GD News

Gillis Delaney Lawyers

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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.

Hoteliers Liability For Assaults On Patrons

Incidents involving intoxicated patrons of pubs and hotels in NSW have come into focus as a consequence of the Government's recent initiates to combat alcohol related offences. Initially the Government introduced lockout laws where "declared premises" were required to stop serving alcohol for 10 minutes every hour after midnight, use plastic glasses only, prevent patrons entering the premises after 2.00 am and stop serving alcohol 30 minutes before closing. The laws were aimed at reducing violence at 50 NSW venues which the Government had identified. The Government also announced that the days of 24 hours trading were coming to an end with no more around the clock licences to be granted. It was suggested that the longest trading hours would be 18 hours and 24 hour venues would come under review.

The Government has now introduced a star rating system to identify hotels which are more prone to alcohol related violence. In addition more recently Sydney City Council has mooted the introduction of trading hour restrictions as part of the grant of development applications.

Assaults involving hotel and club patrons have also become a hot media topic with the media recently publishing figures released by the NSW Bureau of Crime Statistics and Research which identified 13,086 separate assaults involving incidents in pubs and clubs in NSW over a 12 month period to July 2008. The Bureau's data was based on police information on the number of confirmed assaults inside each pub and club. Information published by the Sydney Morning Herald suggests that when there is an analysis of assaults for all other alcohol related incidents attended by police inside and outside licenced premises, the level of intoxication in every incident as well as the time, date and name of the hotel linked to the results are quite different and the number of incidents involving intoxicated patrons surges.

Whilst there will be much debate on the accuracy of the analysis performed by the Sydney Morning Herald, the fact remains that hotel incidents involving intoxicated patrons will continue to be a problem for hoteliers and no doubt insurers. So what is the position on the liability of a hotel for the acts of its intoxicated patrons? The NSW Court of Appeal has recently been called on to consider two claims by patrons who were injured in subsequent assaults after initial altercations on licensed premises.

Karimi v Rooty Hill RSL Club Limited

The first case involved Karimi who was a patron at the Rooty Hill RSL Club Limited. Karimi suffered serious injury as a result of an assault which was committed on him in the car park of the Rooty Hill RSL by an intoxicated patron, Michael Smith. The assault occurred around 1.30pm on a Saturday night. Karimi was the innocent victim of an earlier unprovoked assault by Smith inside the Club that evening. As a consequence of the initial incident both men were evicted from the Club by security guards employed by Allied Security Group Limited. The departure of each was managed by Allied staff such that Karimi and his companions left by the rear western entrance and Smith and his girlfriend and others by the front entrance.

Smith told the security guards that he intended to go home and the security guards saw Smith and his companions drive out the front car park. This information was conveyed to the security

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staff at the western entrance who then invited Karimi and his companions to leave. Unfortunately, Smith was driven to the western car park by his companions and as Karimi walked through the car park Smith ran up and hit him and king hit with sufficient force to knock him backwards to the ground. Karimi was conveyed in an unconscious condition to hospital where he remained comatosed for around 2 months and suffered significant residual brain damage as a result of the assault. Karimi brought proceedings for damages for injuries that he sustained in the assault. He sued the Club and Allied in negligence and sued Smith for trespass to persons.

The negligence alleged against the Club and Allied was based on the failure to devise and maintain a system by which offenders such as Smith had completely left the premises before victims were permitted to leave. It was argued that the Club should also have required Allied to devise and maintain such a system and the Club should have satisfied itself that the systems Allied had in place were appropriate. Karimi's lawyers alleged that Karimi should have been escorted to his vehicle, and not allowed to return to the vehicle unaccompanied.

Karimi succeeded in his claim against each of the defendants and in a cross claim between Allied and the Club, the trial judge effectively determined that the liability of the Club and the security company was equal.

Both the security company and the Club appealed.

Justice Allsop of the Court of Appeal noted in his judgment noted that

> *"the law recognises that occupiers of licensed premises may be liable for the tortious or criminal conduct of patrons. . . . The basis of the liability lies in the control exercised by the occupier over patrons and the occupier's knowledge, or ability to know about, the intoxicated condition of patrons. . . . The element of control is subject to the statutory obligations not to permit intoxication or violent conduct on licensed premises and to remove those who engage in such conduct."*

The duty to take steps to protect patrons from tortious or criminal acts to other patrons not only arises from the fact of intoxication, an additional element is required, namely knowledge, actual or constructive of the aggressive character of the person when intoxicated.

In this case it was accepted by the Club that it had a duty to exercise reasonable care arising out of the intoxicated or dangerous condition of its patrons and the duty extended to the protection of a patron whilst he was on or departing from the premises. Allied also accepted that it had a duty by reason of provision of security services at the Club to exercise reasonable care to avoid one patron encountering another in circumstances where it knew or had constructive knowledge that the patron was a potential source of danger.

The Court of Appeal concluded that both the Club and Allied owed a duty to Karimi but did not fail to exercise reasonable care. The Court of Appeal accepted that the policy of requiring all participants in an altercation to be removed from the premises was reasonable. One consequence of such a policy was that an innocent party is potentially vulnerable to a further assault by being required to leave along with the aggressor. Smith was known to be intoxicated and aggressive inside the Club and therefore the Club and Allied's duty did not come to end following his eviction.

The security company spent time talking to Smith so as to satisfy themselves that he had calmed down and it was his intention to go home. The Court of Appeal noted that it was Allied's assessment of Smith's condition which was critical to liability of Allied and the Club for the latter assault as this knowledge influenced the determination of the measures that were reasonably required to discharge their duty.

Justice Allsop in his judgment noted that the conclusion that the Club and Allied were negligent could not be sustained. It was only by reasoning backwards from what was known to have happened that a contrary conclusion could be reached.

Smith had appeared to have calmed down and had been planning to go home with his girlfriend. Karimi was not asked to leave until the security staff confirmed that Smith had been driven out of the Club's premises. Karimi was one of a group of men when he left the Club. The Court of Appeal noted that the second assault occurred near security guards that were standing in a well lit area no more than 10 metres away from Karimi who was with three male companions. Justice Allsop concluded that this attack was carried out without regard to the inevitability that Smith would be apprehended in the aftermath of it. And in those circumstances the Court could not conclude that it was probable that the assault would not have occurred if the measures suggested by the Trial Judge in the original trial (namely escorting Karimi) were employed. The end result was that Karimi's only recourse for damages was against his assailant. The hotel and security company were not responsible for the damages.

Portelli v Tabriska Pty Ltd & Ors

The second case considered by the Court of Appeal involved the Aspen Hotel in Jindabyne. At approximately 4.10 am one morning Portelli was seriously injured by blows and kicks to the head in a fight in Jindabyne. The incident occurred in a public street after Portelli and a companion had left the Aspen Hotel and were returning to their lodgings. Two of the assailants had earlier been involved in a brief altercation with Portelli inside the Hotel over a game of pool. This altercation occurred close to closing time. After the altercation was broken up, one group of patrons was asked to leave the Hotel via the front door. Portelli and his companion were allowed to finish their drinks and their game of pool and within a short interval left via the backdoor of the Hotel which opened onto a laneway. As Portelli and his companion were walking up the laneway a group of persons came into view as they were walking up the street which intersected the laneway. As the two groups met a fight broke out and Portelli was punched to the ground and kicked in the head whilst on the ground. The fight occurred only a short distance away from a police station.

Portelli claimed damages from the owner and occupier of the Hotel, the licensee of the Hotel, the provider of security services and the assailants. The claims against the Hotel, the licensee and the security company were dismissed in the Supreme Court. Portelli appealed, however he found no joy in the appeal.

The original trial judge noted that Portelli's facilities were not affected by alcohol to any significant degree. He was involved in an altercation in the front bar but he did not start it but defended himself and the altercation was terminated within a few moments by hotel staff. It did not involve any serious violence and apart from a minor cut to the chin of Portelli, no one was hurt. Those responsible for Portelli's subsequent assault were escorted out of the hotel through the front door and Portelli was allowed to finish his drink and game of pool. Portelli's companion in his evidence said he had no concern for his safety and was not expecting further trouble.

The trial judge concluded:

> *"In my opinion, the duty of care owed by the first and second defendants relevantly extended only to preventing injury to the plaintiff on the premises under their control. It did not encompass a duty of care where injury to the plaintiff was occasioned by the deliberate wrongdoing of persons over whom the defendants had no control in a public street"*

The trial judge also went onto conclude:

> *"That even if there was a duty to exercise care there was no acceptable evidence that there were any facts that were known or ought to have been known to the hotel owner and hotel licensee requiring them to take steps to protect Portelli. Effectively if there was a duty there was no breach."*

The Court of Appeal did not agree with the original findings on the question of duty.

Justice Allsop of the Court of Appeal noted:

> *"I have reservations about whether it can be said, as the primary judge did, that the duty cannot extend to any circumstances where the wrongdoing causing injury to the plaintiff occurred in a public street. The element of control which, together with the statutory obligations and occupation of the site, is the foundation of the duty may in appropriate circumstances apply to control of the victim (or at least circumstances which attend the victim) as well as of the aggressor. The fact that the aggressor has been put out of the hotel may not exhaust the obligation of the licensee or occupier to take reasonable steps to respond to a foreseeable risk of injury to the remaining patron. One can envisage a multitude of circumstances in which a simple step by the licensee could prevent a patron walking outside into almost certain physical injury. Care must be taken, however, to prevent recognition that the control able to be exercised by the licensee or occupier can be the foundation of a duty of care to a patron becoming transformed into a proposition that the licensee or occupier has a positive obligation to become the protector and guardian of the so called "innocent" patron whenever danger outside the hotel can be reasonably apprehended…… . A publican may anticipate that a fight, which has occurred in his or her hotel before being broken up, might reignite on the street. It might be foreseeable that if this occurred there would be danger to a patron who was involved in the fight previously in the hotel and has not left, but who intends to leave. In these circumstances, it might, in all the circumstances, be prudent of the publican to call the police. It does not mean, however, that the publican necessarily has a legal duty to do so in the discharge of a duty to a remaining patron or that he or she thereafter becomes the guardian of the patron who is still on the premises or that he or she becomes responsible for getting that patron home and beyond the clutches of the potential combatant outside."*

In this case the Court of Appeal noted that if the circumstances had revealed that there was a threatening group outside the

hotel and it was reasonably apparent to the licensee that the patron would or might well be set upon when leaving, whatever exit he used, the hotelier may need to ring the nearby police as a reasonable step in the furtherance of the safety of the patron. However in terms of the duty owed to the patron it might well have been sufficient for the hotelier to warn the patron of the danger and leave the issue to a responsible adult to make his own decisions as to how to deal with the situation. It was also noted that:

> *"if the means undertaken by the licensee or occupier of dealing with any disturbance on the premises heightened the risk of injury to one party to the violent assault of another this may reflect a breach of duty resting on the control exercised in dealing with the disturbance. For instance, if both protagonists in an apparently uneven fight are thrown out of the hotel through the one exit into a back lane with a concealed means of egress to the street the subsequent injury to the less well-equipped combatant may be seen to be as much a result of the steps taken by the publican as a result of the blows of his adversary. "*

As Justice Allsop noted when considering the duty of care of a publican

> *"To the extent that the duty exists, its content will be fashioned by the particular circumstances including, in particular, the nature and circumstances of the damage inflicted and the identity of the particular person in question. For instance, any obligation on the licensee occupier based on control to break up a fight on the premises and eject the combatants may found a duty to other patrons. It would not necessarily follow that one of the willing combatants could complain about, however, his injuries if the publican was slow to act.*
>
> *The usual duty of care of an occupier to entrants must be recognised. Further, the conduct (whether as occupier or otherwise) of a public house or other place of entertainment may, of itself, create foreseeable risks to the safety of attendees, which may include the possible violent or rowdy behaviour of some attendees. This may found a duty based on control (perhaps springing in part from occupation) to exercise reasonable care to avoid harm to attendees from such risks.*
>
> *Nevertheless, it may mislead to speak, invariably, in terms of a generalised duty of care of a publican to take reasonable care for the safety of persons on occupied premises. The question will always be whether, in the circumstances, a duty was owed to the plaintiff, in respect of the damage suffered by him or her, to exercise reasonable care in some relevant respect arising from the occupation of premises, the control involved in any such occupation, any statutory responsibilities in relation to the licence or in relation to the conduct of the establishment and any assumption of responsibility."*

In the case in question, a fight was broken up, after a scuffle over a pool game near closing time. All patrons had to leave. One group left through the front door. The other in accordance with best practice, after an interval of time, went out the backdoor into a laneway. The laneway was checked and it was clear. The manager of the hotel did not appreciate the existence of any particular threat to Portelli. Portelli and his companions did not appreciate any particular threat, they having the benefit of being able to see the original assailants standing out of the front of the hotel while they were finishing their drinks and finishing their game of pool. At the end of the day in these circumstances there was no liability on the part of the hotel, the licensee or the security providers.

Conclusion

So hotels do have a duty to protect their patrons and the duty extends beyond the premises that they control. Much will turn on the facts of a particular case. Nevertheless hoteliers need to be aware that their duty extends beyond removing violent patrons from premises. In each of the cases the Court of Appeal decided the occupier and owner of licensed premises escaped liability as they appeared to have managed the situation reasonably having regard to the circumstances that played out. However there can be no doubt that there is a duty on hotels, hotel owners and licensees and providers of security to act reasonably not only within the premises but when removing patrons from premises following aggressive behaviour and requiring "innocent" patrons to depart the premises.

Whilst the NSW Government continues its attempts to legislate to regulate behaviour the Court will continue to field claims by those injured in alcohol fuelled incidents. Will there be someone to blame other than the assailants? Perhaps, but hotels do not owe their patrons an absolute duty to protect innocent patrons leaving the establishment from patrons who have been ejected from the premises as a result of aggressive behaviour. Claims against hotels will continue as no doubt will the NSW Government's attempts to regulate the hotel industry and reduce the number of alcohol related incidents.

Cleaning Company Not Liable For Slip On Orange

A customer slips on an orange in a shopping centre - who is responsible and must someone pay compensation? The answer to this question may not be as simple as it seems and the facts and circumstances of each case must be carefully examined. An example of one scenario where a customer has slipped in a shopping centre is the recent Court of Appeal decision of *Bevillesta Pty Ltd t/as Top Ryde Shopping Centre v Liberty International Insurance Company t/as Liberty International Underwriters.*

Sharifeh Reshad was walking through the Top Ryde shopping centre in July 2001 when she slipped on a squashed orange and was injured. The fall occurred sometime between 5:30pm and 5:40pm. As a consequence of the fall Reshad commenced proceedings in the District Court against Bevillesta Pty Ltd who were the owner and occupier of the shopping centre, along with Kidd's Services Pty Ltd (in liquidation; "Services") and Kidd's Executive Cleaning Service Pty Ltd (in liquidation; "Executive"). Bevillesta cross-claimed against Services and Executive and also Liberty the insure of Executive (as Executive was in liquidation a claim could be brought directly against the insurer). At the commencement of the hearing Reshad discontinued the claim against Services and Executive.

The evidence at the trial demonstrated that at 5pm a witness had seen two oranges on the walkway between the fruit shop and garden bed where Reshad had been walking. The same witness saw a squashed orange on the same walkway somewhere between 5:40pm and 5:45pm. Not surprisingly the trial judge accepted that Reshad had slipped on this orange and awarded Reshad damages. The cross claim brought by Bevillesta against Liberty was unsuccessful. In essence the trial judge determined that Bevillesta had changed the contractual requirements in relation to the cleaning of the premises so that it was only necessary for 2 rather than 4 cleaners to be provided and this reduction in cleaning requirements exposed customer's to a greater risk of injury. The trial judge found that Bevillesta was liable to the plaintiff as it had been prepared to take the risk of a less comprehensive cleaning schedule, as a consequence of which there was "not sufficient manpower to eliminate the risk of food stuffs falling and remaining on the floor for longer periods."

Bevillesta appealed.

Bevillesta in essence argued on appeal that the trial judge had been incorrect in finding that the cleaning system was deficient and also argued that if there was any liability on the part of Bevillesta then there should also be liability on the part of Liberty (who were now in the shoes of the cleaning company).

So what did the Court of Appeal find? The Court of Appeal examined the terms of the contract in relation to cleaning of the premises. The contract between the previous owner and the cleaners provided for 15 minute coverage to be provided by four cleaners. In May 2001 the contractual terms changed as a consequence of which the cleaning company was only obliged to provide 2 cleaners. The Court of Appeal was therefore of the opinion that in those circumstances it was no longer an obligation of the cleaning company to provide 15 minute inspections.

Justice Hodgson who delivered the leading judgement stated:

> *"However, when the schedules were changed, so far as the evidence goes, it is unclear precisely what was the responsibility of Executive at the relevant time and place. As mentioned before, since its obligations went well beyond that of checking for spillages and other hazards and cleaning them up, I do not think it would be appropriate to apply an automatic proportionate reduction of the coverage. In the absence of evidence as to instructions given to cleaners and security personnel and absence of evidence as to actual practice, the Court is left in a position where it just does not know what was the role of the cleaner and what was the role of the security guard and perhaps others in relation to the detection of spillages; or how the reduction in personnel impacted on the question of detection of spillages as opposed to other services provided by the cleaner. In those circumstances, I would not find on the balance of probabilities that Executive has breached a duty of care owed to persons coming on to the premises, including the plaintiff."*

So what was the end result? Bevillesta was liable to Reshad. The decision to downgrade the level of cleaning proved costly. There was no evidence that the cleaners had not carried out the cleaning sufficiently and in these circumstances the cross-claim failed. The case again serves as a reminder that each case turns on its facts - here, there was insufficient cleaning but this was the fault of the owner/occupier in not arranging sufficient cleaning resources rather than any failure on the part of the cleaning company.

Limitation Periods - Demonstration of Actual Prejudice Can Prevent An Extension Of Time

In NSW the Limitation Act 1969 provides that there is a three year period to commence personal injury proceedings after the date of discoverability of an incident. This is as a consequence of amendments to the *Limitation Act 1969* in 2002. Prior to these amendments an injured person would have 3 years from the date of an incident to commence proceedings. But what if the 3 years have passed? Is this the end of the road for the injured person or are there means by which a claim can be commenced late?

If an injured person wishes to commence proceedings after the 3 year period has passed, then the injured person has to satisfy the Court in relation to a number of issues, including whether or not there would be prejudice to a potential defendant if proceedings are commenced. The NSW Court of Appeal has recently considered this issue in the decision of *Walters v Cross Country Fuels Pty Ltd*.

Robyn Walters slipped and fell on the forecourt of a service station in Grafton that was operated by Cross Country Fuels Pty Ltd on 29 March 2001. On 29 March 2004 the limitation period expired. On 6 February 2007 Walters filed a Statement of Claim against Cross Country Fuels and on 23 April 2007 she filed a summons seeking an extension of the limitation period to 7 February 2007.

The evidence before the Court demonstrated that there was an eyewitness to the incident, Andrew Fuller. The trial judge found that the potential defendant was unable to locate Fuller which would cause them significant prejudice. In addition, after Cross Country Fuels ceased to operate the service station sometime after the accident various documents relating to the service station were stored in a container at a depot in Newcastle. In June 2007 there was a flood at the depot and the documents were damaged and rendered illegible. The documents included a franchise agreement with Shell under which Cross Country Fuels operated the service station which would have been relevant to the claim however the documents could no longer be examined. Further, as the accident had occurred on the way to work as a consequence of which Walters received benefits under the Worker's Compensation Act 1987 and the Court found that Walters had originally made the decision to remain on worker's compensation benefits rather than advance the claim against the occupier. This was also a relevant consideration.

So what was the end result? As a consequence of the actual prejudice that the potential defendant would suffer if Walters was allowed to commence proceedings Walters was not allowed to bring her claim.

If 3 years have passed since an accident then, although a claim is prima facie statute barred, this may not be the end of the matter. A claimant can still be granted leave to commence proceedings out of time however this leave will not be granted if a defendant can demonstrate actual prejudice.

Resisting SOP Judgments without a Payment Schedule

It is often the case that an unsuspecting or unprepared company will miss the opportunity to lodge a Payment Schedule in response to a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (the Act). Once the 10 day time frame from the receipt of a Payment Claim has expired one of two things will occur. Either the Applicant will apply to the Court for a Summary Judgment under Section 15 of the Act or alternatively, the Respondent company will receive a further notice under Section 17(2) of the Act providing for a further 5 day opportunity to provide a Payment Schedule.

In the absence of a Payment Schedule being submitted within the first 10 days, or if the Respondent company is lucky enough to receive a Section 17 (2) Notice, within 5 days after that notice, then there are very limited prospects of preventing a Judgment in favour of the Applicant in the amount claimed in the Payment Claim.

Accordingly, anyone who operates in or supplies anything to the construction industry should by now be well aware of the crucial importance of the Payment Schedule in terms of Adjudication under the Act. If there is no Payment Schedule it is highly likely that the Applicant will receive the full amount claimed, regardless of the merits of the claim.

In the event of a failure to provide a Payment Schedule, section 15(2) of the Act provides the Claimant may recover the unpaid portion of the claimed amount from the Respondent as a debt due to the Claimant in any Court of competent jurisdiction; or make an Adjudication Application under Section 17(1)(b) (after having given a 5 day notice under Section 17(2)).

Summary Judgment

The most famous and early example of this is *Walter Construction Group Limited v CPL (Surry Hills) Pty Limited [2003] NSW*

CC266 (9 April 2003). In that case, Walter Constructions submitted a Payment Claim in the sum of $13,962,904.00. CPL had failed to provide a Payment Schedule within the timeframe under the Act and Walter filed for summary judgement under section 15(2)(a)(i) about 14 days later

Despite substantial evidence that the Payment Claim was grossly overstated and unsubstantiated, Walter Constructions were successful in obtaining a Summary Judgment in the full amount claimed ($13,962,904.00). Although CPL retained all its rights at law to bring a further action to recover amounts overpaid you can imagine the difficulty it may have faced (or any company in a similar position) where it is forced to make gross overpayments and then seek to recoup those monies through subsequent court proceedings.

If the Applicant elects to seek Summary Judgment under Section 15(2) of the Act then the Respondent company is not entitled to bring any Cross Claim against the Claimant for defects, overcharging, etc; or raise any Defence in relation to matters arising under the construction contract.

In other words, there is no possibility of resisting a Summary Judgment for matters that arise out of the contract itself. There are only two avenues in which Summary Judgment can be resisted. These are by;

- attacking the validity of the Payment Claim itself; or
- raising some other defence based on Trade Practices Act or at Common Law.

In relation to (a), the Applicant must satisfy the Court that is has met all the elements required under the Act in order for the Payment Claim to be valid. That includes such things the form of the Payment Claim and proof of service (which under the Act means receipt of the Payment Claim).

Numerous applications for Summary Judgments have been resisted because of the inability of the Applicant to prove definitively to the Court that the Payment Claim was actually received by the Respondent. Unless the Applicant can show either a valid fax transmission report and/or a registered mail or carrier receipt (or has used a process server to serve the Payment Claim) then it is likely that the summary judgement application will fail and the Applicant Company will end up paying the Respondent's costs.

In one recent interesting case (which shall remain nameless for the present as it is ongoing) the Applicant gave evidence that he stood by the fax machine and watched the fax go through with a successful transmission report on screen. Thereafter the Respondent's site supervisor had discussed payment of the amount payable in the Payment Schedule but the Respondent subsequently denied ever receiving the Payment Schedule.

Even though the Applicant builder was able to Subpoena Telstra records to prove a transmission from his fax machine to the Respondents fax number at the same time as he deposed to faxing the document, the Court held that this was insufficient evidence that the Respondent has received the Payment Claim and held in accordance with the well known service case under the Act *Firedam Civil Engineering v KJP Constructions [2007] NSW SC.*

In the event an Applicant satisfies all the elements under the Act for a valid Payment Claim then it will obtain Summary Judgment unless the Respondent can raise some other Defence beyond the construction contract. It is now well established that breaches of Section 52 or 51AB of the Trades Practices Act 1974 for misleading and deceptive and/or unconscionable conduct are valid grounds to defend Summary Judgment under the Act (see *Bitannia Pty Limited and Anor v Parkline Constructions Pty Limited [2006] NSW CA 238 (14 July 2006)* and thereafter *Austruct QLD P/L v Independent Pub Group P/L [2009] QSC1 (8 January 2009)*).

In both cases the Respondent argued that circumstances surrounding the delivery of the Payment Claim (such as an intervening agreement between the parties to resolve the dispute) can be raised as a defence to a Summary Judgment. For example, in circumstances where an Applicant has deliberately or inadvertently mislead the Respondent into a belief upon which they relied upon so as to not provide a Payment Schedule then the Application for Summary Judgment may fail.

It is common on construction sites for both parties to be aware of the dispute and for several discussions to occur in between receipt of a Payment Claim and a Payment Schedule. Those discussions can be relied upon in the event that the reason for the non-provision of a Payment Schedule relate to those discussions. It is important however to maintain a record of such discussions and/or note the same in correspondence in order to assist any Defence to Summary Judgment.

Adjudication

If an Applicant elects to proceed to Adjudication under Section 17(2) and the Respondent fails to provide a Payment Schedule

after the five days from the notice, then the Respondent will not be entitled to lodge an Adjudication Response in relation to any Application filed for Adjudication. In those circumstances it is highly likely the Applicant will receive the full amount of the claim on Adjudication plus the Adjudicators costs. An Adjudication Certificate will then be obtained and filed with the Court as a Judgment Debt.

The only option at that point is for the Respondent to seek a stay of enforcement of that Judgment on the basis that it has a prima-facie and valid Cross Claim against the Applicant for such things as defects, overcharging etc.

Whilst it is possible to obtain such a stay, the decision in the Court of Appeal of *Herscho v Expile Pty Limited [2004] NSW CA 468 (13 December 2004)* has made it very difficult to succeed in such an application.

In *Herscho*, the Court applied the reasoning of Justice Einstein in *Grosvenor Constructions NSW Pty Limited v Musico [2004] NSW SC 344* at para 31-32 to the effect that having regard to the policy of the Act (being to support interim payments to contractors), "*there is sound reason for making stays less readily available in such cases*" and that therefore the test in respect of *Security of Payment Act* stay applications is that there should be, 'more than a real risk of prejudice if the stay is not granted'.

Normally, a stay application will succeed merely if a Respondent establishes a prima-facie case for a valid cross claim and the stay will be granted pending the outcome of those proceedings. What *Herscho* has now established is that something more is required for applications for a stay emanating from the Act.

What must be shown is some real evidence of prejudice to the applicant or risk that if the money is paid it will not be ultimately recovered. Therefore, in order to successfully obtain a stay against a Judgment obtained through Adjudication as a result of the failure to deliver a Payment Schedule, two things are required:

- Evidence of the Applicants' lack of financial substance and preferably, current or impending insolvency; and
- Evidence that there is a prima-facie case with good prospects of success for a Cross Claim against the Applicant.

We would go further than the above to suggest that if you are seeking to stay a Judgment obtained under the Act you should have the following things ready before you make your Application:

- Some evidence in financial records, preferably obtained under Subpoena, of the Applicants poor financial status and insolvency;
- Circumstantial evidence of insolvency and/or poor financial status;
- A draft Statement of Claim ready and prepared for filing;
- A full Affidavit outlining the entire basis of the Cross Claim.

In other words, because of the extreme difficulty in obtaining a stay in such cases, a Respondent would have to be very well prepared and go to significant lengths to be successful in such an application before even contemplating it.

It is also not unusual even with all of the above for the Court to use its general discretion to order any payment to made to the Court as security pending outcome of the Cross Claim. In other words, it is quite likely that the money will have to be paid in any event to someone. Therefore, rather than going to the immediate difficulty of preparing an entire case in a short timeframe it may be better tactically and in terms of costs to simply pay the amount to the Applicant and 'concentrate on the main game' by filing a Cross Claim to recover amounts paid when the Respondent company is fully prepared to do so.

When a contractor recovers significant unjustified sums in the first instance it is an extremely bitter pill to swallow. But it is actually the purpose of the Act to do just that, especially where there is no payment schedule.

We would query the decision and application of the *Herscho* principle in a context where solvency in the construction industry has always been a problem. The risk a spurious interim payment will not be recovered is even higher in times such as these. Making stay applications more difficult for one particular class of applicant does not seem equitable and simply shifts the risk of insolvency usually to a head contractor or principal. Perhaps it would have been better to make the general principle - a grant of the stay subject to reasonable security paid into court.

If nothing else, the above highlights the crucial importance of the Payment Schedule in the whole process. We recommend to clients that a template Payment Schedule be created for use whenever an invoice or a claim is received from a subcontractor. Gillis Delaney can assist is preparing such templates and in resisting Judgments under the Act. If you are in receipt of a payment claim and don't know how to respond properly, contact us.

Traffic Management Leads To Fatality

Bilfinger Berger Services - Roads Pty Limited & Bitupave Limited were recently prosecuted for breaches of the Occupational Health & Safety Act arising out of an incident when a worker was fatally injured during the carrying out of road works. Road maintenance was being undertaken on Airport Drive and Link Road, Mascot. Bitupave had contracted with Bilfinger to provide traffic management services with respect to control of traffic passing the site while Bitupave performed repairs and maintenance work to the road. Bilfinger assigned a traffic control crew to the site. Bilfinger used two trucks to transport traffic control signs, witches hats and other equipment. Visibility within the cab of the truck was restricted such that the driver could not see directly behind in the direction of travel when the truck was reversing. Signage and barrier boards restricted the visibility towards the rear of the vehicle.

The traffic control plan was formulated by Bilfinger and approved by Bitupave. The plan did not provide for any vehicle movement procedures for vehicles and mobile plant associated with the works, to control the movement of the vehicles or plant within the premises. In addition, Bilfinger did not provide any safe work method statements with respect to the management of vehicles, mobile plant or pedestrian movements at the premises, including the reversing of those vehicles or plant. Specifically no safe work method procedure was devised with respect to the reversing of the truck driven on the day which ultimately reversed over an employee resulting in the fatality. The systems related to control of traffic on the road rather than the movement of Bilfinger vehicles.

On the day in question a pre-start toolbox meeting was held where the leading hand went over the traffic control plan with the employees. The truck was then driven onto the road and traffic control signs were set up. After some control signs were erected there was a discussion in relation to the closure of the breakdown and slow lanes and then the employees commenced to set up the lanes. A fatality occurred when an employee was run over whilst a vehicle was reversing.

The Court noted to reverse a truck with no or limited rear vision on a busy construction site carries with it a risk to the safety of personnel at the site which is obviously foreseeable and potentially of the utmost seriousness in terms of the likely or probable consequences. The consequences in this case were tragically realised in the needless death of Mr Christian. The risk could have been avoided by the implementation of a number of relatively straightforward measures. No risk assessment was carried out in relation to the reversing of the vehicle. A worker acting as a spotter could have been assigned to assist the truck driver when reversing.

It was noted at the time of the accident Bitupave was in the process of developing a system for reversing vehicles and already had in place specific procedures for dealing with the interaction of people and machinery involved with asphalt laying plant and equipment. It had also been conducting a number of trials with regard to reversing procedures which included reversing cameras and ultrasonic object detection systems. Following the death of Mr Christian, Bitupave fast tracked the roll out of reversing cameras which were being trialled on a number of sites.

At the time of the incident WorkCover's Code of Practice moving plant on construction sites was in force. Both defendants were aware of the Code and the Code made reference to the use of spotters/safety advisors and referred to the risk with respect to reversing vehicles.

The Court noted Bitupave was the head contractor at the worksite and in a position to control all its employees and contractors. It was noted that contractual rights and obligations between the parties did not take precedence over a defendant's statutory obligations. The Court noted Bitupave was the principal contractor on site with its attendant responsibilities to ensure the site safety of all. Effectively, the Court determined that the responsibilities of Bitupave and Bilfinger were equal.

Bitupave had previous convictions and faced a maximum penalty of $825,000.00 whereas Bilfinger had no previous convictions and faced a maximum penalty of $550,000.00.

After considering the nature of the incident, a fine of $123,000.00 was imposed on Bilfinger and a fine of $214,500.00 on Bitupave.

As can be seen, the previous convictions of Bitupave played a significant role in the ultimate penalty imposed for the offence.

Workers Compensation- Travelling To And From Work

In NSW the workers compensation scheme provides coverage for injuries sustained by workers on their periodic journey to and from work however the entitlement is effected if there is a deviation or interruption to the journey unconnected with the

employment and the risk of injury was materially increased. It is not uncommon for workers to attend to a variety of tasks whilst on their way to or from work, for example pick up some shopping or get a bite to eat. This interruption to the journey may cause an impact on the entitlement to compensation.

But what happens if someone arrives at work and before their shift starts they leave the workplace to get a meal? Does that mean the journey comes to an end at the arrival at work or does the journey continue until the worker returns to the workplace for the start of their shift? The recent decision of the President of the Workers Compensation Commission in *Singh -v- Thompson Health Care Limited* provides guidance on this issue.

Singh was an assistant nurse at a Randwick nursing home and had driven to work at about 9 pm and parked his car in the staff car-park. He placed his belongings in his staff locker and then proceeded to walk to a KFC store to buy food with the intention of returning to work to start his shift at 10 pm. Whilst buying his meal he was assaulted by two men. This was not Singh's usual shift. He was advised to work the night shift at 6pm on the day. Therefore, his usual arrangements for dinner were interrupted.

Singh sought payment of workers compensation benefits from his employer. His claim proceeded to arbitration and the arbitrator rejected the claim finding that Singh was not injured on a periodic journey to work. The arbitrator found once he Singh had parked his car at his employer's premises the periodic journey concluded. Singh appealed.

A worker injured on journey that falls into the following categories will be entitled to workers compensation benefits:

- the daily or other periodic journeys between the worker's place of abode and place of employment,
- the daily or other periodic journeys between the worker's place of abode, or place of employment, and any educational institution which the worker is required by the terms of the worker's employment, or is expected by the worker's employer, to attend,
- a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of obtaining a medical certificate or receiving medical, surgical or hospital advice, attention or treatment or of receiving payment of compensation in connection with any injury for which the worker is entitled to receive compensation,
- a journey between the worker's place of abode or place of employment and any other place, where the journey is made for the purpose of having,

However the worker will not be entitled to workers compensation benefits if an injury was received during or after any interruption of, or deviation from, any such journey, and the interruption or deviation was made for a reason unconnected with the worker's employment or the purpose of the journey, and the risk of injury was materially increased because of the interruption or deviation.

So how did Singh fare in his appeal? Not surprisingly he succeeded.

The President did not consider it was a general proposition that a periodic journey comes to an end when and where a worker parks his/her car at their place of employment. The issue was whether the journey ended when Singh first arrived at the employer's premises at about 9 pm or did it continue even though he went to the shops to have his evening meal, where he was subsequently assaulted. Was Singh still on his journey to work when he went to get the takeaway food? The answer was- yes.

The President found Singh's intended journey for the purposes of the Workers Compensation Act commenced when he set out from his place of abode and would have ended, had he not been assaulted, when he returned to his employer's premises for the purposes of commencing his shift. The action of parking his car in the space allocated for staff parking and accessing his locker did not destroy the character of the journey. Using his employer's premises as a repository for his personal belongings and the convenience of parking his car during the course of his journey to his place of employment did not break the chain of causation and therefore the periodic journey was not broken.

When determining whether a periodic journey continues or ceases, one has to have regard to the intention of the worker and whether it was the intention to break the periodic journey, being the single journey between the place of abode and place of employment. In this case it could not be said in attending the local shops the journey was deprived of its character as a daily or other periodic journey. Questions of interruption or deviation were not argued, nor was it argued that the risk of injury had been materially increased because of any interruption or deviation so at the end of the day Singh succeeded in his compensation claim.

The injury was sustained on a journey to work and Singh was entitled to statutory workers compensation benefits.

Change Of Circumstances In Weekly Compensation Claims

Since 2006 the NSW Workers Compensation System has featured the Section 74 Notice. This notice is issued by the Scheme Agents for WorkCover in all claims where liability is declined. Indeed, matters cannot progress for determination to the Workers Compensation Commission (WCC) until either a Section 74 Notice has been issued by the Scheme Agent or there has been a failure to determine the claim.

However, where a worker is already being paid weekly compensation benefits under an Award issued by the Compensation Court or WCC, does the Scheme Agent need to issue a Section 74 Notice prior to challenging that Award in the WCC due to a change in circumstances? It has often been argued that prior to a Scheme Agent lodging a change of circumstances Application in the WCC a Section 74 Notice would firstly need to be issued. Deputy President Bill Roche discussed this requirement in the recent decision of *Pages Hire Centre Kogarah - v - Chapman [2009] NSW WCCPD*.

The facts of the matter were that the worker had initially injured his arm in the course of his employment in 1993. In October 2002, in proceedings in the former Compensation Court of New South Wales, he achieved an Award of $140.00 per week to date and continuing. He also received an Award in relation to hospital and medical expenses.

In 2007 the Scheme Agent advised the worker his weekly compensation payments would cease as he had not fulfilled job seeking obligations. A Section 55 change of circumstances Application was subsequently lodged with the WCC. However, no Section 74 Notice was firstly issued notifying that liability would be declined.

The Deputy President determined that given a change of circumstances is not in respect of a claim for compensation, a Section 74 Notice is not required to be issued. Consequently, a Scheme Agent who possesses evidence of a change of circumstances can lodge a Section 55 Application in the WCC without firstly providing a Section 74 declinature Notice.

Nevertheless, the Deputy President cautioned that whilst a Section 74 Notice does not need to be issued, sufficient particulars will need to be provided in the Section 55 Application in order for that Application to progress in the WCC. In particular, he highlighted that the Scheme Agent's Application may be dismissed on the ground it is frivolous, vexatious or otherwise misconceived if proper particulars were not provided in the Application.

This decision provides guidance to both scheme agents and practitioners as to the conduct of a change of circumstances Application. Given a Section 74 Declinature Notice does not need to issued, there is greater scope for the Scheme Agent to successfully advance a change of circumstances Application.

The "front end loaded" nature of the workers compensation jurisdiction involving the use of Section 74 Notices has often resulted in a worker being able to obtain additional evidence or, sometimes tailor their evidence in order to defeat a declinature decision. The requirement not to file a Section 74 Notice will prevent the worker from obtaining this subsequent evidence prior to the matter being determined by the WCC.

Of course, the worker will still be offered the protection due to the requirement for specific particulars in the Application. They will still be in a position to understand the case they are required to meet and the resolution of the matter will not be unreasonably delayed. Simply making a general assertion that there is a change of circumstances will be insufficient for a Scheme Agent to succeed in a change of circumstances Application.

Stealing Was A Valid Reason For Dismissal

In the matter of Tony Petrosillo v Coles Group Supply Chain Pty Limited the Australian Industrial Relations Commission found the employer Coles did not act harshly or unjustly when it terminated an employee who ate a stolen chocolate bar whilst on the job at its distribution centre at Smeaton Grange.

Coles had developed an anti-theft policy and protocol at the distribution centre. Coles had referred to the anti-theft policy at tool box talks with employees (including Petrosillo) in the months before the incident.

On 31 May Petrosillo was working with another employee unloading a pallet from a container. Another employee threw Petrosillo and the other employee a Snickers chocolate bar. Petrosillo ate the chocolate bar.

The incident came to the attention of management. All employees in the incident were interviewed. They were all suspended from work on full pay. Following two further interviews Petrosillo's employment was terminated. Coles alleged that part of the reason for Petrosillo’s termination was the fact that he refused to co-operate in the interviews.

Petrosillo brought a claim under section 643 of the Workplace Relations Act, 1996 alleging his dismissal had been harsh, unjust or unreasonable. Petrosillo denied he knew the Snickers bar was stolen. The Commission found:
Coles anti-theft policy for stock was reasonable.

- Petrosillo was aware of the anti-theft policy.
- Coles reminded workers of the anti-theft policy from time to time.
- Petrosillo had given misleading evidence during the investigation.
- Petrosillo should have been aware or at least reasonably suspected that the chocolate bar had been stolen.
- The breaches of policy by Petrosillo together with his unwillingness to provide an accurate account during the interviews resulted in the worker destroying the trust and the confidence an employer should have in its employees which was at the heart of the employee relationship.

Consequently the Commission found Coles did not act harshly or unjustly in terminating Petrosillo's employment. The reasons for the decision should be a guidance for employers when setting policies and the procedure to be followed for investigating and terminating employees for breaching those policies.

Employee Breached Zero Tolerance Policy But Still Re-Instated

Shivas had his employment terminated on 21 August 2008 when he climbed over a hand-rail and stood on mesh covering a gypsum removal overflow tank in order to collect a fluid sample. He was observed by a supervisor who told him to climb back over the hand-rail. Shivas was suspended to allow an investigation to take place. A four person panel considered the matter on 21 August 2008 and terminated his employment. The company had a zero tolerance policy in relation to reckless safety breaches.

There was some issue before the four person panel as to whether Shivas made a conscious decision to step over the hand-rail or, at the time he stepped over the hand-rail, he just did not think about what he was doing.

The worker brought an unfair dismissal claim under Section 643 of the Workplace Relations Act, 1996. The Australian Industrial Relations Commission found that whilst the employer did have a valid reason for terminating the worker's employment as the employee had breached their zero tolerance policy in relation to reckless safety breaches, the employer had not afforded him "a fair go all round" and as such his termination was found to be harsh.

All the evidence before the Commission demonstrated the employee was an exemplary employee of 25 years' standing. He did not have any prior safety breaches on his employment record. It was also found the employer had a problem with safety at the plant where the employee worked. There was evidence there had been 650 safety breaches at the plant in the 12 months prior to the hearing.

It was considered by the Commission:-

- the employee had not been treated in the same manner consistent with the treatment of other employees who had breached safety policies;
- there was a lack of signage in the area of the incident;
- there was no written procedure to cover the work that was being carried out by the employee at the time of the incident;
- the employee was not doing his normal duties and had only performed the relevant task on a few occasions; and
- the guard rail was not of sufficient height to act as a strong deterrent.

The Commission noted that an employee with an exemplary safety record of 25 years was unlikely to "recklessly violate" safety policies. The employee stated that he considered the mesh looked sufficient to hold his weight. He could not explain why he did it other than he just did not think. Consequently, taking all these factors into account, the Commission found the termination was inherently harsh.

The Commission ordered re-instatement to the position Shivas held immediately prior to the termination. As a result of the worker's actions, the employer was not required to reimburse the employee for any remuneration lost during the period between termination and re-instatement.

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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GD News

Welcome to our special edition of **GD NEWS** which examines the recently released second report from the panel appointed by the Federal Government to make recommendations on the harmonisation of OH&S laws in Australia.

National OH&S Review

The national review into model OH&S laws remains in focus following the release of the final report of the panel appointed by the Federal Government to undertake a national review into Model OH&S laws.

The development of model legislation seems to be the most effective way to achieve harmonisation of OH&S laws throughout Australia with the intention that all States and Territories adopt the model OH&S laws which the Federal Government implements. The panel was asked to develop recommendations for the development of the optimal structure and content of model legislation which would permit an integrated approach to Occupational Health and Safety across Australia.

Two reports were published by the panel with the first report setting the ground rules for the model laws and the second report filling in the detail. The two reports present an opportunity to harmonise OH&S laws if the recommendations are adopted. If the recommendations are adopted there will be significant changes which include the following:

Broadening the Scope

OH&S has traditionally been seen as an employment based responsibility. There will be a broader approach with the imposition of duties on persons conducting a business or undertaking. A business or undertaking will be defined as an activity carried out by or under the control of a person, whether alone or in concert, of an industrial or commercial nature and whether or not for profit or gain and in which:

- workers are engaged or caused to be engaged to carry out work; or
- the activities of workers at work are directed or influenced; or
- things are provided for use in conduct of work;

by persons conducting the business or undertaking.

Whilst the duties imposed by the model laws will apply to employers , they will have a much wider application and catch many of the alternate labour arrangements including labour hire, franchising and other arrangements where a business impacts on persons that work.

Offences

There will be three categories of offences. The offences will be as follows:

Category 1 offence - where there was a high level of risk of serious harm and the duty holder was reckless or grossly negligent - maximum penalty for a corporation $3m and $600,000 and or a maximum term of imprisonment of 5 years for an individual. Workers guilty of C Category 1 offences will be liable for a penalty of up to $300,000. For Category 1 offences, there will be a right to a jury trial.

Category 2 offences - where there is a high level of risk of serious harm but without recklessness or gross negligence - the maximum penalty for a corporation will be $1.5m, $300,000 for an individual and $150,000 for a worker.

Category 3 offences - where there is a breach of duty without the aggravating factors present for

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National OH&S

On 4 April 2008, the Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, announced a national review into model Occupational Health and Safety (OHS) Laws.

The review was conducted by an advisory panel that was asked to report to the Workplace Relations Ministers' Council on the optimal structure and content of a model OHS act that is capable of being adopted in all jurisdictions.

The panel has published two reports , the first was completed on 31 October 2008 and the second on 30 January 2009.

The reports set the framework for future model OH&S laws to apply in a harmonised OH&S system throughout Australia

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Category 1 and Category 2 offences - maximum penalty for a corporation will be $500,000, $100,000 for an individual and $50,000 for a worker.

A prosecutor will no longer have a right of appeal from an acquittal.

Two or more contraventions of duties will be able to be charged as a single offence if they arise out of the same factual circumstances.

Specified Duties

A primary duty will be imposed on business which includes obligations to ensure as far as is reasonably practicable:

- the provision and maintenance of plant and systems of work as are necessary for the work to be performed without risk to the health or safety of any person;
- the provision and maintenance of arrangements for the safe use, handling, storage and transport of plant and substances;
- each workplace under the control or management of the business operator is maintained in a condition that is safe and without risks to health;
- the provision of adequate welfare facilities; and
- the provision of such information, training, instruction and supervision as is necessary to protect all persons from risks to their safety and health from the conduct of the business or undertaking.

The duties will be imposed on those who are involved in, materially affect or are materially affected by the performance of workers.

In addition to imposing a primary OH&S duty on businesses and undertakings separate duties will be imposed on:

- those with the management or control of the workplace;
- officers of business;
- OH&S providers;
- Builders, erectors and installers of structures
- designers, manufacturers, importers, suppliers and installers of plant and equipment,
- workers.

Each of these persons will have a positive and clearly stated duty of care.

A person or entity can have more than one duty by virtue of being in more than one class of duty holder and no one duty will restrict another duty. More than one person may be responsible for a duty at the same time.

A duty holder must comply with a duty to the extent that it has control over relevant matters or would have had control but for any agreement that purports to limit or remove that control. The term "control" will not be defined and is likely to be given a broad application by any Court that is called on to construe the laws.

The test of "reasonable practicability" will be applied to the primary duty. The laws will provide that when assessing whether or not there is a breach, it is necessary to consider what was reasonably able to be done in relation to ensuring health and safety at a particular time taking into account and weighing up all relevant matters including:

- what the persons know or ought to reasonably know about the hazard;
- the likelihood of the hazard or risk eventuating;
- the degree of harm that may result if the hazard or risk eventuated;
- what the duty holder knows or a person in their position ought reasonably know about:
    - the hazard, the potential harm and the risk, and
    - ways of eliminating or reducing the hazard, the harm or the risk;
- the availability and suitability of ways to eliminate or reduce the hazard, the harm or the risk; and
- the cost associated with the available ways of eliminating and reducing the hazard, the harm or the risk including whether the cost is grossly disproportionate to the degree of harm and the risk.

Codes of Practice will be utilised to benchmark what is reasonably practicable.

All duty holders other than workers, officers and others at the work place, will be obliged to eliminate or reduce hazards or risks so far as is reasonable practicable.

Workers and other individuals at the workplace must co-operate with persons conducting businesses or undertakings of the

workplace to assist in achievement of the objective of the elimination or reduction of hazards of risks and must take reasonable care for themselves.

Officers must proactively take steps to ensure the objective elimination or reduction of hazards or risks is achieved within the organisation.

The duties will be non-delegable.

Duties of Officers

The specific duties for officers will apply to officers of corporations, partnerships and unincorporated associations. "Officer" will be defined in the laws to have the same meaning given by section 9 of the Corporations Act and will apply to body corporates, partnerships and unincorporated associations. "Officer" under the Corporations Act is defined as:

- a director or secretary of the corporation, '
- a person :
  - who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
  - who has the capacity to affect significantly the corporation's financial standing; or
  - in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation);
- a receiver, or receiver and manager, of the property of the corporation;
- an administrator of the corporation;
- an administrator of a deed of company arrangement executed by the corporation;
- a liquidator of the corporation;
- a trustee or other person administering a compromise or arrangement made between the corporation and someone else;
- a partner in the partnership if the entity is a partnership;
- an office holder of the unincorporated association if the entity is an unincorporated association;
- a person:
  - who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
  - who has the capacity to affect significantly the entity's financial standing.

Officers of businesses or undertakings will have a positive duty to exercise due diligence to ensure compliance with OH&S responsibilities. The term due diligence will be defined in the laws as follows:

- The standard for the officer is to be assessed against what a reasonable person in the position of the officer would do. This is an objective test.
- The officer is required to take reasonable steps, proactively and regularly to ensure:
  - Up to date knowledge of OH&S laws and compliance requirements;
  - An understanding of the nature of the operations of the entity and generally the hazards and risks associated with those operations;
  - That the entity has available and used appropriate resources and processes to enable the identification and elimination and control of specific OH&S hazards and risks associated with the operations of the entity;
  - Verification of the implication by the entity of appropriate resources and processes to enable the identification and elimination and control of specific OH&S hazards and risks associated with the operations of the entity; and
  - A process of receiving, considering and ensuring a timely response to information regarding incidents, identified hazards and risks.

OH&S Providers

The laws will define an “OHS service provider” to include persons engaged by another duty holder to provide any or all of the following (“OHS service”) in the course of conducting a business or undertaking, (other than in the capacity of a worker or officer):

- advice or information on any matter related to the health or safety of any person;
- systems, policies, procedures or documents relevant to the management of OHS, broadly or in relation to specific matters;

- training on matters relating to OHS; and
- testing, analysis, information or advice (including, but not limited to, mechanical, environmental or biological matters)
- but not to include:
- a person providing an OHS service as part of the performance or exercise of a function, role, right or power under the model Act; or
- a person providing an OHS service while undertaking activity specifically required or authorised by or under any Act or regulation; or
- a member or employee of an emergency service organisation, providing advice or information during the course of responding as a matter of urgency to circumstances giving rise to a serious risk to the health or safety of any person; or
- a legally qualified person practising as a barrister or solicitor when, and to the extent only to which, that person is providing advice to which legal professional privilege may apply.

The duty of care will require the service provider to ensure so far as is reasonably practicable that no person at work is exposed to a risk to their health or safety from the provision of the services.

Workers

Workers will have a positive duty to protect themselves and others. The duty will apply to all workers not merely employees. Worker will be defined as:

- any person who works in a business or undertaking:
  - as an employee, or
  - as an apprentice or person undergoing on-the-job training, or
  - as a contractor or sub-contractor, or
  - as an employee of a contractor or a sub-contractor, or
  - as an employee of a labour hire company who has been assigned to work for the employer, or
  - as a volunteer, or
  - in any other capacity;
- if the employer is a natural person who works in the employer's business – the employer him/herself.

The duty owed will be assessed on the basis of "reasonable care" rather than what was reasonably practicable.

The model laws will place on all persons carrying out work activities ('workers') a duty of care to themselves and any other person whose health or safety may be affected by the conduct or omissions of the worker at work.

Workers Rights to Cease Work

Workers will have the right to cease work where they have reasonable grounds to believe that to continue to work will expose them and others to the risk of health and safety. The worker's entitlement to paid benefits will continue if they have ceased work for this reason. Disputes concerning payments in these circumstances will be referred to a relevant Court or Tribunal for consideration.

Health and Safety Committees

There will be obligations for the establishment of health and safety committees where workplaces have 20 or more workers or where there has been a request by 5 or more workers in a business. Workers will be entitled to elect health and safety representatives. Health and safety representatives will play a significant role in policing occupational health and safety as they will be entitled to issue provisional improvement notices ("PINS") to a business or undertaking if a representative has reasonable grounds to believe there is a contravention of the laws or there has been a contravention of the laws. The PINS will be required to contain details of persons required to comply with the PIN and the compliance required. Health and Safety Representatives("HSR") will be required to undergo a 5 day training course approved by the regulator and the representative will be entitled to paid leave to attend the training. HSRs will be provided with protection from civil liability when in good faith they are performing their duties.

Incident Notification

There will be an obligation to notify incidents immediately and by the quickest means of:

- a fatality to any person;
- serious injury to any person;
- serious illness to any person; or

- a dangerous incident arising from a conduct of the business or undertaking.

A written record of the incident must be required within 48 hours.

Prosecutions

The right to prosecute will not be given to unions. Only officials acting in the course of a public office or duty will be entitled to bring prosecutions. Persons will be able to request in writing that the regulator bring a prosecution for breach and if no prosecution is to be brought the regulator's decision will be reviewed by the DPP.

The prosecutor will determine the category of the offence when it brings a prosecution.

Courts will be entitled to impose a penalty based on the maximum penalty for the relevant offence or may release an offender after conviction where the offender gives a health and safety undertaking to the Court. However this discretion will not be available for Category 1 offences.

In addition Courts when dealing with offences will have the power to:

- make an adverse publicity order requiring the publication of adverse publicity;
- make remedial orders;
- place a corporation on probation;
- make community service orders;
- impose injunctions prohibiting conduct;
- make specified training orders;
- make compensation orders.

Enforceable undertakings

The model laws will provide that a regulator may accept at the regulator's discretion a written enforceable undertaking as an alternative to a prosecution other than in relation to a Category 1 breach of duty. Provisions relating to enforceable undertakings will provide for a safeguard relating to the process, transparency of decision making, reviewability of decisions and enforcement.

The Court will have the discretion under the model laws to release an offender after conviction if the offender gives a health and safety undertaking to the Court. However this discretion will not be available for Category 1 offences.

Other Enforcement Tools

The model laws will provide power to an inspector to issue the following notices and directions upon entry to a workplace:

- safety directions;
- infringement notices;
- improvement notices;
- prohibition notices; and
- direction to leave a site undisturbed.

Authorised Right of Entry

The model legislation will provide for the right of entry for OH&S purposes to union officials and other union employees formally authorised under the laws. Those who have exercised the right of entry will need to hold a current authorisation. There will be fit and proper person tests and skill requirements before an authority is issued. An authority will last for up to 3 years and can be renewed.

The right of entry can be used to:

- investigate a suspected contravention of the model Act or regulations;
- consult workers on OHS issues; and
- provide advice to workers, and consult with the person in management or control of a business or undertaking or relevant workplace area, on OHS issues
- investigate a suspected contravention of the OH&S laws

The right of entry will be limited to:

- areas of the workplace where work is being carried out as part of a business or undertaking by workers who are

members or eligible to be members of the relevant union;
- consultation with, and/or provide advice to, any worker within the eligible group referred to above (subject to that person's consent); and
- where necessary, advice and/or consultation with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on the resolution of OHS issues and/or the suspected breach of the model Act

and be subject to:
- the right being exercised during working hours; and
- ensuring there is no undue disruption to any business or undertaking at the workplace; and
- reasonable OHS requirements that may apply to the workplace being followed by the authorised persons.

An authorised person exercising a right of entry under the model Act may do any of the following:
- consult with or advise those workers who are members of or eligible to be members of the union, subject to written notice of 24 hours;
- consult with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on an OHS issue;
- inspect work systems, plant or processes contained within the area where relevant workers work;
- investigate a suspected breach of the model Act or associated subordinate instrument(s), subject to the provision of proof of authorisation to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union unless to provide such proof of authorisation would defeat the purpose of the investigation or, it is considered by the authorised person to be an urgent case;
- inspection of documents of the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union relevant to a suspected breach of the model Act or regulations, subject to—
    - provision of 24 hours written notice with a reasonable time given for the person from whom the documents are requested to produce them, and
    - written notification to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union of details of the particular contravention suspected, and
    - a list of the documents sought being provided with the request;
- warn any person that the authorised person reasonably believes to be exposed to a significant and immediate risk of injury;
- request an inspector visit the workplace to determine whether a notice should be issued; and
- have the right to seek a review of the action taken by the inspector (including a decision of the inspector to not take any action).

Any right exercised by an authorised person is limited to matters affecting the health or safety of those workers who are members of or eligible to be members of the authorised representative's union.

A relevant Court or Tribunal may deal with a dispute relating to the exercise or purported exercise by an authorised person of a right of entry under the model Act. The process may involve conciliation, mediation and, where necessary, arbitration.

Authorisation of an authorised person under the model Act may be suspended or revoked, in whole or in part, or limitations imposed where, after providing the authorised person a reasonable opportunity to be heard it is determined by a court or tribunal (civil process) that such action should be taken.

Conclusion

There will be substantially increased penalties, a broader application of OH&S laws and a different enforcement regime for OH&S if the model laws recommended are adopted by all States and Territories. Businesses need to ready themselves for the changes particularly "officers" who no doubt will find themselves in the firing line for prosecutions unless they exercise due diligence when implementing OH&S systems and resources in their businesses.

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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