

## Litigation Newsletter

### October 2004

In this issue we will outline the following topics:

- Industrial Manslaughter
- The Rights of Third Parties in Family Court Property Proceedings
- Civil Liability Amendment (Personal Responsibility) Act 2002
- Architects Act 2003 and Architects Regulation 2004

#### 1. Industrial Manslaughter — A New Crime

##### Current Status of Occupational Health and Safety (OHS) Legislation

All Australian States and Territories have specific OHS legislation that imposes penalties on employers for breaches of their OHS obligations, including penalties in the event of a death or injury to an employee. In NSW, a breach of OHS obligations can result in monetary penalties of up to \$825,000 for a corporation.

The current focus of OHS legislation is on the prevention of workplace accidents through educating employers and employees in workplace safety, promoting consultation within the workplace and adopting risk management procedures to eliminate or mitigate any risks to safety.

A number of recent workplace fatalities, particularly involving the death of young and inexperienced workers, has prompted a debate as to whether the current monetary penalties are sufficient. The Australian Capital Territory has now passed industrial manslaughter legislation in response to that debate.

##### The ACT Legislation

The ACT is the first state or territory to pass industrial manslaughter legislation. The *Crimes Act 1900* (ACT) has been amended to insert the new crime of industrial manslaughter. An employer or senior officer of an organisation commits the offence of industrial manslaughter if:

- a worker of the employer dies in the course of employment; and
- the employer's or senior officer's conduct causes the death of the worker; and
- the employer's or senior officer's conduct is reckless or negligent.

A "worker" under the legislation is defined broadly to include an independent contractor, an apprentice or trainee, or a volunteer. A "senior officer" includes directors and any person who makes or participates in decisions that affect the whole or a substantial part of the business of the organisation. An employer's or senior officer's omission to act can be "conduct" for the purposes of the legislation.

The offence of industrial manslaughter carries a maximum penalty of \$1.25 million for companies, up to \$250,000 for individuals or imprisonment for 25 years or both.

##### The Effect of the New Legislation

Employers in the ACT will not automatically be prosecuted whenever a workplace fatality occurs. It is likely that establishing an industrial manslaughter offence will be difficult for a prosecutor as there must be evidence of criminal recklessness or criminal negligence by the employer that

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substantially caused the death. That conduct needs to be proven according to the criminal test of "beyond reasonable doubt" rather than the civil test of "on the balance of probabilities". The type of conduct required to prove the offence would probably include acts of gross recklessness or culpable negligence.

The ACT legislation provides that where a director's policies and decisions, including allowing a corporate culture to develop that disregards worker's safety, are the cause of the death of a worker, the company and the director could be convicted of the offence of industrial manslaughter.

### **Need for an Offence of Industrial Manslaughter in New South Wales?**

As outlined above, the focus of the OHS legislation in NSW is on prevention of workplace accidents by promoting consultation within the workplace, education of employees and employers in workplace safety and adopting risk management practices. The NSW Government has supported the OHS legislation by committing significant resources for the investigation and prosecution of breaches of OHS legislation. Further, there are only very limited defences available to employers who have been prosecuted for breaches of OHS legislation and generally the Courts have interpreted the OHS legislation in a very strict fashion. In short, the OHS legislation in NSW is aimed at prevention rather than the imposition of punitive measures. The ACT legislation represents a shift to more punitive measures.

There is little doubt that the existing regime in NSW has achieved a lower rate of workplace deaths. However, there is some doubt as to whether the ACT legislation will result in fewer workplace deaths.

Many employers argue that the current NSW OHS legislation and enforcement measures are onerous enough and employers have generally responded by complying with their obligations and adopting sound OHS practices.

In 2002, the NSW Parliament rejected a Private Members' Bill seeking to enact an industrial manslaughter offence. Subsequently, a report by the Legislative Council recommended introducing an industrial manslaughter offence. Although The Greens have been campaigning for the introduction of the provisions, early indications are that an industrial manslaughter offence will not be introduced in NSW.

In 2002, the Victorian Government tried to enact similar legislation but it was rejected by the Legislative Council. The Victorian Government has recently confirmed that it does not plan to pursue the legislation.

## **2. The Rights of Third Parties in Family Court Property Proceedings**

When a marriage breaks down and the parties go their separate ways, they have to decide who gets what. This not only applies to assets, but also applies to liabilities. If parties to a marriage cannot agree, then the Family Court will make the decision for them.

In deciding who gets what, the Court often runs into difficulties where its decisions might affect the rights of third parties. It is established law that, subject to limited exceptions, the Court has no power to make orders which affect third parties by diminishing their rights or imposing obligations upon them.

There are a number of situations which can arise where a third party's rights might be affected by a marriage breakdown. One of the most common is where the parents of one of the parties has provided money to the parties on some unspecified basis. Invariably, when a marriage breaks down, the parents concerned attempt to characterise the provision of such monies as a loan and immediately seek repayment. The Court then has to sort the matter out. Debts owing to the parties' private company in the form of loan accounts are also very common. Even though it may be the parties' corporate alter ego, the company is nevertheless a separate legal entity, i.e., a third party. A glance at the company's accounts usually indicates that the parties' intention was that such debts were never intended to be repaid. Despite this, the party to whose advantage repayment might be invariably insists that they are genuine debts which must be repaid.

Other situations might involve banks or other creditors such as the Australian Taxation Office which are owed money by one or both parties.

Amendments to the *Family Law Act*, which are scheduled to take effect from 17 December 2004, will permit the Court to make orders which are directed to or alter the rights, liabilities and

property interests of third parties. The purpose of the amendments is to ensure that the debts of the parties are considered by the Court in the course of property proceedings and that a final decision is not made until all debts have been taken into account and dealt with.

The types of orders the Court will be empowered to make include the rearrangement of parties' debts so that one of the parties to the marriage is substituted as the sole debtor, or an order that both parties are liable for a debt incurred in the name of only one of the parties.

The amendments also enable the Court to make injunctions restraining third parties from taking such action as the repossession of the property of the parties or commencing legal proceedings against one of the parties to the marriage.

The Court has an obligation under the amendments to ensure that a third party is afforded procedural fairness. This will involve the notification of the proceedings to the third party and the service of documents on the third party. This will enable the third party to be heard and to put before the Court any evidence it considers to be relevant.

Third parties' rights might also be affected by collusion between the parties in an attempt to frustrate third parties who may be creditors. There are examples of the binding financial agreement provisions of the *Family Law Act* being misused to defeat creditors' claims. The Act has been amended to enable third parties whose rights are adversely affected by binding financial agreements entered into by parties which have the effect of frustrating or adversely affecting third party rights. Third parties are now able to take action in the Family Court to set aside such agreements.

The changes to the *Family Law Act* (those already in force and those scheduled to come into force in December 2004) broaden considerably the Court's powers to deal with third parties. The effect of the changes may be very far-reaching indeed, and those who might be caught include relatives, employers, friends, banks and other financial institutions and litigants.

### **3. Civil Liability Amendment (Personal Responsibility) Act 2002**

The New South Wales Government introduced significant and wide-ranging changes to the civil liability laws in a series of Acts over the past few years.

In our April 2004 litigation newsletter, we addressed a few issues arising out of the suite of legislative changes made by the Government. In this issue, we will address some further important changes.

At the time of introduction of the changes relating to the assumption of greater personal responsibility, Premier Bob Carr said:

*"The overwhelming principle behind the new laws is people must take personal responsibility for their actions ... we need to restore personal responsibility and diminish the culture of blame".*

A few of the more important changes are as follows:

- A person who suffers harm as a consequence of an obvious risk is presumed to have been aware of the risk of harm, unless they can prove on the balance of probabilities that they were not so aware.
- There is no general duty to warn of an obvious risk unless:
  - (a) the plaintiff seeks specific advice or information;
  - (b) there is a legal obligation to warn;
  - (c) the defendant is a professional and the risk is one of death or personal injury from the provision of a professional service.
- A defendant is not liable in negligence for harm suffered by a plaintiff as a consequence of a materialisation of an obvious risk when the plaintiff is engaging in a dangerous recreational activity.
- A defendant does not owe a duty of care to another person who engages in a normal recreational activity to take care in respect of a risk of that activity if the risk was the subject of a risk warning to the plaintiff.

- A defendant is entitled to contract with a participant in recreational activities to exclude the defendant's liability for any negligence in the supply of the activity. This has resulted in a massive shift away from corporation responsibility for the safe provision of goods and services in relation to recreational activities. Many operators of recreational centres now require participants to sign a waiver and/or indemnity in an attempt to negate their duty of care.
- In claims for pure economic loss or damage to property, damages are no longer to be jointly and severally assessed against multiple defendants. The liability of a defendant who is a concurrent wrongdoer is limited to an amount reflecting the proportion of the damage or loss that is the responsibility of that defendant. For example, if four parties are equally liable (25% each) for an economic loss and two of the wrongdoers are not sued as defendants, or are sued but are insolvent or otherwise not able to meet the claim, the plaintiff can only recover from the solvent defendants their respective share. This provision does not apply to personal injury claims, only claims for pure economic loss. This part of the new Act remains unproclaimed.
- A Court is not to award damages for harm where a plaintiff's capacity to exercise reasonable care and skill for their own safety was impaired as a consequence of intoxication and unless the Court is satisfied that the same harm would have occurred even if the person had not been intoxicated.
- There is no liability incurred when acting in self-defence provided that the act of defence is a reasonable response to the circumstances as subjectively perceived.
- A Court is not to award damages in respect of a liability where the plaintiff was engaged in conduct that constitutes a serious offence (an offence punishable by imprisonment for six months or more).
- A volunteer does not incur any personal civil liability when doing community work organised by a community organisation or is an office holder of a community organisation.
- An apology does not constitute an admission of fault or liability and is not relevant for a Court determination of those issues.

As can be seen, these legislative changes are far-reaching. It will be interesting to see how the Courts interpret the legislation in cases which are coming through the system at present.

#### 4. Architects Act 2003 and Architects Regulation 2004

##### Introduction

A series of reforms relating to the practice of architecture found in the *Architects Act 2003* ("**the new Act**") and the *Architects Regulation 2004* ("**the Regulation**") commenced on 30 June 2004 (in the case of the Act).

The Act replaces the old *Architect Act 1921* ("**the old Act**") and its Regulation. The purpose of this article is to highlight some of the important provisions of the new legislation particularly in relation to the new *Code of Professional Conduct* ("**the Code**"). The new regime aims to strictly control the activities of architects and the practice of architecture in New South Wales.

##### Objects

Unlike the old Act, the new Act sets out the following objects:

1. to ensure that architects provide services to the public in a professional and competent manner; and
2. to provide mechanisms to discipline architects who are found to have acted unprofessionally or incompetently, and
3. to ensure that the public is appropriately informed about the qualifications and competence of individuals or organisations holding themselves out as architects; and
4. to promote a better understanding of architectural issues in the community.

The new regime seeks to place tighter controls on the practice of architecture in order to protect the public at large and not merely specific individuals who retain the services of architects.

### **The practice of architecture and the *Code of Professional Conduct***

An innovation introduced by the new legislation is the establishment of the Code which sets out guidelines that should be observed by architects in their professional practice. The provisions of the code are a relevant consideration in determining what constitutes proper and ethical conduct by an architect. The introductory note to the code specifically states that a failure to comply with the code will constitute “unsatisfactory professional conduct” and may also be grounds for disciplinary action (where “professional misconduct” is involved). Consequently, it is recommended that all architects structure their practice in such a way so to abide by the Code.

The Code provides a statement of the standards required of architects when they are engaged to provide architectural services. The Code introduces a notion that the architect not only has a duty to his or her client but also to the public at large. In general, the Code aims to assist clients in:

1. understanding the standards expected of an architect and the level of accountability expected of them in the provision of architectural services;
2. understanding the obligations imposed on them as clients; and
3. developing reasonable expectations of the services to be provided.

Furthermore, the Code also sets out the following objectives:

1. to define for the community, architects and clients the reasonable standards of conduct expected from architects in their professional practice;
2. to facilitate the establishment of professional relationships between architects and their clients based on reasonable expectations concerning professional standards and the cost of architectural services; and
3. to promote community confidence in the architectural profession.

Architects are required to use their best endeavours to meet the standard by applying their professional judgment. Those standards relate to general practice, dealings with clients, insurance coverage, continuing professional education, alternative dispute resolution, dealings with the public and professional relationships with other architects.

### **Summary of the New Legislative Regime**

In general, the new Act and the Regulation impose an onerous regulatory regime upon architects and the practice of architecture in New South Wales. Whilst architects have been subject to a legislative regime for some time, the new scheme increases the accountability of architects to their clients and importantly, to the public at large. We point out some of the following differences between the old and the new regimes:

- The new Act establishes a number of objects giving a great deal of structure to the new legislative regime.
- Importantly, the new Regulation establishes a *Code of Professional Conduct* for the regulation of the practice of architecture in New South Wales. Crucially, a failure to comply with the Code will constitute unsatisfactory professional conduct and could expose an architect to disciplinary action.
- The Code states that an architect “should” enter into a written agreement with the client concerning the provision of architectural services. A number of specific items (including the nature and scope of the services, the cost and termination) should also be dealt with in that agreement.
- The new Act contains greater detail in respect of registration and the Register of Architects.
- The new Act contains far more detail in respect of various offences relating to the practice of architecture.
- The new Act contains more detailed provisions regarding complaints and disciplinary findings against architects including the publication of disciplinary action taken against architects.
- The Board has been renamed the “New South Wales Architects Registration Board” (previously known as the Board of Architects of New South Wales). The new Act contains more detailed provisions regarding the Board, its finances, Constitution, procedures and the Architects Fund which it administers.

## Conclusion

Taken together, the new legislation significantly regulates the practice of architecture in New South Wales. The fact that the regime is now more stringent compared with the previous legislation and the fact that it mirrors, in many respects, the regulation that has been imposed on other professionals for some years, indicates the Parliament's concern with the protection of clients and the public at large. However, whilst the new legislative regime appears somewhat onerous, it also has the potential benefit of ensuring that the practice of architecture is a true "profession". This may assist architects in their awareness of the professional boundaries within which they must operate and should also provide members of the public with greater confidence in dealing with architects generally.

## Assistance

If we are able to assist you in any of these areas, or other litigation or industrial matters, please contact one of our Litigation Practice Group Team:

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