

<b>CONTRACTOR'S OBLIGATION TO INSURE: HAVE I GOT THE RIGHT INSURANCE?</b>
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**SCENARIOS FOR AILA SEMINAR ON 17 MAY 2006**

**SCENARIO 1 – THE COMMON LAW POSITION**

1. Goldmines 'R' Us NL owns and operates an open cut gold mine near Kalgoorlie. By written contract dated 10 February 2004, Goldmines 'R' Us engages Digitout Pty Ltd to do heavy earthworks at the mine site ("**Contract**").

Goldmines 'R' Us is insured with its captive insurer ("**Captive**") for its public liability for personal injury happening in connection with its goldmining business.

Digitout is insured with Almost No Risk Insurance (Australia) Ltd for its public liability for personal injury happening in connection with its earthmoving business.

On 3 August 2004, Mike (Jacko) Jackson, who lives and works in Fremantle, is on site visiting a friend when he is seriously injured by a Digitout owned shipping container which topples over and strikes him while he is walking along a path next to the dirt road on which the container had been standing. The container toppled when the edge of the road suddenly fell away ("**Accident**").

Jacko sues Goldmines 'R' Us and Digitout for common law damages, on the basis that each of them had known since June that the part of the road where the container stood was in need of urgent repair. The Accident would not have happened if either of them had repaired the road promptly or if Digitout had moved the container to a part of the road that was not in disrepair.

Goldmines 'R' Us and Digitout issue Contribution notices against each other, claiming a contribution towards any liability each of them have to Jacko pursuant to section 7(1)(c) of the *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act* ("**section 7(1)(c)**"), which is in the following terms:

*(1) Where damage is suffered by any person as the result of a tort ...*

*(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is or would if sued have been liable in respect of the*

*same damage whether as a joint tortfeasor or otherwise but so that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability for which contribution is sought.*

In the main action, the trial judge concludes that each of Goldmines 'R' Us and Digitout negligently caused the Accident and as they are joint or concurrent tortfeasors, each is severally liable for the whole of Jacko's damage.

Accordingly, the trial judge awards Jacko a joint judgment against each of them for the same amount, \$200 000 plus costs.

In the contribution proceedings, the trial judge apportions liability equally between Goldmines 'R' Us and Digitout. Accordingly, the Captive bears Goldmines 'R' Us's 50% share of the liability and Almost No Risk Insurance bears Digitout's 50% share of the liability.

## **SCENARIO 2 – CONTRACTUAL INDEMNITY CLAUSE**

### **The Scenario**

2. The same as Scenario 1, except that the Contract contains a Contractual indemnity clause in the following terms:

#### ***Indemnity of the Principal***

*The Contractor (Digitout) shall be liable for and shall indemnify and keep indemnified and hold harmless the Principal (Goldmines 'R' Us) and its directors, officers and employees against any liability, loss, damage, claim, suit, action, demand, expense or proceedings of whatsoever nature whether arising under statute or at common law in respect of:*

- i) personal injury (which expression shall include illness or disability), or death of any and all persons whomsoever*
- ii) loss or destruction of or damage to or loss of use of all property real or personal (including but not limited to the property of the Principal)*
- iii) breach of statute, breach of contract, breach of intellectual property rights,*

*arising from the Contractor's presence on the site or out of or in the course of or caused by the execution, performance or purported performance of work under the Contract or other obligations hereunder directly or indirectly associated therewith.*

Goldmines 'R' Us adds to its Contribution notice a claim for an indemnity pursuant to the Contractual indemnity clause. Digitout joins Almost No Risk Insurance to the action, claiming an indemnity against Jacko's claim against it and an indemnity against the claims made in the Contribution notice issued by Goldmines 'R' Us.

In the main action, the trial judge awards Jacko a joint judgment against each of Goldmines 'R' Us and Digitout for \$200 000 plus costs. In the contribution proceedings, the trial judge dismisses Digitout's Contribution Notice and orders Digitout to:

- contribute 50% towards Goldmines 'R' Us's liability to Jacko pursuant to section 7(1)(c);
- indemnify Goldmines 'R' Us against the whole of its liability to Jacko pursuant to the Contractual indemnity clause.

Accordingly, Digitout and Almost No Risk Insurance wear the whole of the liability to Jacko, with Almost No Risk Insurance wearing the insured part of the judgment and Digitout the balance (if any, and to the extent it has sufficient funds to do so).

### **SCENARIO 3 – INSURANCE PROCUREMENT CLAUSE**

3. The same as Scenario 1, except that the Contract contains an Insurance procurement clause in the following terms:

***Insurances***

*The Contractor (Digitout) shall arrange for broadform public and products liability (including without limitation contractually assumed liability) in the joint names of the Principal, Contractor and Subcontractors in the sum of \$20,000,000 in respect of any one occurrence and unlimited in the aggregate, arising out of or*

*in relation to work under the contract (including without limitation arising out of the use of unregistered vehicles) in respect of:*

- (a) death of or bodily injury (including illness) to any person; and*
- (b) damage to or loss of property of every kind.*

*The policy of insurance shall include a cross liability clause and waiver of subrogation in favour of the Principal.*

4. Goldmines 'R' Us adds to its Contribution notice a claim for damages for breach of the Insurance procurement clause, in that Digitout's liability policy does not insure Goldmines 'R' Us against its liability to Jacko. Digitout joins Almost No Risk Insurance to the action, claiming an indemnity against Jacko's claim against it and an indemnity against the claims made in the Contribution notice.

#### **SCENARIO 4 – THE CLAIM IS MADE BY AN EMPLOYEE INJURED IN THE COURSE OF HIS EMPLOYMENT**

5. The same as Scenario 1, except that:
  - Jacko is an employee of Sparky's Electricals an off site electrical contractor and the Accident happens while he is on his way to repair a freezer unit in the site Mess operated by Big Belly Catering Pty Ltd;
  - the Contract and the contract made between Goldmines 'R' Us and Big Belly Catering each contains a Contractual indemnity clause and an Insurance procurement clause. Big Belly Catering breaches the Insurance procurement clause.
6. This Scenario introduces the complications of a claim by the employers' indemnity insurer of Sparky's Electricals for recovery of workers' compensation paid to Jacko and a common law claim by the employee of an off site electrical contractor to an on site caterer. These and other complications<sup>1</sup> take this Scenario well beyond the scope of this Paper.

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<sup>1</sup> For example, how will the loss be distributed between Digitout and Big Belly and their respective insurers by reason of the Contractual indemnity clause in each contract and each of Digitout's and Big Belly's breach of the Insurance procurement clause.