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Terms In An Insurance Policy – The Cover Can't Be Illusory

The commercial purpose of an insurance policy is an important consideration when a Court is called on to analyse the terms of an insurance policy and particularly, exclusions which at first blush appear to exclude cover for a risk that would typically be insured.

The recent decision of the NSW Court of Appeal in *Pacific International Insurance Co Limited v Walsh* has confirmed where exclusion clauses make a substantial inroad into the main operation of the policy which was clearly designed to provide insurance against liabilities incurred as a result of the performance of normal business activities a Court will interpret the policy in a more generous way in favour of an insured.

Walsh was a building inspector and arranged a general and public liability insurance policy with Pacific International covering liability for personal injury and property damage suffered by third parties. Walsh also took out a professional indemnity policy. The professional indemnity and third party liability covers were both on a claims made basis. There was an endorsement to the policy which provided specific cover under the general/public liability and professional indemnity policies for building inspections.

Walsh inspected a property owned by Ms Doosey, a barrister, before she purchased the property.

Walsh inspected the balcony of the property and did not identify any problems. Doosey purchased the property and subsequently the baluster on a balcony came away and Doosey's daughter fell 2.5 metres to the ground and she sustained injuries. Doosey suffered mental harm as a result of the accident and brought proceedings against Walsh claiming damages for her nervous shock.

At the original trial Doosey succeeded against Walsh and obtained damages of $175,934.89 with the Court concluding that a prudent inspector performing the task for which Walsh was contracted would have discovered obvious corrosion of the fixation screws for

the baluster and that the baluster was not sufficiently retained.

Walsh had made a claim on his insurer however Pacific International refused to indemnify Walsh for the claim. It relied on two exclusions in the policy. The first was an exclusion in the professional indemnity policy which provided the policy did not cover any liability, loss or damage directly or indirectly caused by or arising out of or in any way connected with any personal injury or property damage.

The public and products liability policy contained a provision excluding liability directly or indirectly caused by or arising out of or in any way connected with:

- the provision of or failure to provide any professional advice or services or related error or omission;
- advice, design or specification given by you for a fee or otherwise in carrying out any business activity.

Business activities were noted to include the activities of the business, with business defined as the business named in the policy schedule.

The policy also contained a provision that where the specific conditions, exclusions or definitions were in conflict with general conditions, exclusions or definitions, the specific conditions, exclusions or definitions would apply.

Walsh was faced with the argument that the public liability policy did not respond as Walsh had provided professional services and the professional indemnity policy did not respond as personal injury and property damage was excluded, notwithstanding there was a specific endorsement that provided that business activities including pre-purchase building inspections were included in the definition of business.

At the first hearing the trial judge determined the claim fell within the public liability wording. The trial judge reasoned that the professional services exclusion was limited to excluding cover for professional advice and service beyond the business activities defined in the endorsement. Accordingly, the policy was seen as responding and the Court read down the effect of that exclusion in the general liability policy.

Pacific International was not content with that interpretation and pursued an appeal which ultimately failed

Three Justices of the Court of Appeal all agreed the policy was liable to respond to the claim.

The liability for personal injury or property damage was a central component of the risk that Walsh sought to insure.

The Court of Appeal was troubled by the possibility that where the policy had an endorsement specifically identifying building inspections as a business activity and as building inspections required advice to be provided to persons for a fee, it would be troubling if the insurer could escape liability for personal injury or physical damage resulting from advice in respect to building inspections.

Macfarlan JA referred to the High Court's decision in *Legal & General Insurance Australia Limited v Ether*, noting that:

> *"If one construction strikes fundamentally at the purpose of the policy, which is to spread the risk insured against, whilst another construction that is reasonably available would affect that purpose, the later will be preferred."*

In that case it was also noted by McHugh JA noted that:

> *"It would defeat the commercial purpose of the contract of indemnity if the wording of the condition operated so as to take away an important part of the basis of the indemnity itself."*

At the end of the day cover was either available under the professional indemnity or general liability policy as the acts or omissions would either be of a professional nature of incidental to acts of a professional nature. Where the acts were incidental to those of a professional nature the general liability policy would respond and where they were of a professional nature, the professional indemnity cover should respond.

The majority of the Court of Appeal concluded the policy was liable to respond because the specific building inspection endorsement indicated cover was intended to extend to personal injury or property damage arising from the provision of building inspection reports and when the endorsement and policy were read together, the provisions conflicted and by virtue of the general condition specifying that special conditions/endorsements would prevail. The effect was the conflict created by the exclusion should result in the exclusion not prevailing.

Accordingly, Walsh was entitled to cover under the policy of insurance arranged for the specific purpose of building inspections despite exclusions in the policy which if read literally would exclude cover for Doosey's claim.

The commercial intent of an insurance policy is a key factor which the Courts will consider when examining the terms of a contract of insurance and Judges will interpret policies in a way that ensures the cover offered by an insurer is not illusory.

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Class Actions – Joining Insurers

In past editions of GD News we have observed how the growth in number and type of class actions is

increasingly having an impact on insurers. This trend does not look like it will end any time soon.

Insurers can be involved on both sides of litigation. In the Queensland floods litigation currently being heard in the Supreme Court, insurers are group members for whom the plaintiff is seeking a recovery from the defendant dam operators and managers.

In *Rushleigh Services Pty Ltd v Forge Group Limited (In Liquidation) (Receivers and Managers Appointed) [2018] FCA 26*, insurers became involved, not just as standing behind defendants, but as active sued parties.

Background

Forge was a public company which provided engineering, procurement, construction, project management and maintenance services for the resources, oil and gas and power sectors. It had operations in Australia, West Africa and the United States of America.

In November 2013 Forge announced to the market a profit write-down for the financial year ending 30 June 2014 associated with unbudgeted cost increases in relation to two power projects. By the close of trade on that day Forge's share price had fallen 84% from its closing price on the last day on which its securities traded prior to the announcement.

In February 2014 the directors of Forge appointed voluntary administrators of Forge, who subsequently became its liquidators.

In due course Rushleigh - a shareholder of Forge - commenced a proceeding against Forge and Peter Geoffrey Hutchinson and David Michael Simpson, both of whom had been directors of Forge.

The proceeding is a representative proceeding under Pt IVA of the Federal Court of Australia Act 1976 (Cth). It is brought by Rushleigh on its own behalf and on behalf of persons who acquired shares in Forge between 7 March 2012 and 1 November 2013; have entered into a litigation funding agreement with IMF Bentham Limited; and who are alleged to have suffered loss and damage (Group Members).

Because Forge was the subject of external administration, the leave of the Court was required for Rushleigh to pursue Forge. An application for the grant of such leave was made, but was refused.

Policies and coverage

Forge had effected certain insurance for the relevant period.

Chubb - the primary insurer – issued a directors and officers liability insurance policy to Forge for the period from 30 June 2013 to 30 June 2014 with a limit of liability in the aggregate for all loss of $20 million (Chubb Policy).

Allianz and Axis each provided excess layer policies to Forge. Allianz issued a directors and officers liability insurance policy as an excess policy (Allianz Excess Policy) and Axis issued a directors and officers liability insurance policy as an excess policy (Axis Excess Policy).

Allianz's limit of liability was $20 million in excess of $20 million; Axis' limit was $10 million in excess of $40 million.

Policy wordings

The insuring clauses of the primary and excess policies were in relevantly identical terms, the primary cover being:

> *The Insurer will pay to or on behalf of the Insured all Loss, except where the Company has paid such Loss, resulting from a Claim first made against an Insured during the Policy Period or Discovery Period, if applicable.*

By Endorsement cover was extended by adding the following:

> *The Insurer will pay to or on behalf of the Company all Loss resulting from any Securities Claim first made against the Company after the Effective Date and during the Policy Period (or Discovery Period if applicable) for any Wrongful Act committed by the Company.*

Relevant definitions were:

> *"Insured" means "a natural person who was, now is or becomes during the Policy Period", among other things, "a Director or Officer";*
>
> *"Director or Officer" means, among other things, "a director or officer of the Company including the equivalent position in any other jurisdiction"; and*
>
> *"Non-Indemnifiable Loss" means Loss where a Company is unable to indemnify an Insured due to:*
>
> *(a) legal prohibition; or*
>
> *(b) a prohibition in the Articles of Association, charter, bylaws, contract or similar documents of such Company; or*
>
> *(c) insolvency under the Corporations Act 2001 (Cth) or the equivalent law in any other jurisdiction.*

It was accepted that Hutchinson and Simpson were each a "Director" of Forge and that their liability to Rushleigh, assuming it was established, would be "Non-Indemnifiable Loss" for the purposes of the Chubb Policy.

Clause 5.4(f) of the Chubb Policy set out how a proceeding against the Insured is to be conducted as between the Insured and the Insurer:

> *The Company and each Insured must give the Insurer and any representatives appointed by the*

Insurer all information they reasonably require, and fully co-operate and assist in the conduct of any investigation into any claim under this Policy.

Clause 5.12 set out the priority regime for payments under the Chubb Policy. It provided:

"The Insurer shall:

(a) first pay Non-Indemnifiable Loss; and

(b) then pay Loss paid by the Company on behalf of an Insured; and

(c) if additional cover is provided to the Company by endorsement to this Policy, other Loss incurred by the Company.

The insolvency or bankruptcy of any Company shall not relieve the Insurer of any of its obligations to prioritise payment of Loss under this Policy."

Extension of Indemnity

In October 2014 the solicitors for Chubb confirmed that Forge was entitled to indemnity under the Chubb Policy for the claim the subject of the proceeding, subject to the conditions and exclusions of the policy, and based on information currently known, and on the basis of full co-operation.

Importantly also, an express reservation to indemnity was made for deliberately dishonest or deliberately fraudulent acts or omissions, non-disclosure or misrepresentation

The same extension of indemnity was made by Chubb to the Directors in September 2015.

In June 2017 the solicitors for the Insurers confirmed that, to the extent that the Directors made a claim in respect of this proceeding under the Allianz Excess Policy or the Axis Excess Policy, indemnity was granted on the same basis as that granted by Chubb to Forge.

Application to join insurers

So, the Insurers had agreed that – subject to the usual reservations – the Directors were entitled to indemnity under the Policies in respect of the claims made in the proceedings.

Against that background, Rushleigh sought orders: for leave to join Forge's primary and excess layer insurers as parties to the proceedings; for leave under s 5 of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) (CAI Act) to continue the proceedings against those insurers, and to amend its claim to plead bases for relief against the insurers.

Legislative Framework

The CAI Act commenced on 1 June 2017, and essentially replaces section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)*. Its broad purpose, like its predecessor, is to facilitate third party claims on insurance moneys.

Section 4 of the CAI Act provides that a claimant may recover from an insurer where:

(1) An insured person has an insured liability to a person (the claimant).

(2) The amount of the insured liability is the amount of indemnity (if any) payable pursuant to the terms of the contract of insurance in respect of the insured person's liability to the claimant.

(3) In proceedings brought by a claimant against an insurer, the insurer stands in the place of the insured person as if the proceedings were proceedings to recover damages, compensation or costs from the insured person. Accordingly (but subject to this Act), the parties have the same rights and liabilities, and the court has the same powers, as if the proceedings were proceedings brought against the insured person.

Section 5(3) provides that a court may grant or refuse an application for leave subject to s 5(4), which provides that leave must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law.

No argument relying on s 5(4) was raised.

Applying the legislation

It was common ground that cases dealing with s 6 of the LRMP Act apply equally to s 5 of the CAI Act.

The leading case outlining the principles to be applied is Bede Polding College v Limit (No 3) Limited and Anor [2008] NSWSC 887 (Bede), which concerned an application pursuant to s 6(4) of the LRMP Act for leave to commence an action against an insurer.

The court there approached the question of leave on the basis that the plaintiff had to show three things:

- first, that there was an arguable case against the insured;
- second, that there was an arguable case that the policy responds; and,
- third, that there was a real possibility that, if judgment were obtained, the insured would not be able to meet it.

Here, there was no dispute that those three requirements identified in Bede Polding were met. That is, there was an arguable case against Forge; there was an arguable case that the insurance policies respond to the claim against Forge; and there is a real possibility that if judgment is obtained then Forge would not be able to meet it.

The Court then examined whether satisfaction of those three conditions was sufficient for the grant of leave.

Following Opes Prime Stockbroking Ltd (In Liq) (Scheme Administrators Appointed) v Stevens [2014] NSWSC 659, the Court held that the section of the CAI

Act confers a discretion if the 3 requirements in Bede are met.

Like most discretions, there are no restrictions imposed by the legislation, so long as the exercise of the discretion is for the purpose for which it is granted. Generally, that purpose is accepted to be to ensure that insurers are not exposed unnecessarily to claims against them. Ordinarily, for instance, leave would not be granted where an insurer was able to demonstrate some irreparable prejudice.

Prejudice

The Insurers submitted that, they would suffer irreparable prejudice: first, because of the cost they would incur in defending the proceeding; and, second, because of the forensic disadvantage to them which arises because they are strangers to Forge.

The argument in relation to the cost they would incur focussed on the additional costs exposure over and above the "Defence Costs" of the insureds which the insurers would have to meet in any event.

The evidence as to this additional cost was somewhat vague, and the Court was of the view that there was no real relevant prejudice in an exposure to additional cost. It referred to the obligation on the insured to co-operate as a mechanism by which the insurers could reduce any extra cost burden. In any event, the Court was of the opinion that if the additional cost that an insurer might incur in defending a claim because it is a third party is a relevant factor, then the intent behind the CAI could be undermined.

As to the prejudice said to arise through forensic disadvantage because the insurers were strangers to the proceeding, the Court again noted the policy requirement for co-operation by the insured. There was no evidence that Forge would not co-operate with the insurers.

In any event, an insurer will always be a stranger to a proceeding when joined as a result of a successful application made pursuant to the CAI. In that respect they will always suffer a degree of forensic disadvantage. That is one reason, the Court said, why co-operation clauses are included in insurance contracts.

Utility

The Insurers also submitted that there was no utility in the Court granting leave to Rushleigh to proceed pursuant to s 5 of the CAI Act because they had agreed to indemnify Forge and Messrs Simpson and Hutchinson (subject to immaterial reservations).The Insurers submitted that this led to the conclusion that there was no utility in a grant of leave.

The Court was influenced here by the fact that Forge itself was no longer an active party to the proceedings (because leave to proceed against it had been refused). In those circumstances, leaving aside the question of availability of funds under the policies, it could not be said that there is no utility in a grant of leave.

Outcome

Ultimately, after dealing with a number of other issues, the Court determined that it was appropriate for leave to be granted to Rushleigh to join and proceed against the insurers, and to amend its claim to abandon any claim against Forge itself.

For the insurers, they will now face the inevitable additional cost of being parties to complex representative proceedings – over and above the defence costs they may be obliged to indemnify their insureds for. At the same time, they will need to be astute to conduct their case in a way which preserves – so far as is possible – their reservation of rights against the Directors – now their co-respondents. All of which is quite a burden.

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The Transport Industry & the Chain of Responsibility Legislation – Changes to Safety Laws Are On The Way

The Heavy Vehicle National Law ("HVNL") which applies to the transport sector will be amended in mid 2018 to more closely align the duties and responsibilities as to safety for those involved in the sector with current workplace health and safety laws.

The HVNL is Queensland legislation which has been adopted by various States and Territories throughout Australia. The ACT, New South Wales, Queensland, South Australia, Tasmania and Victoria have adopted the law although Northern Territory and Western Australia are yet to do so.

The HVNL which is known as the Chain of Responsibility Legislation chain of responsibility imposes obligations in relation to transport on all those involved in the supply of transport services including on consignors, consignees, drivers, transport operators, loaders, unloaders, schedulers and packers as well as their employers and company directors.

The laws impose obligations in respect of:

- heavy vehicle driver fatigue management;
- heavy vehicle driver speed limits;
- heavy vehicle mass dimension and load requirements;
- scheduling of unrealistic timeframes for delivery.

The national heavy vehicle regulator through the HVNL looks after one set of rules for heavy vehicles over 4.4 tonnes gross vehicle mass.

From mid 2018 the HVNL will impose a primary duty on those involved in transport to eliminate or minimise potential harm or loss by doing all that is reasonably practicable to minimise public risks. This is consistent with the duties currently imposed under work health and safety legislation in the various States and Territories.

All of those involved in the supply chain will need to ensure they have business practices, training procedures and process to:

- identity, assess, evaluate and control risks;
- manage compliance with speed, fatigue, mass dimensions and loading requirements;
- provide sufficient information to those that manage businesses to permit managers to satisfy due diligence obligations which will be imposed.

The legislation when amended will provide that each party in the chain of responsibility for a heavy vehicle must ensure, so far as is reasonably practicable, the safety of the party's transport activities relating to the vehicle. The legislation will impose a duty to eliminate public risks and to the extent that it is not reasonably practicable to do so, minimise the public risks.

Executives of companies involved in the supply chain will be required to apply due diligence when it comes to safety. Executives will need to have a good working knowledge of work health and safety laws as well as the HVNL and Regulations made pursuant to the HVNL, the chain of responsibility provisions that apply to them, their business operations, the hazards and risks in their business and will need to ensure appropriate resources are available to manage risks and are properly allocated.

When considering whether something is reasonably practicable the following matters are relevant:

- the likelihood of the risk occurring;
- the degree of harm;
- what a person knows about the risk;
- ways to remove and reduce the risk and whether they are feasible;
- the cost of the risk eventuating compared to the costs of eliminating or modifying the risk.

The potential penalties that flow from any breach of the safety provisions in the HVNL are in line with the penalties imposed under work health and safety legislation in the various States and Territories.

Maximum penalties for a breach of the new primary duty as to safety will be based on 3 Categories depending on the severity of the breach and its consequences. The categories are::

- safety breach - Category 3 - $50,000 individual and $500,000 corporation;
- risk of death/injury – Category 2 - $150,000 individual, $1.5 million corporation;
- recklessness – Category 1 - $300,000 individual and five years imprisonment, $3 million for a corporation.

The chain of responsibility provisions will supplement and not replace, safety obligations imposed on those involved in the supply chain and will be the driver of safe operating practices in the transport sector for all business involved in the transportation of goods.

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Changes to the Consumer and Competition Act and Consumer Protection Are On The Way

The Federal Government has recently published exposure draft legislation and invited submissions from the public on changes to safety provisions in the *Consumer and Competition Act 2010 ("Act")*. The exposure draft legislation follows on from 14 recommendations made in the final report on the Australian Consumer Law Review.

If the draft legislation becomes law there will be changes to the provisions in the Act that deal with unconscionable conduct, unsolicited consumer agreements, product pricing and information gathering.

In addition, when it comes to safety there will be changes that will have significant effect.

There will be a definition for "voluntary recall" which will include any corrective action to mitigate a safety risk of consumer goods including removing the goods from distribution or sale and consequently the business will need to comply with the notification requirements in the Australian Consumer Laws where corrective action is taken.

Under the Australian Consumer Laws suppliers will be required to notify the Commonwealth Minister responsible for competition and consumer policy within two days of initiating a voluntary recall action. If a death or serious injury or illness has been associated with a product it is also necessary to lodge a mandatory report with the ACCC. Notices are also required to be given to the other parties or entities involved in the supply chain advising that a recall has been initiated.

Penalties for failing to notify a voluntary recall will be a maximum of $33,000 for individuals and for companies, the greater of $165,000 or three times the benefit obtained from the failure to notify.

There will also be changes to the provisions that import consumer guarantees of due care and skill into service contracts.

The transport industry has enjoyed an exemption from the provisions that impose a guarantee of due care and skill for all service contracts.

The guarantee does not currently apply to a contract for or in relation to the transportation or storage of goods for the purpose of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored. Those involved the transport industry will need to take heed of the impact that guarantees of this nature will have on their liability as they will no longer be exempt from the operation of this guarantee provision.

The ASIC Act will also be amended with the definition of "financial services" to include "financial products" ensuring the consumer protections that apply to financial services in the ASIC Act will extend to financial products.

Mandatory notice provisions to be included in consumer contacts for goods and services will also be prescribed. For goods and services contracts will need to include the following notice:

> *"Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to cancel your service contract or be compensated for its reduced value for major failures with the service. You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, we must still rectify the failure in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion.*
>
> *You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.*

Submissions on the draft reforms closed on 28 February 2018 and in all probability there will be a relatively quick implementation of these changes. In 2018 consumer protection remains of focus for the Federal Government.

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"Wrongful acts" and "professional activities" – PI Insurer's appeal dismissed by Full Federal Court

In our September 2017 edition of GD News we reported on the decision of her Honour Justice Davies of the Federal Court in *Aquagenics Pty Ltd (in liq) v Certain Underwriters at Lloyd's Subscribing to Contract Number NCP106108663* ("underwriters").

Her Honour found that Aquagenics was entitled to indemnity under its professional indemnity policy with the underwriters.

The underwriters appealed to the Full Court of the Federal Court which recently handed down its decision.

In a unanimous judgment comprising Allsop CJ, Dowsett & Kerr JJ, the underwriter's appeal was dismissed.

To recap, Aquagenics carried on a water treatment engineering business.

It entered into a contract with Break O'Day Council for the design and construction of a wastewater treatment plant at St Helens, Tasmania involving design, construction, testing and commissioning.

The works included a requirement for Aquagenics to carry out pre-commissioning prior to the diversion of wastewater to the new wastewater treatment plant.

Aquagenics carried out design and construction works between March 2006 and June 2007. The works were not completed.

In May/June 2007, a dispute arose between Aquagenics and the Council regarding whether Aquagenics had conducted pre-commissioning tests as per the terms of the contract.

The Council contended those works were not done. Aquagenics disputed this.

Under the contract, the Council was entitled to give notice to Aquagenics to show cause why the Council should not *"take the work out of the hands of Aquagenics"* and have the work remedied by another contractor with any additional costs to be reimbursed to the Council by Aquagenics.

Council issued a notice for Aquagenics to show cause.

Aquagenics argued this amounted to a repudiation of the contract and proceeded to leave the site without finishing the works.

The Council had other contractors complete the works between 2007 and 2010. During this time, Council also discovered design flaws in the work done by Aquagenics that were not known to Council as at June 2007.

In late 2010, Council commenced arbitration proceedings against Aquagenics claiming damages in respect of Aquagenics' failure to complete the pre-commissioning works and alleged flaws in the design and construction works.

The arbitrator found Aquagenics had failed to conduct the pre-commissioning works and Council was entitled to issue the show cause notice.

The arbitrator awarded the Council damages in excess of $1 million.

Aquagenics made a claim on its professional indemnity policy with the underwriters, relying upon the following insuring clause in the policy:

"…we agree to pay on your behalf all sums which you become legally obliged to pay … as a result of any claim first made against the company or entity named as the Insured in the Schedule during the period of the policy and notified to us during the period of the policy arising out of any wrongful act committed by you or on your behalf in the course of your professional activities…"

The underwriters declined indemnity on the basis the claim did not arise out of a wrongful act in the course of Aquagenics' professional activities.

The underwriters contended the claim arose out of the Council taking the matter out of the hands of Aquagenics under the show cause notice.

Further, the underwriters argued that Aquagenics' decision to stop work and leave the site did not constitute a "wrongful act" within the meaning of the policy.

Aquagenics brought proceedings in the Federal Court claiming damages from the underwriters by reason of their wrongful refusal to indemnify Aquagenics under the policy.

At the hearing before Davies J, the underwriters submitted that *"wrongful act"* as defined in the policy only covered inadvertent or unintentional acts, errors or omissions. Not intentional acts.

Her Honour disagreed and observed that the elements of cover still made it necessary to show the relevant act, error or omission was committed by Aquagenics in the course of its professional activities.

On this issue, the underwriters argued the insuring clause was only engaged if the wrongful act was committed by Aquagenics in the performance of its contracted services to the Council.

Justice Davies rejected the underwriters' argument and held it was the failure to comply with the stipulated contractual obligations with respect to pre-commissioning works which gave rise to the claim.

Accordingly, her Honour held that the claim arose from wrongful acts committed by the insured in the course of its professional activities.

In the appeal to the Full Federal Court, the underwriters raised the same arguments regarding whether Aquagenics' so-called "intentional" decision to leave the site and not complete the pre-commissioning works was a wrongful act in the course of its professional activities.

In a single judgment delivered by all three appeal justices, the Court unanimously rejected the underwriters' arguments.

On the issue of "wrongful act", Allsop CJ, Dowsett & Kerr J adopted the reasons of Davies J and stated there was no reason to limit this phrase to "unintentional" acts, as this was not the intention of the policy wording.

On the issue of "professional activities", the Full Federal Court agreed with the primary judge's reasons but also made its own observation that works in respect of pre-commissioning and commissioning contained a number of aspects that involved Aquagenics' professional expertise and skill.

The Full Federal Court's decision is consistent with the decision of the Court at first instance.

Both Courts rejected the underwriters' argument that the word "unintentional" should be read into the definition of "wrongful act" within the policy wording. Simply put, it was held that to do so would be inconsistent with the commercial purpose of the insurance contract.

Further, both Courts adopted a wide scope with respect to the meaning of "professional activities" thereby rejecting the narrow approach for which the underwriters contended.

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Stamp Duty Relief on Insurance For Small Business in NSW

From 1 January 2018 certain types of insurance for small businesses in NSW are no longer liable for NSW stamp duty.

A small business is an individual, partnership, company or trust that:

- is carrying on a business, and
- has an aggregated turnover of less than $2 million.

Aggregated turnover is the annual turnover over the business plus the annual turnovers of any business entities that are affiliates or are connected with the business.

A business is affiliated with another business, if an individual or company, in relation to their business affairs, acts or could reasonably be expected to act:

- in accordance with the other businesses directions or wishes, or
- in concert with the other business.

Trusts, partnerships and super funds can not be your affiliates. However, a trust, partnership or super fund may have an affiliate who is an individual or company.

A business is connected with another business if:

- either entity controls the other entity, or
- both entities are controlled by the same third entity.

The stamp duty exemption will apply to the following types of insurance:

- Commercial vehicle insurance – being motor vehicle insurance for a vehicle used primarily for business purposes
- Commercial aviation insurance - being aviation insurance for an aircraft used primarily for business purposes
- Occupational indemnity insurance – insurance covering liability arising out of the provision by a person of professional services or other services (other than medical indemnity cover within the meaning of the Medical Indemnity Act 2002 of the Commonwealth)
- Product and public liability insurance – insurance covering liability for personal injury of property damage occurring in connection with a business or arising out of the products or services of a business

However there are circumstances where the exemption for small business will not apply for example:

- insurance for an Association
- home businesses - if the policy is taken out by the homeowner and not by a small business then the exemption will not apply
- a body corporate of a strata scheme
- cover under section 2 (liability cover) of a contract works policy will be exempt but not section 1 (material damage).

For a policy to be exempt, the insured must be a small business as at the date the policy is effected or renewed and the insurer must have a small business declaration.

The exemption only applies to policies effected or renewed after 1 January 2018. No refunds are available if the policy was effected or renewed before 1 January 2018.

If an insurer does not have a small business declaration as at the date the policy is effected or renewed then the policy is liable to duty.

Insurers can seek a reassessment of duty payable where the duty was paid and a small business declaration was received after the premium was paid - a refund of overpaid duty can be sought from Revenue NSW.

A small business declaration must be completed by an insured not its broker. Insurers are required to keep any small business declaration for a minimum of 5 years.

Insurers and brokers need to revise their administrative procedures to ensure that insureds are aware of the relief from stamp duty that is available and ensure that stamp duty is calculated properly to avoid the administrative burden and cost of having to seek stamp duty refunds.

Underwriting agencies will need to ensure that brokers are aware of the obligation to provide small businesses declarations to receive the benefit of the stamp duty exemptions and ensure compliance procedures are in place to collect and store the declarations and properly calculate stamp duty payable.

There are challenges ahead for insurers, underwriting agencies and brokers with stamp duty on insurance in NSW.

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TPD Claims: Correctly interpreting an "ETE" clause

In this article we continue our series regarding claims for total and permanent disablement and disablement benefits with particular focus on the interpretation given by Courts to what is commonly referred to as an "ETE" clause.

Typically, the insuring clause in group policies issued by life insurers to superannuation trustees contain criteria which requires the insurer or trustee to determine whether the claimant is unable or unlikely to return to any gainful or remunerative work for which the claimant is reasonably qualified or fitted by reason of the claimant's education, training or experience.

In the past 10 to 15 years, various State and Federal Courts have considered several forms of these "ETE" clauses. Various decisions have considered issues such as whether the incapacity complained of must be permanent, the relevance (if any) of the claimant's age, and whether the insurer or trustee must consider a claimant's past employment history or future employment prospects.

In *Cullinane v Mercer Benefit Nominees Limited (2006)* the Full Court of the Federal Court considered a claim for disablement benefit which was defined relevantly as:

> *"Disablement means any medical state of physical or mental incapacity which, in the opinion of the Trustee, after having considered independent medical evidence, renders the Member unable to engage in any gainful occupation or business or to perform any work for which, in either case, the Member is reasonably fitted by education, training or experience".*

The claimant was a flight attendant who became ill after being exposed to toxic chemicals in the course of her employment.

The Full Court held there is a fundamental difference between an incapacity which is permanent (even allowing for some latitude in the scientific certainty required for that assessment) and an incapacity which

exists now, and will continue to exist in the foreseeable future.

In that regard, the Court stated:

> *"It is the inability of the medical experts to see an end to the incapacity in the foreseeable future … to bring the case within the realm of 'disablement', as it applies to the claimant".*

In *Dumitrov v SC Johnson & Son Superannuation Pty Limited (2006)*, his Honour Justice Gzell of the NSW Supreme Court considered a claim by an unskilled manual labourer who claimed total and permanent disablement benefit with the relevant wording being:

> *"Total and permanent disablement means having been absent from work through injury or illness for an initial period of six consecutive months and in our opinion being incapacitated to such an extent as to render the Insured Person unable ever to engage in or work for the reward in any occupation or work which he or she is reasonably capable of performing by reason of education, training or experience".*

The slight variation here was the use of the words "unable ever" rather than being simply "unable" to engage in future work.

The insurer relied upon a vocational and functional capacity assessment which concluded the claimant had valuable transferrable skills and had a current working capacity.

Gzell J held that, if the claimant required retraining in order to be employable, he met the definition of total and permanent disablement under the policy. The claimant was thus successful.

In *TAL Life Limited v Shuetrim; Metlife Insurance Limited v Shuetrim (2016)* the NSW Court of Appeal considered a claim by a Police Officer for total and permanent disablement benefit with the relevant wording being:

> *"The Insured Member having been absent from their occupation with the Employer through injury or illness for six consecutive months and having provided proof to our satisfaction that the Insured Member has become incapacitated to such an extent as to render the Insured Member unlikely ever to engage in any gainful profession, trade or occupation for which the Insured Member is reasonably qualified by reason of education, training or experience".*

Note the variation here between "unlikely ever" as opposed to "unable" or "unable ever".

His Honour, Justice Leeming, wrote the leading judgment in which his Honour held:

> *"To make an assessment of TPD, it is not sufficient for the insurer to be satisfied that it is more likely than not that the person will never return to relevant work. On the other hand, if there is merely a remote or speculative possibility that the person will at some time in the future return to relevant work, an insurer will not, acting reasonably and in compliance with its duties, be able to be satisfied that the person is not TPD. The critical distinction is between possibilities which are readily contemplatable even though they may not be more probable than not, and possibilities which are remote or speculative. A real chance that a person will return to relevant work, even if it is less than 50%, will preclude an insured person being unlikely ever to return to relevant work".*

Leeming JA went on to say the question was whether the Court was satisfied there was not a real chance the claimant would ever return to relevant work. His Honour also observed that relatively young people whose medical or psychological condition is uncertain will find it harder to prove to an insurer's or a Court's satisfaction that they are unlikely ever to return to work for which they are reasonably fitted by education, training or experience.

Most recently in *Hannover Life Re of Australasia Limited v Jones (2017)*, the NSW Court of Appeal considered a claim by a roof plumber for TPD benefit with the following relevant wording:

> *"Total and permanent disablement … is where the Insured Person is unable to follow their usual occupation by reason of accident or illness for six consecutive months and in our opinion, after consideration of medical evidence satisfactory to us, is unlikely ever to be able to engage in any regular remunerative work for which the Insured Person is reasonably fitted by education, training or experience".*

The term "regular remunerative work" was defined as follows:

> *"An Insured Person is engaged in regular remunerative work if they are doing work in any employment, business or occupation. They must be doing it for reward – or the hope of reward – of any type".*

Again note the variation here to be "unlikely ever to be able to…" rather than "unlikely ever" as in *Shuetrim*.

The medical evidence established the claimant would be unable to return to his previous occupation as a roof plumber for which he had worked in that capacity for over 20 years.

The insurer relied upon vocational assessment reports which suggested the claimant had transferrable skills that gave rise to a future employment capacity in different jobs.

His Honour, Justice Gleeson, wrote the leading judgment in which his Honour held:

> *"In the context of the ETE clause, the word 'by' in the phrase 'reasonably fitted by education, training or experience' clearly expresses the notion of a link or connection between the suggested future work, and the insured's past education, training and experience".*

Gleeson JA also noted the following observations by the Primary Judge:

> *"The work of a retail sales assistant, service station console operator, courier/delivery driver or customer service advisor/telemarketer was not work for which he was reasonably fitted by his education, training or experience. Even if it is conceivable that he might be able to adapt to it, without undergoing further formal training, that has nothing to do with his education, training and experience. Having some of the requisite individual skills does not equate to being fitted for the employment as a whole: capacity to perform remunerative work is different from capacity to perform a work task. It does not follow that because a person is physically capable of performing one or more work tasks that there is an ability to engage in remunerative work".*

These cases illustrate decisions by an insurer or trustee in claims for TPD or disablement benefits must, depending on the wording, focus their attention on a claimant's past education, training and experience by reference to the person's usual occupation(s) as a whole and not the individual skills that may remain, at the time of the assessment, despite the serious injury or illness giving rise to the claim.

Insurers and trustees must exercise some caution in relying upon opinions expressed by vocational capacity experts who suggest a claimant retains some future employment capacity despite being badly injured or suffering a serious illness that would otherwise fall within the wording of the policy, or trust deed, especially when the suggested future occupations bear little or no resemblance to the claimant's past education, training and experience.

The recent decision of *Jones* would suggest that such opinions are of minimal utility to insurers when assessing TPD claims.

Insurers and trustees who rely upon vocational capacity expert opinions may find themselves in breach of their obligation to act reasonably in considering and determining the TPD claim, as we discussed in our previous article in this series.

In our next edition of GD News, we consider some examples where TPD claims were declined and defended based on fraud.

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Labour Hire Licensing is Here

There are significant changes in the labour hire industry on foot.

In Queensland, the *Labour Hire Licensing Act* 2017 will commence on 16 April 2018. Companies that provide labour hire in Queensland will need to apply online for a labour hire licence from that date.

The legislation comes into effect following the 2016 report of the Queensland Parliamentary Finance & Administration Committee into the practices of the labour hire industry in Queensland and subsequent issues paper.

According to the Parliamentary report, the majority of labour hire operators were responsible employers however there was also evidence of phoenixing, sham contracting, exploitation and mistreatment of workers, undercutting of employment conditions and a range of other illegal practices. Labour hire employees were, on occasions, paid less than the award rate and exposed to unsafe working conditions. There was also non payment of superannuation, tax and workers compensation premiums.

So what is the effect of the new legislation?

The legislation provides that:

- labour hire providers must be licensed to operate in Queensland;
- host employers must only engage licensed providers;
- labour hire licensees must satisfy a fit and proper person test;
- the labour hire business must be financially viable;
- the licensee must provide six monthly reports in relation to labour hire and associated activities including compliance with relevant laws;
- there are penalties for breach of obligations;
- a labour hire licensing compliance unit is to be established.

After 16 April 2018 labour hire providers in Queensland have 60 days to lodge an application for licence. If such an application is made within that initial 60 day period then the obligations and penalties will not apply until the licence has been granted.

Interstate or overseas organisations must be licensed if they operate in Queensland.

There are substantial penalties under the legislation including up to $130,439.10 for individuals and $378,450.00 for companies for serious contraventions such as operating as a labour hire provider without a licence, entering into labour hire arrangements with unlicensed providers and entering into arrangements to avoid obligations under the legislation.

Queensland is not the only state to take this path.

Enquiries were also undertaken into labour hire in South Australia in June 2015 and in Victoria in September 2015 and South Australia and Victoria have also passed legislation. The laws are to commence in South Australia on 1 March 2018 and in Victoria on a date to be proclaimed.

And what about NSW? Time will tell if NSW will follow suit but in reality it is probably only a matter of time.

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CONSTRUCTION ROUNDUP

Laws to Protect Against Unsafe and Combustible Building Products in NSW

NSW's Building Products (Safety) Act 2017 addresses concerns over the use of unsafe building products and commenced on 18 December 2017.

The legislation is part of the NSW Government's 10 point plan for fire safety address concerns about unsafe building products triggered by the Grenfell Tower Fire in London.

Fair Trading NSW can now control the use of unsafe building products such as external cladding which pose a safety risk and can ban or restrict the use of unsafe products and rectification orders to fix a building can also be issued.

A building product presents a safety risk if any of the occupants of a building are, or will likely be, at risk of death or serious injury arising from the use of a building product in the building.

There is a safety risk even if the risk only arises in certain circumstances or if some event occurs, such as a fire.

The circumstances which will give rise to a safety risk can be prescribed by Regulations made under the Act.

Asbestos or an asbestos product is not an unsafe building product.

The Commissioner of Fair Trading can ban the use of a building product or restrict the way in which a product is used.

NSW Fair Trading can publish details of product bans and call for public submissions on building products and their use and whether they should be banned.

Building product rectification orders will be issued which will require owners of an affected building to:

- eliminate or minimise a safety risk posed by the use in the building of a building product where a building product use ban applies; and
- remediate or restore the building.

NSW Fair Trading inspectors have the power to enter, inspect and search premises, record interviews, take samples and photographs and compel the production of documents from builders, supplies, manufacturers and importers.

It is an offence to cause a banned building product to be used in building works and there is a maximum penalty of $1.1 million for corporations and $220,000 or two years imprisonment, or both for individuals. There are maximum fines for each day an offence continues to be committed running at $110,000 for a corporation and $44,000 for an individual.

Directors and persons concerned in the management of a company can also be held personally liable for contravening a building product use ban and can face penalties up to $22,000.

The *Home Building Act 1989* has also been amended and the definition of "major defect" now includes the use of banned building products and there is a 6 year statutory warranty for defects arising from the use of banned products.

When it comes to contracts for the sale of properties the contracts must address whether there are building product rectification orders made and or satisfied and vendors must warrant that there has not been a building product rectification order that has not been complied with or disclose the failure.

Owners corporations are also required to disclose in their records any outstanding building product rectification orders so purchasers of property are properly protected.

Further, Section 149 Notices issued under the *Environmental Planning and Assessment Act* which are attached to contracts for the sale of property must include a statement of any building product rectification orders and whether they are outstanding and whether there is any intention to issue a building product rectification order for a property.

But that is not the end of the changes. The NSW Department of Planning and Environment has issued for public comment (which closed on 16 February 2018) draft Regulations dealing with Environmental Planning and Assessment issues that will regulate buildings with combustible cladding. The Regulations can be promulgated without any legislative changes.

Owners of a building with combustible cladding will be required to provide the Secretary of Planning with details about the building and its cladding including information about the classification of the building, number of storeys, the nature of combustible material and the extent of its application. For existing buildings a notice will need to be provided within 3 months of the commencement of the Regulation and for new builds within 3 months of the first occupancy. Notice must be provided through the NSW Planning portal. Councils and authorised fire officers will have the power to direct building owners to notify details of combustible cladding in their building.

In addition building owners will be required to submit cladding statements which include a report from a properly qualified person who has inspected the property commenting on whether the cladding presents

a risk to safety or the spread of fire and measures that should be taken to address the risk. Owners will need to specify their proposed response to any risks in their cladding statement. This is a not so subtle way to require building owners to have their properties inspected by an appropriately qualified person to comment on the safety risk posed by combustible cladding.

It will be an offence not to comply with the notification requirements with a maximum penalty of $33,000 for an offence.

If the proposed Regulation becomes law owners who have building with combustible cladding will be required to report details of their combustible cladding to Regulators who have the power to require owners to address safety risks. Interestingly "combustible material" is defined very widely in the draft Regulation as "any cladding comprised of materials that are capable of readily burning (such as timber, polystyrene, vinyl or polyethylene) and includes any cladding system that incorporates elements that are capable of readily burning (such as combustible framing or insulation behind the surface cladding)".

New South Wales has moved quickly to address safety concerns arising from the use of building products that present a safety risk. The changes will impact on property owners, vendors of property, developers, builders and building product manufacturers, distributors, and importers Some legislative changes have commenced and others are being fine tuned before being introduced.

Everyone involved with the construction industry needs to take stock and carefully consider product safety data for all products used in construction works and the nature of cladding on existing buildings.

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No Judicial Review Of Adjudicators' Determinations Unless Jurisdictional Error

In our February 2017 newsletter, we discussed the decision of the NSW Court of Appeal in *Shade Systems Pty Limited v. Probuild Constructions (Aust) Pty Limited (No. 2) [2016] NSWCA 379*, and particularly the reversal by the Court of Appeal of the earlier Supreme Court's decision which determined that adjudicators determinations could be attacked where there was on error of law on the face of the record. In our newsletter in August of that year, we noted that Probuild had been granted special leave to appeal to the High Court from the Court of Appeal's decision, and that the High Court proceedings were being heard in conjunction with another appeal from a decision of the Full Court of the Supreme Court of South Australia (*Maxcon Constructions Pty Limited v. Vadasz & Ors (No. 2) [2017] SASFC 2*).

In both cases, the primary issue was whether the relevant Supreme Courts had the power to declare void an adjudication determination that had been made in a building contractor's favour pursuant to the security of payment legislation in their State, in circumstances where the adjudicator had made an error of law.

Since the security of payment legislation in Australia is generally a nation-wide uniform law modelled on "east coast" and "west coast" versions, and both SA and NSW have adopted the east coast model, the relevant parts of the security of payment legislation in SA and NSW are identical. Accordingly, the High Court decided to hear and determine both cases together.

Importantly, the Supreme Court of each State retains a supervisory jurisdiction which gives it the power to declare void any decision that has been made in a judicial capacity by a tribunal or adjudicator created or given power by statute, except where the statute itself excludes the court's supervisory jurisdiction in this regard. While a determination purportedly made by an adjudicator who lacked the jurisdiction to do so will be nullified by the court, the issue was whether the courts have the power to interfere if the decision has been made with the requisite jurisdiction, even if the adjudicator had mis-applied the law in coming to that decision.

The High Court (comprised of all seven justices) has now delivered its judgment in each matter and has dismissed the appeal in each case.

In *Probuild Constructions (Aust) Pty Limited v Shade Systems Pty Limited & Anor [2018] HCA 4*, Kiefel CJ, Bell, Keane, Nettle and Gordon JJ delivered a joint judgment, while Gageler and Edelman JJ each chose to provide their reasons separately.

In the majority judgment, the Court agreed with the proposition that in the absence of the Act clearly stating that the courts lacked the power to declare a determination void, it was appropriate to look at the construction of the Act as a whole in order to decide whether the courts were excluded from its processes.

The Court noted that the objective of the Act was achieved by putting in place a scheme under which each party was able to know where it stood at any time. It was explicitly provided in the Act that the statutory regime for the making of payment claims applied only to interim progress claims, and was not intended to be a final determination of the parties' entitlements on the project.

The Court also pointed out that the "brutally fast" deadlines required under the statutory scheme were not conducive to lengthy consideration by the adjudicator of all the relevant facts, and the informal procedures allowed under the Act did not ensure that the parties' rights were fully protected.

Notwithstanding these factors in the statutory process, the Act clearly stated that the principal did not have any right of appeal from a determination that had been made.

The Court also took into consideration the fact that an absence of judicial review would not have a permanent consequence (ie the principal remained entitled to commence substantive proceedings for the restitution of moneys paid pursuant to a determination) and it was the clear intent of the Act that the contractor be paid quickly and with minimal delay – a "pay now argue later" approach.

The Court held that it would not be consistent with the terms, structure or purpose of the Act if potentially costly and time consuming judicial review was to be permitted. This would simply frustrate the operation and the purpose of the statutory scheme. Accordingly, the majority justices dismissed the appeal.

Gageler and Edelmen JJ each agreed with the majority's conclusion but in their separate judgments set out a detailed history and examination of the scope of the Supreme Court's supervisory jurisdiction throughout the centuries.

Gageler J commented that where an administrative body is given power by statute, they are entitled to exercise this power without review by the courts. His Honour held that the objective of the Act would be thwarted if a review by the courts were to be allowed for a non-jurisdictional error such as a mis-application of the law.

Edelman J noted that a narrow approach to the issue had historically been applied by the courts and pointed out that although the Supreme Court had a power of review, the Act as a whole was a factor that would be taken into account by the court as a reason why it should not exercise its discretion to exercise that power – particularly the Act's clear intention and provision that the principal was not entitled to challenge an adjudication made under its processes.

Accordingly, Probuild's appeal was dismissed, and the adjudication determination in Shade Systems' favour remained valid.

In Maxcon, the appellant had raised three issues: (1) Did the adjudicator's reasons disclose an error of law? (2) If so, was this sufficient for the Supreme Court to order that the adjudicator's determination be quashed? (3) If not, was the error of law in the adjudicator's reasons a jurisdictional error?

Maxcon was a head contractor who had engaged Mr Vadasz' business as a piling subcontractor. Under the terms of the subcontract, Mr Vadasz would become entitled to the release of half of his retention moneys when a certificate of occupancy was released for the project. In order for such a certificate to be issued by the council, the owner was required to provide to the council a statement that the project documentation (including the head contract) was consistent with the building approval for the project, and the builder was required to confirm that the project had been constructed in accordance with that project documentation.

Section 12 of the security of payment legislation provides that a "pay when paid" provision in a construction contract is to have no effect. A provision will be deemed to be "pay when paid" if it makes a party's liability to pay money to the other party contingent or dependent on the operation of another contract.

The adjudicator had held that since the Mr Vadasz' entitlement to his retention moneys was stated in the subcontract to be contingent on the certificate of occupancy being issued under the terms of the head contract, it was a "pay when paid" provision and thus ineffective. Accordingly, the adjudicator had determined that Mr Vadasz was entitled to the immediate release of his retention moneys.

Maxcon had applied to the South Australian Supreme Court for judicial review; the Supreme Court dismissed that application. Upon appeal to the Full Court of the Supreme Court, the primary judge's decision was confirmed. However, in doing so the Full Court held that the issuing of a certificate of occupancy was an independent event and thus the relevant clause of the subcontract holding back the retentions until this event was not a 'pay when paid" provision. On each occasion in considering Maxcon's applications, the courts had proceeded on the basis that the adjudicator had made an error of law on this point which permitted judicial review.

Before the High Court, Maxcon had contended that rather than being an error of law, the adjudicator had made an error that affected his jurisdiction, and thus the courts should declare the determination void.

Again in a separate majority judgment (and with Edelman J agreeing), Kiefel CJ, Bell, Keane, Nettle and Gordon JJ examined the circumstances of a certificate of occupation being issued for a project and held that the relevant clause of the subcontract was indeed a "pay when paid" provision which was to have no effect. The adjudicator's reasons therefore did not disclose any error of law and thus the majority of the Court would dismiss the appeal.

In a separate judgment, Gageler J agreed with the majority's decision but his Honour went further – providing his reasoning and hypothetical answers to the second and third questions posed in the matter.

His Honour held that for the reasons stated in the Probuild matter, the courts did not have the power to judicially review an adjudicator's determination unless that determination had been made with a lack of requisite jurisdiction.

In answer to the third question, his Honour held that section 12 of the security of payment legislation (making ineffective "pay when paid" provisions) did not

affect the jurisdiction of the adjudicator; it was merely part of the framework of the Act and the contract that the adjudicator was required to consider when exercising his or her jurisdiction.

The ramifications of the High Court's decision in these two cases are likely to be felt across the construction industry.

With many adjudicators following the intent of the legislation that an amount should be determined as due to be paid to the contractor on the basis that an error in this regard can be corrected later, an application for adjudication of a payment dispute has always been a strong strategic move by building contractors. However, many contractors did not want to be forced into subsequent (and often costly) Supreme Court proceedings in which the adjudicator's determination was reviewed and potentially declared void.

When the primary judge in the Probuild matter had held that the courts had the power to review and declare void adjudicators' determinations even if they did not have jurisdictional errors, many considered that this had opened the door to more litigation in which principals would challenge adjudication determinations.

As a consequence of the High Court's confirmation that an adjudicator's determination will not be interfered with unless the underlying jurisdiction to make that determination was absent, it is likely that a greater number of contractors will be encouraged to follow the adjudication process to try to receive quick payment (and to gain a stronger position in any subsequent negotiations). Principals will therefore be faced with the hard decision as to whether to chase the money already paid to the contractor by commencing formal court proceedings for restitution, or instead to try to negotiate a settlement.

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EMPLOYMENT ROUNDUP

Engaging Contractors

In previous issues of GD News, we have looked at issues in hiring a workforce such as contracts awards and enterprise agreements; probation; and the significance of being a "small business."

Another topic which very often arises is deciding on the status of a workforce. Here the decision is essentially whether to hire direct employees or whether to engage independent contractors.

In order to make an informed decision about the basis of securing a workforce, it is critical to be aware of the different implications which flow from that choice. It is also important to be able to identify whether a person is a worker or an independent contractor.

The Fair Work Ombudsman is a useful resource for employers on these topics, and produces guides which contain the information below.

Employee or independent contractor

Whatever people that work in a business are called, the law classifies them according to the basis on which they perform that work.

Generally employees:

- have their work directed and controlled by their employer
- work set or standard hours (casual employees hours can vary from week to week)
- usually have an ongoing expectation of work
- bear no financial risk – it's covered by their employer's insurance
- are provided by their employer with tools or a tool allowance is provided
- have income tax deducted by their employer
- are paid wages or a salary regularly
- are entitled to paid leave.

In contrast, factors that indicate an independent contractor are that they:

- have a high level of control over how the work is done, including the choice to hire others to assist
- agree to the hours required to complete the job
- are usually engaged for a specific task or time
- bear the risk of making a profit or a loss and usually bears responsibility and liability for poor work or injury and usually have their own insurance
- use their own tools and equipment
- pay their own tax and GST
- have an ABN and submits invoices
- don't receive paid leave.

Independent contractors run their own business. They usually negotiate their own fees and working arrangements and can work for more than one client at a time.

Independent contractors can do the same type of work as an employee of the business they are doing work for and still be an independent contractor. A person won't automatically be an employee or an independent contractor because of the type of work they do.

Sham contracting

Sham contracting is where a person working as an employee is told they are an independent contractor

when in truth they are not. Generally, they will also be treated like an independent contractor in some ways, for example they may be required to have an ABN and submit invoices. Sham contracting is illegal. It's illegal to:

- claim an employee is an independent contractor
- say something false to convince an employee to become an independent contractor
- dismiss or threaten to dismiss an employee if they don't become an independent contractor
- dismiss an employee and hire them as an independent contractor to do the same work.

Sham contracting can be done intentionally or carelessly by an employer. These types of arrangements are sometime set up by employers who are seeking to avoid responsibility for paying legal entitlements to employees.

Getting paid

Since independent contractors aren't employees, they don't have a minimum wage or pay rate. Instead, independent contractors negotiate payment as part of their contract.

An independent contractor will submit an invoice when they need to be paid. They can be paid on a regular basis or at the end of the contract or project.

If an independent contractor doesn't get paid for an invoice they need to take their own legal action or seek independent legal advice for help.

Tax and super

Since independent contractors are running a business, they will need to arrange for tax to be taken out of their pay and pay GST.

As well as paying their own tax, independent contractors may need to make their own superannuation contributions. There are exceptions to this, such as when a contractor is hired wholly or principally for labour – in this case, they're considered employees for superannuation purposes, and the person that hired them is responsible for paying their superannuation.

This can be a complex area, and employees should seek professional advice.

Minimum entitlements

Independent contractors don't get other entitlements that employees get such as leave and notice of termination unless they negotiate for these entitlements to be included in their contract.

Independent contracting laws

The Fair Work Act 2009 protects independent contractors from adverse action, coercion and abuses of freedom of association.

The Independent Contractors Act 2006 sets up a national unfair contracts scheme for independent contractors where they can ask a court to set aside a contract if it is harsh or unfair.

All in all there is a lot to consider. In a future article we will examine some of the financial, taxation and regulatory issues which can influence this decision.

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No Stop Bullying Order Where Reasonable Management Action Taken By Employer

The Fair Work Commission recently determined an employer's actions fell within the ambit of reasonable management action carried out in a reasonable manner and as such determined not to issue a Stop Bullying Order.

An employee who reasonably believes that he or she has been bullied at work may apply to the FWC for an order the Commission considers appropriate so as to prevent the employee from being bullied at work by the individual or group.

Section 789FD provides a worker is bullied at work where an individual or a group of individuals "repeatedly behave unreasonably towards the worker, or a group of workers of which the worker is a member, and that behaviour creates a risk to health and safety".

Section 789FF(1)(b)(ii) of the *Fair Work Act 2009* requires the Commission to be satisfied that a worker has been bullied and there is a risk the worker will continue to be bullied at work by the individual named when considering whether or not the Commission will issue a Stop Bullying Order.

Kotevski had been employed by MSS Security Pty Limited as a security officer since January 2011.

Kotevski made an initial application to the FWC for a Stop Bullying order alleging he was bullied by the site security manager at Watsons Bay Naval Base. It was alleged the site security manager behaved in an offensive manner designed to cause Kotevski harm and harassment. Kotevski alleged the site manager made constant false accusations about Kotevski causing him to feel stressed and affecting his general wellbeing.

MSS Security responded to the application stating it had undertaken the process outlined in its harassment and bullying policy. MSS Security took action against its site manager as a result of Kotevski's complaint including the coaching of the site manager. However MSS Security found no evidence of bullying. As part of the conciliation conferences held at the Commission in relation to the initial application, Kotevski agreed to be temporarily transferred to another worksite at

Randwick until the retirement of the site manager which was anticipated in early 2017.

When the site manager retired in April 2017, Kotevski accepted there was no possibility of the site manager continuing to bully him. The Commission stated it could not be satisfied there was any ongoing risk of bullying from the site manager.

Kotevski amended his application to the FWC now alleging the state operations manager was bullying him. The application included allegations of events which occurred prior to his original application which was only against the site security manager.

The new allegations of bullying made by Kotevski were:

- In January 2017 he was issued a written warning as he attended work without his work tie and safety vest.
- In February 2017 he did not attend work due to illness and received a written warning regarding his conduct during the investigation concerning his absence.
- The roster at Watsons Bay did not accommodate his travel restrictions from a work injury which meant he was unable to drive for longer than 40 minutes.
- The state operations manager was putting pressure on him to prevent him from undertaking his walking exercises while at work for his work-related injury.

In relation to the first incident in January 2017, Kotevski alleged he was bullied by receiving a warning for not wearing his work tie and safety vest and such warning was unreasonable. Evidence was provided by the state operations manager that failing to wear a tie and safety vest was a contravention of the MSS Security Employment Standing Instructions. The site manager gave evidence he had given written warnings to other employees for not wearing their work tie.

The Commissioner was unable to conclude the written warning was unreasonable management action as the conduct that occurred was in breach of the policy which was known to Kotevski.

As to the second warning in February 2017, MSS Security was unable to find any record of Kotevski calling in to advise he would not be at work. MSS Security issued a written warning regarding Kotevski's conduct during the investigation process on the basis Kotevski was unco-operative and evasive. Kotevski alleges the written warning constituted bullying. MSS Security agreed to withdraw the warning and as such the Commissioner did not need to deal with the issue.

Kotevski's third complaint that he was bullied because MSS Security did not take into account his medical restriction of not travelling for more than 40 minutes to work and transfer him back to his shift at Watsons Bay. MSS Security provided evidence it had a contractual right to direct Kotevski to work at different sites. MSS Security required Kotevski to continue working at Randwick which complied with his medical restriction. As such the Commissioner determined the decision to keep the employee at Randwick was a reasonable management action carried out in a reasonable manner.

Finally Kotevski's complaint that he was not allowed to walk for his rehabilitation by the site manager was determined to again be reasonable management action taken by the employer. The site manager gave evidence Kotevski was spoken to about disappearing from his work location during his walk and staying away from his work location for longer than stipulated on his medical certificate. No further action was taken by MSS Security other than speaking to Kotevski.

The Commissioner determined that Kotevski had not demonstrated MSS Security or the site manager had repeatedly behaved unreasonably towards him. The Commissioner was satisfied the conduct complained of by Kotevski was within the ambit of reasonable management action carried out in a reasonable manner.

It was observed by the Commissioner that whilst some of MSS Security's communication could have been better, the Commissioner noted that mere imperfection in undertaking management action does not make it unreasonable. The conduct must be repeated, unreasonable behaviour that creates a risk to health and safety.

The Commission dismissed the application by Kotevski.

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WORKERS COMPENSATION ROUNDUP

Noisy Employment and Industrial Deafness – The Fictions in Proving a Claim

In NSW where noisy employment causes loss or further loss of hearing of such a nature as to be caused by a gradual process, so called "boilermaker's deafness" or sensorineural hearing loss, the special provisions of Section 17 of the *Workers Compensation Act 1987* apply to:

- identify the time at which the injury is taken to have occurred;
- identify the person responsible for paying compensation, and

- make provision for contribution by other employers.

It is important to keep in mind Section 17 is not concerned with determining actual causation. In the Court of Appeal decision of *A&G Engineering v Civitarese* (1996) 41NSWLR 41 it was observed:

> *"Section 17…provides an easy path to compensation for a worker suffering from hearing loss of gradual onset. All that is necessary under the section is for the worker to prove that the last employment (in respect of which that employer is sued) is one to which the nature of the disease is due. It is not necessary to prove that that employment brought about or contributed to the disease. …s17 proceeds on a series of fictions or assumptions, upon which a worker's entitlement to recover an award under s66 is based."*

To establish injury a worker must show that the relevant employment had the tendency, incidents or characteristics to cause industrial deafness. In determining whether at the time notice of injury was given a worker was "employed in an employment to the nature of which the injury was due" attention is directed not to whether the employment being engaged in actually caused the injury but whether the "tendencies, incidents or characteristics" of that employment were of a type which could give rise to the injury in fact suffered: *Blayney Shire Council v Lobley* (1995) 12 NSWCCR 52.

This decision is also important from the perspective it was held the finding of the judge at first instance that the employer was not liable because the employment involved the compulsory wearing of hearing muffs was incorrect. It was held that it was sufficient for "*the worker to establish the employment in which he was engaged occurred in an environment which were he unprotected could cause injury of the type suffered".*

The decision of Neilson J in *Callaby v State Transit Authority* (2000) 21NSWCCR216 confirmed that a noise level of over 85 dB on a time weighted average basis of eight hours per day, five days per week involves a real not theoretical risk of inducing deafness. It was held the work as a bus driver which exposed the worker to a noise level of 81 dB was insufficient to involve a real risk of deafness. It is not only the level of noise but also its duration that is of relevance in determining whether the employment involved a risk of deafness.

In *Dawson t/a The Real Cane Syndicate v Dawson* [2008] NSWWCCPD35 Roche DP considered the evidence necessary to establish noisy employment. Whilst Roche DP confirmed it was preferable to call an acoustics expert to give evidence of the level of noise to which the worker was exposed during the period of employment, the absence of a noise level study was not fatal to a claim. Roche DP stated:

> *"Whilst it is not necessary for a worker to call an acoustic engineer in every case of boilermaker's deafness, it is not sufficient for workers to merely say 'my employment was noisy and I have boilermaker's deafness'. It is always essential that he or she present detailed evidence of the nature (volume) and extent (duration) of the noise exposure and for that evidence to be given to an expert for his or her opinion as to whether the 'tendencies, incidents or characteristics' of that employment are such as to give rise to a real risk of boilermaker's deafness".*

A worker will normally provide statement evidence of his exposure to loud noise in the workplace and his inability to have a normal conversation with co-workers. The statement should deal whether he wore any hearing protection and the amount of time worked in close proximity to loud noise. Such statement evidence should be provided to a relevant expert doctor to comment on whether the frequency and duration of exposure to noise was sufficient to cause noise induced hearing loss.

Unless the employer adduces evidence to refute the alleged system of work and the noise level to which the worker was exposed or medical evidence to refute the views of the worker's doctor, it is likely an arbitrator will accept the employer was the last employer who employed the worker in an employment to the nature of which the injury was due.

Section 17(1)(c) identifies the employer liable to pay compensation is:

- where the worker was employed by an employer in employment to the nature of which the injury was due at the time he or she gave notice of that injury – that employer, or
- where the worker was not so employed – the last employer by whom the worker was employed in employment to the nature of which the injury was due before he or she gave the notice.

A number of decisions have confirmed the term "employer" does not extend to employment outside of New South Wales. Consequently, where a worker was employed for two periods of noisy employment in the State of New South Wales and subsequently for an employer under Comcare, the State Act did apply and the last employer in New South Wales became the last employer by operation of Section 17 and thus liable to pay compensation to the worker.

Section 17 also provides an entitlement for the employer liable to pay compensation to seek contribution from earlier noisy employers for a period of five years immediately preceding the date when notice of injury was given. Contribution is payable on a proportional basis having regard to the period of employment with each employer.

Despite the 10% threshold for entitlement to lump sum compensation for loss of hearing, industrial deafness remains a concern for all employers. In order to reduce costs associated with strict proof of causation, the legislation has provided an easy path for workers

to succeed in their applications by way of statement evidence with a supportive medical report. A simple statement from the worker to the effect he had to shout to be heard over the levels of noise to which he was exposed is usually sufficient to establish the level of exposure to noise was sufficient to involve a real risk of deafness.

An employer will need to present evidence from an acoustics expert to refute a claimant's statement regarding the level of noise exposure claimed.

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An Employer's Obligation to provide suitable duties

Does an employer have an obligation to assist an injured worker to return to work? What happens if liability for the claim is denied? Is there an ongoing obligation to provide suitable duties? In most cases, the answer is yes.

Pursuant to Chapter 2 of the *Workplace Injury Management Act 1998* employers have an express obligation to provide suitable duties to an injured employee. This obligation is irrespective of whether there is a dispute as to liability.

Section 49 of the Act provides that if a worker, who is totally or partially incapacitated for work as a result of an injury, is able to return to work (whether on a full time or part time basis and whether or not to his or her previous employment), then an employer liable to pay compensation in respect of the injury must at the request of the worker provide suitable employment. A failure to comply with the section renders the employer liable to pay a penalty.

Section 49(3) provides a defence in limited circumstances. The circumstances include where it is not reasonably practicable to provide employment in accordance with the section, where a worker has voluntarily left employment, a worker was employed after the injury happened (whether before or after the commencement of the incapacity for work), or the employer terminated the worker's employment after the injury, for a reason other than the fact the worker was not fit for employment due to the injury.

The *Worker's Compensation Act* 1987 also provides protection for injured workers in relation to their employment.

Section 248 of that legislation provides that it is an offence to terminate an injured worker within six months of the date of an injury.

Section 241 provides that a worker who has been dismissed due to their injury, and subsequently obtains a Certificate certifying them fit for employment, can apply to the employer for reinstatement. Section 242 provides that an application can be made to the Industrial Relations Commission for a reinstatement order if an employer refuses to reinstate a worker and any application must be made within two years of the termination, unless there are exceptional circumstances.

Section 243 (3) of the legislation not only permits the Industrial Relations Commission to order the employee to be reinstated into a position, it can also order a different type of employment, such as part time employment, or employment in which the worker may undergo rehabilitation.

And what is the role of the Workers Compensation Commission?

Non-compliance with the obligations imposed on an employer can be dealt with by the Workers Compensation Commission who can conciliate the dispute to bring the parties to agreement or issue directions that an injury management consultant conducts a workplace assessment to ascertain what positions are suitable.

The Workers Compensation Commission can also refer the dispute to SIRA to make a recommendation to take specific action that the Commission considers necessary or desirable to remedy the failure.

The Workers Compensation Commission can also make a recommendation with respect to the provision of suitable employment.

For example, in the 2013 decision of *Jones v Bunnings Group Limited,* Arbitrator Phillips did not accept the employer's argument that there were no suitable duties available for the injured worker and it would need to create a position that was not a real and substantial position. The Arbitrator directed that the employer provide suitable duties at either its Lismore or Ballina stores, to which the worker could reasonably travel from his place of residence.

Employers must ensure they comply with their statutory obligations to provide suitable duties to injured workers and appropriately manage reinstatement requests after injured workers become fit for work within 2 years of any dismissal because the worker was not fit for employment due to their injury.

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