Industrial Court fined P&D Transport NSW Pty Limited $100,000 and its director, Paul Houghton, $5,000 for breaches of the Occupational Health and Safety Act and highlighted that an employee's involvement in a breach of the Occupational Health & Safety Act will not diminish the employer's responsibility under the OH&S Act.

P&D Transport carried on a trucking business transporting oversized plant and equipment to and from demolition sites. An employee of P&D Transport reversed a vehicle into a position to load an excavator, lower the loading ramps attached to the rear of the trailer using the controls for the hydraulic ramp system, drove the excavator up the ramps dismounted from the excavator and then went to operate the hydraulic ramp system to lift the ramps. The employee was found under the ramp. As a result of a mechanical failure the hydraulic ramp failed to support the offside loading ramp which fell under the influence of gravity causing the employee to suffer fatal injuries. The incident was caused by the failure of the pin in the sliding mounting bracket that supported the hydraulic cylinder that operated the ramp.

The particulars of the charge included allegations that the company failed to ensure the plant was safe and without risks to health and failed to provide or maintain a safe system for loading or operation of the loading ramps. Relevantly one of the particulars alleged that the employee failed to ensure the employee remain clear of the area beneath the loading ramp when in a raised position and failed to provide the employee with sufficient training in this regard.

The defendants pleaded guilty to the charges. The maximum penalty for the offence was $550,000 for the company and $50,000 for the director.

The court noted that the defendant did not have in place any system for the periodic inspection of the trailer and did not undertake definitive maintenance.

The defendant argued that the contribution of other parties to an offence is a matter which ought to be weighed in the consideration of the objective seriousness of the offence. It argued the deceased in placing himself under the ramp should result in some blame being attributed to his actions. The court noted that the duty to provide a risk free work environment is a duty owed not only to the careful and observant employee but also to the hasty, careless, inadvertent, inattentive,

unreasonable or disobedient employee in respect of conduct that is reasonably foreseeable. Further the court noted that the Occupational Health & Safety Act requires employees to be diligent and proactive to ensure the safety of employees and those obligations are not diminished because of the error or negligence of an employee although such matter may reflect on the degree of culpability of the employer for the purposes of sentencing.

In this case the court held that there was no basis to conclude that the conduct of the employee minimised the liability of defendants however it was prepared to take the matter into account when assessing the degree of culpability of the employer.

The director argued that he was impecunious (his only source of income was Centrelink benefits) and he alleged his business had collapsed and accordingly a substantial fine should not be imposed. However defendants failed to produce financial documentation for the company and the court therefore determined it was not prepared to reduce any penalty in relation to the company. The company was fined $100,000 and the director's fine was only $5,000.

The case serves as a reminder that under the Fines Act a court has the discretion to reduce the amount of the fine which would otherwise have been ordered to be paid due to the impecuniosity of a defendant. Without evidence of the financial circumstances of a defendant a court will not exercise its discretion to reduce a fine.

Further, despite the fact that an employee has contributed to the acts and omissions that result in the charge, that contribution will only go the question of culpability of the company and not liability for a breach of the Occupational Health & Safety Act.

Workcover Liable For Costs Of A Summons For Production - $168,319.31 Sought

The Industrial Court of NSW was recently called on to consider a claim for costs in respect to the costs incurred in answering a Summons for Production issued by WorkCover. In Inspector Wayne Jones v Justin Jones Ryan (No.5) Alesco Corporation Limited brought an application before the Court for recovery of costs and expenses incurred by it in complying with a Summons for Production by WorkCover. It sought costs of $168,319.31. The Industrial Relations (General) Regulations 2001 provide Expenses of Persons Summoned.

Any such person is not required to comply with a Summons unless an amount sufficient to meet the reasonable expenses of the person in complying with the Summons is paid or tendered to the person at the time of service of the Summons or not later than a reasonable time before the day on which the person is required to comply with the Summons.

Alesco engaged a legal costs consultant who expressed the opinion that the totality of the costs and expenses payable by the Prosecutor was $153,372.31. A legal costs consultant engaged by WorkCover had estimated the maximum range of total reasonable costs as between $62,760.50 and $65,060.50. There was a wide divergence between the opinions and ultimately the Court directed the parties to jointly select a cost consultant to be a cost assessor and determine reasonable costs.

However the Court did comment on the nature of the costs which would be recoverable. The substantive proceedings related to the prosecution of Mr Ryan, who was alleged to be a director of the Dekorform Pty Limited. A director is deemed to have contravened the same provisions of the OHS Act, as the company has contravened. An employee of Dekorform had been fatally injured. Dekorform was a subsidiary of Parbury Pty Limited. Parbury Pty Limited was a wholly owned subsidiary of Alesco. There was evidence that Mr Ryan was a director of Dekorform, however he asserted that he was not a director or a person in a position of influence the conduct of the corporation in relation to the breach. Ultimately the proceedings were dismissed against Mr Ryan. As the proceedings were dismissed against Mr Ryan he could not be held liable for any costs incurred by WorkCover in the proceedings. Accordingly the costs in respect of the issue of the Summons for Production would be paid by WorkCover alone and not Ryan.

A Summons issued to Alesco sought production of 25 categories of documents including board meetings, briefing papers, agendas, draft minutes, proposed resolutions or other documents spanning a 3 year period including documents in relation to 19 acquisitions / merger proposals. The Summons was widely drafted to attempt to require production of any document which reflected details of the roles, responsibilities, duties, powers or authorities of Ryan and other directors in the companies and in the acquisitions and mergers.

The legal costs incurred were incurred providing legal advice on the questions of relevance and scope of the documents and reviewing legal professional privilege and issues of confidentiality in relation to the documents sought. Alesco sought a sum of $23,562.00 for its own personnel including costs of its general counsel. It was estimated that the documents ran into several thousand documents all of which had to be reviewed, to identify the documents actually relevant to the Summons.

Following the production of documents Alesco and WorkCover agreed that certain documents should be subject to orders concerning confidentiality. The Court determined that steps taken after the production of documents to note the confidentiality of documents were not recoverable however the court noted with favour a decision of the Supreme Court that confirmed that the expenses that may be allowed in dealing with a Subpoena included legal advice reasonably incurred in relation to confidentiality and privilege issues pertaining to the Summons assessed on a solicitor / client basis and the costs of photocopying.

At the end of the day WorkCover will be liable for the majority of Alesco's costs. Whether the costs payable by WorkCover will to be closer to those claimed by Alesco or the amount estimated by WorkCover's cost assessor will have to wait for another day when the costs are assessed by a cost consultant.

However the case serves as a warning to WorkCover that it will be liable for legal costs incurred by a non-party to proceedings when it issues a Summons for Production of Documents. Generally if WorkCover is ordered to pay the costs of a Summons for Production it will be able to look to a defendant that has been successfully prosecuted to meet those costs. As can be seen the issue of Summons for Production can have significant cost consequences. Those costs consequences will flow to WorkCover where WorkCover fails in its prosecution but will fall on the defendant where the prosecution succeeds.

Would the Application for costs had been made by Alesco if the prosecutor had succeeded against Ryan? Probably not. However there is one thing for certain, the case serves to highlight the fact that costs are recoverable for legal expenses incurred by non-parties when they seek advice in relation to a Summons for Production and this may well lead to an increase in Applications made by non-parties to recover the legal costs they incur in complying with a Summons for Production.

Workers Compensation Roundup

Limitation Defences in Work Injury Damages Claims

The NSW Court of Appeal in Maoun Taouk v Maoun Taouk & Anor has recently affirmed a trial judge's determination to reject an application by a worker to bring a work injury damages claim against his employer some 7 years after the accident as the employer had lost any entitlement to seek recovery from another party. The employer had lost its rights of contribution as the limitation period in which it could bring a claim against that other party had also expired.

Taouk was injured on 31 May 2001 whilst working on a construction site. He was a trainee plumber and was directed by Firedam Civil Engineering Pty Limited to assist carrying a PVC pipe. A Firedam employee failed to retain control of one end of a 6 metre length of pipe and the pipe struck Taouk. He suffered injuries to his mouth, teeth, jaw and upper torso.

Taouk made a claim for workers compensation payments. The workers compensation insurer obtained a report from an investigator relating to the circumstances of the incident. The report noted that it was possible that recovery of compensation paid could be sought from Firedam. Taouk then went on to claim lump sum permanent impairment compensation in December 2001. That claim settled on 29 May 2003.

On 31 May 2004 the limitation period for work injury damage claims prescribed by the NSW Workers Compensation Commission Act expired. Section 151D of the Workers Compensation Act provides that an employee is not entitled to commence proceedings for any damages against an employer more than 3 years after the date the injury was received, except with the leave of the court. The Court must consider the explanation for the delay as well as prejudice suffered by the employer/workers compensation insurer when it considers whether it is appropriate to permit a claim to be brought after the limitation period expires.

In November 2005 Taouk consulted a different solicitor who requested the file from the previous solicitors. In June 2006 those new solicitors corresponded with the worker compensation insurer advising they were investigating the worker's work injury damages entitlements. In December 2006 a formal work injury damages demand made by Notice under Section 281 of the legislation was served. A response was served by the insurer denying liability. It was not until 25 September 2008 that the worker served his formal Pre Filing Statement claiming damages on the employer.

During the time between the service of the 281 Notice and the filing of the Pre Filing Statement, the worker's solicitors had consulted counsel in relation to a potential negligence claim against the worker's former solicitors and in fact, instituted proceedings in February 2008 against those solicitors alleging that the former solicitors had failed to advise the worker a

potential damages claim against Firedam.

The limitation period in which the employer could bring a claim for contribution against Firedam expired on 31 May 2008. Accordingly the Pre Filing Statement was served after the employer had lost its entitlement to seek contribution from Firedam. The Court of Appeal noted the Workers Compensation Act permits a worker's compensation insurer to seek recovery of workers compensation payments made from negligent parties who have caused or contributed to an injury which leads to the payment of workers compensation benefits. This claim is known as a claim under section 151Z of the Act. Under section 151Z a workers compensation insurer has 6 years in which to bring a claim against a negligent party from the date of each payment of compensation.

The worker argued that the workers compensation insurer was on notice of its right of recovery from the date that it received the factual report identifying that it had a right of recovery and in those circumstances it chose not to pursue the recovery and as a consequence of its own failure to seek an indemnity pursuant to section 151Z the prejudice flowed from that decision. The Court of Appeal rejected that argument noting that the claim under section 151Z was different to one for contribution. A claim for contribution could have resulted in a different amount being payable to that which could be recovered under section 151Z.

The worker also argued that if the employer chose in the past not to pursue to a 151Z claim it would not have sought contribution from Firedam. There was no evidence to that effect and that was seen as merely a matter of speculation and the Court of Appeal rejected that argument.

The Court of Appeal concluded that the workers compensation insurer had lost a right of contribution against Firedam and that amounted to prejudice and that it was not just to allow the claim to proceed.

Section 151D of the Workers Compensation Acc provides that an employee is not entitled to commence proceedings for any damages against an employee more than 3 years after the date the injury was received, except with the leave of the court. The court must consider the explanation for the delay as well as prejudice suffered by the employer/workers compensation insurer.

The case serves to confirm that where an employer/workers compensation insurer has a potential claim for contribution against another negligent party and the time to bring that claim expires before the worker brings proceedings for work injury damages the employer/worker compensation insurer suffers prejudice and that prejudice will generally be sufficient for a worker's compensation insurer/employer to resist an application by the worker to bring a work injury damages claim outside the limitation period for work injury damage claims.

Additional Permanent Impairment Claims – Approved Medical Specialist Or Arbitrator?

The WCC presidential decision in *Abou-Haidar v Consolidated Wire Pty Limited* examined the question of whether it is necessary for a worker to establish a deterioration in their condition to the satisfaction of an Arbitrator before the matter can be referred for assessment to an Approved Medical Specialist. It has often been the cornerstone of many arguments in the Commission that there needs to be a determination by an Arbitrator that the deterioration in the worker's condition has occurred prior to it being referred to an Approved Medical Specialist for assessment of the level of permanent impairment.

In this matter, the worker originally brought a claim in 2006 for 16% whole person impairment. The worker was referred to an Approved Medical Specialist with the cervical spine and thoracic spine which resulted in assessment of 6% whole person impairment to the cervical spine and nil whole person impairment as a result of injury to the thoracic spine. This was not subject to any appeal.

In 2010, the worker made a further claim for whole person impairment, including 5% for the thoracic spine, due to an alleged deterioration in his medical condition. The employer argued that the Arbitrator would need to determine whether there had been any deterioration prior to referral to the Approved Medical Specialist. The Arbitrator originally found in favour of the employer.

The Arbitrator commented it was necessary for the Commission to determine as a threshold issue whether the worker has satisfied the burden of proof of demonstrating that his condition had deteriorated in order to have an entitlement to obtain an assessment of additional whole person impairment from an Approved Medical Specialist.

Deputy President Bill Roche disagreed with the Arbitrator's determination. He noted that the Workers Compensation Act 1987 and the Workplace Injury Management and Workers Compensation Act 1998 were silent as to claims for additional lump sum compensation. There was no specific reference to a deterioration of a worker's condition when seeking an increase in a previously assessed and compensated whole person impairment. Nevertheless despite the silence of the legislation in regard to this issue, the right to claim such compensation could not be doubted.

The Deputy President commented it was an Arbitrator's task to determine injury and other liability issues. Once that was done, the question of the extent of any whole person impairment as a result of the injury is a matter for an Approved Medical Specialist. In this matter, as the employer had conceded the worker had injured his thoracic spine but disputed his entitlement to lump sum compensation, this gave rise to a medical dispute within the meaning of the legislation. As the only issue in dispute was the extent of the worker's whole person impairment as a result of an accepted injury, that issue could not be determined by the Arbitrator but rather an Approved Medical Specialist. The Deputy President stressed that a worker did not have to establish a prima facie case of deterioration before a claim can be referred to an Approved Medical Specialist for assessment.

The employer argued in this matter that a finding such as this would result in workers bringing unlimited claims for additional lump sum compensation. The Deputy President commented that all claims have to be supported by assessments provided by WorkCover trained assessors. Any workers who bring claims that are frivolous or vexatious, fraudulent or without proper justification will be liable to an adverse costs order.

The decision neatly conveys the legal position that once a worker has properly made a claim and liability issues have been determined, there exists a medical dispute as to a deterioration and additional lump sum impairment. The only appropriate forum for such a determination of a dispute of that kind is with an Approved Medical Specialist. Although there is no need for a worker to establish a plausible case for a deterioration before referral to an Approved Medical Specialist for determination of an additional claim for whole person impairment, if the worker is unsuccessful in his claim, the lack of a plausible case for a deterioration may result in a costs order adverse to the worker.

Is A Partially Incapacitated Worker Entitled To Section 40 Payments While Attending Treatment?

Although only a first instance Arbitrator's decision, in Marshall v Australian Automotive Group Pty Limited (January 2011), Arbitrator Elizabeth Beilby, determined that the worker was not entitled to compensation pursuant to Section 40 for the two hours per week that he was absent from work performing an exercise program at a gymnasium. There was no dispute the gymnasium attendance was "reasonable and necessary" treatment and was documented on the Workcover Medical Certificate. To accommodate the program, the employer had offered to allow the worker to start work earlier each day so he could leave work earlier on two days to attend his gymnasium before it closed.

The employer's doctor, the worker's treating specialist and an injury management consultant all agreed the worker was fit to undertake suitable duties 38 hours per week. The worker's nominated treating doctor however only certified the worker as fit for suitable duties 36 hours per week, on the basis that it was more beneficial for him to perform the exercise program for two hours after work.

On the basis of the medical evidence the Arbitrator found no reduced physical ability to perform suitable duties 38 hours per week. Although the exercise program was "reasonable and necessary" she commented that this was not the test for partial incapacity. The Arbitrator commented the starting point for weekly compensation was an incapacity and a simple medical treatment in the form of a gymnasium program was not an incapacity.

The case demonstrates that a worker's entitlements pursuant to Section 40 are dependent on physical incapacity for work in the labour market, not for the workers convenience to attend medical treatment at a time of their choosing.

No Deemed Total Incapacity Where There Are No WorkCover Medical Certificates

In NSW in the recent decision of Pacific National (NSW) Pty Limited v Plummer [2010] NSW WCC PD 109, Deputy President O'Grady considered the determination of worker's entitlements pursuant to Sections 38 (partial incapacity deemed total incapacity) and 40 (partial incapacity) of the Workers Compensation Act (NSW) in circumstances where the worker had delayed giving formal notification of his claimed injury.

Mr Plummer was employed by Pacific National as a train driver for 23 years. He alleged he injured his back as a result of

postural difficulties whilst seated during the performance of his duties. He alleged his injury caused incapacity for work from 18 December 2007 to 26 October 2008. A claim for weekly compensation was made by Mr Plummer almost seven months after the period of incapacity commenced. During the earlier period, Mr Plummer provided medical certificates which were not WorkCover medical certificates. The first WorkCover medical certificate was dated 30 June 2008.

The primary matter in issue was "injury" and this was resolved in the worker's favour by both the Arbitrator and the Deputy President.

In determining the worker's entitlements to weekly benefits, the Deputy President noted the worker relied on Section 38 in calculating his entitlements. The Deputy President accepted the worker was at all times ready, willing and able to accept an offer of suitable employment. The employer disputed the worker had requested suitable employment.

The Deputy President agreed with the employer that Section 38A(2)(b) must be read together with Section 38(1)(a), finding that liability to make payments pursuant to Section 38 arises on compliance with the formal requirements of Section 38A(2)(b) only where it is established that the partial incapacity addressed in the medical certificate arises as a result of an injury within the meaning of the 1987 Act, or that the employer was otherwise aware by reason of Notice of Injury or a claim, of such injury. As there was no Notice of Claim or injury until July 2008 and the non WorkCover medical certificates contained no reference to the relevant injury, the Deputy President found there was no liability pursuant to Section 38, concluding the employer was completely ignorant that the partial incapacity alleged was a result of injury.

The decision indicates that unless the employer is on notice of a claim and the certificates of incapacity or other documents contain all the information specified in Section 38A(2)(b), the worker will not be entitled to weekly benefits calculated in accordance with 38. The decision also indicates that any deficit in the certificates of incapacity cannot be cured retrospectively by provision of a backdated WorkCover medical certificate.

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

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