GD News

Gillis Delaney Lawyers

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on the employment and insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Funding the Fight

In the last 10 to 15 years there has been an increase in the financing of court cases by third parties. Generally, the third party would finance the litigation in exchange for a share of the damages if the claims were successful. Until recently the attitude of the Australian Courts to litigation funding was unclear.

However, in the decisions of Campbells Cash and Carry Pty Limited - v - Fostif Pty Limited and Mobil Oil Australia Pty Limited - v- Trendillen Pty Limited which were handed down on the same day the High Court effectively gave a green light to litigation funding but put an end to litigation funding in Australia for so called class actions or representative actions where the potential litigants have no real common interest in the proceedings.

Campbells Cash and Carry and other tobacco wholesalers had been sued by seven retailers in a form of class action known as a representative action which permits multiple parties with a common interest to bring one claim. Campbells Cash and Carry and the other wholesalers supplied 21,000 supermarkets and other retailers and paid licence fees pursuant to the legislation in each State and in the ACT. In 1997 the High Court determined that licence fees were excise duties and invalid. In 2001 the High Court held that as long as certain conditions were fulfilled then retailers who had the licence fee passed onto them could recover the amount from their wholesaler, even if the fees had been passed onto customers. Potentially the licence fees that could be claimed totalled many millions of dollars.

In 2002, Firmstones Pty Limited, a litigation funder, encouraged retailers to claim a refund of tobacco licence fees which had been paid but which wholesalers had not passed on to taxing authorities after the 1997 decision. Firmstones sought authority to act on the retailers' behalf to recover the money in return for one-third of the refunds achieved. Firmstones arranged for summonses instituting seven proceedings to be issued in the Supreme Court in June 2003. The summons were commenced as representative proceedings under the Supreme Court Rules. The summons provided for what it described as "opt-in" procedures by which persons might later consent to becoming a plaintiff.

The wholesalers sought orders that the proceedings be dismissed or stayed as an abuse of process or that they be struck out as representative proceedings. At this time Firmstones had already signed up 2,100 retailers to join the action.

Justice Einstein of the Supreme Court found that the proceedings could not continue as representative proceedings and dismissed applications for discovery by Firmstones seeking the names of other retailers to bolster the group.

The NSW Court of Appeal allowed the appeals from seven retailers and found that the representative proceedings could continue. The High Court subsequently disagreed. The High Court held that the actions could not continue as representative proceedings in the Supreme Court because the actions did not comply with the Supreme Court Rules. In essence the majority of the High Court concluded that the retailers did not have the necessary common interest for a representative action. Each retailer had a claim but not a common interest in the same claim.

We thank our contributors

David Newey dtn@gdlaw.com.au
David Collinge dec@gdlaw.com.au
Naomi Frank ndf@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au

October 2006 Issue

Inside

Gillis Delaney Lawyers
Level 6,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

The relevant Court Rules provided:

> "Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them. "

The question for the High Court was therefore:

> "Do numerous persons have the same interest in the action which the [plaintiff has] commenced? If they do not then that is the end of the matter. If they do, then the action is properly begun and, unless the Court otherwise orders, it may be continued."

A central objective of representative procedures is the avoidance of multiplicity of proceedings and the efficient determination, once and for all, of controversies in which parties have the same interest. What the rules were intended to achieve was a single judicial determination of common issues in a way that binds those who were interested in those issues.

In a joint judgment the High Court determined there was no common interest and stated:

> "At the time the summons was issued there were persons, other than Fostif, whom it could be said would be "affected" by a decision of the claim made by Fostif against Campbells. The most obvious persons "affected" were any other persons who had bought tobacco products from Campbells by transactions relevantly identical to the transactions identified as having been made between Fostif and Campbells. But when the proceedings were instituted, Fostif made no claim on behalf of any of those other purchasers. Their participation in the proceedings, and any consequence for their rights, depended upon them choosing to join the proceedings. Deciding Fostif's claim would decide no issue between any of those other purchasers and Campbells unless or until those others chose to participate in the proceedings. The only effect that the decision of Fostif's claim would have would be its precedential value."
>
> The claim made by Fostif was its own claim and not a claim for others. It did not make any claim for other retailers and the only person interested in the claim was Fostif. The summons did not claim declarations for the common benefit of represented debtors.

The High Court noted:

> "No doubt it was hoped that the procedures for "opting-in", which the summonses contemplated would be followed after the proceedings had been instituted, would lead to there being numerous persons with the same interest, but that was a hope or expectation about future events."

The High Court in rejecting the Fostif claim as one which could be brought as a representative action confirmed that in some cases representative actions can be maintained if properly framed at the start of the case as a claim in which others have an interest, for example claims under separate contracts by multiple parties. The High Court referred to English cases considering representative actions that concluded that:

> "The fact that the claims arose under separate contracts was held not sufficient of itself to defeat the rule's requirement that numerous persons have the same interest in the proceedings."

The Fostif claim was rejected as a result of the way the claim was framed at the start rather than for any policy reason. Nevertheless the High Court found it necessary to clarify its views on litigation funding despite rejecting the Fostif claim.

In their joint judgment, Justices Gummow, Hayne and Crennan revealed a continuing acceptance of litigation funding and stated:

> "As Mason P rightly pointed out in the Court of Appeal, many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?
>
> Two kinds of consideration are proffered as founding a rule of public policy - fears about adverse effects on the processes of litigation and fears about the "fairness" of the bargain struck between funder and intended litigant. …..

> Neither of these considerations, whatever may be their specific application in a particular case, warrants formulation of an overarching rule of public policy that either would, in effect, bar the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement. To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears. "

Further reflections were provided by the majority of the High Court in the following reasons:

> "The appellants submitted that special considerations intrude in "class actions" because, so it was submitted, there is the risk that such proceedings may be used to achieve what, in the United States, are sometimes referred to as "blackmail settlements". However, as remarked earlier in these reasons, the rules governing representative or group proceedings vary greatly between courts and it is not useful to speak of "class actions" as identifying a single, distinct kind of proceedings. Even when regulated by similar rules of procedure, each proceeding in which one or more named plaintiffs represent the interests of others will present different issues and different kinds of difficulty.
>
> The difficulties thought to inhere in the prosecution of an action which, if successful, would produce a large award of damages but which, to defend, would take a very long time and very large resources, is a problem that the courts confront in many different circumstances, not just when the named plaintiffs represent others and not just when named plaintiffs receive financial support from third party funders. The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions. And if there is a particular aspect of the problem that is to be observed principally in actions where a plaintiff represents others, that is a problem to be solved, in the first instance, through the procedures that are employed in that kind of action. It is not to be solved by identifying some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against that defendant."

The High Court did not condemn litigation funding rather it determined that the actions that were being considered failed to comply with the Court Rules with the result that the actions could not be maintained. The High Court made special mention of the fact that:

> "The outcome of the present proceedings with respect to those Rules is not to be taken necessarily as indicating there would have been the same outcome in proceedings under the Rules of other Courts."

The retailers are not prohibited from pursuing the claims separately and if the litigation funder chooses to support those separate actions then the battle continues. No doubt a multitude of separate actions would result in an enormous escalation of costs for all sides and make the funding of the actions less attractive.

On the same day the High Court handed down a similar judgment in Mobil Oil Australia Pty Limited - v- Trendillen Pty Limited. Again, the proceedings were commenced by retailers and funded by Firmstones Pty Limited. The proceedings commenced by Trendillen took substantially the same form as the proceedings commenced in Fostif and the end result was the same.

Where to from here for litigation funders? The High Court has not ruled out litigation funding but it will be up to the funders to see if they can come up with carefully framed claims that will satisfy the common interest requirement for representative actions. It will be necessary for the litigation funders to have a pool of clients from the outset to ensure that any claim commenced is a claim in which each member of the group has an interest.

Litigation funding is here to stay but the pre litigation manoeuvrings by litigation funders will need to increase to secure a truly representative class with a common interest in a claim.

Failure to Repair the Road- The Council is Liable

Mr Sullivan was riding his motor cycle in an easterly direction along Stennett Road, Ingleburn. This particular area was not well lit. As Mr Sullivan was approaching the intersection between Stennett Road and Inglis Road, his front tyre hit “something” and he was thrown off onto the road. As a consequence he sustained injuries. Sullivan recovered workers compensation payments from his employer and the employer brought proceedings against Campbelltown Council to recover the payments.

The cause of Mr Sullivan’s fall was a “delamination” in the eastbound lane of Stennett Road. The delamination was constituted by the collapse of the asphalt surface or pavement of the road. The delamination had occurred in an area of roadway showing signs of distress from 1.5 to 6 metres from the northern kerb, approximately 40 metres long, and ending approximately 20

metres west of the intersection between Stennett Road and Inglis Road, with the actual delamination being about 1.3 metres wide and 3.3 metres long.

According to an expert witness, the delamination was probably caused by a heavy truck braking on the asphalt surface, either so as to be able to turn into Inglis Road or to slow down because of another vehicle proceeding from Inglis Road into Stennett Road. The expert pointed out that heavy trucks and trailers with multiple axles constituted much of the traffic that travelled along Stennett Road near the intersection with Inglis Road.

Approximately 6 months prior to the accident the Council had received a report on the state of the road from consultants that it had engaged and the report revealed damage to the road with an estimated life for the surface in the relevant area of less than a year.

It was common ground that Campbelltown Council owed Mr Sullivan a duty of care. The trial judge found that the Council had breached its duty of care by failing "to take warning steps" and to provide "barricades to lessen the wear on the eastern side of the carriageway". The Council appealed.

The Court of Appeal stated that "The Council knew that Stennett Road was an access route to and from an industrial area and knew or ought to have known that much of the traffic along it, in the area where the accident occurred, comprised heavy trucks and trailers with multiple axles." There was evidence that nothing was done in response to the Council's consultants report. It was common ground that the Council's documents produced on subpoena did not disclose any evidence of the Council undertaking any inspection, repairs or maintenance on Stennett Road in the 12 months before the incident. The Court concluded "This gives rise to the inference, as there was no evidence to the contrary, that the Council did not undertake any inspection, repairs or maintenance on Stennett Road during that period."

The Court of Appeal stated that:

> "The Council should have foreseen that there was a significant risk that the pavement of Stennett Road near the intersection with Inglis Road could suddenly wear away and break up through the force imposed on it by the industrial traffic. Despite these risks, on the evidence, no steps were taken by the Council to limit the dangers that foreseeably could arise and, in particular, the Council took no steps to implement the recommendations in the March 1997 Douglas report concerning interim maintenance of the road."

The absence of evidence from the Council and the failure to call evidence to refute the claims was the final straw for the Council. The Court noted:

> "The Council did not call any witness to prove that the Council gave any consideration to the situation that had developed. … From an evidential point of view, there has been silence from the Council on this issue. There is no evidence, express or from which any inference could be drawn, that the Council intended to carry out long-term rehabilitation of the road within a reasonable, or any, time. There is no evidence that the Council believed that it was reasonable to leave the situation in the state that it was, and, if so, on what grounds."

The Court reasoned that in light of the consultants report it was reasonable that the Council should carry out inspections of the road at reasonable intervals and the Council made no attempt to determine the extent or severity of the cracking even though it knew that the pavement was at risk. It was relevant to the Court that the area particularly at risk was relatively small. The Court determined that the costs of short term maintenance were relatively small and that the failure of the Council to take any measures to remove the foreseeable risk of harm caused by the pavement of Stennett Road breaking up in the area near Inglis Road was negligent.

Councils need to carefully consider expert reports they receive and properly address recommendations made in the reports and implement appropriate recommendations in a planned and co-ordinated way. This claim may have been successfully defended if evidence was available that a reasonable strategy had been implemented by the Council for the timely introduction of repairs and maintenance following receipt of Council's consultants report.

In this case the Council chose not to call evidence. The end result for the Council was predictable. Silence from a defendant will result in adverse inferences being drawn and can be fatal to the defence of a claim.

Plastic Glasses For Your Drinks?

At sports grounds around Australia if you purchase a drink it comes in a plastic glass. But should this become the practice at other venues? The New South Wales Court of Appeal says no. In what is a welcome decision for pub and tavern owners, the Court of Appeal has recently determined that it is unrealistic to expect the owner of a tavern to serve liquor in plastic glasses (Hobona Pty Limited & Anor v Gremmo).

Richard Gremmo was injured on Christmas Eve 2000 whilst a patron at the Castle Hill Tavern. At the time of the incident which resulted in the injury, Gremmo was standing in an area which was usually the carpark but had been fenced off that night for the service of alcohol. There were about 300 people in the area at the time of the incident. It appears that a scuffle broke out at the tavern amongst a small number of patrons and Gremmo was injured when he was struck by a person who, in an unprovoked act of violence, "took a swing" at Gremmo whilst he had a glass in his hand. Gremmo was not involved in the scuffle.

At trial, the Trial Judge found in favour of Gremmo for two main reasons. The tavern, having anticipated a large crowd, had hired additional security guards for the evening. The Trial Judge found that the security guards were negligent in the way they managed the situation that had arisen. Another finding of the Trial Judge was that the tavern should have used only plastic glasses for the service of alcohol in the area on the night.

Hobona Pty Limited (who conducted the business) and Peter Bingham (the licensee) appealed.

The Court of Appeal disagreed with the Trial Judge. In the Court of Appeal's opinion there was no evidence that the security guards had acted negligently and it was not negligent that the security guards failed to observe one of the patrons, who had previously been acting normally, act in the manner that he did. The Court of Appeal were of the opinion that the security guards were properly trained and sufficient in number.

The Court of Appeal also disagreed with the Trial Judge's findings in relation to the use of plastic glasses. The Court of Appeal unanimously held that this finding was such as to impose an unreasonable standard of care on the tavern. As Justice Ipp stated:

> "There was evidence that many people preferred drinking alcohol from glass containers rather than plastic cups. A tavern owner that served its alcohol in plastic containers could well lose popularity and be regarded as an establishment of less quality. Plastic containers carry with them their own problems. The occasion was not one involving thousands of persons where emotions would inevitably become inflamed or over excited. This situation was different from important sports games or popular concerts where completely different considerations arise."

Plastic glasses will remain a feature in the service of alcohol at large events however we can continue to enjoy our drinks in glasses in hotels and taverns at least for a while.

Non Work Related Injuries and Discrimination

The health and welfare of workers is an important issue for all employers and they need to carefully consider their dealings with employees when non-work related accidents result in an incapacitating injury to a worker.

The Queensland Anti-Discrimination Tribunal has recently considered a claim by a worker alleging discrimination as a consequence of his forced early retirement due to non-work related injuries.

Toganivalu, a prison officer, had suffered injuries to both his knees in two non-work related accidents. The first accident occurred in 1998 before he commenced employment as a prison officer. When he applied for employment he was not required to undergo a physical assessment. The second non-work related accident occurred in August 2002 whilst he was employed.

The worker was pursuing his rights to compensation in respect to the two incidents and was required to take time off from work as a result of his injury in August 2002. His performance at work had been satisfactory prior to August 2002.

Toganivalu returned to work in January 2003 and undertook a series of workplace rehabilitation programs which the Tribunal found were designed to return him to a position where he could perform all of his duties. He completed two rehabilitation

programs and prior to a third rehabilitation program being completed he was required to undergo a medical assessment as a preliminary step to the consideration of his retirement on medical grounds. The medical assessment concluded the worker was unlikely to improve unless he had both knees replaced and consequently he was retired on the grounds of medical ill health.

Toganivalu complained that he had not been consulted about his impairment and that there was a dispute as to whether he could perform the genuine occupational requirements of his former job. The employer argued that it was a valid ground for exemption from the anti-discrimination legislation as he was not capable of performing genuine occupational requirements.

The Tribunal found that Toganivalu had been discriminated against on the grounds of his impairment as a consequence of the employer not allowing him to complete the rehabilitation programs and failing to consult him over his impairment and subsequently forcing him to undergo a medical assessment as a prelude to retiring him. The Tribunal concluded Toganivalu could perform the genuine occupational requirements of his job albeit with some limitations. The exemption argument did not apply. The Tribunal found that Toganivalu's performance in his job and his impairment would not have posed a risk to the health and safety of himself or others.

Toganivalu was reinstated to his former position, and awarded compensation for loss of income of $30,000.00 and an additional $15,000.00 for pain and suffering.

Employers need to carefully consider the approach they adopt when confronted by a worker who suffers an incapacity as a consequence of a non-work related injuries. Employers need to carefully consider:

- Possible rehabilitation obligations.
- The opportunities for the worker.
- Whether alterations can be made to the worker's job specifications to allow the worker to continue in employment.
- Whether the continued employment of the worker may place the worker or other employees at risk.
- Genuine consultation with the injured worker in relation to his capacity before taking any action.

Confusing times for CTP insurers?

A recent NSW Court of Appeal decision concerning procedure under the Motor Accidents Compensation Act 1999 (MACA) will require CTP insurers to reassess how they handle their claims portfolios.

The facts were simple. The claimant was injured in a motor vehicle accident and made a claim on the relevant CTP insurer. The insurer accepted liability, but indicated it wished to allege some contributory negligence by the claimant.

The claimant then applied for assessment under section 94 of MACA. An assessment hearing took place - the Assessor found that the claimant was liable for 10% contributory negligence, and awarded her a sum of damages.

Section 95(1) MACA provides, in effect, that an assessment of liability by an Assessor is not binding on either party. Section 95(2) says:

> "An assessment … of the amount of damages for liability … is binding on the insurer, and the insurer must pay to the claimant the amount of damages specified … if:
> (a) the insurer accepts that liability under the claim, and
> (b) the claimant accepts that amount of damages in settlement of the claim…"

The claimant advised the insurer that she accepted the amount of damages but the insurer indicated it did not accept the liability/contributory negligence finding. It invited the claimant to begin proceedings.

This she did. The issue between the parties was what section 95(2) meant. The insurer - which had not accepted the liability finding of the Assessor - wished to litigate both liability/contributory negligence and quantum of damages. The claimant wanted the litigation confined to liability alone.

Put another way, the issue was whether conditions (a) and (b) in s95(2) applied only to the obligation to pay (the words after the comma) or to the words "binding on the insurer" as well.

Initially, the insurer obtained orders from the District Court that the only thing it could raise in the proceedings was the issue of liability - here, really, the issue of contributory liability. In practical terms, this reading of s95(2) would mean that a finding by an Assessor of the amount of damages would always be binding on an insurer, and all it could ever litigate in court proceedings would be liability.

This appeared to be in line with what had been said by the Minister in the Second Reading Speech before MACA's introduction "However, assessments by CARS of the amount of compensation will be binding on the insurer but binding on injured people only if they accept the assessment within 21 days."

The insurer evidently did not believe that the Act and the Second Reading Speech said the same thing. Not surprisingly, it appealed.

The Court of Appeal held that the insurer was right, and the District Court (and the Minister) wrong.

It said that section 95(2) provides a mechanism by which the non-binding assessment of the issue of liability and the assessment of the amount of damages become binding as a package. To activate that mechanism - and bind the insurer to the amount of damages - both condition (a) and (b) must be satisfied.

That is, an assessment of damages will not be binding on an insurer unless it accepts it. Simple really.

No Procedural Requirements for Nervous Shock Claim

In New South Wales in claims for work injury damages there are a number of procedural requirements that an injured worker must comply with before they can commence a claim for work injury damages in the District or Supreme Court. The procedural requirements are largely set out in the Workplace Injury Management and Workers Compensation Act 1988 ("WIMS Act") and include requirements such as a claim being made in accordance with the WorkCover guidelines and the service of a pre-filing statement that sets out the particulars of the claim and any evidence upon which the injured worker may rely. The worker must also have been paid compensation for permanent impairment and pain and suffering and have a whole person impairment of at least 15%. There is also a requirement that there is a mediation of the claim prior to the commencement of Court proceedings

The New South Wales Court of Appeal has recently had an opportunity to consider whether or not the procedural requirements in the WIMS Act apply where a claim is not brought by an injured worker but by the spouse of a deceased worker.

Rosalina Thompson was the widow of the late Mark Thompson who died as a consequence of injuries received during the course of his employment with Kimberly-Clark Australia Pty Limited ("Kimberly-Clark"). Mrs Thompson brought a claim in the Supreme Court for alleged nervous shock arising as a consequence of the death of her husband. Kimberly-Clark sought an order dismissing the statement of claim on the basis that Mrs Thompson had failed to comply with the procedures set out in Chapter 7 of the WIMS Act. The application was first heard in the Supreme Court before Master Harrison who dismissed the application. On appeal, Justice Patton upheld the decision of Master Harrison. Kimberly-Clark appealed this decision.

The Court of Appeal determined that the definition of "work injury damages" in Section 250 of the WIMS Act did not extend to Mrs Thompson's claim. The damages recoverable were not "in respect of" the death of her husband, rather, the damages were recoverable in respect of nervous shock to herself. In these circumstances Chapter 7 of the WIMS Act which deals with new claims procedures did not apply to claims such as Mrs Thompson's. When the Workers Compensation Act 1987 was examined, the same conclusion was reached.

The Court of Appeal did not look at the issue as to whether or not it was necessary for Mrs Thompson to have a whole person impairment as no question had yet arisen as to the assessment of damages. No doubt this issue will arise in due course.

Employees Should Not Be Victimised For Raising Safety Issues

NSW employers should be aware of Section 210(1)(j) of the Industrial Relation Act, 1996 (the "Act") which prohibits victimisation of an employee who makes a complaint about a workplace safety matter or an employee who exercises functions as a member of a committee with respect to workplace consultation. The Occupational Health and Safety Act 2000 also

provides obligations on employers to ensure consultation takes place in the workplace. If employees are victimised or restricted in raising issues of health and safety in the workplace, there could be action taken by WorkCover against the employer in failing to ensure consultation takes place in the workplace.

In Twentieth Superpace Nominees - v - TWU (2006) NSW IRComm an employee who had been an OHS representative at the workplace for an employer had raised concerns regarding the over-filling of sugar cane bins. The employer provided an unsatisfactory response to the employee's concern which led the employee to contact the Road Transport Authority to make a complaint about the employer's actions.

The employer subsequently lost the sugar cane carting contract in Northern NSW. The employee was refused employment with the company that took over the sugar cane carting contract, despite scoring highly in the recruitment assessment for the job.

The Industrial Relations Commission accepted the TWU's argument the employee had been victimised for complaining about potential health and safety risks with his old employer. The new company's action in failing to employ the employee was found to constitute victimisation under Section 210(1)(j) of the Act. The Commission commented that every reasonable avenue should be available to an employee to raise occupational health and safety concerns without fear of victimisation or retribution. Section 210 was intended to ensure workers could raise health and safety concerns without fear of losing their job or being mistreated.

The Commission upheld the previous order made against the new company that they should employ the employee and pay him for lost remuneration. The cost was imposed on the new employer who was not related to the original employer. This seems quite harsh.

There is a statutory presumption in Section 210(2) that an employee or prospective employee who suffers any detriment as a result of an action of the employer was victimised because the employee made a complaint about workplace health and safety. An employer has the onus of rebutting the presumptions that the safety concerns raised by the employee was not a substantial and operative cause of the employer's detrimental actions.

Latest Statistics from NSW Workers Compensation Commission

The New South Wales Workers Compensation Commission has recently published their quarterly review for the period April to June 2006. The statistics confirm the declining trend in litigated disputes. As compared to the March 2006 quarter, the June quarter showed a 6.4% decrease in the amount of disputes lodged with the Commission. However, the statistics confirm the type of issues in dispute continue to remain stable. Disputes for permanent impairment remain the most significant area of dispute. Whilst there are often multiple issues in dispute when an Application is lodged with the Commission, disputes about permanent impairment continue to comprise 80% of the disputes lodged with the Commission.

The role of the Arbitrator continues to decline with only 10% of matters being determined by an Arbitrator. 44% of disputes were settled by agreement between the parties and 28% of disputes being discontinued by the applicant worker. The average time taken to resolve disputes (without appeal) has decreased from 133 days to 111 days from the date of registration. 90% of matters are now finalised within 39 weeks provided no appeals are lodged.

With respect to appeals, the success rate of appeals has improved. 8% of the total determinations by Arbitrators were revoked or the matter remitted back to an Arbitrator. This contrasts with a previous success rate of 2% for appeals from an Arbitrator. Similarly, 17% of medical assessment appeals have been revoked by the Medical Appeal Panel as compared to 9% previously.

Common law matters remain stable with just over 100 applications for mediation being received by the Workers Compensation Commission. The large proportion of the common law matters continued to be resolved in the mediation process without the need for subsequent referral to the District Court.

Once again, the statistics echo the decline in disputed Workers Compensation matters. The legislative amendments in late 2005 requiring insurers to conduct a further review before matters could be disputed has certainly been reflected in the declining level of disputes. The further amendments to be introduced in November 2006 will also see the role of the Arbitrator significantly diminished. The legislative changes will result in the removal of the Arbitrator in any disputes about permanent impairment. These disputes will be referred to an Approved Medical Specialist without the necessity for a teleconference.

Given that 40% of matters are solely related to disputes about permanent impairment, we expect a large number of the Arbitrators who are currently appointed to the Commission will not have their appointments reviewed in 2007. However, we do not expect the trend for disputes to be resolved in a timely fashion to continue. We have no doubt the automatic referral to an Approved Medical Specialist for permanent impairment disputes will significantly increase the time it takes by the Commission to finalise the dispute.

OH&S Roundup

Company Structuring Leads to Double Penalties

Big River Timbers (Veneer) Pty Limited and Big River Timber Pty Limited were each fined $9,100.00 by the Chief Industrial Magistrate following breaches of the Occupational Health and Safety Act. Big River Timber controlled the business activities and owned the relevant plant and Big River Timbers (Veneer) was operating as an employment company for the veneer and engineering division at the time Craig Cole received multiple crush injuries to his right hand when he was crushed between a steel parallel flange channel and a steel wheel of a travelling overhead gantry.

The Chief Industrial Magistrate treated the two corporate entities as one entity for the purposes of sentencing because they were interlocked, having common governance and operations. WorkCover were not happy with this approach and appealed.

The Full Bench of the Industrial Commission confirmed that the Chief Industrial Magistrate's approach was incorrect. The principle of totality had no role to play in the incident but rather the question was one of parity. The two companies had to be treated separately and fines imposed based on the culpability of each company. The overall penalty should not be determined and then shared between the companies.

The Commission held it was appropriate to compare the respective sentences imposed on each defendant to ensure parity, making due allowance for relevant differences in their level of culpability. The Commission concluded that it was not open to the Chief Industrial Magistrate to treat the companies as one defendant. The Commission reassessed the fine and imposed penalties of $20,000.00 on each corporate defendant. This penalty was determined after a discount of 35% for mitigating factors and the utilitarian nature of the early plea of guilty. This was the same discount applied by the Chief Industrial Magistrate.

A substantial increase in the fine. Companies who structure their business to operate through numerous corporations are exposed to multiple fines arising out of a single work accident.

Be Aware of a History of Violence

The State of New South Wales was recently successfully prosecuted by WorkCover, when the Department of Education was fined $220,000.00 arising out of two charges brought pursuant to the Occupational Health and Safety Act. WorkCover alleged that the Department of Education failed to ensure the health, safety and welfare at work of its employees at Rose Bay Secondary College.

In essence a student was properly in attendance at school but should have been suspended and there was a failure by the Department of Education to undertake an adequate risk assessment of the student and his impact on employees, given his attendance at school. There was a failure to ensure that a complete medical, psychological and psychiatric assessment of the student was performed and a failure to inform or consult employees about previous incidents. It was also alleged there was a failure to provide security guards at the school. The teachers were said to be at a potential risk as a result of actual threatened violence by the student and as a result of having to restrain the student.

The Commission found that the Department of Education did not carry out a risk assessment with a focus on safe working for the teachers. The evidence revealed that there had been a failure by the school to identify at the enrolment stage whether a student had a prior recorded history of violent behaviour at other schools. Since the accident there has been a significant increase in the overall expenditure provided to schools to support teachers dealing with students with behavioural problems.

The flow on effect of the decision to the private sector has significant potential. Will employers need to screen applicants for employment to ascertain details of a violent past? No doubt the Department of Education was seen to have the capacity to collect this information from previous dealings with students and this was factored into the determination of what should be done. Nevertheless the issue will cause concerns for some employers.
Hospitals dealing with psychiatric patients and nursing homes will need to carefully consider the potential impact of this decision and carry out risk assessments that specifically address the potential impact on the workforce from patients with a

propensity for violence.

Escape of Gas

Bluescope Steel (AIS) Pty Limited was recently fined $120,000.00 following a breach of the Occupational Health & Safety Act. The fine arose out of an incident where there was an uncontrolled release of blast furnace gas from the Port Kembla Steelworks which resulted in a number of personnel at the site being affected by carbon monoxide gas. Employees and contractors were working on the site at the time of the incident. The prosecutor argued that the offences were serious because the risk involved was exposure to a potentially dangerous gas which was colourless and odourless with the potential to cause serious injury. A risk was known and recognised by the company. The system which it had in place to deal with that risk did not properly address the possibility of dispersion of the gas within and outside the plant.

The employees of the company had developed a tolerance to alarms that operated as part of a safety system so as to alert them to the presence of gas. This was a problem to which the company ought to have been alive. The result was that the system in place carried with it inherent identifiable and serious risks. There were sophisticated safety measures in place, however the Commission held that the failures in question were serious with significant potential consequences.

The Commission concluded there was a need for a penalty which took into account both general deterrence and specific deterrence. There were two incidents and the Commission concluded that the appropriate penalty was $210,000.00 for each offence, a total of $420,000.00. The Commission then applied the discount of 25% for the utilitarian value which was achieved by a guilty plea at the earliest opportunity after the charges were amended by the prosecutor. The Commission also regarded the two offences involved some overlap and therefore applied the principle of totality to reduce the fines. The Commission ultimately reduced the total penalty to $240,000.00 after applying the principles of totality and the 25% discount.

Loading Incident

Toll Pty Limited recently received a fine of $115,000.00 following a plea of guilty to a prosecution brought by WorkCover under the Occupational Health and Safety Act arising out of an incident on 22 December 2003.

Price, a yardman, whilst performing duties, was pinned by a forklift against the rear door of a truck in a loading bay. He received significant crush injuries. It was alleged that there was a failure by the company to conduct a proper risk assessment in respect to all aspects of the work and to identify and eliminate all risks associated with the operation and use of dock levelling ramps including risks associated with persons stepping onto the ramp whilst it was in motion. It was also alleged that the company failed to identify and eliminate risks concerning inadequate room in a docking area.

There were 12 loading docks at which in-borne and out-borne products were loaded and unloaded by the use of forklifts or pallet jacks. There were hydraulic dock levellers that enabled the height of the second tier of the loading dock to be adjusted up or down so as to provide a ramp for the first tier of the loading dock into the trailer of the truck. The leveller operated by two simple buttons, an up and a down button. The leveller had a metal flap that once operated acted as a bridge between the loading dock and the trailer of a truck. The accident occurred when an employee stepped onto the dock leveller and commenced to close the rear trailer door when a forklift driver, who was an employee of a labour hire company, left the forklift truck unattended at the head of the dock leveller with its tines facing towards the trailer and its front encroaching onto the head of the dock leveller. As the employee was in the process of closing the trailer door the forklift moved down the dock leveller striking the employee.

The Commission concluded there were a number of steps which could have been taken prior to the accident to lessen the risk. There was a very detailed safety system in place and contributing to the culpability of the incident was the controller of the site and the labour hire company. Toll Pty Ltd was faced with a maximum penalty of $825,000.00 with one previous conviction. The Commission concluded that, having regard to the fact of an early plea, the size and nature of the industry in which the company operated and the number of employees it engaged, it had a good safety record. The Commission imposed a fine of $115,000.00 after discounting the penalty by 25% for an early plea of guilty.

Jib Crane Incident

Austral Brick Company Pty Limited was recently fined $100,000.00 by the Industrial Relations Commission following a conviction for a breach of the Occupational Health and Safety Act when employees were exposed to injury when a jib crane collapsed whilst they were using the jib crane to lift a slab of bricks in premises.
The crane fell a distance of 2.4 metres striking an employee. The jib crane was approximately 9.3 metres long with a lifting capacity of 125kgs. Mr Coleman, a 22 year old labourer, was injured. Following the incident the jib crane was replaced.

The crane was regularly maintained and a number of pre-incident reports identified faults with the crane requiring repair or replacement. The company that carried out the regular maintenance was not authorised to carry out the repairs without express permission of Austral Brick. At the time of the incident some of the repairs had not been carried out.

Despite a comprehensive occupational health and safety management plan and a spend of nearly $1.3 million on occupational health and safety over a period of 3 years, and an approved spend of an additional $6 million on safety, the company's conviction resulted in a penalty of $100,000.00.

Watch your employee's hours

The Federal Workplace Relations Minister, Kevin Andrews, has extended the date for employers to comply with the record keeping requirements introduced with Work Choices from 27 September 2006 to 27 March 2007.

Employers will be required from 27 March 2007 to monitor the hours that many of their employees work and to implement record keeping mechanisms. The purpose behind the amendments introduced by Work Choices is to ensure the new wages and hours guarantees are met. All records must be kept for each employee for a period of at least 7 years.

Failure to comply with these strict liability provisions after the initial grace period which now expires on 27 March 2007, will put employers at risk of a fine up to $2,750.00 per incident and individual employers will be subject to fines of $550.00 per incident. The obligation to keep records cannot be shifted onto employees. If an employee does not comply with directions to enter information into the records of the employer, it is the employer who is at risk of a penalty - not the employee.

The additional record keeping obligations introduced by Work Choices require employers throughout Australia to keep hours of work and records as follows:

- Where the employee's base salary (not including bonuses or penalties) is less than $55,000.00 and they have an entitlement to overtime - a record of start and finish times each day and total hours worked must be recorded.
- Where the employee's base salary (not including bonuses or penalties) is more than $55,000.00 and there is an entitlement to overtime - start and finish times for each day must be recorded.
- Where the employee's base salary (not including bonuses or penalties) is less than $55,000.00 and they have no entitlement to overtime - a record of total hours worked each day must be recorded.
- Where the employee's base salary (not including bonuses or penalties) is more than $55,000.00 and they have no entitlement to overtime - no record of start and finish times or total hours worked is required.

There are additional record keeping obligations. The Regulations require the following details be kept for each employee:

- The employer's name.
- The employee's name and date of birth.
- The date the employee commenced work with the employer.
- The name of any federal industrial instrument under which the employee has entitlements and their job classification.
- Whether the employee worked full-time, part-time or casual and whether they are permanent or temporary staff members.
- Rates of pay.
- Any allowances, penalties, loadings, bonuses or incentive based payments.
- Date of payment and period to which it relates.
- Leave taken and leave accrued.
- Superannuation fund name and contributions.
- The termination of employee's employment, including their name, reasons for termination, how the termination took place and the date of the termination.
- If the employee has agreed to an averaging of reasonable additional hours, a copy of the written agreement is to be kept.

Records that are required to be kept by employers pursuant to the Regulations must be kept in a condition that allow a workplace inspector to determine whether an employee is receiving their correct entitlements.

Gillis Delaney Lawyers specialise in the provision of advice and legal services to businesses that operate in Australia. We can trace our roots back to 1950. The name Gillis Delaney has been known in the legal industry for over 40 years. We deliver business solutions to individuals, small, medium and large enterprises, private and publicly listed companies and Government agencies.

Our clients tell us that we provide practical commercial advice. For them, prevention is better than cure, and we strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service. The changing needs of our clients are met through creative and innovative solutions - all delivered cost effectively. We make it easier for our clients to face challenges and to ensure they are 'fit for business'.

We look at issues from your point of view. Your input is fundamental to us delivering an efficient, reliable and ethical legal service. We like to know your business, and take the time to visit your operation and develop an in depth understanding of your needs. Gillis Delaney is led by partners who are recognised by clients and other lawyers as experts in their fields. Our service is personal and 'hands on'.

Our clients receive the full benefit of our ability, knowledge and effort in our specialist areas of expertise. We provide superior and distinctive services through a team approach, drawing the necessary expertise from our specialists. Our mix of professionals ensures that clients enjoy high level partner contact at all times.

We are committed to delivering a quality legal service in a manner which will exceed your expectations and we maintain a focus on business and commercial awareness whilst delivering excellence in legal advice.

We have a proven track record of delivering commercially focused advice. Whether it be advisory services, dispute resolution, commercial documentation or education and training, a partnership with Gillis Delaney offers:

- practical innovative advice
- timely services
- expert insight
- accessibility
- cost effective solutions

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtn@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.

Gillis Delaney Lawyers