

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.

## Consumer Protection – A Brave New World

The Trade Practices Amendments (Australian Consumer Law) Bill 2009 (“ACL”) has passed through third readings of both Houses of Parliament and has now been referred to the Senate Economics & Legislation Committee. A further report is due from the Committee on 21 May 2010 when the ACL will return to Parliament for a further and most likely final reading before being approved in the winter sittings of Parliament. The Government’s reform package for its National Consumer Protection regime to replace the myriad of State and Federal legislation is on track to take effect by 1 January 2011. The National regime will be established by the enactment of complimentary legislation in each State and Territory in the same terms as found in the ACL.

The ACL is comprised of more than 380 pages. Changes include:

- Renaming the Trade Practices Act to the Competition and Consumer Act 2010
- Changing the definition of “consumer”;
- Introducing a new system of statutory consumer guarantees;
- Introducing a regime to regulate unfair terms in standard form consumer contracts;
- Introducing specific consumer protections concerning misleading and deceptive conduct; unconscionable conduct and safety defects in products based on existing State and Territory legislation and the existing Trade Practices Act;
- Prescribing a wide range of enforcement options for breaches of the consumer laws.

The changes will affect all businesses involved in the supply of consumer goods or services. The Unfair Term Provisions in the ACL will apply to standard form contracts as defined by the ACL. Businesses will need to be aware that if they do not provide consumers with an opportunity to negotiate the terms of a contract for the supply of consumer goods or services, then that contract may be found to be a standard form contract and any unfair term will be subject to attack. There are a wide range of terms that can fall within the indicative list of unfair terms specified in the ACL. Businesses should begin the process of reviewing their contracts immediately to identify terms which could potentially fall foul of the Unfair Term Provisions and amend or remove those terms from their consumer contracts.

Preparation will be the key to dealing with the upcoming changes.

Businesses will need to review their compliances manual and put procedures in place to deal with the consumer laws to be introduced by the ACL.

The building industry in particular will need to focus on standard form contracts used and carefully consider the impact of the Unfair Term Provisions of the ACL and develop new contracts that address the issues in the ACL or move towards a negotiated contract model for residential building works.

Manufacturers and distributors will need to review their contracts to identify terms that may fall foul of the Unfair Term Provisions.

Whilst the Unfair Term Provisions will not apply to insurance contracts, (at least for the moment

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by virtue of Section 15 of the Insurance Contracts Act) the jury is still out and we may well see the provisions applying to insurance contracts after the Government released an option paper calling for submissions on this issue (see our later articles in this Newsletter).

The insurance industry needs to carefully consider the impact of the changes and the liability imposed on manufacturers, importers and suppliers of not only consumer goods and services but goods and services supplied to businesses.

The new regime is due to commence on 1 January 2011. The Senate Economics Committee is due to provide their report on the ACL Bill by 21 May 2010 and the ACL Bill is likely to become legislation shortly thereafter. A brave new world is not that far away so what concepts does the ACL introduce?

## Consumers

For many purposes the provisions of the ACL apply to all persons and are not limited to a defined class of consumers. However, for some purposes, provisions apply with respect to a defined class of consumer on the basis that it is not appropriate to extend the protection afforded by the relevant provision more broadly.

A person is taken to have acquired particular goods as a consumer if, and only if: the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption.

A person is not a consumer for the purposes of the ACL if they acquire the goods, or hold themselves out as acquiring the goods for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce in the course of a process of production or manufacture.

The case law that developed around previous provisions in the Trade Practices Act are relevant to these considerations.

The definition of consumer in the ACL is relevant to the new concept in the ACL of consumer guarantees.

## Consumer Guarantees

The ACL provides for statutory consumer guarantees that will replace conditions and warranties that were implied into contracts by the TP Act and Fair Trading legislation in the different States and Territories.

The ACL provides consumers with the following guarantees in respect of supplies of goods:

- a guarantee that the supplier has the right to sell the goods;
- a guarantee that goods are free from any undisclosed security, charge or encumbrance;
- a guarantee that the consumer will have undisturbed possession of the goods;
- a guarantee that goods are of 'acceptable quality'-fit for all the purposes for which goods of that kind are commonly supplied, and acceptable in appearance and finish, and free from defects, and safe, and durable;
- a guarantee that goods are fit for a purpose that the consumer makes known to the supplier;
- a guarantee that goods match their description or a sample;
- a guarantee that spare parts and facilities for the repair of goods are reasonably available for a reasonable period; and
- a guarantee that any express warranty is complied with.

The legislation also provides the following statutory consumer guarantees in respect of supplies of services:

- a guarantee that the services will be rendered with due care and skill;
- a guarantee that services are fit for a purpose made known to the supplier; and
- a guarantee that services are provided within a reasonable time.

If a person (the supplier) supplies, in trade or commerce, services to a consumer; and the consumer or a person on behalf of the consumer makes known (expressly or by implication), to the supplier the result that the consumer wishes the services to achieve there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result, provided the circumstances show that the consumer relied on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier

A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of

the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying a consumer guarantee.

A term in a contract is not void if it excludes the application or a right or liability under the consumer guarantees if it relates to recreational services; and is limited to liability concerning death, personal or mental injury, a disease or something that is harmful or disadvantageous to an individual or the community.

A breach of a consumer guarantee will give rise to a damages claim where a loss has resulted.

A consumer may take action under this section if a person (the supplier) supplies, in trade or commerce, goods to the consumer; and a guarantee that applies to the supply is not complied with. An action may also be taken against the manufacturer. A manufacturer of goods is liable to indemnify a person (the supplier) who supplies the goods to a consumer if the supplier is liable to pay damages under the ACL for a breach of a consumer guarantee.

## Unfair Contracts

The ACL provides that a term of a consumer contract is void if the term is unfair and the contract is a standard form contract.

A consumer contract is a contract for supply of goods or services or sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. The intended use of the goods is the determining issue.

In determining whether a contract is a standard form contract, a Court may take into account such matters as it thinks relevant, but must take into account the following:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
- whether another party was given an effective opportunity to negotiate the terms of the contract;
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction;
- any other matter prescribed by the regulations created pursuant to the legislation.

If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

A term of a consumer contract is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In determining whether a term of a consumer contract is unfair a court may take into account such matters as it thinks relevant, but must take into account:

- the extent to which the term is transparent;
- the contract as a whole.

A term is transparent if the term is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term

The following are examples of the kinds of terms identified in the legislation that may be unfair:

- a term that permits one party (but not another party) to avoid or limit performance of the contract;
- a term that permits one party (but not another party) to terminate the contract;
- a term that penalises one party (but not another party) for a breach or termination of the contract;
- a term that permits one party (but not another party) to vary the terms of the contract;
- a term that permits one party (but not another party) to renew or not renew the contract;
- a term that permits one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- a term that permits one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- a term that permits one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- a term that limits one party's vicarious liability for its agents;
- a term that permits one party to assign the contract to the detriment of another party without that other party's consent;
- a term that limits one party's right to sue another party;
- a term that limits the evidence one party can adduce in proceedings relating to the contract;
- a term that imposes the evidential burden on one party in proceedings relating to the contract;
- a term of a kind prescribed by the regulations created pursuant to the legislation.

The above list is not exhaustive nor is it intended to be exhaustive.

The Courts will have the power to make orders:

- declaring the contract void from the start
- declaring a term an unfair term
- declaring terms of the contract are void
- varying terms
- preventing enforcement of terms
- directing refunds of money
- ordering compensation

## **Liability of Manufacturers for Goods with Safety Defects**

The ACL will impose obligations on manufacturers and importers and remedies for consumers where there are goods with a safety defect.

Manufacturer is defined to include the following:

- a person who grows, extracts, produces, processes or assembles goods;
- a person who holds himself or herself out to the public as the manufacturer of goods;
- a person who causes or permits the name of the person, a name by which the person carries on business or a brand or mark of the person to be applied to goods supplied by the person;
- a person (the first person) who causes or permits another person, in connection with the supply or possible supply of goods by that other person; or the promotion by that other person by any means of the supply or use of goods; to hold out the first person to the public as the manufacturer of the goods;
- a person who imports goods into Australia if the person is not the manufacturer of the goods; and at the time of the importation, the manufacturer of the goods does not have a place of business in Australia.

If the name of a person, a name by which a person carries on business or a brand or mark of a person is applied to goods, it is presumed, unless the contrary is established, that the person caused or permitted the name, brand or mark to be applied to the goods.

Goods have a safety defect if their safety is not such as persons generally are entitled to expect. There is no definition of safety.

In determining the extent of the safety of goods, regard is to be given to all relevant circumstances, including:

- the manner in which, and the purposes for which, they have been marketed; and
- their packaging; and

- the use of any mark in relation to them; and
- any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
- what might reasonably be expected to be done with or in relation to them; and
- the time when they were supplied by their manufacturer.

A manufacturer of goods is liable to compensate an individual if the manufacturer supplies the goods in trade or commerce; and the goods have a safety defect; and the individual suffers injuries because of the safety defect.

In a defective goods action, it is a defence if it is established that:

- the safety defect in the goods that is alleged to have caused the loss or damage did not exist at the time when the goods were supplied by their actual manufacturer; or
- the goods had that safety defect only because there was compliance with a mandatory standard for them; or
- the state of scientific or technical knowledge at the time when the goods were supplied by their manufacturer was not such as to enable that safety defect to be discovered; or
- if the goods that had that safety defect were comprised in other goods—that safety defect is attributable only to the design of the other goods; or the markings on or accompanying the other goods; or the instructions or warnings given by the manufacturer of the other goods.

A person may commence a defective goods action at any time within 3 years after the time the person became aware, or ought reasonably to have become aware, of all of the following:

- the alleged loss or damage;
- the safety defect of the goods;
- the identity of the person who manufactured the goods.

A defective goods action must be commenced within 10 years of the supply by the manufacturer of the goods.

A person who wishes to institute a defective goods action but does not know who is the manufacturer of the goods to which the action would relate may, by written notice given to a supplier of the goods who is known to the person, request the supplier or suppliers to give the person particulars identifying the manufacturer of the goods, or the supplier of the goods to the supplier requested. If, 30 days after the person made the request or requests, the person still does not know who is the manufacturer of the goods, then each supplier to whom the request was made and who did not comply with the request is taken, for the purposes of the defective goods liability action to be the manufacturer of the goods.

## **Unfair Practices- Misleading and Deceptive Conduct**

A prescriptive approach has been adopted by the ACL in the regulation of misleading and deceptive conduct.

Whilst there is a primary requirement that *"A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive"* there is also specified conduct that is prohibited.

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

- make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- make a false or misleading representation that services are of a particular standard, quality, value or grade;
- make a false or misleading representation that goods are new;
- make a false or misleading representation that a particular person has agreed to acquire goods or services;
- make a false or misleading representation that purports to be a testimonial by any person relating to goods or services;
- make a false or misleading representation concerning a testimonial by any person or a representation that purports to be such a testimonial relating to goods or services;
- make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;
- make a false or misleading representation that the person making the representation has a sponsorship, approval or

affiliation;

- make a false or misleading representation with respect to the price of goods or services;
- make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods;
- make a false or misleading representation concerning the place of origin of goods;
- make a false or misleading representation concerning the need for any goods or services;
- make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under the Act);
- make a false or misleading representation concerning a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

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

A person must not, in trade or commerce, make a representation that is false or misleading in a material particular; and concerns the profitability, risk or any other material aspect of any business activity that the person has represented as one that can be, or can be to a considerable extent, carried on at or from a person's place of residence.

If a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the person does not have reasonable grounds for making the representation the representation is taken to be misleading. A person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

## Unconscionable Conduct

THE ACL prohibits unconscionable conduct by persons in connection with the supply of consumer goods or services and goods and services supplied to businesses that are acquired for the purpose of trade or commerce.

The use of the term consumer in the unconscionable conduct provisions is not linked to the definition of consumer in section 3 of the ACL. A consumer for the purposes of the unconscionable conduct provisions is the other person to whom a person supplies or will possibly supply with goods and services.

The provisions include an requirement that

*"A person must not, in trade or commerce, in connection with the supply or possible supply to another person of goods or services (of a kind ordinarily acquired for personal, domestic or household use or consumption), engage in conduct that is, in all the circumstances, unconscionable."*

When determining whether a person (the supplier) has contravened the unconscionable conduct provisions in connection with the supply or possible supply of goods or services to another person (the consumer), the Court may have regard to:

- the relative strengths of the bargaining positions of the supplier and the consumer; and
- whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the supplier.

For the purpose of determining whether a person has contravened the unconscionable conduct provisions any circumstances that were not reasonably foreseeable at the time of the alleged contravention are disregarded as are circumstances existing before the commencement of the legislation

There are also provisions that apply to goods and services supplied to businesses where the acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce. The provisions include a requirement that:

*“ A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to another person (other than a listed public company); or the acquisition or possible acquisition of goods or services from another person (other than a listed public company); engage in conduct that is, in all the circumstances, unconscionable.”*

When determining whether a person (the supplier) has contravened the unconscionable conduct provisions in connection with the supply or possible supply of goods or services to another person (the business consumer), the Court may have regard to:

- the relative strengths of the bargaining positions of the supplier and the business consumer; and
- whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and
- the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and
- the requirements of any applicable industry code; and
- the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and
- the extent to which the supplier unreasonably failed to disclose to the business consumer:
  - any intended conduct of the supplier that might affect the interests of the business consumer; and
  - any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);
- if there is a contract between the supplier and the business consumer for the supply of the goods or services:
  - the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the business consumer; and
  - the terms and conditions of the contract; and
  - the conduct of the supplier and the business consumer in complying with the terms and conditions of the contract; and
  - any conduct that the supplier or the business consumer engaged in, in connection with their commercial relationship, after they entered into the contract; and
- whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and
- the extent to which the supplier and the business consumer acted in good faith.

Once again when determining whether a person has contravened the unconscionable conduct provisions concerning business transactions any circumstances that were not reasonably foreseeable at the time of the alleged contravention are disregarded, as are circumstances existing before the commencement of the legislation.

## Remedies and Enforcement

Civil pecuniary penalties will be available for conduct that does not warrant a criminal penalty and contravention of the unconscionable conduct provisions and the unfair contract terms provisions of the ACL and ASIC Act can attract civil pecuniary penalties. The maximum penalties are consistent with those presently available for breaches of certain consumer protection provisions of the Trade Practices Act (\$1.1 million for corporations and \$220,000 for individuals).

Disqualification orders under the ASIC Act are also available for breaches of certain provisions including those relating to

unconscionable conduct and the use of prescribed unfair contract terms. Orders may be made prohibiting individuals from managing corporations or engaging in particular activities in connection with the management of corporations.

The enforcement powers and options available for contraventions of the ACL include:

- undertakings
- substantiation notices
- public warning notices
- injunctions
- damages
- compensatory orders
- redress for non-parties
- penalties (including penalties imposed by infringement notices)
- non-punitive orders
- civil pecuniary penalties

Where a claim for damages for economic loss or damage to property is made in relation to a contravention of the prohibition on misleading and deceptive conduct and the loss or damage was partly the fault of the alleged contravener and partly due to the claimant's failure to take reasonable care, the amount he or she may recover is reduced to the extent the Court thinks fair having regard to the claimant's share of responsibility. This only applies if the alleged contravener did not intentionally or fraudulently cause the loss or damage.

Where a person is employed to carry out the acts of another, the state of mind of directors, employees or agents is deemed to be that of the body corporate and, similarly, conduct engaged in by such persons is also taken to have been engaged in by the relevant body corporate.

Importantly State and Territory laws on professional standards that were prescribed by the regulations and in force at the time of a contravention are not excluded and will limit the liability arising from misleading or deceptive conduct under the legislation.

### **Contracting Out of Guarantees and Liability for Contravening Conduct**

A provision in a contract which causes that contract to contravene the ACL, is severable from that contract. The concept of severability means that the contract remains valid and enforceable otherwise than in relation to the particular provision, so far as it can be without that provision.

A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying any guarantee imposed by the legislation.

### **Conclusion**

The changes are extensive and are not limited to the areas we have considered in this article. Businesses need to prepare for the new consumer laws. Standard form contracts require review. Terms of trade require review not only from the point of view of the new consumer laws but also as a consequence of the new *Personal Property Securities Act 2009 (Cth)* (which is on track for commencement in May 2011) which impact on retention of title clauses in contracts. Trade Practices Compliance manuals require review. Strategies for the registration of security instruments need to be implemented. Insurers need to consider new risk profiles and perhaps will need to rewrite policy wordings if unfair term provisions ultimately apply to insurance contracts. The Governments ambitious plans for National consumer reform are falling into place.

### **Amendments To The Insurance Contracts Act**

The *Insurance Contracts Amendment Bill, 2010* was tabled in Parliament on 17 March 2010. The Bill sets out proposed amendments to the *Insurance Contracts Act* which will come into effect once the legislation has been passed by both Houses of Parliament. The Minister for Financial Services, Superannuation and Corporate Law, when introducing the Bill, noted that the changes introduced by the proposed legislation seek to:

- "remove impediments to the use of electronic communication for statutory notices and documents;
- ensure that failure to comply with the duty of utmost good faith is a breach of the act;

- *make the duty of disclosure easier for consumers to understand and comply with, especially at renewal of household/domestic insurance contracts;*
- *make the remedies in respect of life insurance contracts more flexible and suited to modern life insurance products;*
- *clarify the rights and obligations of persons named in contracts as having the benefit of cover, but who are not parties themselves; and*
- *clarify what types of contracts are exempt from its operation."*

The Minister also noted the one issue that had not been addressed in the Bill was the current carve-out under Section 15 of the *Insurance Contracts Act* for insurance contracts from the operation of the unfair terms provisions found in the Government's proposed amendments to the *Trade Practices Act*. The Minister announced that an options paper was released (on 17 March) to provide an adequate opportunity for stakeholders to make submissions on possible changes to Section 15 that could ultimately be included in changes to the *Insurance Contracts Act*.

Whilst the Bill has progressed through its second reading it has not yet passed into legislation.

It seems likely that there will be further fine tuning to the Bill after the Government receives responses to the option paper. Those changes may well include incorporation of provisions in the *Insurance Contracts Act* that seek to regulate unfair terms in insurance contracts or alternatively an amendment to section 15 of the *Insurance Contracts Act* that expressly excludes insurance contracts from the operation of any Act (Commonwealth, State or Territory) that provides relief in the form of judicial review of harsh or unfair contracts.

The Bill makes substantive changes to the *Insurance Contracts Act* and we will have to wait a few months to see if the Bill is amended to deal with unfair term provisions for insurance contracts. For now, the changes that have been identified are as follows:

### **Third Party Beneficiary**

A new definition of will be added to the *Insurance Contracts Act* will be amended to include a new definition of "third party beneficiary" which will mean a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends. The new legislation will make it clear that the duty of utmost good faith will extend to third party beneficiaries. Third party beneficiaries will have the same rights as contracting insureds have under the section 41 of the *Insurance Contracts Act* to request information from an insurer.

### **Breach of Duty of Good Faith**

A breach of the duty of utmost good faith will be a breach of the *Insurance Contracts Act* and not only a breach of an implied term of an insurance contract. ASIC will now have power to vary, suspend or cancel a financial services licence of an insurer if an insurer fails to comply with a duty of utmost good faith in the handling or settlement of a claim or potential claim. ASIC will also be entitled to bring representative proceedings on behalf of an insured which will facilitate the recovery of losses that are suffered by an insured.

### **Delay in Accepting Claims**

Where an insured or third party beneficiary has made a claim under a contract of insurance, the insured or the third party beneficiary may by notice in writing given to the insurer, require the insurer to inform the insured or the third party beneficiary, as the case may be, in writing:

- whether the insurer admits the contract applies to the claim; and
- if the insurer so admits, whether the insurer proposes to conduct the claim.

If the insurer does not provide a response within a reasonable time after being given that notice, the insurer will lose the benefit of conditions in the contract of insurance that prohibit the settlement or compromise of the claim or any admission or payment without the consent of the insurer as the insurer cannot reduce its liability in relation to the claim by reason only that the claimant has breached such a term of the contract.

## **Nondisclosure & Misrepresentation**

The Bill will contain changes to the nondisclosure and misrepresentation laws, however there will be an 18 month deferral in the commencement of those changes. Section 21 of the *Insurance Contracts Act* is to be amended to provide that:

*“An insured has a duty to disclose to the insurer before the relevant contract of insurance is entered into, every matter that is known to the insured being a matter that:*

- (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and if so, on what terms; or*
- (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant, having regard to factors including but not limited to, the nature and extent of the insurance cover to be provided under the relevant contract of insurance.”*

The change effectively focuses the inquiry concerning an alleged nondisclosure or misrepresentation on the nature and extent of the insurance cover whilst maintaining a mixed objective/subjective test to the inquiry. In addition, there will be an additional section which imposes a duty of disclosure before originally entering into an eligible contract of insurance.

## **Duty of Disclosure**

Eligible contracts of insurance are those that are specified in the regulations to the *Insurance Contracts Act*. These currently include contracts that provide cover commonly sought by consumers, such as motor vehicle, home and contents, consumer credit, sickness and accident and travel insurance.

If a contract of insurance is an eligible contract of insurance, the insurer may request an insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and if so, on what terms. If the insurer does not make a request, the insurer is taken to have waived compliance with the duty of disclosure in relation to the contract. If an insurer makes a request and requests the insured to disclose to the insurer any other matter that would be covered by the duty of disclosure, then the insurer is taken to have waived compliance with the duty of disclosure in relation to that other matter. Attempts by an insurer to include a “catch all” question to require disclosure will be ineffective. Unless a question is asked the insurer will be taken to have waived their rights in relation to issues that have not been raised by a question.

If an insured answers a specific question and discloses each matter that is known to the insured; and a reasonable person in the circumstances could be expected to have disclosed in answer to that question; the insured will have satisfied the duty of disclosure.

Where an eligible contract is renewed the insurer will be required to ask specific questions again or give to the insured a copy of previously disclosed information and request the insured to disclose to the insurer any change to the information previously provided. If there is no such request, the insurer is taken to have waived compliance with the duty of disclosure in relation to the renewed contract.

It should however be noted that if the insured fails to comply with the duty of disclosure in relation to the original contract as originally entered into, or any renewal of that contract, then the insurer is not taken to have waived compliance with the duty of disclosure in relation to the earlier failure and the insured is not taken to have complied with the duty of disclosure in relation to the earlier failure.

There is also an obligation to advise an insured of the new disclosure requirements.

At the end of the day, for eligible contracts, insurers will need to prepare new disclosure notices to deal with the upcoming changes and to carefully craft questions on proposals to ensure that adequate information is obtained from the insured. Catch all questions will be of no use. In addition insurers will need to seek information on renewal by asking specific questions. If on renewal there is no inquiry or request for details of changes to matters previously disclosed the insurer will be taken to have waived its rights in relation to issues that have not been raised.

There is likely to be a form of words prescribed by regulations for use by insurers to inform persons of their duty of disclosure.

## **Life Insurance**

The duty of disclosure will be extended to apply to any person who is not the insured but who proposes to become a life insured under a life insurance contract. The insurer must give this person notice of the duty before the contract is entered into and that person will be subject to the duty of disclosure. A failure to disclose by the proposed life insured will be imputed to the insured.

The application of the non-disclosure and misrepresentation regime to group life insurance is to be made more effective so that where there is a delay from the time of joining a scheme until the time that cover is actually effected, the life insurance contract is taken to have commenced at the time the proposed life insured became insured under the scheme.

An insurer will be able to avoid a contract to which section 29 applies on the basis of non-disclosure or misrepresentation only if the insurer would not have entered that particular contract (as opposed to the current standard of any life insurance contract) on any terms.

## Subrogation

Section 67 of the *Insurance Contracts Act* deals with the allocation of monies recovered when an insurer exercises its rights of subrogation in relation to an insurance claim. The amendments will provide as follows:

1. If the insurer exercises its subrogation rights it is entitled to keep:
  - (a) the amount paid to the insured in respect to the loss; and
  - (b) the amount paid by the insurer for administrative and legal costs incurred in connection with the recovery.The surplus will then go to the insured to the extent that it satisfies the insured's overall uninsured loss including the excess and the insurer is entitled to any excess over and above the total loss.
2. If the insured pursues the recovery on its own it will be entitled to retain its uninsured loss and its expenses including legal costs of recovering the loss and only if there is an excess will the insured need to account to the insurer to reimburse the insurer for payments made. If the total sum recovered exceeds the total loss the insured would be entitled to retain the excess.
3. If there is a joint subrogation action with the insured and the insurer pursuing the recovery, the proceeds are to be distributed on a pro-rata basis having regard to the proportions that the insured and the insurer have borne the claim. Any excess recovery would also be shared on a pro-rata basis.

The provisions specify that any interest awarded will be retained by the insurer if the insurer has pursued the subrogation action and will be retained by the insured if the insured has pursued the recovery action. Interest is to be divided fairly between the insured and the insurer where there is a joint recovery.

These rights are subject to the terms in the relevant contract of insurance and any agreement made between the insurer and the insured after the loss has occurred.

The provisions potentially have the effect of delivering a windfall gain for the party who brings the recovery action as any interest recovered on the loss will rest with the party pursuing the recovery action rather than the party has paid for the loss.

These new provisions are likely to cause insurers and insurance brokers to turn their minds to subrogation clauses. Insurance contracts with large deductibles and aggregate deductibles will come under close scrutiny with insurance brokers seeking to ensure that uninsured losses remain collectible at the right of an insured. Where there are large excesses and large uninsured losses brokers may seek to include terms in the contract of insurance to ensure that at the least the insured will have a joint right to pursue a recovery claim or alternatively that the division of recovery proceeds and any interest recovered is distributed in a manner that is different to that specified in section 67.

There is no doubt this amendment will bring subrogation clauses into sharp focus particularly where there are or aggregate excesses.

## Electronic Notifications

The *Electronic Transactions Act* will now apply to the *Insurance Contracts Act* and notices, documents and information will be able to be supplied by electronic communication.

## Conclusion

The changes are significant. The commencement date for these changes is yet to be determined as the Bill is yet to be passed by Parliament. The Bill's final form is unlikely to be finalised until the Government determines the approach it wishes to adopt with the possible application to insurance contracts of the unfair term provisions which have been introduced by the *Trade Practices Amendment (Australian Consumer Law) Bill, 2010*. In all likelihood we are likely to see Section 15 of the *Insurance Contracts Act* amended with the result that the "Unfair Contract Term Provisions" in the Australian Consumer Law legislation will apply to insurance contracts or alternatively the *Insurance Contracts Act* itself will be amended to incorporate similar unfair term provisions in the *Insurance Contracts Act*.

The *Insurance Contracts Bill* is likely to be passed by Parliament in the middle of the year after responses to the Government's option paper have been considered. The changes will impact on insurers and intermediaries as further regulation is imposed on the industry.

## Consultation Paper on Options For Dealing With Unfair Terms in Insurance Contracts

On 17 March 2010 the Australian Government released a consultative paper on options for dealing with unfair terms in insurance contracts. The Senate Economics & Legislation Committee has recommended that the *Trade Practices Amendment (Australian Consumer Law) Bill* and its proposed unfair terms in contracts regime should apply to insurance contracts.

In 2009 the Productivity Commission recommended that a new generic National Consumer Law dealing with unfair contract terms should apply in all sectors of the economy.

In 2009 The State Economics & Legislation Committee noted that Section 15 of the *Insurance Contracts Act, 1984* would operate to prevent some or all of the unfair provisions in the ASIC Act which would be created by virtue of amendments to the *Trade Practices Act* applying to terms in insurance contracts. Submissions from consumers argued that the unfair contract terms provisions should operate in respect of terms in insurance contracts whilst the insurance industry argued that there was no justification to have the unfair contract term provisions applied as there was sufficient regulation under the *Insurance Contracts Act, 1984*.

The options paper has been released to gather submissions to address the Senate Committee's concerns that the unfair terms regime should apply. The options paper calls for the submission of any data or information that would assist in determining the extent to which unfair contract terms in insurance contracts are causing consumers actual potential loss or damage.

The Government intends to prevent consumers (including third party beneficiaries) from suffering detriment due to terms in standard form insurance contracts which are unfair or harsh. Five options that may achieve that objective have been identified, which are:

- The status quo remains with the problem addressed through the operation of Section 14 of the *Insurance Contracts Act* and the application of the duty of utmost good faith.
- Section 15 of the *Insurance Contracts Act* would be amended to permit the unfair term provisions in the *Trade Practices Amendment (Australian Consumer Law) Bill* to apply to insurance contracts.
- The *Insurance Contracts Act* be amended to include remedies relating to unfair contract terms along the lines of those that are introduced by virtue of the *Trade Practices Amendment (Australian Consumer Law) Bill*.
- Modifying the duty of utmost good faith in the *Insurance Contracts Act* to address concerns. Amendments could include reversing the onus of proof so where an insurer is relying on a term in the contract that is the subject of an allegation by the insured that it is in breach of the duty of utmost good faith, the insurer must demonstrate its reliance on that term is not in breach of the duty of utmost good faith.
- Encourage industry self regulation to better prevent use of unfair terms by insurers. The suggestion here is that there could be a specific section dealing with the issue in the General Insurance Code of Practice.

Submissions in response to the option paper can be made until 30 April 2010.

The *Trade Practices Amendment (Australian Consumer Law) Bill* progressed through its third reading speech in Parliament

and was referred to the Senate Economics & Legislation Committee and a further report is due from the Committee on 21 May 2010 when the Bill will return to Parliament for a further and most likely final reading before being approved.

It appears that the more favoured outcome is the introduction of greater protection from unfair terms in insurance contracts by amendments to the Insurance Contracts Act by introducing remedies similar to those found in the *Trade Practices Amendment (Australian Consumer Law) Bill*.

Further regulation of insurance contracts will have far reaching ramifications for the insurance industry and we will keep you informed of all developments on this front.

## Smoking, Asbestos & Lung Cancer

The High Court of Australia in *Amaca Pty Limited – v – Theresa Ellis* (as executor of the Estate of Paul Stephen Cotton) has determined that the death of a long term and heavy smoker from lung cancer had not been shown, on the evidence, to have been caused or materially contributed by his exposure to asbestos fibres at a particular time during his working life.

Paul Cotton died of lung cancer in 2002. He had smoked between 15 and 20 cigarettes a day for more than 26 years. He was exposed to asbestos fibres during his employment at the South Australian Engineering & Water Supply Department and consequently Millennium Inorganic Chemicals Limited. Whilst he was employed he was exposed to asbestos cement pipes manufactured by Amaca Pty Limited. Theresa Ellis, the executor of Cotton's Estate sued Amaca, Millennium and the Department, claiming that their negligence had caused Cotton's cancer.

The main issue was whether or not asbestos exposure had caused Cotton's lung cancer. The original Trial Judge found that all three defendants had been negligent and that exposure to asbestos had caused or materially contributed to his lung cancer. An appeal by the defendants to the Court of Appeal of the Supreme Court of Western Australia subsequently failed. The matter then came before the High Court.

The High Court noted that:

*“when, as here, medical and scientific examination cannot say whether exposure to respirable asbestos fibres was a cause of Mr Cotton's cancer, the medical practitioner and scientist have little choice but, as one witness said at Trial, to “take it into consideration in looking at what might have caused his lung cancer. In their enquiries the uncertainty about cause means that they cannot “exclude it from the end result.”*

The High Court however concluded that the Court's response to uncertainty arising from the absence of knowledge is different to that of a medical practitioner or a scientist. The High Court noted:

*“The Court cannot respond to a claim that is made by saying that, because science and medicine are not now able to say what caused Mr Cotton's cancer, the claim is neither allowed nor rejected. The Court's must decide the claim and either dismiss it or hold the defendants responsible in damages.”*

So, was it more probable that exposure to asbestos was a cause of Mr Cotton's death? Further, had it been shown that it was more probable than not that the negligence of the defendants in question was a cause of Mr Cotton contracting lung cancer?

To determine that issue it was necessary to closely examine the evidence that was led at trial. The plaintiff's argument was that causation was established as a matter of inference, not direct proof and the inference of causation was to be drawn from understanding the epidemiological evidence. The High Court noted that the Trial Judge had approached the evidence considering the cumulative effect of the exposure of asbestos from the various periods of employments and approached the analysis on the basis that the aggregate exposure to asbestos was a probable cause of Cotton's cancer and each defendant was liable. The High Court rejected this approach.

The High Court noted it was necessary to determine whether exposure to respirable asbestos fibres caused by the negligence of each defendant separately was causative of the cancer.

The proposition that smoking and asbestos must work together to cause cancer in a synergistic effect was the basis of Cotton's case.

The plaintiff had argued that the Court should consider whether or not the cancer was solely caused by smoking or the combined effect of both smoking and asbestos exposure. It was argued that all possible causes of cancer were to be

dismissed as improbable. The High Court noted that:

*“Observing that by far the largest number of population of lung cancer sufferers had been either smokers or smokers and exposed to asbestos, does not without more, provide a foundation for an inference about the probability that asbestos exposure was a cause of Mr Cotton’s cancer.”*

Ultimately the High Court concluded it had not been shown it was more probable than not that asbestos was a cause of a “necessary condition” for his cancer. It was also not shown that exposure to asbestos made a material contribution to his cancer. Material contribution was not shown because a connection between Mr Cotton’s inhaling asbestos (with each separate employer) and his developing cancer was not demonstrated.

The High Court noted that it was not enough to say that exposure to asbestos may have been a cause of Mr Cotton’s cancer by observing that a small percentage of cases of cancer were probably caused by exposure to asbestos as that does not identify whether an individual is one of that group.

Accordingly, the High Court overturned the judgments of the Trial Judge and the Court of Appeal. In this case the plaintiff had fallen short of the evidentiary burden necessary to establish that asbestos was the cause of the cancer. Speculation and inferences were not enough. Studies linking lung cancer to asbestos exposure was not enough. As is always the case, the plaintiff must establish, on the evidence, that on the balance of probabilities the defendant’s negligence had caused or contributed to (in the sense of being a necessary condition for) the injury.

## **Company Reinstated So Insurer Can Be Identified**

The NSW Supreme Court in *AMP Capital Investors Limited and/or The Parsons Brinkerhoff Australia Pty Limited* recently ordered the reinstatement of a company to allow a liquidator to investigate the existence or otherwise of an insurance policy.

Section 601(A)(g) of the Corporations Act provides that a person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:

- the company had a liability to the person; and
- the insurance contract covered that liability immediately before deregistration.

Often when a company is deregistered it is difficult to ascertain whether or not that company had insurance when it existed. Enquiries of former directors and shareholders about insurance may be met with silence.

The Corporations Act provides the Court with the power to reinstate a company and in this case the Court held:

*“It seems to me that there is a proper and practical purpose in reinstating the company so that a liquidator may investigate the existence or otherwise of an insurance policy. That this application has been made necessary and has to be pursued and the costs and expense that will be incurred in reinstating the company is regrettable. Commercially it is not a very pragmatic or satisfactory state of affairs. One would have thought that in what is obviously going to be substantial litigation between large corporations this sort of minor impediment ought not to have provoked an application to the Court – it should have been dealt with by frank communication between the parties as to whether or not there was an insurance policy and then the parties could have come to grips with whatever legal consequences flowed.”*

Once the company is reinstated a liquidator can conduct a public examination of the directors and/or shareholders and question those directors and shareholders on oath as to their knowledge of the existence of any insurance.

So, at the end of the day there are avenues available to gather information about the existence of an insurance policy.

If former directors and shareholders know about insurance arrangements but are not inclined to provide details a diligent proponent who seeks to make a claim upon the insurance policy can make an application for re-registration of the company. A liquidator can be appointed. A liquidator can conduct a public examination of the directors and shareholders under oath and require the necessary evidence to identify the insurance.

Frank disclosure by the directors and shareholders would have avoided an application for reinstatement.

## Asbestos Claims Can Be Made On More Than One Policy Of Insurance

The NSW Court of Appeal, in Commonwealth Steel Company Limited – v – Certain Underwriters at Lloyds has recently confirmed that there is no general rule that where incapacity results from a number of injuries sustained by an employee in the course of employment with the one employer, in the case of a single consequence, relevantly where partial capacity has resulted from a “number of separate injuries” the liability to pay compensation is properly seen as flowing from the last injury and as having arisen at the time of that injury.

In this case Commonwealth Steel carried on business as a steel mill at Waratah and Mr Kozaczynski, who worked at the mill, was exposed to asbestos fibres from 1962 to July 2000. He was exposed to and inhaled asbestos fibres and contracted mesothelioma in July 2000. He brought proceedings in the Dust Diseases Tribunal which settled for a sum of \$525,000.00.

The employer had a number of excess Common Law policies covering policy years 1963/1964 until 1967/1968. The question before the Court was whether under two policies of insurance on risk the insurers were liable to indemnify the employer or whether only one policy would apply. It had been argued that a decision of Orica Limited – v – CGU and Vero Insurance Limited – v – Power Technologies had developed a legal rule directed to the response of insurance policies for asbestos related diseases, in particular mesothelioma and that rule was said to be that where there were a number of policies held by one insured only the first policy responding in terms would in fact respond.

The Court of Appeal rejected this argument, noting that whether or not a policy will respond will be a matter of construction. The operative clauses of the insurance policy need to be considered to see whether or not a claim will fall within the policy. In this case the policy provided:

*“This policy is to cover the liability of Commonwealth Steel Company Limited (hereinafter referred to as the “Employer”) to its employees as follows: -*

*If at any time during the period commencing ... and ending .... Any employee in the immediate service of the Employer shall sustain any personal injury (fatal or non fatal) by accident while engaged in the service of the employer and worked performing part of or processing his business .... The Employer shall be liable to make compensation for such injury solely under or by virtue of:*

- (a) compensation under the Workers Compensation Act of any State as amended, up to the date of the inception of this policy and of any subsequent amendment of the said act or acts at terms to be agreed to underwriters; or*
- (b) damages independently of the said acts of personal injury or fatal accident to any employee of the insured ....”*

The Court of Appeal determined that on the proper construction of the policy the insuring clause was satisfied and the policy would respond. The net effect in this case was that more than one policy would respond to the claim.

So, it must be remembered at the end of the day whether or not a policy will respond depends on the construction of the policy. There is no general rule that only one policy of insurance can respond. The fact is a policy will respond if the claim falls within the operative clause of the insurance policy.

## OH&S Round Up

### \$360,000.00 In Penalties For Traffic Control Incident

The Industrial Court of NSW has recently handed down three fines of \$120,000.00 for three companies involved in an accident when a worker was fatally injured by plant and/or vehicles being used during roadworks.

Borthwick & Pengelly Ashpalts Pty Limited (“Borthwick & Pengelly”) and Ace Civil Engineering Pty Limited (“Ace”) and Eagle Eye Traffic Services (Aust) Pty Limited (“Eagle Eye”) were contractors assisting in the relaying of the surface on a dual carriageway road and each were on the relevant date performing nightwork. Ace was the head contractor and did the civil engineering onsite and was responsible for the provision of and compliance with Safe Work Method Standards. Borthwick & Pengelly was an asphaltting company and had control over the road surfacing work. Eagle Eye had control over the public use of the roads and traffic control. The RTA had control over the quality of work and occupational health and safety. It had its written traffic control manual onsite. RTA employees were onsite in a supervisory capacity.

A worker was fatally injured when he was struck by a reversing vehicle without a camera. The vehicle was reversing without the assistance of a spotter.

Changes to the work system after the accident included:

- fitting a rear view camera to vehicles with a screen in the cabin for the driver;
- installing an additional rear spotlight so that when vehicles reversed it provided additional lighting to the area;
- avoiding reversing where possible; and
- using a spotter where it is not possible to avoid reversing.

All companies pleaded guilty to the charges and it was noted there was no internal communication onsite between the parties. There was communication within each employer team, however there was no coordination across the various contractors.

The Court determined that all three defendants failed to take steps to remove the risk to prevent the movement of vehicles operated by each employer on the site. A coordinated approach to the system of work was required rather than an individualistic approach.

The Court determined that each defendant had an equal responsibility for the risk and a fine of \$120,000.00 was imposed on each company.

### **Fall Through Penetration - \$140,000.00 In Fines**

The NSW Industrial Relations Commission has imposed fines totalling \$140,000 following a convictions for breaches of the Occupational Health and Safety Act ("OH&S Act") arising from a fall through a penetration.

High Corp were the principal contractors on a residential unit development. A contract steel fixer was working on the top floor of the site. The top floor consisted of a concrete slab with some brick walls partially completed, full and empty brick pallets and bricklayers' trestles adjacent to partially completed walls. There was a penetration in the slab to be used as a mechanical ventilation shaft. Plywood covered the opening but was not secured. Whilst cleaning up rubbish around the mechanical ventilation shaft the steel fixer picked up the plywood covering and fell through the opening and fell nine to ten metres to the concrete basement. The steel fixer suffered significant injuries.

The Court found the construction company did not adequately supervise the premises, particularly in relation to any work that was required to be performed in the vicinity of the penetration and did not have an adequate system in place to ensure that non employees reported to work before working onsite.

The Court considered the breaches of the OH&S Act as most serious and imposed a fine of \$120,000.00 and \$10,000.00 on the director. It was the first offence for both the company and the director.

The employer of the steel fixer was also fined \$10,000.00. The employer was a sole trader, not a company. As can be seen in this case, a sole trader received a fine of \$10,000.00 against a maximum penalty of \$55,000.00, whilst a corporation received a fine of \$120,000.00 against a maximum penalty of \$550,000.00.

### **Dismissal Of Ten Mine Workers Not A Genuine Redundancy**

A desire to employ more highly qualified staff in substitution for less qualified employees which results in the termination of the less qualified employees may lead to unfair termination claims as those terminations may be harsh or unfair as was seen in a recent decision of Fair Work Australia. The Construction of Forestry, Mining and Energy Union ("CFMEU") argued on behalf of the ten of its members that their dismissal from the Ulan Coalmine ("Ulan") operated by Xstrata was not a genuine redundancy.

Section 385 of the *Fair Work Act, 2009* (the "Act") provides a person has been unfairly dismissed if FWA is satisfied that:

- (a) *the person has been dismissed;*
- (b) *the dismissal was harsh, unjust or unreasonable;*
- (c) *the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
- (d) *the dismissal was not a case of genuine redundancy.*

If the termination of employees was a genuine redundancy, those employees cannot make a claim for unfair dismissal. Ulan sought to argue that each termination was a genuine redundancy.

Section 389 of the Act provides:

- "1. a person's dismissal was a case of genuine redundancy if:*
- (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and*
  - (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.*
- 2. a person's dismissal was not the case of genuine redundancy if it would have been reasonable in the normal circumstances for the person to be re-deployed within:*
- (a) the employer's enterprise; or*
  - (b) the enterprise of an associated entity of the employer."*

As a result of a review of operational requirements, Ulan concluded that it was necessary to reduce the size of its workforce by eliminating 38 mine worker positions (including 19 fixed term positions and 19 permanent positions), 6 staff positions and 75 contractor positions.

Ulan also wanted to increase the proportion of trade qualified mine workers within underground work crews and wanted to increase its trade qualified mine worker positions by 11. Initially the employer called for voluntary redundancies. Ultimately 14 permanent mine workers were terminated in reverse order of seniority. Unfair dismissal proceedings were commenced by 10 of the 14 non trade qualified mine workers who were terminated.

The ordinary meaning of redundancy extends to where the job is no longer needed to be performed by the employees of an employer, even if the work is to be provided in the future by a contractor.

This was clarified by the Full Court of the Federal Court of Australia in *Dibb v Commissioner of Taxation* [2004] 136 FCR 388 which held that:

*"An employee becomes redundant when his or her job (described by reference to the duties attached to it) is no longer to be performed by any employee of the employer, though this may not be the only circumstance where it could be said that the employee becomes redundant."*

The work at the Ulan coalmine continued after the termination of the 10 men. It was determined by FWA their work was being done by somebody – specifically by trade qualified mine workers including new employees and there was not a change in the genuine operational requirements of the enterprise.

The implication for employers is that FWA may find that a desire to employ more highly qualified staff is understandable, however that may not be sufficient to constitute a genuine change in the operational requirements of an employer.

Commissioner Rafaelli also found that Ulan took insufficient steps to consult directly with the affected employees. Ulan held general discussions with the CFMEU about redundancy. The precise identity of the workers to be made redundant was only known during a six day period between 19th and 24th August 2009. The Commissioner found that Ulan breached the relevant enterprise agreement by not specifically consulting with the employees who were to be made redundant.

The employer's failure to make out an objection on the basis of genuine operational reasons is not the end of the matter. It simply means that the employees can seek to argue that the termination of their employment was harsh unjust or unreasonable.

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*Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.*

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