GD News

Gillis Delaney Lawyers

October 2009 Issue

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.

Liability For Independent Contractors On Building Sites - High Court Provides the Answer

An accident occurs on the building site. The claimant is employed by one entity, and the accident occurs as a consequence of another entity's negligence. Of course there is also the head contractor on site who has an overriding responsibility for the project. Who should the injured person sue? The trend in the past has been for the injured person to sue his employer (if he is over the 15% threshold necessary to sue an employer), the head contractor and any other contractors involved in the negligent act. This may change with the recent High Court decision of Leighton Contractors Pty Ltd v Fox.

Brian Fox sustained injury on 7 March 2003 whilst working at the construction site of the Hilton Hotel in Sydney. Leighton Contractors Pty Limited ("Leighton") was the head contractor on site. Leighton had contracted with Downview Pty Limited ("Downview") to carry out the concreting, including provision of reinforcing the formwork, for certain works. Downview had subcontracted the concrete pumping to Quentin Still and Jason Cook. Fox and Warren Stewart were engaged by Still and Cook in connection with the concrete pumping for a pour scheduled to take place on 7 March.

After the concrete pour was completed Still, Stewart and Fox commenced to clean the concrete delivery pipes. This involved blowing an object through the pipe with compressed air. This was done in a negligent manner and the end pipe swung around and struck Fox on the head as a consequence of which Fox sustained injury.

Fox subsequently commenced proceedings in the District Court against Leighton and Warren Stewart Pty Limited, who employed Warren Stewart, and Downview. The Trial Judge in the District Court found that the accident was caused by the negligence of Still and Stewart. The Trial Judge dismissed the claims against Leighton and Downview, finding that there was no breach of duty by either Leighton or Downview. Fox successfully obtained judgment against Warren Stewart, however Warren Stewart was subsequently deregistered. It does not appear that there was a relevant insurance policy in place and so this seems to have been a hollow judgment.

Fox subsequently appealed to the Court of Appeal against the dismissal of his claims against Leighton and Downview. The Court of Appeal allowed the appeal, finding that Leighton and Downview were each subject to a common law duty of care and had breached that duty of care. Fox therefore successfully obtained judgment against Leighton and Downview in the sum of $472,562.00.

In the Court of Appeal's opinion Leighton should have taken reasonable steps to ensure persons coming onto the site to work had undergone relevant induction training. The Court of Appeal noted that Stewart had given evidence that he had taken the precaution of directing Fox to stand clear before attempting to clear the blockage and therefore the inference should be drawn that had Fox received training and been told of the need to tie the end of the pipe to the waste bin then Fox would have done so. Failure to give these instructions resulted in the liability of Leighton.

Leighton and Downview subsequently appealed to the High Court. Both were granted special

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leave. Downview was subsequently deregistered and the liability insurer, Calliden Insurance Limited, stepped in as the defendant.

In the appeal to the High Court Leighton asserted that the Court of Appeal had imposed on Leighton a duty requiring it to train every worker coming onto the site. Leighton argued that this was far too high a burden to be imposed on a head contractor.

In a joint judgment Chief Justice French, Gummow, Hayne, Heydon and Bell JJ, stated:

> *"It may be accepted that Leighton, as the occupier of the site, owed a duty to persons coming onto it to use reasonable care to avoid physical injury to them. However, this says nothing about whether Leighton owed a duty to Mr Fox to take reasonable care to prevent him suffering injury on the site as the result of the negligent conduct of Mr Stewart. The relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken."*

The High Court continued.

> *"If Leighton owed a duty to Mr Fox and Mr Stewart to provide induction training to them in the safe method of line cleaning, it owed a duty to provide training in the safe method of carrying on every trade and conducting every specialised activity carried out on the site to every worker on the site. There is no reason in principle to impose a duty having this scope on a principal contractor. The latter is unlikely to possess detailed knowledge of safe work method statements across the spectrum of trades involved in construction work. And a duty to provide training in the safe method of carrying out the contractor's specialised task is inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and a principal to independent contractors."*

In essence, the High Court determined that Leighton's obligation under the Occupational Health and Safety Regulations (whilst not founding an action for breach of statutory duty) was to be satisfied that the contractor carrying out construction work on the site had undergone OH&S induction training rather than providing the training itself. The obligation on Leighton created by Clause 213(i) of the Regulations was to be satisfied that a worker coming onto site had undergone general and work activity based OH&S induction training and this would ordinarily be discharged by obtaining a copy of the worker's statement of satisfactory completion of the general and work activity based components of training.

There was not an issue at trial as to what measures Leighton might have taken to confirm workers coming onto site had undergone OH&S induction training and Leighton had no notice that Stewart and Fox were coming onto site. The adequacy of Leighton's measures to ascertain who was coming onto site was not an issue at trial.

The High Court concluded that the Court of Appeal's conclusion that Leighton was negligent by reason of an assumed failure to provide OH&S induction training to Fox and Stewart could not be sustained. Nor could the finding of liability that Leighton was negligent as a consequence of its failure to take reasonable steps to ensure Fox and Stewart had completed OH&S training be allowed.

Interestingly, the High Court also appears to clarify the issue that there is no separate cause of action for a claim of breach of the Occupational Health & Safety Act or Regulations in NSW.

Leighton was not subject to a duty of care requiring that it provide training to subcontractors in the safe methods of carrying out the subcontractor's specialised work.

What about Downview? The Court of Appeal had found that Downview failed to take any steps to ensure persons coming onto site on 7 March had undergone induction training. The Court of Appeal determined that Downview had a general obligation to those participating in carrying out contracting work to conduct operations safely and to do that Downview was obliged to contract with competent and properly trained operators. In relation to Downview, the High Court concluded:

> *"In Stevens - v - Brodribb Sawmill & Co Pty Limited, Mason J explained that if an entrepreneur engages independent contractors to do work that might as readily be done by employees, in circumstances in which there is a risk to them of injury arising from the nature of the work and where there is a need for direction and coordination of the various activities being undertaken, the entrepreneur will come under a duty to prescribe a safe system of work. Fox submitted that Downview's liability should be sustained upon this basis. He pointed to the fact that this was a busy building site with many people in and about it. However, as the Court of Appeal observed, there is nothing unreasonable about subcontracting the work of concrete pumping. It is an activity that requires specialised equipment*

and which lends itself to being carried out by independent contractors."

If Downview had failed to engage a competent contractor, then Downview may not have avoided liability for the negligent failure of the contractor to take reasonable care to adopt a safe system of work. However, in this case, the contractor was competent and the concrete pumping was properly placed in the contractor's hand. Downview was therefore not subject to an ongoing obligation with respect to the safety of the work methods employed by the contractor or any subcontractors.

No doubt as a consequence of the Leighton decision there will be a change in claimant's approaches to building cases. Head contractors and other subcontractors may be able to rest a little easier as the inevitable writ which was issued in the past may actually become a feature of the past particularly if there is one clearly negligent party with a policy of insurance to respond to the claim.

Model OH&S Laws- Issues For Insurers

The Federal Government has released model OH&S legislation for public comment. The Model laws will form the base for a nationalised OH&S regulatory regime with each State and Territory enacting legislation in the same terms. The model legislation imposes a significant obligation on "officers" of corporations which will no doubt catch the eye of insurers involved in D&O insurance and employment practices liability. We have published a special edition of GD News dedicated to the review of the model OH&S laws which we have published on our website. There are significant issues for liability insurers, workers compensation insurers and scheme agents which arise from the proposed OH&S laws and the interest of the insurance industry is sure to be significant.

The model laws provide that where a breach of the laws results in damage the Court may make a compensation order for a breach of the Act. The proposed laws will allow damages to be awarded to injured persons where the damages result from the breach of the laws. Effectively a prosecution for a breach of OH&S laws could result in an award of damages to the injured person by the Court hearing the prosecution. The model laws provides that:

“a court may make an order requiring the person to pay compensation to a person who suffered loss or damage arising from the Commission of the offence.”

At first blush one might think that this could open up a new area of litigation for injured persons. However, for employees in New South Wales any compensation order made will be subject to the application of the damages regime in the Workers Compensation Act, 1987 as that legislation applies to an award of damages in respect of an injury caused by negligence or other tort of the worker’s employer even though the damages are recovered in an action for breach of contract or in any other action. Similar provisions are found in the Civil Liability Act for persons who are not employees. The Civil Liability Act, 2002 in New South Wales applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

Any compensation orders made for the benefit of injured persons whose injury arose from the commission of an offence under the laws would still be subject to the damages regimes in the Workers Compensation Act, 1987 or the Civil Liability Act, 2002. However, insurers need to be aware that Courts hearing prosecutions will have the power to make compensation orders. This will present a significant difficulty for insurers who will need to deal with these potential orders. Perhaps insurers will need to become involved in occupational health and safety prosecutions- but how can that happen

Is there an answer for liability insurers? Perhaps an extension of cover under a policy to cover the costs of OH&S prosecutions so that the insurer can play a role in the ultimate prosecution. However, even if this occurred there will be conflict of interest issues as an insured facing a penalty and or imprisonment has a different interest to an insurer facing a compensation claim.

There are interesting times ahead and insurers need to focus on the Model OH&S Laws and the proposed right to award compensation and develop strategies to deal with this interesting development. Insurers and Scheme Agents will no doubt need to take action to ensure their interests are properly protected where there is an OH&S prosecution.

Rescuers Not Entitled To Damages For Nervous Shock

The NSW Court of Appeal has recently confirmed that a rescuer who attends an accident scene is not owed a duty of care and is therefore not entitled to recover damages against a negligent defendant (*Wicks & Sheehan v SRA*).

In New South Wales claims for nervous shock or pure mental harm are governed by the Civil Liability Act 2002. Section 30 of the Act specifies who can bring a claim and provides the claimant is not entitled to bring a claim for damages unless:

- the claimant witnesses, at the scene the victim being killed, injured or put in peril; or
- the claimant was a close member of the family of the victim.

Section 32 of the Act sets out when a duty of care is owed in claims for pure mental harm and provides that no duty of care is owned "unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken." The "circumstances of the case" include whether or not the injury was suffered as a result of sudden shock, or whether the claimant witnessed, at the scene, a person being killed, injured or put in peril.

David Wicks and Peter Sheehan were police officers who attended the aftermath of the Waterfall train derailment on 31 January 2003. Wicks and Sheehan assisted the injured passengers and moved the bodies of the deceased. Part of Wicks' job was also to collect and return passengers personal items.

Wicks and Sheehan contended that they suffered nervous shock as a consequence of their involvement with the Waterfall derailment and sued the State Rail Authority of NSW.

The claim was originally heard in the Supreme Court. The police officers' claims failed with the trial judge determining that the SRA did not owe the police officers a duty of care. Wicks and Sheehan appealed.

The Court of Appeal determined that Wicks and Sheehan could not succeed in the claim. The Court of Appeal determined that for a person to satisfy the Civil Liability Act the person must witness an event at the scene. Observations via other means, such as the media, are not sufficient. A person must directly observe the causal affect where another person is being killed, injured or put in peril. The provisions of the Civil Liability Act do not extend to people, including rescuers who come upon the scene after the accident in which a person is killed, injured or put in peril is over.

The Court of Appeal found:

> *"There is no doubt that there is an entitlement to claim damages where a person witnessed a person being killed, injured or put in peril in the course of the incident. Thus, if a passenger saw a fellow passenger being pinned under a falling stanchion that crushed the train, the first mentioned passenger is a person who "witnessed, at the scene, the victim being . . . injured or put in peril" if the stanchion was knocked loose in the collision and then fell during the rescue process, killing or injuring passengers, or putting them in peril, then a rescuer who saw the stanchion crushing or pinning persons underneath and who suffered mental harm as a result, would, arguably at least fall within Section 30(2)(a). In that situation, "being" would be satisfied, as would the causal connection with the negligent act or omission whereby the derailment occurred. To that extent, there would be substance in the appellant's argument that an accident extends beyond the time when the impact occurs.*
>
> *It is another step again to say that a rescuer witnessing matters at the scene as the appellants did witness victims "being killed, injured or put in peril" in context, and confining attention to being "put in peril", "by the act or omission of the defendant". The derailment is what put the victims in peril by the respondent's act or omission. When the appellants arrived at the derailment, as the incident which killed, injured and put in peril the passengers in the train, was over; there was no consequential event such as the falling of the stanchion box that loosened the collision. The process of victims being put in peril was ended and the appellants witnessed what some cases and the report referred to as the aftermath."*

Not a surprising result from the Court of Appeal. It is difficult to see how with the current state of the law in NSW Wicks and Sheehan could succeed in their claims. Further, the Court would have no doubt been concerned that it should not open the flood gates to result in a torrent of nervous shock claims from rescuers.

Can A Road Authority Be Liable For Criminal Conduct Of Others That Result In Accidents?

There is little doubt that a road authority owes a duty of care to drivers that use roads but "does that duty extend to provide a requirement that the road authority must provide protection for road users from the deliberate criminal conduct of vandals and fools who seek to injure road users?" Even if there is such a duty, how far does that duty extend and "what must the road authority do?"

The recent decision of the New South Wales Court of Appeal in *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Limited* has brought into focus these issues as well as well as a road authorities right to defend claims on the basis that the road authority has limited financial resources at its disposal.

Mr Mark Evans, an employee of Refrigerated Roadways, was killed whilst driving a truck along the F5 freeway in Sydney's southwest when a concrete block dropped from an overhead bridge known as the Glenlee Bridge penetrated the front windshield. Mr Evans died at the scene of the accident. A widow and two children survived him.

Four people were involved in the dropping of objects from the bridge on 23 August 1998. They collected the objects that were dropped from the bridge from the home of one of the men, placed them in the boot of a motor vehicle, and drove to the Glenlee Bridge for the specific purpose of dropping them from the bridge onto trucks passing below. Clearly, dropping the concrete from the bridge onto traffic below was criminal conduct. It was common ground that the four people responsible have been convicted and sentenced for offences concerning this incident.

Refrigerated Roadways made payments to his widow pursuant to the Workers Compensation Act 1987 consisting of a lump sum death benefit and continuing weekly payments. Mr Evans' widow and children did not take any action for damages against the RTA having received the workers compensation benefits. Refrigerated Roadways contended, it was entitled, pursuant to section 151Z(1)(d) Workers Compensation Act, to indemnity from the RTA for the payments of workers' compensation made, plus interest on the death benefit component of compensation and Refrigerated Roadways brought an action in negligence against the RTA as the responsible roads authority claiming breach of a duty of care owed to road users by failing to screen the overhead bridge.

The RTA was aware that there was a problem of people dropping objects from overhead bridges and had developed an order of priority for screening overhead bridges. Progress in screening the bridges was slow due to budgetary constraints and so the Glenlee Bridge had yet to be screened at the time of the accident.

The Trial Judge concluded the RTA had been negligent and an appeal followed.

The RTA argued that even though it admitted it owes a duty of care to motorists the duty did not extend to requiring it, either at the time of construction of the Glenlee Bridge or later, to take reasonable care that motorists not be injured by criminal behaviour like that involved in rocks being thrown or dropped from an overhead bridge onto a freeway.

If that argument failed and a duty existed, the Court of Appeal would then need to determine whether the RTA breached that duty (bearing in mind section 42 Civil Liability Act 2002) by either

- not having installed screening on the bridge when it was first constructed, or
- not having retrofitted screening to the bridge prior to 23 August 1998.

Section 42 of the Civil Liability Act 2002 provides:

> *"The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:*
>
> *(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,*
>
> *(b) the general allocation of those resources by the authority is not open to challenge,*
>
> *(c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),*
>
> *(d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate."*

The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable. So is the RTA in a special relationship with road users where a duty to protect against criminal behaviour arises? The answer is that it is as the Court of Appeal concluded the RTA owed a duty of care to road users to take reasonable care to prevent harm to road users. This includes taking reasonable care to protect motorists from harm resulting from the criminal conduct of others.

The Court of Appeal noted:

> *"A motorist travelling on a freeway could suffer physical injury as a result of an object falling from an overhead bridge and striking his or her vehicle even if no criminal conduct was involved. Such an event could happen as a consequence of part of a poorly secured load on a truck going over the overbridge becoming loose and falling over the edge, or as a result of some object that a pedestrian on the bridge was carrying or playing with accidentally going over the edge."*

Importantly the Court of Appeal concluded:

> *"The RTA has a unique role to play concerning any dangers of objects falling from an overpass onto cars on a freeway below. It was the RTA (which for this purpose need not be distinguished from its statutory predecessor) that constructed the freeway, a type of road calculated to encourage vehicles to travel fast and thereby be at potentially greater danger if hit by a falling object. It was the RTA that constructed the overpass, that provided the physical source of risk of objects dropping onto the freeway below. It was the RTA that had ownership of the freeway, pursuant to section 145(1) Roads Act. That ownership would extend to ownership of objects constructed in the superincumbent airspace, such as the Glenlee Bridge. Both that ownership, and the RTA's powers of care, control and management, make it the only entity that has power to take steps to lessen the risk of objects dropping.*
>
> *People driving on the freeway are vulnerable, in the sense that they have little or no capacity to protect themselves from the risk of an object falling onto their vehicle: .. All these matters show the sense of the general duty of care of a road authority, recognised in Brodie, applying to the RTA in relation to the risk of personal injury caused by an object falling from an overpass onto a freeway, regardless of the particular cause of the object falling"*

However the fact that a duty was owed then required the Court to assess what was the nature of the duty owed having regard to the circumstances of the foreseeable risk and whether there was a breach of that duty as the Court of Appeal noted :

> *"In my view, the duty of care that the RTA owes, of the type recognised by the High Court in Brodie, has a content that does not exclude taking reasonable care to protect a motorist from the criminal actions of another.*
>
> *While the fact that an object's falling has been caused by criminal conduct is clearly important in deciding whether the RTA has a liability in negligence concerning it, the criminality of the dropping of the object enters the analysis at the levels of breach of duty, and causation of damage, not at the level of existence of a duty of care."*

The Court of Appeal went on to consider whether there was a breach of duty at time of construction of overpass. There was evidence that at the time in 1977 when the Glenlee Bridge was constructed the then Department of Main Roads, the defendant's predecessor, was aware from published experiences in the United States of America that there was a risk of objects being launched from bridges passing over high-speed roads so that it ought to have screened or fenced the bridge during the construction.

The Court of Appeal in rejecting that there had been a breach of duty at the time of construction noted:

> *"Even accepting that the American publication was in the library of the DMR at that time, there is no evidence that, whatever the situation might have been in the USA, the problem of objects being dropped from overpasses onto freeways was a real one in Australia in the 1975-1978 period. One can say, in fairly abstract terms, that it is always predictable that someone might drop an object from a bridge, and the possibility of that happening is not far-fetched or fanciful (or not insignificant, if section 5B(1) Civil Liability Act imposes a test that is any different in substance)…. However, before a roads authority is negligent for having failed to screen the bridge it must have failed to take a step that a reasonable roads authority would have taken. There is no basis for concluding that a reasonable roads authority in the 1975-1978 period in Australia, would have fenced a bridge like the present one. Thus, if the judge had made his finding of negligence on the basis of failure to install protective screening at the time of construction of the bridge, such a finding would in my view be erroneous"*

The Court of Appeal then considered whether there was a breach of duty in not retrofitting screens. The Court of Appeal noted:

> *"By 1995 it was not only reasonably foreseeable, but actually foreseen by the relevant officers in the RTA that motorists might be killed or injured by people dropping objects from overhead bridges on freeways. They expressly recognised that the people who dropped such objects were "criminals", and applied their minds to what the RTA should do to lessen the risk of such criminal activity. Thus, whether there has been a breach of duty depends on what is the reasonable response to the risk."*

It was noted that the relevant risk in this case was that of a vehicle on the freeway being struck by a falling object and the consequences of that risk materialising might be a bad fright for motorists involved, might be property damage, might be personal injury, or at worst might be death. There had been one death from an object dropped from a bridge in Australia. RTA summary data for the year 1998 relating to all accidents in New South Wales showed that there were a total of 52,575 recorded accidents in the year, of which 56 related to "load or missile struck vehicle". As well, there were 158 incidents where a vehicle struck an object on the carriageway, which could include some objects that had come from overhead bridges. The 1998 NSW road accident figures included 491 fatal accidents, 19,667 "injury accidents", and 32,417 "non-casualty accidents". Those same statistics show that 556 people were killed, and 26,415 people were injured on NSW roads in the year. None of the people killed were killed through incidents involving objects thrown from overpasses.

The RTA had developed a matrix which considered various issues to determine priorities for screening of the various bridges throughout NSW. The factors considered included- whether there was pedestrian access; the type of road under the bridge; whether it was near a school; whether it was near a hotel or club; whether it was near a youth attraction; whether it was near other pedestrian generators such as shopping centres, bus and train stations or "high resident areas"; the lighting conditions; the exposure to buildings; the exposure to traffic; whether there was a history of incidents and/or signs of graffiti; and whether there were any loose objects nearby.

Justice Sackville in his judgment noted the Court of Appeal examined in detail the competing demands placed on the resources available to the RTA to minimise the risk of injury or death to road users posed by the propensity of some people to throw objects from overpasses into the path of oncoming vehicles on freeways and other roads. Justice Sackville concluded:

> *"There is no doubt that the risk of injury or death from activities of this kind was not only foreseeable but actually foreseen some time before the tragic incident that caused Mr Evan's death. It was also foreseen that the Glenlee Bridge, along with many other overpasses, presented a significant risk of injury to road users requiring attention from the RTA. The chances of injury or death occurring at any particular location, if preventative measures were not taken, were very low. But if harm did result from objects being thrown or falling onto the carriageway from an overpass, the harm was likely to be very serious. "*

The Court of Appeal concluded that in determining whether a statutory authority has breached a duty of care, evidence of funding constraints and competing priorities of the authority should be taken into account in order to determine what a reasonable authority, with its powers and resources, would have done in the circumstances of the case.

The Court of Appeal noted:

> *"A reasonable road authority would also take into account that, while screening overpasses would create a very significant obstacle to objects being deliberately dropped onto freeways, it would not completely eliminate that risk. There had been at least one incident in which a tree planting stake had been dropped onto a vehicle after screens were erected and, as demonstrated by experience on the M2 and at the St Andrews Bridge on 9 August 1998 screening of overpasses did not make it impossible to drop rocks from them. Experience shows that rocks could be lobbed onto freeways from the sides of the freeways, sometimes even by children"*

The Court of Appeal noted the cost of screening was a particularly important issue commenting:

> *"As well, and particularly important, the cost of screening was significant. Even at the initial cost estimate of $50,000 per bridge, screening all 231 bridges where there was the potential to drop rocks would cost $11,550,000. At the ultimate cost of $75,000 per bridge, screening 231 bridges would cost $17,325,000"*

The Court of Appeal recognized that the RTA has limited resources and could not question whether the resources available were appropriate.

As was noted by Justice Campbell:

> *"Indeed, whenever a court orders judgment against a governmental authority whose finances come from parliamentary appropriation it usually does not pause to enquire what is the situation about budget appropriation before pronouncing the judgment. Such judgments are usually made on the basis that the government will appropriate money to satisfy them. … In deciding whether a court is able to decide that a governmental authority had breached a duty of care it owes by not taking some course of action, what matters is not whether there has or has not been money appropriated for that activity, but the type of decision that would have been involved in deciding to spend money on that activity. Concerning comparatively cheap activities like the erection of a warning sign, or service of a*

statutory notice requiring some source of danger to be fixed, a court can sometimes say that it is able to make the judgement about whether a reasonable statutory authority, in the position of the defendant, would have spent the money. That decision of reasonableness has implicit in it all the pre-requisites for the statutory authority having been able to spend the money….. It might sometimes happen, even in relation to a decision that is clearly in the operational area, that an authority could not reasonably have been expected to get itself into the financial position to make the expenditure in question by the time the plaintiff suffered his or her injury. This could happen concerning dealing with a completely new type of risk that emerges, notwithstanding that the risk is comparatively cheap to deal with. There would be an onus on the authority of adducing evidence to show that that was the situation – a court would often presume that a reasonable authority would find the money to make a comparatively small expenditure."

So the availability of resources was not the issue, rather it was whether the RTA had acted reasonably. The Court of Appeal ultimately held that:

"In light of the nature of the risk, and of the other responsibilities of the RTA for expenditure of money available to it from the Federal government on the National Highway in New South Wales, I am unable to reach a conclusion that the RTA failed to take reasonable care in not having the Glenlee Bridge screened prior to 23 August 1998."

Justice Sackville concluded:

"The RTA's response to the risk, having regard to the burden of taking precautions to alleviate the risk of harm to all road users from similar sources, was not shown to be unreasonable. The RTA adopted a rational and apparently systematic (although not perfect) approach to assessing priorities for the erection of protective fencing on the basis of the magnitude of risk. It acted on that assessment within the limits of available resources. The evidence does not demonstrate that a reasonable authority in the position of the RTA would have sought additional funding from the Commonwealth or that, if it did, such funding would have been made available for fencing the Glenlee Bridge before the incident that led to Mr Evans' death."

It must however be remembered that section 42 of the Civil Liability Act has an impact on the conduct of the RTA that can be challenged and in this case, is the "general allocation" by the RTA of those resources that are reasonably available to the RTA for the purpose of the care control and management of freeways and other roads under its care control and management could not be challenged. However the Court of Appeal noted that the section did not prohibit a challenge to the specific use of resources once allocated. Justice Campbell concluded:

"Effect must be given to the word "general" in section 42(b). It seems to be drawing a distinction between the general and the specific. It will be a matter that needs to be decided concerning any particular set of resources that is allocated to a public authority, whether a particular decision about allocation of those resources by the authority is regarded as a decision about the general allocation of resources, or a decision about the specific allocation of resources.
The force of the words "is not open to challenge" in section 42(b) is to prohibit a particular manner of contending that a public or other authority is under a duty of care, or has breached a duty of care. Thus, in a case like the present, which concerns an allegation of breach of duty of care, application of section 42(b) needs to be carried out bearing in mind each particular manner in which it is alleged a duty of care has been breached"

To demonstrate the way that the challenge could apply Justice Campbell noted:

"It was not open In the present case, if one allegation had been that the RTA misapplied well-established principles and made careless factual errors in the way it prioritised overpasses for screening, and that a principled and careful prioritisation process would have put the Glenlee Bridge close enough to the top of the priority list to have been screened before 23 August 1998 with the money that the RTA actually chose to spend on bridge screening, the challenge that was being made would have been to the allocation of resources that the RTA had actually allocated to bridge screening. I do not think that such a challenge would be one to the general allocation of the resources reasonably available to the RTA for the purpose of exercising its functions. … Similarly, in the present case, if the allegation had been that the RTA did not take seriously enough the risk of objects being dropped from overpasses, and should have spent more money on remedying that risk than on, for instance, providing warning lights and protective barriers at railway level crossings, the challenge would be to the allocation by the RTA of money to screening overpasses as opposed to other road safety measures. One would need to decide whether a challenge of that type was to the "general allocation" by the RTA of the resources reasonably available to it for the purposes of exercising its functions."

The crux of this reasoning is that the allocation of resources is not open to challenge but once allocated the use of the

resources may be open to challenge. In this case as Justice Sackville noted:

> *"In making this determination, the Court needs to consider whether the RTA's ordering of priorities was a departure from standards to be expected from a reasonable person in the RTA's position. The Court should also take account of the opportunities reasonably available to the RTA to gain additional funding from the Commonwealth or other sources for the purpose of addressing particularly acute risks of which it was aware or should have been aware."*

Finally the Court of Appeal turned to consider whether there had been a breach of duty in assigning priorities for screening of the various bridges in NSW. Unfortunately for the RTA there had been an error in classifying the Glenlee bridge as a zero score had been assigned to the previous incident factor where in fact there had been previous incidents and therefore a higher score should have been assigned which would have moved the bridge up on the priority list. This however was not causative of the injury as noted by Justice Campbell who found:

> *"Thus, even if the error in application of Mr Onggo's matrix that arose from his not taking into account the history of incidents at the Glenlee Bridge were to have been corrected, it would still not have resulted in the Glenlee Bridge having been screened before 23 August 1998. Mr Onggo's mistake is an act of negligence that has not caused Mr Evans' death.*

So in this case the RTA owed a duty of care in relation to the criminal conduct of others but had not breached the duty of care. The duty did not extend to a requirement to screen the bridge before this accident happened although it may have been a different matter if the proper prioritisation of the bridge would have resulted in the spending of resources on the screening of the bridge before the date of the accident. The final words on the case are best left to Justice Sackville who in his judgment concluded:

> *"…the RTA appreciated in a reasonably timely fashion the nature and magnitude of the risk to road users, including the risk to users of the F5 from the Glenlee Bridge, by reason of objects being thrown or falling from overpasses. The RTA's response to the risk, having regard to the burden of taking precautions to alleviate the risk of harm to all road users from similar sources, was not shown to be unreasonable. The RTA adopted a rational and apparently systematic (although not perfect) approach to assessing priorities for the erection of protective fencing on the basis of the magnitude of risk. It acted on that assessment within the limits of available resources. The evidence does not demonstrate that a reasonable authority in the position of the RTA would have sought additional funding from the Commonwealth or that, if it did, such funding would have been made available for fencing the Glenlee Bridge before the incident that led to Mr Evans' death."*

Resolving Evidence In Conflict-Did The Accident Happen?

In personal injury litigation it is not uncommon for there to be a dispute over the circumstances of the accident and the recollection of witnesses. A persons recollection of events may over time and often one person's observations of an incident will be very different to another persons.

However, the factual disputes are not usually as wide as those considered in the recent Court of Appeal decision of *Shimokawa v Lewis*.

Shizunori Shimokawa was involved in a motor vehicle accident with Rebecca Lewis on 21 November 2003. The conditions on the M6 freeway under Mt Ousley Road near Wollongong at the time of the accident were wet and foggy and late in the afternoon there were a series of accidents amongst south bound vehicles.

In order to avoid a collision with another vehicle that had stopped immediately in front of him, Mr Josie McCaw drove his mother's Holden Rodeo utility into the breakdown lane on the left side of the road and stopped. Rebecca Lewis had been driving her employer's Toyota Hi Ace van behind the Holden Rodeo. Lewis swerved to the left and braked in order to avoid a collision. Lewis was however not completely successful and the front of the van she was driving hit the towbar of the Holden at low speed. The damage as a consequence of this collision was trivial. A Toyota Hi Ace Bus towing a trailer driven by Shimokawa, then collided with some force with the back of the Toyota van driven by Lewis. This was the second collision that occurred. In this collision the damage to the Toyota van was quite extensive, including damage from being forced into the back of the Holden. A Mitsubishi Pajero subsequently ran into the back of the Toyota bus.

Lewis commenced proceedings against Shimokawa alleging that he had driven the Toyota bus negligently and that she had sustained injury as a consequence of the second collision.

Proceedings were commenced in the District Court and the trial judge, His Honour Judge Levy found that Shimokawa had failed to take reasonable care in his driving.

An appeal followed however there was no challenge to the finding of negligence rather the challenges were to the findings that the evidence of Lewis should be accepted and that the accident occurred in the way the plaintiff described.

The significant issue in the appeal was an unusual one for the Court of Appeal. Lewis argued that the second collision had occurred within seconds of the first collision whilst she was still seated in the Toyota van when it was struck from behind by the Toyota bus, and as a consequence of this impact Lewis was lifted off her seat and hit her head on the vehicle's roof. Shimokawa asserted that there had been minutes between the collisions and in fact Lewis was not in the Toyota van when it was struck from behind but was standing on the roadside with McCaw and his two passengers, McCaw and a friend who had been travelling in the Holden.

The trial judge found that Lewis was in the Toyota van at the time of the second collision and was seriously injured. His Honour assessed damages at $1,444,851.00 which was incidentally far in excess of figures submitted by Lewis that she should be awarded at trial.

There were five witnesses that gave evidence which refuted the evidence of Lewis. The trial Judge was of the opinion that McCaw was an unreliable witness and at very least had mistakenly reconstructed his memory. The trial judge also found that he was unable to rely on the evidence of Andrew McCaw. In relation to the evidence of another witness, Perkins the trial judge rejected the version as Perkins had admitted over the years he had discussed the accident with the McCaws. In relation to Mrs Shimokawa His Honour's opinion was that the passing of time had caused her memory to be inaccurate. Another witness Nayler who was travelling in the Toyota bus did not see the accident and gave evidence as to the force of impact and his evidence was rejected.

In essence the trial judge rejected the version of all witnesses apart from Lewis.

The Court of Appeal was somewhat critical of the trial judge and commented:

> *"Further, and of particular importance, the trial judge did not bring into his consideration the two critical matters, despite their prominence in the submissions of the appellant at trial. His approach was rather to express acceptance of the respondent's evidence, subject to his analyses of the conflicting evidence, and serially to reject on credibility grounds the conflicting evidence given by the appellant's witnesses. He did not stand back to assess the significance of the evidence of those witnesses being congruent in the essential respect of the respondent being out of the Toyota van at the time of the second collision, and in particular the congruence despite any suggestion of contact or collusion of the evidence of the McCaw witnesses and Shimokawa witnesses. As I have said, in my view there was a serious deficiency in the fact-finding.*
>
> *Leaving aside the elements of fact-finding skewed by differential approach to the analyses of evidence and of failure fully to put to the appellant's witnesses the respondent's version of events (with its own contrast with findings adverse to some of the appellant's witnesses on matters not put to them), the process of fact-finding was in my opinion flawed, and the appellant's challenge to his Honour's findings should be upheld. The further elements would not of themselves give a basis for overturning the fact-finding, but provide some additional reason for doing so. On the review which this Court must undertake, despite the limitations flowing from the trial judge's advantages I consider that the trial judge's resolution of the "differing versions of conflicting liability evidence can not stand. (This does not mean that the opposite resolution should be substituted, see below.) "*

So what was the end result? The Court of Appeal did not deal with the issue of damages or liability. Rather the Court of Appeal ordered that a new trial be held in the matter on all issues except whether or not Shimokawa took reasonable care with his driving. The Court of Appeal in essence concluded that a fresh set of eyes should see the witnesses and assess any inconsistency in the evidence balancing the evidence as a whole. No doubt the trial judge who next considers the matter will closely consider the evidence from the lay witnesses in this hotly contested case.

There Must Be Some Negligence

In a recent edition of GD News we discussed the recent Court of Appeal decision of *Penrith Rugby League Club Pty Ltd t/as Cardiff Panthers v Elliott* in which the NSW Court of Appeal gave a reminder to plaintiff's that it is not sufficient solely for an accident to have occurred for there to be negligence on the part of a defendant. In *Willett v United Concrete Pty Ltd & Anor*

the Court has again reminded plaintiffs that this is the case.

David Willett commenced proceedings in the Supreme Court at Sydney against United Concrete, the occupier of a concrete yard and his employer PF Transport Pty Limited. Willett was transporting sand to the concrete yard when, after emptying the sand from his truck, he alleges that after sweeping sand off his drawbar he stepped over the drawbar and slipped. Willett had given a number of versions as to what had actually happened to him. There were no witnesses to the incident. Unfortunately for Willett the version of events that he gave at trial was not consistent with either of his previous versions and in fact was found by the trial judge to be essentially an implausible version of the accident.

Her Honour Justice Schmidt concluded:

> *"While Mr Willett's 2007 account of the accident and what was alleged in the Amended Statement of Claim were consistent with the fall which could have resulted in Mr Willett hitting his lower back on the drawbar as he fell backwards, when his left foot slipped as he stepped across the drawbar, while raising his right leg, Mr Willett's insistence in cross-examination that this account was inaccurate and the explanations which he then gave as to how he fell, made striking his back on the drawbar as he fell backwards, and his left foot slipped on something on the ground, quite unlikely. It follows that the onus which fell upon Mr Willett to make out the case which he advanced was, in this respect, not met."*

Her Honour Justice Schmidt went on to consider that in any event the risk of slipping on sand and concrete was not a foreseeable risk and Willett's claim must therefore fail. Willett had sought to rely on expert evidence but the fact that his version of how the accident happened was not accepted by the trial judge meant that he did not get over the first hurdle and his claim therefore failed (the expert's view that sand on concrete was a slipping risk was disputed by the defendant's expert).

The case is again a reminder that there must be more than simply an accident for a claimant to succeed - there must be some negligence. In this case Willett's case was doomed from the start as his version of events was not accepted by Her Honour also found that the slipping risk was not foreseeable and therefore there was no negligence.

The judge relied on the decision of the Court of Appeal in *Penrith Rugby League Club Pty Ltd t/as Cardiff Panthers v Elliott* and no doubt that decision will become a feature of the submissions made by defendants where the evidence of negligence in a case is scant.

OH&S Round Up

$180,000 Fine Not Too Rich

The Full Court of the Industrial Relations Commission has recently rejected a challenge to penalties imposed upon Sacco Builders Pty Limited and Kaydee Engineering Pty Limited arising out of breaches of the Occupational Health & Safety Act.

The NSW Industrial Commission had fined Sacco Builders Pty Limited and Kaydee Engineering Pty Limited $180,000 each and Mr Cunningham, (a director of a company that was placed in external administration following the incident) $18,000 following a fatality at a worksite on 3 June 2005.

Sacco were the project managers at a site and had contracted with a person to be responsible for safety at the site. That person was responsible for the preparation of site safety plans, review of work methods of sub-contractors and the carrying out of safety inspections during construction. The safety manager and Sacco were responsible for implementing the safety plan at the site

Sacco contracted with Kaydee to supply and erect structural steel beams. Kaydee contracted with Sydney Metro Cranes Pty Limited ("SMC") which was Cunningham's company, to erect the structural steel beams at the site and operate a boom lift also known as an elevating work platform. Cunningham was SMC's supervisor at the site, which also had a rigger on site. SMC hired the boom lift.

The rigger's normal duties involved assisting the crane driver swinging and directing the movement of the crane and tying the nuts and bolts for fixing steel beams at the site. The rigger was a trainee in the use of and operation of the elevated work platform. SMC were craning materials and fixing steel purlins into position at the site. The rigger was ultimately found stuck between one of the purlins and the boom lift platform hand safety rail. The purlin was pressed against his chest and his body was bent backwards over the basket of the boom lift. When the boom lift was lowered the rigger fell out of the basket. It was

noted that the rigger's lanyard which was attached to the back of his harness had not been clipped to the boom lift platform. The rigger was fatally injured due to a combined effect of a head injury and asphyxia.

The original Judge heard evidence that there was a fault in the safety drive speed over-ride system which may have resulted in the machine not operating at slow speed. It was noted the work the rigger was undertaking was dangerous as it involved operating the controls of the boom lift while adjusting bolts at roof level on the metal roof steel purlins. The original Judge noted there was a failure to properly instruct the rigger. In addition as the rigger was a trainee, the designated supervisor was required to directly supervise him at all times, which Cunningham did not do. There was a failure to train, instruct and supervise on the part of Cunningham.

The original Judge was critical of the fact that the rigger was a trainee working alone operating a machine which he had little or no familiarity with at a height in excess of seven metres and in those circumstances there was an obvious and foreseeable risk. The original Judge ultimately determined that the respective culpability of each of the defendants was equal. Each defendant had some direct involvement in the construction work and each defendant failed to ensure that the safe work methods were designed and implemented with regard to the work undertaken by the rigger at the time of the accident.

On appeal it was argued that the penalties were manifestly excessive.

The Full Court noted:

> *"Although damage or injury to employees does not, of itself, dictate the seriousness of the offence, or the penalty, a breach where there was every prospect of serious consequences, may be assessed on a different basis to a breach unlikely to have such consequences. In such a case, the occurrence of death or serious injury, may manifest the degree of seriousness of the relevant risk. In these matters, the incident resulted in the death of Mr Gallace. In our view, the seriousness of the risk and its foreseeability renders these offences, as was found by her Honour, to be objectively very serious. Looking at the range of objective seriousness, whilst being cognisant that subjective factors will always be different, these offences must fall within the mid-range of seriousness. The risk here was obvious and known. A trainee working alone on a moving machine at height, close to steel purlins was always exposed to the risk of being crushed and falling to the ground. The contention by the appellants that the risk was neither foreseeable nor able to be readily ascertained (because of the fault in the EWP), cannot be sustained. "*

In rejecting the appeal the Full Court noted:

> *"The bringing of this appeal on the question of whether the penalty was manifestly excessive not only demonstrates a fundamental misunderstanding of the role of subjective features in these matters, but also the role of penalties. The starting point in the sentencing process is an assessment of the relative seriousness of the offence in relation to the worst case for which the maximum penalty is provided: …… The maximum penalty for these offences was $550,000. This was a case where there were significant objective factors in respect of the maximum penalty and where the risk was very high. It is completely misconceived in that context that a low mid range penalty should apply. In our view, such a submission shows a misunderstanding of how the maximum penalty should be applied. We wish to make it abundantly clear that having regard to the objective and subjective factors that are relevant to be assessed in these proceedings, penalties of the kind imposed fall within the acceptable range, albeit at the lower end….. Penalties of $180,000, given that the maximum for the offence was $550,000, were well within the range of penalties that may be imposed, taking into account the objective seriousness of the offence, the particulars to which the appellants pleaded guilty, and the findings made by her Honour. The offences here were aggravated by the fact that the worker who was exposed to the risk was a trainee. The penalty imposed by her Honour fits within the mid range, but is not at the upper end of it. It is most important that sentencing under any regime be done against the maximum penalty, not on the basis of what is thought to be fair in any case "*

So there is a warning for all those involved in OH&S prosecutions involving a fatality. $180,000 is certainly not too rich and in fact is not even at the top end of the range.

An Expensive Christmas

City of Canada Bay Council was recently fined $140,000.00 over a breach of the Occupational Health & Safety Act which occurred whilst the Council was erecting banners and decorations for Christmas.

Employees of the Council were in the process of placing street Christmas decorations along Majors Bay Road Concord. An

elevated work platform was used to access light poles to which the Christmas decorations were to be attached. The Council contracted with a Company to supply an EWP with an operator and had on previous occasions used the same company which had always supplied the same operator until this occasion. An area of the roadway was blocked off with witches hats. The Project Service Co-ordinator of the Council had intended to supervise the works but he had not advised other Council's employees of his intention to do so. The EWP operator attended the site early one morning whilst a number of the Council employees were present but not the Project Co-Ordinator who had not yet arrived. The operator lowered the bucket of the EWP which required the boom to be raised and as it was raised it impacted with a banner wire which had been previously stretched across the street. As a result of strain placed on the banner wire a number of bricks came off part of a wall, some of which fell and struck a Council employee.

The Council did not take steps to block pedestrian access to the footpath along Majors Bay Road where the EWP was operating. Non-employees and pedestrians were exposed to a risk of injury. The Council had not arranged for any employee to be a spotter for the EWP operator. A Safe Work Method Statement ("SWMS") was not provided to the Council. After the incident a SWMS was developed for the activity which included requiring a spotter.

The Court noted this was an activity practised by all Councils in NSW and a rigorous approach was needed by all local Council's in the performance of this task which was an inherently dangerous task. The erection of banners and decorations effects traffic flow. It cannot be denied that in supporting community activities and the raising of awareness in the public of Councils support activities and the use of banners and street directions is an important tool. That practice was not to be discouraged however the Court noted Councils must ensure that they take great care.

At the end of the day the Court imposed a fine of $140,000.00 after allowing a 25% discount on the penalty for an early guilty plea. No doubt 2009 will not be such a Merry Christmas for Council as it will have to pay for its errors from Christmas past.

Workers Compensation-Primary Psychological And Primary Physical Injury - Compensation For Both

The Workers Compensation Commission has recently determined in *Romanous Constructions Pty Limited v Arsenovic 2009 NSW WCC PD 82* that a worker is entitled to receive lump sum compensation for permanent impairment for both a primary physical and primary psychological injury. Deputy President Bill Roche in involves such a question.

Arsenovic was involved in a car accident on 1 October 2002 and he made a claim in relation to injuries to his neck and lower back. He ultimately received $6,250.00 in respect of 5% whole person impairment as a result of injury to his lumbar spine. In 2008 he made a further claim for lump sum compensation in respect of a deterioration in his cervical and lumbar spines and also claimed 18% whole person impairment for a primary psychological injury alleged to have resulted from the car accident.

Deputy President Bill Roche considered the application of Section 65A of the Workers Compensation Act, 1987. Section 65A provides a worker is only entitled to receive lump sum compensation for either a primary psychological or primary physical injury. Secondary psychological injuries do not attract lump sum compensation.

The insurer disputed liability on the basis that the worker had not received a primary psychological injury and secondly even if the worker had received a primary psychological injury because he had received lump sum compensation for the primary physical injury he was not entitled to any compensation for psychological impairment.

The Commission determined that the worker had received both a primary physical and primary psychological injury. Deputy President Bill Roche then turned his mind to the availability of lump sum compensation for the primary psychological injury given the worker had already received lump sum compensation for the primary physical injury.

He noted:

> *"If a worker has received lump sum compensation in respect of a physical injury and has a later assessment of a psychological impairment resulting from an incident, he or she is not prevented from claiming lump sum compensation for the psychological injury. The provision does not act to exclude workers from claiming compensation to which they are otherwise entitled, but merely limits the recovery of compensation in certain specified circumstances.*
>
> *A worker is entitled to receive lump sum compensation for whichever injury results in a greater amount of compensation being payable and is not entitled to compensation for the impairment resulting from the other injury. In other words if there are two whole person impairments, one as a result of a physical injury and one as a result of a psychological injury, the worker is entitled to receive compensation for the injury that results in the greater*

compensation."

Practically speaking a worker who brings a subsequent claim for a primary psychological injury after already receiving compensation for a primary physical injury will receive the difference between the two assessed amounts. In other words, the employer is allowed to claim a credit for the amount of lump sum compensation benefits paid in relation to the earlier claimed physical injury against any later award for the primary psychological injury.

Our recent experience in the Commission has shown an increase in such claims. It should not be forgotten that the worker still faces the hurdle of demonstrating that the psychological condition is a primary psychological injury before he can succeed in a claim for lump sum compensation. This is a difficult medical onus as the vast majority of psychological cases are the result of a secondary psychological injury caused by the pain and distress brought on as a result of the primary physical injury. Nevertheless, once this hurdle has been overcome and the worker can demonstrate 15% WPI or above for the primary psychological injury (the threshold for psychological claims) there is no impediment in receiving compensation even if amounts have been paid previously for the primary physical injury.

Are Some Bonuses Really Discretionary?

During good economic times when employers are scrambling to attract or retain good employees, bonuses are sometimes used by employers. However, when the economic tide turns, what happens to these bonuses if employers claim they are discretionary?

The starting point for an entitlement to a bonus is there must be a legal obligation on the employer to pay the bonus.

In some employment arrangements, employees are invited to participate in bonus schemes. The criteria under the bonus schemes may provide a clear set of parameters for which, if achieved, an employee will be entitled to a bonus. However, there are other bonus schemes used by employers where the amount and circumstances in which the bonus will be paid to an employee are couched in terms by the employer as "purely discretionary" or payable "in the absolute discretion of the employer". Disputes arise where an employee considers they are entitled to a bonus and where an employer, notwithstanding certain hurdles are achieved by the employee, decides "in its absolute discretion" not to pay a bonus. There are a range of options available including:

- a claim there is a breach of a contractual term of the employment contract;
- a claim there is a breach of an implied term by way of practice and custom that the bonus should be paid;
- an allegation of misleading and deceptive conduct by the employer by representing the bonus would be paid by the employer and the employee relying on that representation and performing the work for the employer; and
- a claim the employer will be unjustly enriched if the bonus is not paid and the bonus forms part of the employee's market remuneration.'

In the matter of Morton Interpro Australia Pty Limited & Anor. v Federal Magistrates Court it was determined that the employer failing to pay a bonus to the employee breached its contractual obligation to pay the bonus and breached Section 53B of the Trade Practices Act 1974 (the "Act")

Morton was residing in Britain. In pre-employment conversations with the employer he alleges he was advised that:

- employment would be for a guaranteed period of two years; and
- he would receive a 1% commission override on gross profit of Interpro in his second year of employment (the "bonus")

Whilst there was some conflict in the evidence between the employer and Morton as to the exact term of the representations and contract, the Federal Magistrate accepted Morton would not have left England to come to Australia had the representation regarding the bonus not been made. Ultimately the Federal Magistrate accepted that the representation made by the employer in relation to the length of service and bonus was a representation made to a person seeking employment.

Section 53B of the Trade Practices Act, 1974 provides:

"A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead the person seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment."

Morton accepted the role and relocated to Australia. After a year, the employer sought to change the structure of the remuneration package and the bonus available to the employee. The employment relationship broke down. There were a number of issues between the employer and Morton including Morton not accepting the change to the remuneration structure. The employer ultimately accused Morton of taking sensitive documents from their premises and terminated his employment without notice.

Morton commenced proceedings claiming:

- the employer had breached the contract by altering the bonus scheme;
- the employer breached the contract by failing to give him notice; and
- the employer engaged in misleading and deceptive conduct in the pre-employment representations in breach of Section 53 of the Act.

The Federal Magistrate found the employer had breached the employee's contract by seeking to unilaterally change the way the bonus was paid. The Court found the representation made in the pre-employment representations regarding the nature of the bonus was a binding representation. The specific representation regarding the bonus was a factor which Morton relied upon in accepting the role and relocating from England to Australia. He accepted that without the representation regarding the bonus, the employee would not have accepted the role.

However, the Federal Magistrate found there was no evidence as to what the employee would have earned had he remained in the UK. Consequently the damages awarded to Morton for the employer's breach of Section 53B of the Act could not be determined as a result of the misrepresentation. The employee could not demonstrate what his position would have been had the representation not been made. In other words for Morton to have been entitled to damages for the employer's breach of Section 53B of the Act, the employee would have to show a difference between his earnings if the representation had not been made and he had remained in England.

In any event the employee was entitled to compensation under the contract for the bonus and also for notice.

In a matter before the Australian Industrial Relations Commission, Commissioner Larkin in *Currie v Bucyaus Australia Underground LAD Pty Limited* found that Currie was entitled to a bonus and the bonus formed part of his normal remuneration. As such, the inclusion of the bonus as part of Currie's remuneration, resulted in Currie's remuneration package exceeding $106,400.00 and as such the Commission had no jurisdiction to hear his application for unfair dismissal.

The bonus payable to the employee related to performance standards met in the previous calendar year.

The bonus scheme was described in a letter to Currie as "… *a discretionary global incentive programme* …". If the bonus scheme was included in Currie's rate of remuneration immediately prior to termination, he would exceed the jurisdictional limit of $106,400.00.

The Commissioner referred to the decision in Sawiris v BMS Entertainment Pty Limited. The Full Bench noted that for a bonus to be paid there had to be a legal obligation on the employer to make the bonus payment. The Full Bench could not find any evidence to support the alleged promise to pay a bonus. It was not part of the written contract of employment. There was no evidence it became a term of the contract subsequently. Written correspondence to Mr Sawiris made it clear the bonus was in the nature of a gratuity and it was in part intended to induce the employee to stay with the firm.
The Commissioner, however, was of the opinion there was a legal obligation in Currie, at least in 2008, for the employer to pay the bonus if certain criteria were met. These criteria were in writing and stated:

"1. Employee had to be permanent.
2. Employee had to be paid for more than 1,000 hours of work in 2008.
3. Employee had to be employed as at 31 December 2008.
4. Employee had to be employed at the time the 2008 bonus paid."

The Commission determined as there was a legal obligation to pay the bonus. The inclusion of the bonus as part of his total remuneration took Currie over the jurisdictional limit to bring an unfair dismissal claim.

As can be seen the bald assertion that a bonus is discretionary will not necessarily save the employer from an obligation to pay a bonus.

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Insurance Law Trends - 20 October 2009 - 7.45am to 10.00 am

Join us for a talk on recent trends in Insurance Law. We will cover:

- Liability For Independent Contractors- The High Court Has Spoken.
- Interim Payments In Damages Claims- Is This A New Frontier For Liability Claims?
- Liability For The Criminal Conduct Of Third Parties. Do You Really Owe A Duty To Protect People From The Criminal Conduct Of Unknown Persons? Concerns For Occupiers, Employers, Hotels And Government Agencies.

Harmonised OH&S Laws- The Release of Model OH&S Legislation - 27 October 2009 - 7.45am to 9.00 am

Join us for a talk on the Model OH&S Laws released by the Federal Government on 28 September 2009. We will cover:

- New Offences And Penalties
- Notification Obligations
- Directors And Managers- New Obligations
- Health And Safety Representatives - The New Role And Powers

Workers Compensation Issues - 10 November 2009 - 7.45am to 9.00 am

Join us for a talk on trends in Workers Compensation.

- Journey And Recess Claims - What Are The Boundaries?
- Commutations- Trends And Success Stories
- Primary And Secondary Psychological Injuries- What Does It All Mean

Employment Law Issues - 17 November 2009 - 7.45am to 9.00 am

Join us for a talk on trends in Employment Law.

- Managing Rights of Entry
- What's Happening With Unfair Dismissal Claims
- Discrimination and Victimisation- Managing Complaints

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GD News

Gillis Delaney Lawyers

Welcome to our special edition of GDNews. Our newsletter reviews the Model Occupational Health and Safety Laws released for public comment by the Federal Government on 28 September 2009. A harmonised National OH&S system now appears to be a reality although there is still some resistance from some of the states but that resistance is not likely to last much longer.

Release Of Model OH&S Laws

The much anticipated draft Model OHS laws were released for public comment on 28 September 2009 following endorsement of a decision to release the Model Laws for public comment by the Workplace Relations Ministers' Council at its meeting on Friday 25 September 2009. The public comment period will open on Monday 28 September 2009 for six weeks.

However all the issues which confront a nationalised scheme have not been resolved. At the meeting all Ministers, except the Western Australian and NSW Ministers, agreed to the content of the multi-lateral inter-governmental agreement which outlines the roles and responsibilities of participants in the national system.

The Commonwealth, Victoria, South Australia, the Northern Territory, the ACT and Tasmania agreed to the multi-lateral intergovernmental agreement (IGA) and have signed the IGA. Queensland agreed to the text of the multi-lateral IGA and subject to resolving remaining issues would be prepared to sign the IGA. New South Wales is yet to determine whether or not it will refer its workplace relations powers, but indicated were it to do so it would not seek any amendment to the IGA. Queensland and New South Wales agreed to work with the Commonwealth to resolve outstanding issues by late October 2009. W.A is yet to commit but has the provisions that would apply in the event it elected to sign as a cooperating jurisdiction.

In a speech delivered by Deputy Prime Minister Gillard on 24 September 2009 Gillard stated:

> *"Harmonisation of OHS laws may be hard, but the benefits cannot be denied. Harmonised OHS laws will reduce compliance costs for Australian businesses, it will reduce red tape and the myriad of regulations and it will increase Australia's productivity at a time when Australia needs to maximise business efficiency."*
>
> *" In 2010 Safe Work Australia must continue to work diligently on drafting the all important model regulations and code that will give effect to the model laws. As with the model laws, the model regulations and codes must be agreed to by WRMC.*
> *We will also have to bring into the harmonised system a number of discrete industries; many with strongly held views and justifications for wanting to be treated differently.*
> *And of course the nine Parliaments of Australia all have to pass the model laws by the end of 2011 in order to actually achieve harmonised national OHS legislation; a process that should not be under-estimated."*

The Federal Government's commitment to reform of OH&S laws and harmonisation of those laws remains focused and the final form of the model provisions is not far away. For now we have the template for those proposed laws, subject to any changes following the public comment period. However it must be remembered that significant issues will be dealt with in Regulations created pursuant to the OH&S laws and Safe Work Australia will be busy drafting those Regulations in 2010. But for now we have 156 pages of legislation to digest.

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September 2009 Special Edition OH&S Harmonisation

National OH&S Scheme

Draft laws for a new national occupational health and safety (OHS) regime have been released for public comment following a meeting of workplace relations ministers in Sydney on 25 September 2009.

The public comment period will run for six weeks ahead of a vote on the new system by workplace relations ministers in early December.

The state and territory governments will then have until December 2011 to enact the laws in each jurisdiction.

A nationally harmonised OH&S system will be a feature of the landscape in the not too distant future.

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The Proposed Legislation

A discussion paper with draft legislation has been published. It is necessary to read the Legislation in conjunction with the discussion paper. The thrust of the Proposed Legislation is as follows:

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 is carried out by a person whether or not the person conducts the business or undertaking in concert with other and whether or not for profit or gain.

Whilst the duties imposed by the model laws will apply to employers , they will have a much wider application and will catch many of the alternate labour arrangements including labour hire, franchising and other arrangements where a business impacts on persons that work. To facilitate the wider application the Laws define terms such as "worker" and "workplace".

The Laws define "workplace" as a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. A "place" includes a vehicle, ship, boat, aircraft or other mobile structure; and any installation on land, on the bed of any waters or floating on any waters.

Under the Laws a person is a "worker" if the person carries out work in any capacity for a person conducting a business or undertaking, including work:

- as an employee;
- as a contractor or sub-contractor;
- as an employee of a contractor or sub-contractor;
- as an employee of a labour hire company who has been assigned work in the person's business or undertaking;
- as an outworker;
- as an apprentice or trainee;
- as a student gaining work experience;
- as a volunteer.

A person conducting the business or undertaking is also a "worker" if the person is an individual who carries out work in that business or undertaking

With these definitions in place the Laws then scope the duty which is owed.

Specified Duties

The Laws impose a primary duty and a number of additional specified duties. A duty is non-delegable. A person may have more than one duty by virtue of being in more than one class of duty holder. A person must discharge the person's duty to the extent that the matter is within the person's capacity to influence and control the matter; and the person must consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

It is important to note that a duty imposed on a person to ensure health or safety requires the person to eliminate hazards, and risks to health and safety, so far as is reasonably practicable; and if it is not reasonably practicable to eliminate hazards and risks to health and safety, to minimise those hazards and risks so far as is reasonably practicable.

In determining what is (or was at a particular time) reasonably practicable, regard must be had and appropriate weight given to all relevant matters including:

- the likelihood of the hazard or the risk concerned occurring;
- the degree of harm that might result from the hazard or the risk;
- what the person concerned knows, or ought reasonably to know, about:
    - the hazard and the risk;
    - ways of eliminating or minimising the hazard or the risk;
    - the availability and suitability of ways to eliminate or minimise the hazard or the risk;

- the cost of eliminating or minimising the hazard or the risk.

A primary duty will be imposed on business which includes obligations to ensure as far as is reasonably practicable the health and safety of:

- workers engaged, or caused to be engaged by the person; and
- workers whose activities in carrying out work are influenced or directed by the person; and
- workers of a prescribed class,

while the workers are engaged at work in the business or undertaking.

In addition there is a primary duty to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

The Laws scope the primary duty to require the business so far as is reasonably practicable to:

- provide and maintain a safe and healthy work environment;
- provide and maintain safe plant and structures;
- provide and maintain safe systems of work;
- ensure the safe use, handling, storage and transport of plant, structures and substances;
- provide adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking;
- provide any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking;
- ensure that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

In addition to the primary duty the Laws impose the following additional duties:

- On a person who has management or control of a workplace - an obligation to ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are safe and without risks to the health of any person;
- On a person who has management or control of fixtures, fittings or plant in a workplace - an obligation to ensure, so far as is reasonably practicable, that the fixtures, fittings and plant are safe and without risks to the health of any person;
- On a person (the designer) who conducts a business or undertaking that designs plant or a substance that is to be used or could reasonably be expected to be used at a workplace; or a structure that is to be used as, or at, a workplace - an obligation to ensure, so far as is reasonably practicable, that the plant, substance or structure is designed to be safe and without risks to the health of persons that use, handle, construct carry out an activity with the plant, substance or structure;
- The obligations imposed on designers of plant, substances or structures are also imposed on manufacturers, importers and suppliers;
- On a business or undertaking that installs, constructs or commissions plant or a structure that is to be used or could reasonably be expected to be used as, or at, a workplace - an obligation to ensure so far as is reasonably practicable, that the way in which the plant or structure is installed, constructed or commissioned makes the plant or structure safe and without risks to the health of persons that will use or install or construct the plant or structure.

Officers Duties

If a person other than an individual (a "body") has a duty, an officer of that body must exercise due diligence to ensure that the body complies with that duty.

An "officer" is a person:

- who is a director of the body; or
- who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the body; or
- who has the capacity to affect significantly the body's financial standing; or

- who is a receiver or manager of any property of the body; or
- who is a liquidator of the body.

Worker's Duties

While at work, a worker must take reasonable care for his or her own health and safety; and take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and co-operate with any reasonable instruction given by the person conducting the business or undertaking to comply with this Act.

Other Persons at Workplaces

A person at a workplace (other than a person who has another duty under this Laws) must take reasonable care for his or her own health and safety; and take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons.

Offences

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

Category 1 offence - where there is a safety duty and the person is reckless about whether the failure causes serious harm to anyone; and the failure causes the death or serious illness of, or serious injury to, a person or a high risk of the death or serious illness of, or serious injury to, a person. Interestingly there is no need for actual injury.

Category 2 offences - where there is a safety duty and the person fails to comply with the duty; and the failure causes the death or serious illness of, or serious injury to, a person or a high risk of the death or serious illness of, or serious injury to, a person. Once again there is no need for actual injury.

Category 3 offences - where there is a safety duty and the person fails to comply with the duty.

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.

Offence	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
Category 1	$3,000,000	$600,000 and/or 5 yrs imprisonment Or, breach of workers or Other Persons Duty $300,000 and/or 5yrs imprisonment
Category 2	$1,500,000	$300,000 Or, breach of workers or Other Persons Duty $150,000
Category 3	$500,000	$100,000 Or, breach of workers or Other Persons Duty $50,000

There will be additional categories of offences but those categories relate to obligations specified in the Laws other than the safety duties we have discussed above.

Notifiable Incidents

The Regulator must be notified of an incident if it causes a death; or a serious injury or illness of a person; or a dangerous

incident. The Laws define "serious injury" and "dangerous incident" in a very wide way to ensure the majority of work incidents will be reportable.

A serious injury or illness of a person is an injury or illness requiring the person to have:

- immediate treatment as an in-patient in a hospital; or
- immediate medical treatment for:
  - the amputation of any part of his or her body; or
  - a serious head injury; or
  - a serious eye injury; or
  - the separation of his or her skin from an underlying tissue (such as de-gloving or scalping); or
  - a spinal injury; or
  - the loss of a bodily function; or
  - serious lacerations; or
- medical treatment within 48 hours of exposure to a substance; or
- any other injury or illness prescribed by the regulations made pursuant to the Laws.

A dangerous incident is an incident that exposes a worker or any other person in the immediate vicinity of a workplace to an immediate or imminent risk to health or safety through:

- an uncontrolled escape, spillage or leakage of a hazardous or potentially hazardous substance;
- an uncontrolled implosion, explosion or fire;
- an uncontrolled escape of gas or steam;
- electric shock;
- the fall or release from a height of any plant, substance or object;
- the collapse, overturning, failure or malfunction of, or damage to, any plant that must not be used unless authorised in accordance with the regulations;
- the collapse or partial collapse of a structure;
- the collapse or failure of an excavation or of any shoring supporting an excavation;
- the inrush of water, mud or gas in workings, in an underground excavation or tunnel;
- the interruption of the main system of ventilation in an underground excavation or tunnel;

A person who conducts a business or undertaking must notify the regulator immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred. A breach of this duty can attract a maximum penalty of $50,000 for a corporation and $10,000 for an individual.

A person who has management or control of a workplace at which a notifiable incident has occurred must ensure that the site where the incident occurred is not disturbed until an inspector arrives at the site or such earlier time as an inspector directs. A breach of this duty can attract a maximum penalty of $50,000 for a corporation and $10,000 for an individual.

Duty to Consult

A person conducting a business or undertaking must, so far as is reasonably practicable, consult with workers who carry out work for the business or undertaking about matters affecting or likely to affect their health and safety at work. A breach of this duty can attract a maximum penalty of $100,000 for a corporation and $20,000 for an individual.

Consultation requires:

- the sharing of relevant information about the matter with the workers; and
- that workers be given a reasonable opportunity:
  - to express their views and to raise occupational health and safety issues in relation to the matter; and
  - to contribute to the resolution of the matter; and

- that the views of workers are taken into account by the person conducting the business or undertaking; and
- that the persons consulted are advised of the outcome of the consultations in a timely manner.

Consultation is required in respect of the following health and safety matters:

- when identifying hazards and assessing risks arising from the work carried out or to be carried out by the business or undertaking;
- when making decisions about ways to eliminate or minimise those hazards or risks;
- when making decisions about the adequacy of facilities for the welfare of workers;
- when proposing changes that may affect the health or safety of workers;
- when making decisions about the procedures for:
  - resolving health or safety issues;
  - monitoring the health of workers;
  - monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking;
  - the provision of information and training for workers;
- when making decisions about the procedures for consultation with workers;
- when carrying out any other activity prescribed by the regulations for the purposes of this section.

Requirement For Authorisations/Qualifications

The Laws provide for the regulation of a scheme where activities, businesses, plant and substances can be specified as requiring authorisation and a failure to have appropriate authorisations will be a breach of the Laws.

A person must not conduct a business or undertaking at a workplace or direct or allow a worker to carry out work at a workplace if the regulations under the Laws require the workplace to be authorised; and the workplace is not authorised in accordance with the regulations. A breach of this duty can attract a maximum penalty of $250,000 for a corporation and $50,000 for an individual.

The Laws also contemplate authorisations for use of plant and substances and work or activities and the imposition of prescribed qualifications and or experience. A failure to comply with obligations not to carry out activities in the absence of appropriate authorisations or qualifications can attract a maximum penalty of $100,000 for a corporation and $20,000 for an individual.

Health and Safety Representatives

A worker who carries out work for a business or undertaking may ask the person conducting the business or undertaking to facilitate the conduct of an election for one or more health and safety representatives to represent workers. If a request is made the person conducting the business or undertaking must facilitate the determination of one or more work groups of workers to facilitate the representation of workers in the work group by one or more health and safety representatives.

The work group is to be determined by negotiation and agreement between a person conducting the business or undertaking; and the workers who will form the work group or their representatives. The negotiation will address the number and composition of work groups to be represented by health and safety representatives; the number of health and safety representatives and deputy health and safety representatives (if any) to be elected; the workplace or workplaces to which the work groups will apply; the businesses or undertakings to which the work groups will apply.

A business must facilitate an election for health and safety representatives as soon as practicable after the relevant work group or work groups are established . The workers will determine how the election proceeds. An elected health and safety officer will hold office for three years and is eligible for re-election.

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The functions of a health and safety representative for a work group are:

- to represent the workers in the work group in matters relating to health and safety at work;
- to monitor the measures taken by the person conducting the relevant business or undertaking or that person's

representative in compliance with this Act;

- to investigate complaints from members of the work group relating to occupational health and safety;
- to inquire into anything that appears to be a risk to the health and safety of workers in the work group, arising from the conduct of the business or undertaking.

In performing a function, the health and safety representative may:

- inspect the workplace or any part of the workplace at which a worker in the work group works:
  - at any time after giving reasonable notice to the person conducting the business or undertaking at that workplace; and facilitate an election for health and safety representatives:
  - immediately in the event of an incident or any situation involving an immediate or imminent risk to the health or safety of any person;
- accompany an inspector during an inspection of the workplace or part of the workplace at which a worker in the work group works;
- if a worker or workers in the work group consent, be present at an interview concerning occupational health and safety between:
  - the worker or workers in the work group and an inspector; or
  - the worker or workers in the work group and the person conducting the business or undertaking at that workplace or the person's representative;
- request the establishment of a health and safety committee;
- receive information concerning the occupational health and safety of workers in the work group;
- whenever necessary, request the assistance of any person.

The person conducting a business or undertaking must consult on occupational health and safety matters with any health and safety representative for a work group. The person must also provide any resources, facilities and assistance to a health and safety representative for the work group that are reasonably necessary or prescribed by the regulations under the Laws to enable the representative to perform his or her functions. There is an obligation to train the HSR and allow them to attend an approved course. A list of the HSR in a business must be kept and displayed prominently.

There will be obligations for the establishment of health and safety committees where there has been a request by a HSR or 5 or more workers in a business. A HSR will be a member of the Health and Safety Committee if they consent. The committee must meet at least once every three months.

Health and safety representatives will play a significant role in policing occupational health and safety as the HSR 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. However, the HSR may only do so after consulting with the business about remedying the contravention or the likely contravention or the matters or activities causing the contravention or likely contravention. PINs can be issued to persons conducting businesses and workers.

The PINS will be required to contain details of persons required to comply with the PIN and the compliance stipulated in the PIN. The PIN must give 8 days notice to remedy a contravention. A person must comply with the PIN within the time specified in the notice subject to any request to the regulator to review the notice where an inspector will as soon as possible review the notice and confirm , vary or revoke the notice. The operation of the PIN is stayed during the review.

HSRs will be provided with protection from civil liability when in good faith they are performing their duties.

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 a serious risk of health and safety emanating from an immediate or imminent exposure to a hazard. The worker's entitlement to paid benefits will continue if they have ceased work for this reason. The health and safety representative or the person conducting the business or undertaking or the worker may ask the regulator to arrange for an inspector to attend the workplace to assist in resolving an issue arising in relation to the cessation of work. However, the health and safety representative may give a worker a direction to cease work only after consulting with the person conducting

the business or undertaking for whom the workers are carrying out work; and attempting to resolve the issue; and the issue is not resolved.

Prosecutions

The right to prosecute will not be given to unions. Prosecutions can only be brought by the regulator; or an inspector with the written authorisation of the regulator. If a person reasonably considers that the occurrence of an act, matter or thing constitutes a Category 1 offence or a Category 2 offence; and no prosecution has been brought in respect of the occurrence of the act, matter or thing within 6 months but not later than 12 months after that occurrence, the person may in writing request that the regulator bring a prosecution. The regulator must provide a response within 3 months and if a prosecution is not to be pursued the person may request the regulator to refer the matter to the Director of Public Prosecutions for consideration. If the DPP recommends a prosecution and that recommendation is not followed the Regulator must provide to the person a copy of the DPP advice and the Regulators reasons for not following those recommendations.

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;
- make community service orders;
- impose injunctions prohibiting conduct;
- make specified training orders;
- make compensation orders. The Laws will potentially allow civil claims for damages to be made and businesses will need to address the possibility of injured persons taking civil actions for breaches of OHS legislation as the Laws appear to give rise to a cause of action for a breach of a Statutory Duty whereas current OH&S legislation stipulates that there is no separate cause of action for a breach of a statutory duty for a breach of the OH&S laws. Insurers may now need to be involved in prosecutions in light of the potential that a compensation order is made.
- Release on the giving of a court-ordered OHS undertaking -The Court may (with or without recording a conviction) adjourn the proceeding for a period of up to 2 years and make an order for the release of the offender on the offender giving an undertaking with specified conditions (a court-ordered OHS undertaking).

Enforceable undertakings

The model laws 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 provide for a safeguard relating to the process, and reasons must be provided by the regulator including reasons for any rejection of an undertaking.

The Court will have the power to enforce compliance with an enforceable undertaking.

Other Enforcement Tools

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

- rectification orders
- infringement notices;
- improvement notices;
- prohibition notices; and
- directions to leave a site undisturbed.

Authorised Right of Entry

The model legislation provides 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.

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; and
- investigate a suspected contravention of the OH&S laws.

The right of entry will be limited to:

- a 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;
- 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;
- 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 without prior written notice ;
- inspection of documents of the person conducting a business subject to provision of 24 hours written notice, and
- 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.

The approving authority for permits 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 Laws 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 that such action should be taken.

Other Offences

There are a large number of offences in addition to the offences for breaches of safety duties which give rise to Category 1 to Category 3 offences. We have highlighted some of those offences and the different maximum penalties in the following table

Offence	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
Duty to notify a notifiable incidents	$50,000	$10,000
Duty to preserve incident sites	$50,000	$10,000
Requirements for authorisation of workplaces	$250,000	$50,000
Person must not use unauthorised plant or substances	$100,000	$20,000
Person must not carry out unauthorised work or activities	$100,000	$20,000
Unqualified person must not carry out work or activity	$100,000	$20,000
Unauthorised person must not carry out work or activity	$100,000	$20,000
Requirement to comply with conditions of authorisation	$100,000	$20,000
Duty to consult	$100,000	$20,000
Notice to workers	$25,000	$5,000
Election of HSRs to be held	$50,000	$10,000

Offence	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
Obligation to train HSR	$50,000	$10,000
Display of Provisional Improvement Notice("PIN")	$25,000	$5,000
Destroy or deface PIN notice	$25,000	$5,000
Offence to contravene an PIN	$250,000	$50,000
Person must not engage in discriminatory conduct	$500,000	$100,000
Rights that may be exercised at a workplace (by person with right of entry)	$50,000	$10,000
Notice of entry required for requests for information	N/A	$10,000
Contravening OHS entry permit conditions	N/A	$10,000
OHS requirements and right of entry	N/A	$10,000
OHS entry permit holder must not delay, hinder or obstruct business	N/A	$10,000
Person must not refuse or delay entry of OHS entry permit holder	$50,000	$10,000
Person must not hinder or obstruct OHS entry permit holder	$50,000	$10,000
Misrepresentation about things authorised by Rights of entry	$50,000	$10,000
OHS entry permit holder must not delay, hinder or obstruct business	N/A	$10,000
Person must not refuse or delay entry of OHS entry permit holder	$50,000	$10,000
Person must not hinder or obstruct OHS entry permit holder	$50,000	$10,000
Misrepresentation about things authorised by Rights of entry	$50,000	$10,000
Unauthorised use or disclosure of information or documents obtained using right of entry	$50,000	$10,000
Person must produce documents and answer questions	$50,000	$10,000
Comply with requirement of inspector in relation to seizure	$50,000	$10,000
Person to provide name and address to inspector	$50,000	$10,000
Unauthorised use or disclosure of information or documents obtained using right of entry	$50,000	$10,000
Person must produce documents and answer questions	$50,000	$10,000
Person must comply with requirement of inspector in relation to seizure	$50,000	$10,000
Person to provide name and address to inspector	$50,000	$10,000
Offence to hinder or obstruct inspector	$50,000	$10,000
Offence to impersonate inspector	$50,000	$10,000
Offence to conceal person, document or thing from an inspector	$50,000	$10,000
Offence to prevent a person from assisting inspector	$50,000	$10,000
Offence to assault, threaten or intimidate inspector	$250,000	$50,000 and/or 2yr imprisonment
Compliance with non-disturbance notice	$250,000	$50,000

Offence	Proposed Maximum Penalty - corporation	Proposed Maximum Penalty – individual
Compliance with improvement notice	$250,000	$50,000
Compliance with direction and prohibition notice	$500,000	$100,000
Remedial action Notice - workplace, plant or substance that is a serious risk to health and safety	$250,000	$50,000
Compliance with OHS undertaking	$250,000	$50,000
Offence to fail to comply with order	$250,000	$50,000
Offence to give false or misleading information	$50,000	$10,000
Offence to produce false or misleading document	$50,000	$10,000

Issues for Insurers

The Federal Government has released model OH&S legislation for public comment. The Model laws will form the base for a nationalised OH&S regulatory regime with each State and Territory enacting legislation in the same terms. The model legislation imposes a significant obligation on "officers" of corporations which will no doubt catch the eye of insurers involved in D&O insurance and employment practices liability. We have published a special edition of GD News dedicated to the review of the model OH&S laws which we have published on our website. There are significant issues for liability insurers, workers compensation insurers and scheme agents which arise from the proposed OH&S laws and the interest of the insurance industry is sure to be significant.

The model laws provide that where a breach of the laws results in damage the Court may make a compensation order for a breach of the Act. The proposed laws will allow damages to be awarded to injured persons where the damages result from the breach of the laws. Effectively a prosecution for a breach of OH&S laws could result in an award of damages to the injured person by the Court hearing the prosecution. The model laws provides that:

> *"a court may make an order requiring the person to pay compensation to a person who suffered loss or damage arising from the Commission of the offence."*

At first blush one might think that this could open up a new area of litigation for injured persons. However, for employees in New South Wales any compensation order made will be subject to the application of the damages regime in the Workers Compensation Act, 1987 as that legislation applies to an award of damages in respect of an injury caused by negligence or other tort of the worker's employer even though the damages are recovered in an action for breach of contract or in any other action. Similar provisions are found in the Civil Liability Act for persons who are not employees. The Civil Liability Act, 2002 in New South Wales applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

Any compensation orders made for the benefit of injured persons whose injury arose from the commission of an offence under the laws would still be subject to the damages regimes in the Workers Compensation Act, 1987 or the Civil Liability Act, 2002. However, insurers need to be aware that Courts hearing prosecutions will have the power to make compensation orders. This will present a significant difficulty for insurers who will need to deal with these potential orders. Perhaps insurers will need to become involved in occupational health and safety prosecutions- but how can that happen

Is there an answer for liability insurers? Perhaps an extension of cover under a policy to cover the costs of OH&S prosecutions so that the insurer can play a role in the ultimate prosecution. However, even if this occurred there will be conflict of interest issues as an insured facing a penalty and or imprisonment has a different interest to an insurer facing a compensation claim.

There are interesting times ahead and insurers need to focus on the Model OH&S Laws and the proposed right to award compensation and develop strategies to deal with this interesting development. Insurers and Scheme Agents will no doubt need to take action to ensure their interests are properly protected where there is an OH&S prosecution.

Conclusion

There will be substantially increased penalties, a broader application of OH&S laws and a different enforcement regime for OH&S when the model laws 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.

GD News

September 2009
Special Edition
OH&S Harmonisation

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 is 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.