GD News

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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.

Negligence Is Not Enough In A Claim Against A Statutory Authority Exercising A Special Statutory Power Conferred On It.

In personal injury claims a Court must determine whether or not there was a reasonable response to a foreseeable risk of injury to determine whether or not a defendant has discharged its duty of care. However when negligence is alleged against a statutory authority there are further issues that must be considered. A statutory authority is required to make administrative decisions in the exercise of their special statutory powers and over time the law has developed to provide an immunity from liability. A statutory authority exercising its powers is immune from liability unless the act or omission in the exercise of its special authority is so unreasonable that no reasonable authority could ever come to exercise its authority that way.

When the *Civil Liability Act* was introduced in NSW in 2002 section 43A codified this concept and introduced a pre-cursor to liability on the part of a statutory authority exercising its special statutory power. The pre-cursor was that "the authority would not be liable in negligence in the exercise of the statutory authority unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of or failure to exercise its power."

Prior to the introduction of the *Civil Liability Act* It had been said that something overwhelming was required to show that a decision was so unreasonable that no reasonable authority could have come to it. Section 43A introduced a different concept. It is no longer a question of what a reasonable authority would have done and rather it is a question of what is so unreasonable that no authority could properly consider the decision or act to be reasonable.

The NSW Court of Appeal in *Allianz Australia Insurance Limited v Roads and Traffic Authority of New South Wales* and *Kelly v Roads and Traffic Authority of New South Wales* has recently provided guidance on the analysis required in the determination of liability of a statutory authority. Essentially section 43A requires a determination to be made from the perspective of the authority but with an objective element.

Kelly's case was concerned with the RTA's statutory authority to control roads and place warning signs. In particular it was concerned with warning signs placed to warn road users when water covered the road.

Mark Kelly and a passenger in a motor vehicle he was driving were killed in a collision when the vehicle Kelly was driving aquaplaned and collided with a vehicle travelling in the opposite direction on the Riverina Highway. Prior to and at the time of the accident water was flowing across the road. Mr Kelly was travelling at speed when he encountered the water. The driver in the other vehicle and a passenger in that vehicle suffered serious injuries. Prior to the accident the RTA had placed signs warning "Water Over Road" in the vicinity. One was placed on the southern side of the road 924 metres east of the water and the other was placed on the northern side of the road to the west of the water. Kelly was approaching the water from the east.
A number of claims were brought by the dependants of those killed and the injured driver and passenger including claims against the RTA.

Inside

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The trial judge found that Mr Kelly had been negligent in failing to keep a proper lookout or in travelling at an excessive speed in the circumstances. Allianz Australia Insurance Ltd ("Allianz") the third party insurer of Mr Kelly's vehicle, was found liable for the accident. The trial judge also found that the "Water Over Road" sign should have been placed 150 to 300 metres to the east of the water and that the RTA had breached its duty of care in placing it 924 metres to the east. He held that in placing warning signs the RTA was exercising a special statutory power, and found that its acts or omissions had the unreasonableness in the exercise of such a power required by s 43A of the *Civil Liability Act* to attract liability and amount to a negligent act. However the trial judge found the RTA was not liable for damages as the accident was not caused by the RTA's breach of its duty of care.

An appeal by Allianz followed. Allianz challenged the trial judges findings on causation.

In the appeal it was necessary for the Court of Appeal to reflect on the provisions in the Civil Liability Act that govern the liability of Statutory Authorities in NSW.

Section 43A of the Civil Liability Act provides:

> *"43A Proceedings against public or other authorities for the exercise of special statutory powers*
> *(1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.*
> *(2) A special statutory power is a power:*
> *(a) that is conferred by or under a statute, and*
> *(b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.*
> *(3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power."*

Previous judgments of the NSW Court of Appeal have commented on the effect of section 43A of the Civil Liability Act and Giles JA in this case noted:

> *" In Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd Campbell JA, with whom McColl JA and Sackville AJA agreed, said … that the preferable reading of s 43A(3), considered as text, was that it "either replaces or supplements" the pre-existing standard for the existence of liability arising from exercise or failure to exercise a special statutory power. After further consideration, his Honour said .. that -*
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> > *"What [s 43A(3)] does, by adopting a form of words that there is no civil liability unless … , is to state a precondition for the existence of civil liability in the sort of circumstances to which it is addressed. One would need to look at the pre-existing common law of negligence to ascertain when it was that there was a duty of care, and whether there had been what the common law would regard as a failure to exercise reasonable care. Section 43A(3) imposes an additional requirement, beyond those of the common law, before liability can be established."*

The question for the Court of Appeal was whether the RTA's action was "so unreasonable that no authority having its special statutory power to erect warning signs could properly consider its act to be a reasonable exercise of that power".

Giles JA noted that it was necessary to objectively assess the RTA's conduct. The trial judge had determined the conduct was unreasonable and irrational and Giles JA criticised this analysis which was more indicative of a subjective assessment of RTA's conduct and noted:

> *"There is a danger in framing the relevant question as whether the "decision to so place the sign" was irrational; or as it was put in another way ….whether "the decision by (the RTA)" was irrational or unreasonable. The danger is that the question becomes one which focuses on the decision-maker's subjective thought processes, when it should be objectively determined.*
> *No doubt the decision-maker's subjective processes can inform the objective determination required by s 43A(3) of the Civil Liability Act, although a trial should not become diverted to their examination. In the objective determination relevant facts can be found from the decision-maker's evidence (such as the existence of the dip and the extent of water on the road in the dip in the present case), although a fact of which the decision-maker was not aware but should have been aware may also be a relevant fact for the objective determination."*

Giles JA noted the RTA's conduct " may not objectively have been the preferable or correct course", but was

"comprehensible".

Giles JA noted the words "could properly consider" found in section 43A require a determination to be made from the perspective of the authority, but with an objective element.

The question to determine was whether the RTA's decision was "*so unreasonable as to amount to an improper exercise of the relevant power."*

The Court of Appeal did not think it was so unreasonable. Giles JA in his judgement went on to conclude:

> *"Applying the terms of s 43A, I respectfully differ from the trial judge. Accepting the guiding principle that a warning sign should be close enough so that the driver would recognise the hazard when he or she came to it, and attributing to the RTA Mr McGregor's observations of water in the dip, in my view the RTA could, and could properly consider placing the "Water Over Road" sign where it was placed a reasonable exercise of its special statutory power. Placing the "Water Over Road" sign east of the dip, to act as a warning for the dip and for the water over the road at "Lyntods", was in the circumstances not an act so unreasonable that no authority having the RTA's special statutory power to erect warning signs could properly consider it to be a reasonable exercise of that power."*

Accordingly the RTA was not liable as Allianz failed to establish the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power. The trial judge's findings on this issue were therefore incorrect, however the Court of Appeal agreed with the trial judge's conclusion that Allianz had not established causation.

Giles GA concluded:

> *"A plaintiff has the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation: Civil Liability Act, s 5E…. It was necessary that the appellants prove the facts relevant to determining causation in accordance with s 5D of the Civil Liability Act."*

The Civil Liability Act imposes a "but for" test for causation and Giles JA stated:

> *"if it could not be concluded on the balance of probabilities that the harm would not have happened but for the negligence, then it could not be concluded that the harm was caused by the negligence…*
> *Accordingly, the appellants (Allianz) had the onus of establishing that it was more probable than not that, but for the failure to place a "Water Over Road" sign 150 to 300 metres to the east of "Lyntods", the accident would not have happened."*

Giles JA then went on to conclude that causation had not been established and found:

> *"If Mr Kelly did not see and take in the sign where it was in fact placed, in my opinion the probability is that he would not have seen a sign placed 150 to 300 metres east of (the water) at the least, it is speculative whether or not he would have done so. (Allianz) repeated the submission that attentiveness could be seen in his negotiation of the left hand bend, but it is difficult to find attentiveness when Mr Kelly did not see the water over the road, or did not react to the hazard it presented.*
> *If Mr Kelly did see and take in the sign where it was in fact placed, it did not bring a material reduction in the speed of his vehicle as it approached the water over the road. I do not accept that, on the probabilities, that was because the distance from the water over the road was such that the impact of the sign was lost; again, at the least, it is speculative whether or not he would have reduced the speed of his vehicle had the sign been closer to the water over the road …*
> *In my opinion, it should be concluded that a "Water Over Road" sign placed 150 to 300 metres to the east of "Lyntods" would not have changed Mr Kelly's driving, or at least that it is speculative whether or not it would have done so. Causation was not established."*

As can be seen from *Kelly's* case a claim against a statutory authority for failing to properly exercise its statutory powers is not a simple one. Claimant's must establish that the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise its power. That issue is determined objectively. It is also important to note that when looking at the unreasonableness of a decision the statutory authority will be immune from liability if no authority having that power 'could properly' consider the act or omission to be a reasonable exercise of or failure to exercise its power.

Giles JA noted in *Kelly's* case, there can be "*unreasonableness without negligence in the 'sense' of a breach of duty of care*", just as there can be negligence without (the requisite) unreasonableness. However even where there is the requisite unreasonableness it is still unnecessary for a claimant to establish that the negligence was a necessary condition of the occurrence of the harm and that the scope of the negligent authorities' liability should extend to the harm caused. In NSW the question is whether or not the harm would have been caused but for the negligent act.

Section 43A of the *Civil Liability Act* will provides a statutory authority with immunity from liability however the immunity is not absolute. Whilst the Courts will be the final arbiter on the reasonableness of a statutory authority's decision, liability will only be imposed where no authority vested with the relevant statutory power could properly have come to the act or omission and even then liability will only be imposed if the act or omission of the authority was a necessary condition of the harm that resulted.

Actions Against Insurers Where A Company Is Deregistered

Justice Barrett of the NSW Supreme Court has recently confirmed that where proceedings have been commenced against a company which has been deregistered Section 601AG of the Corporations Act 2001 will permit a claimant to join an insurer as a defendant to the claim in place of the deregistered company. The case of Kelley v Western Pacific Insurance Limited & Ors highlights the approach that the Court is likely to take where a claimant has mistakenly sued a deregistered company and the company had an insurance policy that is liable to respond to the claim.

Kelley suffered an injury in an incident at a hotel in Wollongong in circumstances in which she alleged RDL (the hotel operator) and Checkmate, (the provider of security guards or security services at the hotel) breached a duty of care owed to her. Kelley originally commenced proceedings against RDL. She subsequently filed an Amended Statement of Claim joining Checkmate. When she joined Checkmate it had ceased to exist by reason of its deregistration following completion of its winding up. As Checkmate did not exist Kelley could not proceed against a nonexistent defendant.

Kelley made an application to the NSW Supreme Court to substitute Western Pacific Insurance as second defendant in the proceedings in place of Checkmate. Kelley argued she had a separate claim against Western Pacific under Section 601AG of the Corporations Act 2001 which provides

> *"a person may recover from the insurer of the company that is deregistered an amount that was payable to the company out of the insurance contract if:*
> *(a) the company had a liability to the person; and*
> *(b) the insurance contract covered that liability immediately before deregistration."*

The Supreme Court confirmed that Section 601AG creates a new cause of action against an insurer to recover an amount that was payable to the deregistered company under the relevant insurance contract. There are two precursors to that liability, the first is the company is deregistered and the second is that, the insurance contract covers the liability immediately before deregistration.

The cause of action under the Corporation Act does not arise until the company is deregistered. Accordingly the cause of action is not available if a company is still in the process of being wound up.

Justice Barrett noted that any defences that an insurer may have had at the time the company is deregistered may be pleaded in defence of the cause of action against the insurer.

It was noted prima facie, Checkmate held a relevant insurance policy and it was at least arguable there was a Section 601AG claim available to Miss Kelley against Western Pacific Insurance.

Justice Barrett noted the proceedings should be reconstituted in an appropriate form. The Court therefore gave leave to join Western Pacific as a defendant rather than substitute Western Pacific for Checkmate and the Court noted the claim against Western Pacific Insurance should be pleaded based in part on the pleadings against Checkmate but also based on the addition of a derivative cause of action against Western Pacific Insurance for recovery pursuant to Section 601AG, in place of the claim against Checkmate.

Kelley's application to the Court proceeded without representation on the part of Western Pacific Insurance who had no opportunity to be heard on the matter. It was noted that Western Pacific position was sufficiently protected by its ability to

defend the claim in the ordinary course and to have the new claim struck out if the policy did not respond to the claim.

Where an insured company is deregistered before proceedings are commenced and claimants mistakenly commence proceedings against an entity that in reality does not exist the claimant will have a remedy available to them against an insurer where that insurer had a liability to pay the claim before the deregistration of the company. It must however be noted in this case it was necessary to make an application to the Court for leave to amend the proceedings and that is way the matter came before the Court. If a claimant gets it right from the start and identifies that a company is deregistered before proceedings are commenced the claimant can simply bring a derivative claim against an insurer pursuant to Section 601AG of the *Corporations Act 2001* and there is no need for the Court to provide permission to pursue such a claim. The insurer however can still take issue if it was not liable to indemnify the company for the claim before it was deregistered.

Insolvency And Director And Officer Liability Claims- Sons Of Gwalia

Disgruntled shareholders that look to recover losses that arise consequent to the liquidation or administration of a company until recent times had as a potential target of the remaining assets of the company. The High Court's decision in the Sons of Gwalia case determined that claims brought by shareholders based on misleading and deceptive conduct by the company would rank equally with other creditors' claims.

In January 2010, the Federal Government announced that it would introduce changes to the Corporations Act that would reverse the *Sons of Gwalia* decision to ensure that shareholders' claims against the company would not rank equally with other creditors' claims. We previously speculated that the knock-on effect of such a change was to focus shareholders on other recovery actions such as claims against directors and office holders which may have an increased flow-on effect for D&O insurers as shareholders seek to recoup their losses from other sources.

Whilst it was thought that the legislation would be enacted quickly, it has taken until December 2010 for the legislation to be introduced into and passed by both Houses of Parliament. The Corporations Amendment (Sons of Gwalia) Bill 2010 has now been approved by both Houses. The legislation is not retrospective, meaning that it will only have application to shareholder damages claims arising after the legislation comes into effect.

Claims by shareholders against a company will no longer rank equally with other creditors' claims. A shareholding in a company does not prevent a compensation claim from being brought against a company, rather the claim is simply postponed until all other debts payable by and claims against the company are satisfied.

If a shareholder's claim is postponed, the shareholder is entitled to receive a copy of any notice, report or statement of creditors if the person asks the administrator or liquidator of the company, in writing, for a copy of the notice, report or statement and the shareholder is entitled to vote in their capacity as a creditor of the company at a meeting of creditors only if the Court so orders.
These changes replicate US style provisions which subordinate shareholder claims to other creditor claims.

The legislation will remove access to the assets of the company unless other creditors are paid in full. Litigation funders and plaintiff lawyers who seek to bring sharehlolder class actions will now need to look to alternative claims on which to base shareholder claims if the companies assets will not discharge the claims of other creditors.

One alternative basis on which shareholder claims can be brought is based on the oppressive conduct provisions in Sections 232, 233 and 234 of the Corporations Act. Under those provisions, shareholders have standing to apply for compensation and other prescribed orders against the company.

It is not difficult to imagine the following situations arising more often:

- shareholders will argue they were misled into buying the company's shares or retaining ownership and, bring a class action under Sections 232, 233 and 234 or alternatively;
- shareholders will argue directors were knowingly concerned in the company's misleading or deceptive conduct in failing to inform the market of material facts (in breach of the Listing Rules);
- companies defend shareholder claims at a time when it is under the control of an administrator or liquidator, and the companies bring a cross-claim against current and former directors for breaches of directors' duties with the objective of recouping or being indemnified for losses incurred as a result of a shareholder class action, or
- ASIC brings an action against current or former directors alleging breaches of directors' duties under the

Corporations Act.

At the end of the day, as a consequence of the legislative changes, D&O insurers should steel themselves for an increase in claims activity in the future. It will be the directors and officers of a company that are the shareholder's targets rather than the left over assets of a company in liquidation.

Watch Out Your Family Might Sue You

It's a family event and you are working away crushing grapes, making tomato sauce, or mixing preserves and you are injured using equipment that belongs to one of your family members. Can you recover compensation from your relative that owns the equipment that was used? The simple answer is yes, as is demonstrated in the recent NSW Court Of Appeal judgment in *Agresta v Agresta* which considered a claim for damages for injuries sustained by Mrs Argesta who was injured operating equipment to make tomato sauce owned by her brother in law.

Mrs Agresta joined her extended family at the fruit farm of her brother-in-law and his wife for the purpose of making tomato sauce. There was a long standing annual tradition in the family for this to occur. Mrs Agresta was 61 years of age.

To make tomato sauce it was necessary to wash and cut tomatoes, place them in the mincing machine by placing them in a hopper and an auger blade in the machine would crush the tomatoes. The machine had been used for over 15 years without incident although Mrs Agesta had never herself operated the machine. Mrs Agresta's brother-in-law was called to go elsewhere and asked Mrs Agresta to take over the operation of the machine to deal with some remaining tomatoes. She used the machine for 10 to 15 minutes without incident until she was distracted by a question from another family member as to whether the sauce in a particular bottle was sufficient. This distraction resulted in Mrs Agresta accidently allowing her left hand to go down into the hopper with her hand being caught by the auger and she lost the top of her middle and ring fingers. Mrs Agresta commenced a claim for damages against her brother-in-law and his wife alleging that they were negligent in failing to ensure the machine has a safety guard or any other means to prevent a hand entering the hopper.

Mrs Agresta succeeded in her claim in the District Court and was awarded $305,551.00. Her brother-in-law and wife appealed arguing that there was no negligence, that Mrs Agresta was partially to blame for the accident and that her damages should be reduced for contributory negligence and finally that the damages assessed were excessive.

The Court of Appeal agreed with the trial judge in relation to the liability findings. The Court of Appeal noted that to allow Mrs Agresta to operate the machine in its unguarded condition was negligent. She had no experience in the use of the machine and there was no reason for the brother-in-law to think that she had experience. The Court of Appeal noted:

> *"to avoid injury, an operator required either high, prolonged concentration or experience that had developed an instinctive safe method of operation. Mrs Agresta did not have the latter and the risk of her having a momentary lapse of concentration in the cooperative family situation in which she was operating the machine was high. There was a significant risk that, as happened, that she would at some stage when using the machine be distracted."*

The Court of Appeal noted the fact that Mrs Agresta was aware of a risk in the operation of the machine was no answer to the claim.

It was argued that the machine created a risk that was comparable to many risks encountered in domestic situations, such as those created by sharp knives, stairs, broken glass and lawnmowers and the law does not require elimination of all such risk. It was also argued that a reasonable response to the risk was to do nothing.

The arguments were rejected by the Court of Appeal and the Court of Appeal noted that the fact that the machine operated for some 15 years without accident in circumstances where experienced operators had used the machine and not an inexperienced operator like Mrs Agresta did not assist the defendants proposition.

In the original trial the judge found that Mrs Agresta had not been guilty of contributory negligence and the Court of Appeal agreed. The Court of Appeal noted:

> *"Mrs Agresta gave uncontested evidence that she was 'being very careful' and to concentrate when operating the machine. As identified by the High Court in Podrebersk v Australian Iron & Steel Pty Limited the questions to be asked in a context such as the present is whether, assuming that the defendant had been negligent and taking into account relevant the circumstances, the plaintiff's conduct 'amounted to mere inadvertence, inattention or misjudgement or to negligence."*

The Court of Appeal noted that Mrs Agresta had been inattentive or inadvertent but not negligent. The liability for the injury rested solely with the brother in law and his wife.

At the end of the day the Court of Appeal upheld the trial judge's finding that there was negligence which had caused Mrs Agresta's injuries and there was no contributory negligence. The Court of Appeal did however reduce the damages awarded, adjusting the allowance made for gratuitous care.

The case serves as a reminder that there may well be someone to blame for an injury when a family members asks you to use their equipment to help with food preparation or the like particularly where the equipment is unsafe. Further the case serves as a reminder that mere inadvertence does not amount to contributory negligence.

Model Regulations and Model Codes of Practice for National OH&S legislation released

Safe Work Australia has released for public comment the model WHS Regulations and a number of Codes of Practice which will supplement the Work Health and Safety Act the legislation for the national occupational health and safety regime due to come into effect from 1 January 2012. A Regulation Impact Statement and an Issues Paper has also been released. The Issues paper identifies aspects where specific public comment is sought.

The model Regulations are comprised of some 548 pages and the codes of practice which have been released covered:

- How to manage work health and safety risks;
- How to consult on work health and safety;
- Managing the work environment and facilities;
- Facilities for construction sites;
- Managing noise and preventing hearing loss at work;
- Hazardous manual tasks;
- Confined spaces;
- How to manage and control asbestos in the workplace;
- How to prevent falls at workplaces;
- How to safely remove asbestos;
- Labelling of workplace hazardous chemicals;
- Preparation of safety data sheets for hazardous chemicals.

The regulations detail duties which are owed by employers, self employed, principal contractors, persons concerned with management or control of workplaces, designers, manufacturers, importers, suppliers and installers. There are also specific obligations to identify, control and guard against specific risks. The Regulations prescribe specific duties on businesses in specific areas.

As an example when it comes to the general working environment there are prescribed duties in relation to general workplace facilities and the duty to provide and maintain adequate and accessible facilities. The duties are:

"A person conducting a business or undertaking must, so far as is reasonably practicable, ensure that:

- *the layout of the workplace allows, and the workplace is maintained so as to allow, for persons to enter and exit the workplace and to move about within the workplace without risk to health and safety, both under normal working conditions and in an emergency; and*
- *work areas in the workplace have space for work to be carried out without risk to health and safety; and*
- *floors and other surfaces in the workplace are designed, installed and maintained to allow work to be carried out without risk to health and safety; and*
- *lighting at the workplace enables:*
- *each worker to carry out work without risk to health and safety; and*
- *persons to move within the workplace without risk to health and safety; and*
- *safe evacuation in an emergency.*

- *ventilation at the workplace enables workers to carry out work without risk to health and safety; and*
- *workers exposed to extremes of heat or cold at the workplace are able to carry out work without risk to health and safety; and work in relation to or near essential services at the workplace does not give rise to a risk to the health and safety of persons at the workplace.*
- *the provision of adequate facilities for workers, including toilets, drinking water, washing facilities and eating facilities.*
- *that the facilities provided are maintained so as to be:*
    - *i. in good working order; and*
    - *ii. clean, safe and accessible.*
- *In relation to those duties the person must consider all relevant matters including:*
- *the nature of the work being carried out at the workplace; and*
- *the nature of the hazards at the workplace; and*
- *the size, location and nature of the workplace; and*
- *the number and composition of the workers at the workplace."*

In addition to prescribing specific duties in relation to the general working environment, the regulations provide specific duties in relation to:

- personal protective equipment;
- first aid;
- emergency plans;
- noise;
- confined spaces;
- hazardous manual tasks;
- falls;
- falling objects;
- abrasive blasting;
- electrical work;
- diving work;
- plant design;
- plant manufacture;
- management or control of plant;
- high risk construction work;
- excavation work;
- hazardous chemicals;
- asbestos.

The regulations also detail licensing obligations in respect to particular types of work such as high risk work. For example, a person must not carry out a class of high risk work unless the person holds a high risk work licence for that class. The types of work which fall into the high risk work category include scaffolding, dogging and rigging work, crane and hoist operation (including use of reach stackers) forklift operations and pressure equipment operation. To secure a high risk work licence workers will need to achieve a national training information service competency unit which is also identified in the regulations. The draft Regulations are quite prescriptive however the detail supporting the prescriptive requirements is found in the Codes of Practice.

The Codes of Practice are designed to be used by employers, self employed, principal contractors, persons with management or control of workplaces, designers, manufacturers, importers, suppliers and installers. The Codes of Practice help to identify hazards that present a risk of harm and show ways to eliminate or minimise the risks. The Codes of Practice provide a description of the health and safety duties in relation to each hazard, identify the duty holders, discuss what is involved in managing the risks and demonstrates how to identify the risks, how to inspect the workplace, how to assess the risks and how

to control the risk. The Codes of Practice also address safe work practices surrounding risks and the equipment and methods that can be utilised to control risks.

Compliance with Codes of Practice will not be not mandatory. However the Codes of Practice will be evidence the risks that are known and the methods used to control those risks and compliance with Codes of Practice can be used to demonstrate that a business has done everything reasonably practicable to identify and control the risks.

The Codes of Practice are lengthy documents. As an example the Code Of Practice on "How to prevent falls at workplaces" runs to 54 pages in length. The Code Of Practice for the preparation of safety data sheets for hazardous chemicals runs to some 107 pages.

The issues paper sets out the proposed approach to penalties for breaches of the regulations.

Offences in the regulations that are linked to the model WHS Act specifically to either the general duties or the authorisations under Part 4 of the model WHS Act will attract the penalties set out in the legislation which include fines of up to $3,000,000 for a corporation and $600,000 for an individual for reckless breaches, $1.5 million for a corporation and $300,000 for an individual where there is a risk of death or serious injury and $500,000 for a corporation and $100,000 for an individual in other circumstances.

At the next level the model WHS Act prescribes a maximum monetary penalty of $30,000 for stand alone offences under the model WHS regulations where those offences are not linked to the model WHS Act specifically to either the general duties or the authorisations under Part 4 of the model WHS Act. However the Issue Paper has highlighted the fact that a higher amount of $60,000 is being considered. The $30,000/$60,000 figure would be the maximum applicable in the case of a corporate offender and the comparable maximum for an individual offender would be one fifth of the corporate amount. It is intended to group the regulations into three levels with the maximum penalty for offences for breaches of the regulations differing in each level. A level one breach will give rise to a maximum penalty of $30,000 (or $60,000 if the increased amount is adopted), a level two offence will give rise to a maximum penalty of $18,000 (or $36,000 if the higher scale is adopted) and a level three offence will give rise to a maximum penalty of $6,000 irrespective of whether or not the higher scale is adopted.

The table below sets out the method of allocating the relevant regulations in the three levels.

Level 1	• Offences which may have very serous consequences, i.e. risk of death or serious injury to the person if the risk control fails • Offences relating to risk assessment and hazard identification • Key administration-related offences, e.g. preparation of a safe work method statement or asbestos register • Other specific risk controls, such as technical or operational risk controls • Risk control offences—high risk industries • Emergency procedures
Level 2	• Other risk control offences • Other offences which may have serious consequences • Information and training-related offences • Notification-related and administration-related offences • Licence offences
Level 3	• Duties placed on workers • Duties placed on persons other than workers • Record-keeping offences • Low-level offences

There will also be the capacity to issue infringement notices for breaches of the regulations with penalty amounts ranging from $50 to $1,300 for individuals and from $250 to $3,250 for a corporation. Infringement penalties will not exceed 20% of the maximum penalty applicable to offences.

There is a lot of boning up to do for those involved in workplace safety.

It is time to get cracking. So what should you do?

It would be prudent to identify the specific obligations in the Regulations which will apply to your business.

It is also important for businesses to carefully consider all of the Codes of Practice and identify those which will apply to their work practices.

Whilst the model regulations may be tinkered with as following the four month public comment period the final form of the Regulations is due for release in June 2011. However the model Regulations in their current form will in all probability reflect the lay of the land in the future.

In the transition period before the commencement of the Regulations and a nationally harmonised OH&S regime in January 2012 you should:

- identify the obligations and requirements that will be imposed by the Regulations and the Codes Of Practice;
- identify any shortcomings in your work practices and take action to remedy those shortcomings;
- keep abreast of any changes that are made to the model Regulations in June 2011;
- following the public consultation period.

Times are changing. A brave new world with a national OH&S regime will be upon us before we know it.

OH&S Roundup

Two Charges Or One - Does The Penalty Differ?

Whenever a workplace accident occurs, it is not uncommon for two companies to be involved in activities which play a role in the injury which result in prosecutions for breaches of the Occupational Health & Safety Act for both companies.
A business may engage an independent contractor who sends its employees to that business to carry out work. In that situation, both the business and the contractor can be liable to prosecution when the independent contractors employee is exposed to the risk of harm. In fact, the business may be liable to a prosecution for endangering the health and safety of its employees as well as other persons (the independent contractor's employee) and, face a prosecution for two offences under the Occupational Health & Safety Act arising out of the circumstances, where as the independent contractor faces one charge as it has only exposed its employee to the risk of harm.

So where there are 2 charges do you face double the penalty?

In Fidoto Pty Limited v Inspector John Patten, the Full Bench of the Industrial Court of NSW was called on to consider the penalty imposed on Coles Myer Limited and Fidoto Pty Ltd a contractor to Amcore Packaging that picked up cardboard from Bi-Lo stores operated by Coles Myer Limited. A Fidoto truck driver attended the premises of a Bi-Lo Supermarket to load bales of cardboard and fell from a loading dock hoist onto the floor of the loading dock. At the time of the accident, the storeman, an employee of Bi-Lo, was assisting the truck driver.

Coles Myer were prosecuted for two breaches of the Occupational Health & Safety Act. The first for failing to ensure the health and safety of its employees and, the second, for failing to ensure the health and safety of persons other than its employees.

Fidoto was charged with a breach of the OH&S Act for failing to ensure the health and safety of its employees.
Both companies had prior convictions. The original Judge determined that each defendant had been equally culpable for the offences and each defendant pleaded guilty and received a discount of 25% on their fines in light of the early plea of guilty. Fidoto was convicted and fined $90,000 for its offence and Bi-Lo was fined a total of $90,000 for the two offences, apportioned equally between each charge.

Fidoto appealed and challenged its conviction arguing that it had only committed one offence and the principles of parity should dictate that its fine should be comparable to Bi-Lo's fine for the same breach, namely $45,000.

The Full Bench of the Court disagreed. The Court noted:

> *"Importantly between these two defendants, there are different circumstances. The two breaches by Bi-Lo, arising out*

of the same workplace accident and surrounding circumstances, on her Honour's finding as to the total level of commonality in the two charges, required her to apply the principle of totality so as to properly reflect the total criminality of Bi-Lo – Bi-Low was not to be penalised twice for the same conduct. As a result of the application of the principle of totality, Bi-Lo has been fined a total of $90,000, the same total amount that the appellant (Fidoto) has been fined. The fact that the sum of $90,000 has been divided between the two offences upon the application of long standing sentencing principles, therefore cannot lead to any justifiable sense of injustice. Here, the mere difference in monetary penalties properly understood does not lead to a conclusion that there is an unjustified discrepancy".

The fact of the matter was that the circumstances involving Bi-Lo were such that an appropriate penalty was $90,000, notwithstanding that there were two charges. The same circumstances simply lead to the commission of 2 offences. The principle of totality came into play and the culpability of Bi-Lo was no greater than the culpability of Fidoto and, therefore, an equal punishment should be measured out. That punishment was an aggregate fine of $90,000 for Bi-Lo.

Accordingly, Fidoto's appeal and arguments that its fines should be reduced to $45,000 failed.

Companies need to note that convictions for two offences arising out of the same circumstances will not result in twice the fine.

Similarly where a company is prosecuted for one offence and another for two offences the first company cannot expect half the fine imposed on the company that committed two offences.

Prosecutions In OH&S - What Needs To Be Included In The Charge?

The High Court decision of Kirk v Industrial Court of New South Wales confirmed that a charge under the Occupational Health and Safety Act must identify the act or omission which constitutes the contravention of the Act and if it does not it is a prosecution which cannot proceed.

Following Kirk's decision there was a flurry by defendants seeking to have charges dismissed based on arguments that the charges failed to disclose the essential elements of the offence invalidating those charges. In addition WorkCover NSW set out to amend charges which it considered were potentially defective. To amend a charge it was necessary to apply to the Court for leave to amend the charge and the Court has a discretion as to whether or not it would allow an amendment.

Charges that are currently being brought by WorkCover generally describe the alleged offence, the risk of harm and actions which WorkCover contend ought to have been taken in much more detail than previously. Some prosecutions commenced before the decision in Kirk's case are still pending and are subject to a challenge by defendants although in light of a recent decision of the New South Wales Court of Appeal the number of challenges to prosecutions on the basis that the charge has been inadequately described is likely to decrease.

The NSW Court of Appeal in John Holland and Parsons Brinkerhoff (Australia) v The Industrial Court of NSW was called on to consider appeals from the Industrial Court where the Full Bench of the Industrial Court had rejected challenges by John Holland and Parsons Brinkerhoff that charges were invalid as they did not adequately describe the offence.

On 2 November 2005 the roof of the Lane Cove Tunnel under construction in Sydney collapsed. John Holland in a joint venture with a related corporation, Theiss was the constructer of the Lane Cove Tunnel and Parsons Brinkerhoff was the designer. An inspector employed by WorkCover commenced proceedings against both John Holland and Parsons Brinkerhoff for breaches of the OH&S Act. Persons on site at the time of the collapse including employees of both John Holland and Parsons Brinkerhoff and other employees were exposed to the incident. Charges were laid under the Occupational Health and Safety Act which requires an employer to ensure the health, safety and welfare at work of all of the employees of the employer. In addition there is an obligation to ensure that people other than the employees of the employer are not exposed to risks.

John Holland and Parsons Brinkerhoff argued that the Industrial Relations Court's jurisdiction had not been validly invoked on the basis that each of the four charges laid failed to properly identify an offence at law. The defendants relied on the High Court's judgment in Kirk v Industrial Court of New South Wales.

The arguments of John Holland and Parsons Brinkerhoff were rejected by the Full Bench of the Industrial Court. Now they have been rejected by the NSW Court of Appeal.

The Court of Appeal concluded that whilst the decision in Kirk considered offences under the Occupational Health and Safety Act 1983 the decision had equal application to the current Occupational Health and Safety Legislation in New South Wales namely the Occupational Health and Safety Act 2000.

The Court of Appeal confirmed that charge documents for an offence must identify the act or omission alleged to constitute a contravention of the OH&S Act. Further the relevant act or omission which gives rise to the offence is a failure on the part of the employer to take particular measures to prevent an identifiable risk eventuating.
Accordingly a charge must identify both the act or omission alleged and the measures which should have been taken to prevent the risk as well as the risk.

The Court of Appeal confirmed that a failure to identify the nature of the offence prevents a charge proceeding as to proceed on a document that does not identify the offence adequately gives rise to a jurisdictional error which will permit the Court to dismiss the charge.

When the Court of Appeal turned to consider the charges in this case the Court of Appeal determined that the charge adequately identified the particular measures which should have been taken to prevent the risk of a tunnel or rock collapse and subsidence or undermining.

The Court of Appeal noted that charges must be read as a whole including the particulars supplied in the original charge. An application for order is the document which is filed in the Industrial Court to ground a prosecution. The application for order must be read in its entirety as it is the document that invokes the Court's jurisdiction and if the offence is appropriately identified in the document as a whole, then there is no reason to conclude that the jurisdiction of the Court is not properly invoked.

The Court of Appeal confirmed that charges can list a range of matters, facts and actions as constituting a single offence and this does not raise any problem. It is permissible for more than one contravention to be charged as a single offence however the Court of Appeal confirmed that the charge must validly identify each alleged contravention.

The charges which were considered in this case used words such as 'adequately' or 'sufficiently' in the statement of offence when describing the actions which were alleged ought to have been taken for example, "adequate system of ground support". The Court of Appeal noted that whilst these terms may result in the need for further clarification this may be achieved by the supply of further and better particulars subsequent to the issue of the charge. The Court of Appeal specifically noted that the possibility of further particularisation does not detract from the validity of the charge for purposes of invoking the jurisdiction of the Court.

The use of the words 'adequate' and 'sufficient' in the charges sufficiently described the action which should have been taken as the Court concluded that the expressions lent themselves to standards found in tunneling practises and avoidance of collapses. A request for further clarification in the form of a question, "what actions is it alleged would have been adequate", would have resulted in the supply further clarification. The need for further clarification however did not invalidate the original charge.

The current approach of prosecutors in the OH&S prosecutions of drafting charges that provide detailed information about the facts, risks and actions that ought to have been taken which are alleged to constitute the offence will continue however the Court of Appeal's decision is likely to provide some comfort to prosecutors that the charges do not need to laboriously state all actions that ought to have been taken. Use of terms such as 'sufficient' or 'adequate' will not necessarily invalidate a charge and may simply lead to a right to request further clarification. The defendant will be entitled to further clarification when such terms are used in a charge however the charge itself will not be invalid.

Kirk's case has made certain that prosecutors provide more detailed information in the documents filed to support a charge under the Occupational Health and Safety Act however the number of charges that have been found to be invalid since the decision in Kirk have been few and was not the panacea defendants had hoped for to overcome prosecutions.

Worker or Independent Contractor? - the Decisions Continue

In our April 2010 edition of GDNews we examined the Workers Compensation Commission decision in Djuric v Kia Ceilings Pty Limited. The decision set out a number of criteria used in determining whether a worker is an independent contractor or

an employee, deemed or otherwise, under the NSW workers compensation legislation. In December 2010 Deputy President Kevin O'Grady delivered a presidential decision in Djukic v Tactical Cargo Solutions Pty Limited [2010] NSW WCC PD 123 where once again this question was examined.

Mr Djukic established an electrical business known as Hoxton Communications and in February 2007 he entered into an arrangement with Tactical Cargo Solutions concerning the performance of electrical work at their premises at Botany. When Tactical Cargo Solutions (TCS) moved to new premises at Milperra in 2008, Mr Djukic carried out the electrical relocation work. In respect of all the work carried out, he presented invoices to Tactical Cargo for the work done. On 10 March 2008 he was injured after falling off a ladder whilst working at the new TCS premises in Milperra.

Mr Djukic made a claim under the workers compensation policy of TCS. He argued that he was either a worker in the employ of TCS or in the alternative he was a deemed worker pursuant to the provisions of clause 2, Schedule 1 of the Workers Compensation and Work Injury Management Act 1998 (NSW). The work performed by Mr Djukic involved the employment of an offsider, he utilised his own equipment, provided his own transport and attended the premises on a variety of dates when he worked variable hours. All work was charged on an hourly rate and charges were made in respect of the materials provided. The work performed was specialist electrical installation and was work performed in the course of Mr Djukic's trade and business. Mr Djukic argued that TCS exercised a level of "control" in the performance of that work despite no evidence adduced either in the original hearing or the appeal which could lead to a conclusion that the relationship was of the traditional master and servant. Deputy President O'Grady determined Mr Djukic to be an independent contractor.

In relation to the allegation that he was a deemed worker, it was clear that work Djukic carried out was incidental to a trade or business carried out by a contractor for a value in excess of $10 (the first limb of the deemed worker provisions). The worker however failed in the second limb of the deemed worker provisions as Mr Djukic employed another worker to carry out the electrical work. Accordingly he was not entitled to workers compensation as a deemed worker.

As in his earlier decision of Djuric v Kia Ceilings Pty Limited, Deputy President O'Grady reinforced that the onus of proof in establishing a claimant is not an independent contractor or is a deemed worker still rests with the claimant. This is established on the balance of probabilities. Interestingly, despite the examination of various criteria such as the flexibility of working hours, the supply of own tools etc when determining whether a claimant is an independent contractor, the comments made by the Deputy President with regards to the lack of evidence as to purported control exercised by the alleged employer suggest the "control" test is still a determining factor and it is not enough for a claimant to assert they were under the control of a person there must be evidence of control.

Drinks After a Training Course – In The Course Of Employment?

In *Department of Corrective Services v Weekes* (2010) President Judge Keating examined an injury which occurred whilst a worker was out drinking with work colleagues whilst participating in a training course. The worker, Michael Weekes, was employed by the Department of Corrective Services as a dog handler. Between 19 September 2007 and 25 September 2007 he was required as part of his duties to attend a dog training course at the Wellington Correctional Centre with 7 other officers. Mr Weekes alleged that on Saturday 22 September 2007 he was encouraged by two senior officers to join them and others s attending the course for dinner and drinks following at the conclusion of the day's training activities. They attended the Local Bowling Club where they consumed drinks and an ate an evening meal. Shortly thereafter they left the bowling club and proceeded to a local hotel arriving there soon after 9.30 pm. After a number of altercations in the hotel with fellow patrons, Mr Weekes commenced walking back to his motel to rejoin his colleagues when he was assaulted. At least one of the assailants was a person involved in the earlier disputes in the hotel.

Mr Weekes was initially successful in his claim for compensation on the grounds it was within the course of his employment and employment was a substantial contributing factor to the injury. On appeal, President Judge Keating examined the connection between employment and an injury outside work hours. The President commented that whilst the worker was within one overall period or episode of work, whether the injury was in interlude or an interval within that episode needed to be closely examined. An injury sustained in such an interval will only be in the course of employment if it incurred at that place of employment or while the employee was encouraged in an activity in connection with that employment. The exception will be when a worker was guilty of gross misconduct which would take the worker out of the course of his employment. The factual circumstances in this matter were Mr Weekes was not guilty of gross misconduct.

The worker relied upon evidence of encouragement from a joint suggestion of senior officers that "we all go out for drinks and a meal together". The suggestion was made in the content that it had been Mr Weekes experience attending previous

courses that attendees were encouraged to "team build" by socialising after hours during a course. Ultimately President Keating accepted there was sufficient encouragement from the senior officers to attend dinner and drinks at the local bowling until 9.30 pm. Nevertheless there was no evidence by Mr Weekes or the senior officers that there was any discussion, inducement or encouragement by any senior officer of the Department to proceed from the bowling club after dinner to the hotel for more drinks.

President Keating reminded the worker it was his onus to prove that the employer expressly or impliedly induced or encouraged him to spend the interval or interlude of a particular place or in a particular way. The worker was unsuccessful as there was no evidence he was encouraged to indulge in a drinking session that lasted until the next morning. In particular, the President highlighted other attendees at the hotel understood their attendance at the hotel was to be part of a "social get together" without any involvement by senior officers. The fact that two senior officers did not raise an objection and that they joined in with the rest of the group attending at the hotel did not establish that the officers singularly or jointly induced or encouraged Mr Weekes to attend at the hotel. Indeed, to drink to the point of intoxication and engage in unruly behaviour into the early hours of the morning would not have been within the course of employment.

President Keating further commented that any employment characteristic ceased around 9.30 pm to 10.00 pm when dinner and drinks at the bowling club finished. In the alternative, whilst it would have been reached by 11.30 pm when some of the members of the group were asked to leave the hotel for fighting in the hotel, it was certainly reached when Mr Weekes was escorted from the hotel at 1.48 am.

The decision of the Commission neatly signals the point when so called "team building" activities that seem to be an intrinsic part of employment training courses will cease to have an employment characteristic. Provided the employer does not actively encourage or induce workers to "kick on" at an alternative venue with further drinks, they will escape liability. The simple fact that management or senior employees attend with an injured worker at a subsequent social gathering is insufficient to invoke the protection of the Workers Compensation Act for the injured worker. It is refreshing to see the Commission draw a distinction between afterhours social gatherings amongst workmates and activities for the express benefit of the employer in encouraging team building.

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