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The Insurance Industry – A Storm Front Is Approaching

If the warning signs coming from the multitude of recent inquiries into practices in the insurance industry are any indication, legislative change which will have a substantial impact on practices in the insurance industry is fast approaching.

The Australian insurance industry is under scrutiny at the moment.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services industry is underway.

ASIC has been busy chasing businesses involved in the add on insurance sector to deliver compensation to consumers that arranged motor equity insurance, loan protection insurance, tyre and rim insurance and warranty insurance with more than $120 million of compensation delivered to consumers by insurers and other businesses involved in the provision of add on insurance.

The Productivity Commission delivered its draft report into competition in the Australian Financial System in January 2018 with its final report due in June 2018.

On 27 March the Federal Government Parliamentary Joint Committee on Corporations and Financial Services released its report on the life insurance industry which also dealt with issues relevant to general insurers.

It certainly feels like the storm clouds are building around the insurance industry.

The Productivity Commission has observed that the general insurance sector in Australia has a small number of very large providers and a long tail of smaller providers and because many general insurers provide insurance under multiple brands this creates the illusion of more competition than actually exists in the general insurance market.

According to the Productivity Commission:

- four insurers account for more than 70% of

insurance written in most insurance classes with different insurers populating the top 4 depending on the class of insurance

- there has been considerable consolidation in the market despite some new entrants and mergers, restructures and exits which have reduced the overall number of providers over the last 10 years.

The Productivity Commission has called for renewal notices to contain details of the previous year's premium and the percentage change on renewal and recommended that insurers using more than one brand be required to provide information about the actual underwriter of a product and a list of other brands underwritten by that insurer on each insurance brand website.

The Productivity Commission also believes the insurance industry in Australia has lacked innovation.

The Parliamentary Committee Report into Life Insurance criticises the protection afforded to life insurers by Section 15 of the *Insurance Contracts Act 1984* which exempts insurance contracts from consumer protections available under the Australian Consumer Laws, the ASIC Act and the Corporations Act.

The Parliamentary Committee has recommended that consumer protection for financial and non financial services should be aligned and Section 15 of the *Insurance Contracts Act 1984* be reformed to enable all consumer protections to apply to life insurance contracts. If this recommendation is followed through it is only a short step to amend Section 15 of the *Insurance Contracts Act* so that the consumer protections apply to all insurance contracts, not only contracts for life insurance.

The Parliamentary Committee also concluded the provision of claim services should be regarded as a financial service and subject to regulation under the *Corporations Act 2001* which could see third party claims administrators and claims preparers need an Australian Financial Services Licence and they will be subject to the protections available to consumers in respect of financial services.

There may be an amendment of Section 15 of the *Insurance Contracts Act 1984* to remove the provisions that insurance contracts are not:

- capable of being made the subject of relief under any other Commonwealth or State Act; or
- subject to the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable; or subject to relief for insureds from the consequences in law of making a misrepresentation(except for compensatory damages).

The following protections would then be available to consumers in connection with insurance contracts:

- protection from misleading or deceptive conduct – Section 12DA of the ASIC Act;
- protection from unconscionable conduct – Sections 12CA to 12CC of the ASIC Act;
- unfair contract term protection found in the ASIC Act – Section 12BF to 12BM;
- protection from unfair practices concerning false and misleading representations, pricing, rebates, bait advertising, referral selling, accepting payment without supply, harassment, coercion, pyramid selling or unsolicited supply – Section 12BB, 12DB-12DM of the ASIC Act;
- incorporation of implied guarantees and warranties that in relation to the supply of financial services that they are rendered with due care and skill and are fit for purpose under Section 12ED of the Corporations Act 2001.

The report of the Parliamentary Committee observed in March 2017 the final report of the Australian Consumer Law Review determined the insurance industry's exemption from the unfair contract term laws should be removed.

As the clouds continue to converge there is only one thing certain and that is a downpour of regulatory change for the insurance industry is likely. Looking forward we are likely to see the unfair contract terms regime apply to insurance contracts and the conduct of insurers and claims handlers will be subject to the consumer protections in the *ASIC Act* the Corporations Act and the Australian Consumer Laws. Interesting times are ahead.

As is often the case, change will be slow at first with further consultation however once the ball starts to roll the momentum is likely to be unstoppable and the insurance industry will find that insurance contracts will not be exempt from the protections currently available to consumers for goods and services in Australia and there will be overarching consumer protections found in the Insurance Contracts Act, 1984.

Challenging times are on the horizon for the insurance industry.

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Labour Hirer Covered Under Liability Policy For Contractual Liability To Host For Host's Liability For Injuries To Employees On Hire

The game for liability insurers just got a little harder for those providing cover for labour hire businesses and insurers may well move the labour hire industry up the list of the less attractive industries to insure as a result of the recent decision in QBE Underwriting Ltd as managing agent for *Lloyds Syndicate 386 v Southern Colliery Maintenance Pty Ltd [2018] NSWCA 55*.

An employee lent on hire exposes the host to potential liability for injuries suffered by that employee whilst working for the host. The labour hirer will also have potential liability for the injury and will be liable for workers compensation payments in any event.

Balancing the costs and risks of employing and hiring labour is often a conundrum. Labour hire is an effective way to manage fluctuations in demand for labour however there are insurance consequences.

Liability premiums are significantly less than workers compensation premiums and claims experience does not have as great an impact on the determination of liability premiums compared to workers compensation premiums. However liability insurers often require significant excesses when it comes to claims for compensation pursued by hired labour.

A host will usually be insured for their own liability however there may be a significant excess payable on a claim or claims may impact on their insurance premiums so why not allocate risk downstream to the labour hirer. A host can protect itself through risk allocation in its agreement with the hirer by requiring the hirer to indemnify the host for any liability for injury to a worker lent on hire even where the host is partially at fault. The labour hirer may have insurance to cover liability it has assumed and the worst that can happen is the labour hirer can't pay. Labour hirers were exposed to uninsured risks as the usual liability policy taken out would contain provisions that exclude cover for liability assumed under contract.

Labour hirers often work on small margins and the cost of workers compensation insurance is a primary cost. The burdens created by contractual liabilities have the potential to undermine the viability of a business.

A specialised approach was required for the labour hire industry. Bespoke products were developed. Policies that covered the labour hirers liability assumed under an indemnity were developed and enhanced provisions found their way into liability wordings to provide the cover the labour hirer needed. However each labour hirer's approach to insurance is unique and there are a myriad of liability products taken out by labour hirers. Not all labour hirers have moved to take out bespoke products.

In NSW when there is an injury to a labour hire worker the host is the first target as the damages recoverable are usually greater than those that would be recovered by the worker against their employer under the modified damages regime in the Workers Compensation Act,1987.

Night follows day as does an action against the host following an injury to a worker lent on hire. A claim against the labour hirer by the host's insurer quickly follows if there is an indemnity in the agreement to provide labour. The labour hirer lodges a workers compensation claim, the workers compensation insurer covers the liability of the employer for statutory payments and any liability in negligence but disavows liability for any contractual liability assumed by the hirer. So it's over to the liability insurer to see if they cover the contractual liability even though there are exclusion in the liability policy for liability assumed under contract and for claims in respect of injuries to workers.

Not much luck with the liability insurer one would think, but that may not be the case in all situations.

Insurance policies include provisions that give and take cover away. The terms and phrases used in a policy and the use of words to introduce concepts requires close attention. Using the phrasing "for" instead of "in respect of" can have significant consequences as was seen from our article last month on the case of *Downer EDI v John Holland.*

When one looks to see whether a liability assumed under contract is covered it is necessary to examine how the liability arises, whether the liability has been assumed, what it is in respect of, and what is for. The reason for this is a policy may well utilise the words and phrases "for", "assume", "in respect of" and "arising" when referring to liabilities and phrasing in insuring clauses may differ from exclusions.

So is a liability insurer liable to cover an insured that is a labour hirer for the labour hirer's liability to the host for the host's liability for an injury to a worker lent on hire. It depends on the terms of the policy but in the case of a policy arranged by Southern Colliery Maintenance with Lloyds Syndicate 386, the answer was yes.

We look at the facts in that case which ultimately found its way to the NSW Court of Appeal.

Ryan Newman an employee of Southern Colliery Maintenance Pty Ltd (SCM), a labour hire company, was injured while working on hire for Endeavour Coal Pty Ltd (Endeavour).

The relationship between SCM and Endeavour was governed by a Special Services Agreement. The agreement contained warranties that SCM's labour services would be "performed by appropriately qualified and trained personnel", and would be "performed with due care and skill" and would be fit for purpose. The agreement also provided that SCM would be liable for, and would indemnify, Endeavour for any breach of the agreement, any negligence on SCM's part and also "any liability and/or any loss or damage of any kind whatsoever, arising directly or indirectly from ... the illness, injury or death of any of [SCM's] employees .."

SCM was required take out and maintain two forms of insurance, a "comprehensive public and products liability policy" and workers compensation insurance as required by law. SCM arranged its liability insurance with a Lloyd's syndicate represented by QBE Underwriting Ltd (QBE) and its workers compensation insurance with Coal Mines Insurance Pty Ltd (CMI).

Newman received some $25,335 in workers compensation payments. Newman also commenced proceedings claiming damages for personal injury from SCM as his employer and Endeavour as the occupier of the site where he was injured. In the proceedings Endeavour cross claimed against SCM seeking indemnity against its liability to Newman.

SCM claimed on both of its policies. CMI agreed to indemnify Endeavour but only for its liability arising from negligent acts. QBE declined to cover any liability relying on employer liability and contractual liability exclusions.SCM joined CMI and QBE in the proceedings seeking cover for its liability to Newman and Endeavour.

But there was an injury to SCM's worker and surely the workers liability exclusion in the liability policy would apply and the workers compensation insurer should only be liable for negligence and not any contractual liability SCM assumed. However it was the contractual liability that was the concern. If the contractual liability was not covered by the workers compensation insurer could it come under QBE's liability policy. The battle lines were drawn.

At a mediation in the proceedings all claims resolved other than the claim between SCM and QBE. The settlement was effected in 2 stages. First, Endeavour's claim against SCM was settled on the basis that SCM was ordered to indemnify Endeavour and immediately assume the conduct of the claim against Endeavour and pay Endeavour's costs of $40,000. Second, Newman accepted a settlement of $375,000 payable by both Endeavour and SCM. CMI the workers compensation insurer agreed to pay $124,664.58 to the sum payable to Mr Newman, "representing a contribution of 40% to the settlement sum less workers compensation payments already paid".

Newman accepted $375,000, CMI met 40% of the claim being an apportionment of 40% liability to SCM's negligence, Endeavour had a liability of $265,000 in respect of its apportionment of 60% and Endeavour was indemnified by SCM for that liability. SCM was looking to QBE to cover the indemnity provided to Endeavour and the $40,000 costs paid.

So how did the claim fall out? SCM had an initial win but QBE appealed and it what may well surprise many pundits that SCM's claim against QBE was also upheld by the Court of Appeal. Leeming JA, with Macfarlan JA and Payne JA agreed dismissed the appeal.

To understand the outcome in the case you need to look closely at the terms of the insuring clause and the exclusions in the policy of insurance.

The insuring clause provided:

> *"Subject to the terms of this Policy, Underwriters will pay to or on behalf of the Insured all sums which the Insured shall become legally liable to pay by way of compensation* ***in respect of****:*
>
> *1.1 Injury*
>
> *1.2 Damage*
>
> *1.3 Advertising Liability*
>
> *happening during the Period of Insurance as a result of an Occurrence in connection with the Insured's Business."(emphasis added)"*

The employment liability exclusion excluded liability:

> *"7.9* ***For*** *Injury to any Worker.*
>
> *Provided that if the Insured:*
>
> *7.9.1 Is required by law to insure or otherwise fund, whether through self insurance, statutory fund or other statutory scheme, all or part of any common law liability (whether limited in amount or not) for such injury; or*
>
> *7.9.2 Is not required to so insure or otherwise fund such liability by reason only that the Injury is to a person who is not a Worker or 'employee' within the meaning of the relevant Workers' Compensation Law or the Injury is not an Injury which is subject to such Law;*
>
> *then this Policy will respond to the extent that the Insured's liability would not be covered under any such fund, scheme, Policy of insurance or self insurance arrangement had the insured complied with its obligations pursuant to such Law. (emphasis added)"*

The contractual liability exclusion excluded liability:

> *"Assumed:*
>
> *7.6.1 Under the terms of a contract, agreement or warranty unless the Insured would have been liable in the absence of such terms or warranty;*
>
> *7.6.2 Where the Insured may have been able to recover from another party(ies) but for an agreement between the Insured and such party(ies) where the Insured has waived, released or abandoned any right of recourse or recovery against such other party(ies)."*

The cover in the policy was pitched widely with the insurer agreeing to cover claims in respect of injury but the worker liability exclusion was more limited excluding claims for injury to workers. Did that make a difference? Absolutely!

Leeming JA observed:

> *"The exclusion "for" Injury to any Worker is more narrowly drafted than the insuring clause, which is expressed more broadly in terms of "in respect of" Injury. It can be unsafe to construe such inchoate relational terms as "for" and "in respect of" in isolation, a point made by Spigelman CJ in Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd .. However, here the two terms appear in the same contract, and the narrower term excludes liability which otherwise would be caught by the more*

broadly worded insuring clause. In such a case, the reasoning in Unsworth v Commissioner for Railways (1958) 101 CLR 73; [1958] HCA 42 and Allianz Australia Ltd v Wentworthville Real Estate Pty Ltd [2004] NSWCA 100; 13 ANZ Ins Cas 61-598 – which is really just an example of the different breadth of the two terms in similar contexts – is available to support the natural meaning of the words.

In Unsworth, a claim for statutory contribution was held to fall within a statute limiting compensation payable by the Commissioner in any action "to recover damages or compensation in respect of personal injury". In Allianz Australia, Mason P, with Sheller JA and Pearlman AJA agreeing, held that a claim for contribution and/or indemnity from a joint tortfeasor pursuant to s 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) arising out of the personal injury suffered by the tenant did not fall within an exclusion of claims against the insured "for" any alleged or actual bodily injury or property damage. Mason P said at [31]-[32] that a claim for contribution and/or indemnity with respect to the landlord's liability to the tenant was not a claim "against the Insured … for any alleged or actual bodily injury".

It was all in the use of the terms "for" and "in respect of" in different parts of the policy.

Leeming JA concluded that the following are claims "in respect of" injury but are not claims "for" injury:

- a liability to meet a claim for statutory contribution by another tortfeasor following bodily injury to an employee
- a liability to pay contractual damages whose measure is the liability to pay tortious damages for the same injury

Accordingly the employment liability exclusion had no application as the claim was not one for injury it was one in respect of an injury namely a contractual liability.

So then it was on to the contractual liability exclusion.

SCM was sued by Endeavour for breach of contract. The allegations were that SCM had breached the agreement by failing to provide employees who were properly trained and who would perform the services with due care and skill. Its damages were alleged to be the legal costs and disbursements in defending Mr Newman's claim, and its potential liability to him for damages, interests and costs.

Endeavour's loss in the form of its liability to Mr Newman arose "naturally, that is, according to the usual course of things, from SCM's breach of contract" and the damages would have been in the reasonable contemplation of both parties at the time they made the contract. Endeavour did not sue SCM in negligence.

SCM had a liability under contract to provide services. Failing to provide those services properly resulted in the liability to Endeavour. The liability arose irrespective of any indemnity provision in the agreement. Leeming JA concluded that SCM's liability was not a liability that the insurer could disavow. Leeming JA observed:

"In Zurich Australian *Insurance v Regal Pearl at [117]-[118], Spigelman CJ addressed an exclusion clause worded similarly to cl 7.6, save that it referred to liability accepted by the insured, rather than assumed by the insured. The Chief Justice said:*

> *"The commercial purpose of providing cover against risks in a product liability policy should, absent clear words to the contrary, be understood to encompass the range of obligations normally associated with such liability in Australian law. The wording of the policy presently under consideration does not contain any clear words to the contrary.*
>
> *The use of the words 'accepted by', where twice appearing, together with the reference to any such contract 'requiring acceptance' indicates that something distinctive and out of the ordinary, by way of additional liability, must arise before the exclusion clause takes effect. The implied terms of merchantable quality and fitness for purpose with respect to product liability are so common that only clear words will be found to exclude them in a policy purporting to give cover for product liability. Clause 12(b) does not contain any such clarity."*

Likewise, there is no basis for reading an exclusion for liability assumed by the insured to exclude the liability it incurs for supplying services which breach its contractual obligation to provide services which are fit and proper, by an employee who was properly trained and supervised, as promised in the (agreement)."

The exclusion was for liability assumed under the terms of a contract, agreement or warranty unless the Insured would have been liable in the absence of such terms or warranty. Leeming JA noted:

"The point of (the exclusion) is to exclude liability which is voluntarily assumed by SCM, as opposed to liability arising out of various specified circumstances. But liability will only be assumed under a contract, agreement or warranty if the only reason the insured is liable is that assumption of liability. That is to say, the words "unless the Insured would have been liable in the absence of such terms or warranty" are to be read with the word "assumed" and confirm that the exclusion is directed to liability which only rests with the insured because of its voluntary act of assumption."

Leeming JA concluded the liability claimed by SCM against QBE was a liability which was not assumed by it, but rather was liability for which SCM would have been liable in the absence of the terms or warranties in the contract.

So at the end of the day a liability policy was liable to respond to the labour hirer's liability to the host for the

injury to the hired worker including liability arising from the negligence of the host.

One needs to refrain from making any generalised statement that there is some proposition of law arising from this case, as each case turns on its own facts, the way a case is run and the terms of any insurance policy. However there are certain principles that one must keep in mind and they include:

- the Courts will generally construe "in respect of" having wider import than "for" when used in an insurance policy
- if "in respect of" is used in an insuring clause and "for" in an exclusion when referring to Injury the exclusion will be interpreted as requiring a more direct connection to injury
- "in respect of " injury includes a liability to meet a claim for statutory contribution by another tortfeasor following bodily injury to an employee (*QBE Underwriting v Southern Colliery Maintenance*)
- "in respect of " injury includes a liability to pay contractual damages whose measure is the liability to pay tortious damages for the same injury (*QBE Underwriting v Southern Colliery Maintenance*)
- where there is a contractual liability exclusion and liability is excluded unless the insured would have been liable in the absence of terms or warranties the word "assumed" will be read as directed to liability which only rests with the insured because of its voluntary act of assumption of liability
- claims for damages for failing to provide goods and services in accordance with the terms of an agreement are not liabilities which can be disavowed consequent to a contractual liability exclusions
- claims for pure economic loss are not claims for property damage (Downer EDI v John Holland) but they are "in respect of " property damage (Downer EDI v John Holland, Nuplex Industries v QBE).

There are challenges for insurers and insurance brokers on the roads ahead when they confront labour hirers looking for liability cover.

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Litigation Funding For Class Actions – Reforms On The Way?

Class actions now regularly have a significant financial impact both for claimants and defendants, as well as insurers and other interested parties. There is a perception that the recent growth in representative actions is driven, at least in part, by litigation funders.

There is also a view that the current models for class action litigation allow actions to be conducted more for the benefit of the lawyers and the funders, and inadequately protect the interests of claimants

Certainly, the size and nature of the class action landscape has rapidly changed, with many more funding and lawyer participants now involved.

Unsurprisingly, government has responded to these concerns.

At the Federal level, in December 2017 the Attorney-General provided Terms of Reference to the Australian Law Reform Commission (ALRC) for an Inquiry into class actions and third party litigation funders.

The aim of the inquiry is to ensure that the costs of class actions are 'appropriate and proportionate and that the interests of plaintiffs and class members are protected'.

The ALRC is to consider 'whether and to what extent class action proceedings and third party litigation funders should be subject to Commonwealth regulation, with reference to specific matters that have arisen including the proportionality of lawyers' costs and the lack of ethical constraints on their operation such as those binding legal practitioners'

The published timetable for the referral is:

- Jan to June: Research and consultations
- End May: Discussion Paper and call for submissions
- May to September: Consultations
- Mid September: Submissions close

The ALRC has been asked to consult widely with institutions and individuals with experience of the conduct of litigation, class action proceedings and access to justice issues including the legal profession, courts and tribunals, litigation funding entities and the academic community. Hopefully, this will also include speaking to insurers and re-insurers.

The ALRC report is to be provided to the Attorney-General by 21 December 2018.

At the State level, the Victorian Attorney-General asked the Victorian Law Reform Commission (VLRC) to review aspects of the law and court procedures concerning cases financed by litigation funders and class actions. Some of the key questions are:

- What changes, if any, should be made to the class actions system to make it fairer and less risky for people involved in legal action?
- What changes, if any, should be made to litigation funding, and should there be more supervision and regulation to make it fairer and less risky for people involved in legal action?

- Would it help people get access to justice if lawyers could charge contingency fees?
- Are there other ways to improve access to justice by reducing the costs and unfair risks to people involved in legal action?

The Commission has been asked to report on whether lifting the ban on lawyers charging contingency fees would help to address problems with litigation funding.

Over 35 written submissions were received from lawyers, insurers, litigation funders, insurers, academics and claimants. A wide divergence of views as to whether any changes should be made was expressed.

The VLRC has now delivered its report on Access to Justice: Litigation Funding and Group Proceedings to the Attorney-General. The report is due to be tabled in Parliament within 14 sitting days.

Likely targets for reform proposals in both the ALRC and the VLRC reports are: contingency fee charging by lawyers; the introduction of an early stage 'certification' procedure (as in the United States); and greater regulatory oversight for litigation funders and the terms on which they agree to fund proceedings.

Depending on the extent to which any reform is adopted by government, the picture of group litigation in Australia may soon look very different.

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Allocation of Risk in Infrastructure Projects Involves Complex Considerations

Public partnerships deliver procurement mechanisms for major infrastructure projects. A government entity may own land on which infrastructure is located whilst private entities may fund, design and construct, and operate the infrastructure.

Infrastructure projects call for a myriad of contracts, many which are interlocking in nature and need to incorporate provisions dealing with a multitude of participants in the project and rights and obligations of participants who may not be parties to a particular contract.

Risk needs must be apportioned between all participants in any infrastructure project and is a key consideration. Risk in property before, during and after completion of the infrastructure is a dominant consideration as is the responsibility for the design and construction of the infrastructure and liability for defects and deficiencies.

The laws of negligence create challenges when it comes to allocation of risk. Generally a business does not owe a duty of care to protect against pure economic loss.

Whether a business owes a duty to take reasonable care to prevent others from suffering economic loss turns on an analysis of the relationship between the parties. Relevant factors include:

- the foreseeability and nature of the harm;
- the degree and nature of control able to be exercised by a person to avoid harm;
- the degree of vulnerability of the person who suffers the loss;
- the ability of a person to protect themselves from a loss;
- the degree of reliance that a person has on another;
- any assumption of responsibility by a party;
- the nature and consequence of any actions taken or action that could be taken to avoid the harm;
- the existence of conflicting duties arising from principles of law or statute.

The High Court in *Brookfield Multiplex Limited v The Owners Corporation Strata Plan 61288* concluded that a builder engaged by a developer did not owe a duty of care to prevent economic loss suffered by an owner's corporation where economic loss was suffered as a consequence of defects in the building.

It is said that claims for pure economic loss give rise to difficult questions about the imposition of a duty to prevent economic loss particularly where a person has the capacity to protect themselves from harm through contractual rights.

Vulnerability and reliability are seen as the touchstones to a finding that a duty of care exists to prevent economic loss.

If an action in negligence is not available to recoup a loss those that suffer the loss and do not own the property will rely on allegations of breach of contract and/or alleged misleading and deceptive conduct on the part of the business seen as responsible for the loss.

Design and construct contractors, manufacturers and suppliers of products and services will all have contracts dealing with risk but the obligations generally only deal with allocation of risk between the contracting parties. Participants in infrastructure projects will not be parties to all contracts concerning the project.

Misleading, deceptive statements may be made to one party involved in an infrastructure project with indirect reliance being placed by others on those representations, which arguably gives rise to a claim for loss consequent to the misleading conduct but will present challenges for those that seek to establish the essential requirements for a claim based on indirect reliance.

These complications are keystones for building the suite of contracts needed in infrastructure projects.

The interlocking nature of contracts in infrastructure projects is also a critical factor in the allocation of risk as is the use of common definitions in each contract. However complexity arises where there is an attempt to use common definitions where there are different parties to the various contracts. Contracts often incorporate words and phrases with defined meanings such as “associates” or “principals” designed to extend the application of provisions to employees, agents and contractors of a party.

If that is not enough to consider there will then be attempts to carve out liabilities for excepted risks and consequential loss and perhaps impose limits on liability restricting liability to insurance cover available or a maximum specified amount.

When it comes to risk allocation the proof is in the pudding and it is only when something goes wrong when we see whether the contracts will stand the test of time.

Risk allocation is often not properly tested until something goes catastrophically wrong.

Have the multitude of contracts adequately allocated risk? What about insurance? Will the contracts of insurance of the various participants respond to claims or leave a shortfall where provisions in the insurance exclude cover for defects?

The recent decision of *Downer EDI Rail (“Downer”) and EDI Rail PPP Maintenance(“EDI Rail”) v John Holland, Kellogg Brown & Root(“KBR”) and Atlantis Corporation (and its insurer QBE)* illustrates some of the issues that can go wrong with an infrastructure project where there are concerns that the infrastructure constructed is defective.

Rail Corporation NSW (“RailCorp”) owned land at Auburn and maintenance of the Waratah trains required a special purpose Maintenance Centre to be constructed on RailCorp’s land. Reliance Rail, a special purpose vehicle was established which would fund the construction of the Maintenance Centre.

RailCorp contracted the design and construction of the Maintenance Centre to Reliance Rail which now has a licence from RailCorp to operate the Maintenance Centre. Reliance Rail owns the fixtures and most of the equipment associated with the Maintenance Centre.

Reliance Rail sub-contracted design and construction of the Maintenance Centre to Downer and the provision of the maintenance of the Maintenance Centre for 30 years to EDI Rail, a wholly owned subsidiary of Downer.

Downer sub-subcontracted the design and construction of the Maintenance Centre to John Holland.

Auburn City Council required that there be incorporated into the Maintenance Centre a stormwater detention system to accommodate a 1 in 50 year storm event.

Ultimately, a detention tank system was adopted. The system used a series of arrays of plastic cells made from panels made from recycled polypropylene. The cells were covered with geofabric, and buried at specified depths beneath a rail area and a car park.

John Holland sub-contracted the design of the detention system to KBR. John Holland purchased the cells pursuant to a supply contract from the manufacturer Atlantis Corporation.

The facility was completed. Several years after it was completed a car park collapsed when excavation works on an adjoining property were being carried out. Those excavation works were being carried out by a contractor for RailCorp.

With the collapse of the car park engineering minds turned to the cause of the collapse. The engineers had concerns the strength of the cells might not be adequate which turned minds to other areas where the cells were installed. There were depressions in the ballast above the cells in other areas. Some areas were dug up which revealed the cells had partially collapsed, with geofabric around the cells being torn.

There were concerns about a total failure of the detention system and monitoring systems were put in place by Downer to observe the rail yard.

The cells under the car park were replaced with a concrete detention system at a cost of $10.9 million. Approximately $4 million was spent investigating the rail yard and another $4 million on works in the rail yard. The ultimate cost of replacing cells in the rail yard would be $30 million or more.

With costs incurred and further costs looming, Downer and EDI Rail commenced proceedings against John Holland, KBR, Atlantis and as Atlantis was placed in administration, its insurer QBE who it was said was liable to cover Atlantis for the claim.

Downer alleged each of John Holland, KBR and Atlantis:

- were negligent;
- had engaged in misleading and deceptive conduct during the design process and submission of documents for the approval of the design and incorporation of the Atlantis cells.

Downer also alleged John Holland breached terms of its design and construct contract. However, it had no contract with KBR or Atlantis.

EDI Rail was in a more difficult position. Risk in the facility had passed to it after practical completion but it was not a party to the contract between Downer and John Holland, nor did it have any agreement with KBR or Atlantis.

EDI Rail sued in negligence and also alleged John Holland, KBR and Atlantis engaged in misleading and deceptive conduct, making representations to it or alternatively making representations to Downer which it indirectly relied on.

The cards were on the table. Downer and EDI Rail believed they had suffered loss however they did not own the property which was damaged/defective. They did not own the car park or the rail yard.

Perhaps not unsurprisingly during the course of the hearing the claims in negligence were abandoned by both Downer Rail and EDI Rail as they were for pure economic loss as a consequence of contractual arrangements with Reliance Rail and both had concerns they would not establish the criteria necessary to establish that a duty of care was owed to protect against pure economic loss. Vulnerability was a problem as Downer and EDI Rail could have protected themselves by the contract.

The real lynchpin in the claim for Downer was its contractual rights.

However risk in the Maintenance Centre had passed to EDI Rail on practical completion of the infrastructure.

The contract between Downer and Reliance Rail allocated risk in the Maintenance Centre to Downer up to practical completion. The contract between EDI Rail and Reliance Rail allocated risk in the Maintenance Centre to EDI Rail after practical completion.

The two Downer entities had risk in the property, one before and one after, practical completion and an issue in the proceedings arose about who paid for works and inspections to identify the alleged damage to /defect in the infrastructure. A critical issue was who had the loss and did they have a claim to recover the loss?

Unfortunately for Downer and EDI Rail all of its claims failed and the proceedings were dismissed. Stevenson J concluded that Downer had not proved on the probabilities that; the car park collapse was the result of the design of the Detention System; the Detention System under the rail area will not last its design life (which the judge found to be 50 years); or the Detention System under the car park would not have lasted its design life had it not collapsed. Those conclusions meant there was no relevant consequence to whatever shortcomings there may have been in the design of the Detention System.

In the course of considerations Stevenson J considered the terms of Downer's contract with John Holland to determine the risk allocation under that contract.

Stevenson J observed that a contractual hierarchy was created for the purpose of the design and construction of the Maintenance Centre and to a very large extent the contracts were back to back and in the same, or similar terms.

RailCorp entered into a contract with Reliance Rail to design, construct and commission the Maintenance Centre. By that contract Reliance Rail agreed to provide through life support for the Maintenance Centre for 30 years. Reliance Rail entered into a contract with Downer to design, construct and commission the Maintenance Centre. Downer assumed no obligation in relation to the through life support of the Maintenance Centre.

Reliance Rail entered into a contract with EDI Rail by which it agreed to provide through life support for the Maintenance Centre for 30 years.

Downer entered into a contract with John Holland to design, construct and commission the Maintenance Centre.

John Holland entered into a contract with KBR to design the relevant parts of the Maintenance Centre including the Detention System.

John Holland entered into a contract with Atlantis for the manufacture, supply and certification of cells.

There was no contractual relationship between EDI Rail and John Holland, KBR or Atlantis.

The Downer/John Holland contract allocated risk to John Holland.

Clause 34.3 of the contract provided that John Holland bore the risk of any damage to or loss or destruction of the maintenance facility works prior to the date of practical completion and must repair, replace or reinstate damage within a reasonable period specified by Downer's representatives if any such damage, loss or destruction occurs. The repair or replacement was to be carried out at the cost of John Holland unless it arose from an Excepted Risk.

Under the Reliance Rail/EDI Rail contract which had a similar provision, the risk of damage to or loss or destruction of the Maintenance Centre commenced for EDI Rail after practical completion.

The definition of "through life support" in the contract was sufficiently wide to include rectification of the Detention System.

There were similar provisions in the RailCorp/Reliance Rail contract although Reliance Rail bore the risk in the property during construction and the through life support phase.

Stevenson J observed the allocation of risk to John Holland prior to practical completion coincided with the allocation of risk before practical completion to Downer under its contract with Reliance Rail. The clause was limited to imposing risk in the property on Downer up to practical completion.

Clause 34.5 provided that where any damage or loss occurred arising from a breach of John Holland's obligations under the contract it must promptly repair, replace or reinstate the damage, loss or destruction at John Holland's cost.

Stevenson J noted this clause referred to third parties or affected persons, if their property was damaged, however in the contract there were numerous references to RailCorp, the owner of the property, with over 20 defined terms in the contract including the name, RailCorp. Stevenson J concluded the language in the contract made it clear this meant that the expression "third parties" referred to parties other than those named in terms in the contract, in particular, RailCorp.

Accordingly, Stevenson J concluded Downer had no rights against John Holland under clause 34.

Downer were on risk for the property until practical completion. It followed that John Holland vis a vis Downer was off risk for the purposes of Clause 34 in each of the relevant contracts where the damage occurred after practical completion. The same conclusion flowed to the Downer/Reliance Rail relationship. And there was no damage to third party property caused by John Holland as RailCorp was not a third party under the Downer/John Holland contract.

Stevenson J also considered the indemnity provision in the contract. Clause 35 provided that John Holland would indemnify Downer from and against any claim or loss in respect of damage to, loss or destruction of, or loss of use of, (whether total or partial) consequent on the damage to or loss or destruction of, any real or personal property (including property belonging to (Downer) or (Reliance Rail) or RailCorp. There was a proviso reducing liability under the indemnity for any claim or loss arising from the fraudulent or wrongful (including negligent) act or omission of Downer, Reliance Rail or RailCorp or their respective "Associates".

Reliance Rail had sent a letter to Downer indicating it held Downer responsible for the design and construction of the Maintenance Centre and in light of the failure of the Detention System, Reliance Rail required Downer to meet its contractual obligations in respect of the Maintenance Centre and Reliance Rail would seek damages and compensation from Downer for the loss and damage which Reliance Rail suffered.

Stevenson J concluded this demand by Reliance Rail was sufficient to be a claim within the terms of the contract. The indemnity was potentially triggered given Downer had a potential liability. Stevenson J concluded the letter was sufficient to be a claim for the purposes of the indemnity.

However, the indemnity was reduced for wrongful acts or omissions of Downer, RailCorp or one of their "Associates".

There was a very broad definition of "Associates" which included "any related body corporate of that person and any officer, employee, agent, contractor, consultant, nominee, licensee or advisor of that person or that related body corporate".

The Transport Infrastructure Development Corporation had entered into a contract with Laing O'Rourke to carry out works on land that adjoined the Maintenance Centre. The related bodies corporate of RailCorp included Transport Infrastructure Development Corporation. Thus Laing O'Rourke was a contractor to a related body corporate of RailCorp and thus an associate of RailCorp and therefore the indemnity would be reduced to the extent that Laing O'Rourke's actions contributed to the loss. Interestingly Laing O'Rourke's works had no relationship whatsoever to the Auburn Maintenance Centre and were being carried out on an adjoining property. This was critical in the case as Stevenson J concluded the collapse of the carpark was caused by the actions of Laing O'Rourke. The carve out of liability would have bitten hard if the claim had succeeded.

Stevenson J concluded that any liability under the indemnity of John Holland would be reduced to the extent that such loss arose from the negligence of Laing O'Rourke.

In addition, Downer had engaged Cardno, engineers to review the design of the project and Cardno was an associate of Downer. The effect of the carve out in the indemnity and the definition of "Associates" was that John Holland's liability would also be reduced to the extent such loss arose from the negligence of Cardno.

Finally in relation to contract provisions Stevenson J had to grapple with an argument there was no loss suffered by Downer noting the word "loss" was defined in the contract and there was a limitation of liability provision referencing pasts of that definition.

The word "Loss" was defined as follows:

"Loss

(a) subject to paragraphs (b), (c) and (d) means any cost, expense, loss, damage or liability;

(b) does not include any:

(i) loss of revenue, loss of business, loss of income, loss of profit, loss of use, loss of data, loss of opportunity, business interruption and the like; and

(ii) any indirect consequential or pure economic loss of any kind whether or not included in paragraph (b)(i),

unless and to the extent that such loss is recovered under any insurance (or would have been recovered but for any conduct on the part of the subcontractor or any of its associates which under the insurance entitles an insurer to avoid the relevant contract of insurance or to reduce its liability under the relevant contract of insurance).

(c) …"

The limitation of liability provision was as follows:

(a) *Subject to paragraphs…(g), [John Holland's] total liability to [Downer] under this Subcontract is limited to 50% of the Subcontract Price.*

(b) *The parties agree that [John Holland's] liability in respect of liquidated damages under clause 15.11 falls within the limit of liability under paragraph (a)*

…

(g) *Notwithstanding any other provision of this Subcontract, neither party has any liability to the other party for any Claim or Loss within paragraph (b)(i) or paragraph (b)(ii) of the definition of 'Loss'."*

Was the claim one for pure economic loss and did it fall within the definition of Loss in paragraph (b)(ii) of the definition of Loss?

Stevenson J noted the natural reading of the definition of loss leads to the conclusion that subparagraph (b) operated with an exception to the exclusion.

Stevenson J concluded the effect of the indemnity was that John Holland was obliged to indemnify Downer against any reasonable foreseeable economic loss which fell within sub-paragraph (b) of the definition of loss to the extent that it was insured.

However the limitation of liability provision made no reference to the chaussette following (b)(i) and (b)(ii) be incorporated when reading the provision. It simply referred to each sub-paragraph.

The argument put forward was that references to paragraphs (b)(i) and (ii) should be read without reference to the chaussette.

Stevenson J disagreed. Stevenson J concluded that whilst the claim Downer had may be a claim for pure economic loss which was an indirect consequential or pure economic loss claim, the limitation of liability clause provided that John Holland had no liability for claims of that nature only where those claims were not insured. That was because of the chaussette and that John Holland had insurance. On that basis the claim for pure economic loss would not be excluded from the contractual liability.

The drafting of the definition of loss created concerns for all but at the end of the day the provision operated only to exclude claims for pure economic loss if such claims were not insured. There was no dispute that John Holland's insurance would not cover such a claim.

Interestingly however when Stevenson J was called on to consider the terms of the liability policy arranged by Atlantis, Stevenson J concluded the policy was not liable to respond to a claim for pure economic loss and only a claim for property damage as a consequence of the terms within that contract of insurance.

If John Holland had a similar contract of insurance to Atlantis there would be no cover for pure economic loss and the limitation of liability provision that applied to the indemnity would have meant there was no "loss" under the indemnity that would be recovered. This highlights the significance of the terms of the contracts of insurance for the various participants.

The indemnity allocated risk to John Holland and John Holland would be liable to indemnify Downer to the extent it was insured, and one wonders about the size of John Holland's excess however Downer did not prove its loss and as a consequence the contractual indemnity had no work to do.

This case serves as a reminder that risk allocation in infrastructure projects is not easy. Careful consideration must be paid to the interlocking nature of contracts and the use of common definitions. Further, references to an entity by name in a contract has the potential to result in a finding that references to "third parties" does not include references to those entities whose names are used in the contract. Finally when it comes to insurance it is important to understand the cover provided when liability limitation provisions limit exposure to insured liabilities only.

Infrastructure projects will continue to challenge businesses when preparing the complex contractual hierarchy that is required to deliver the design, construction and operation of infrastructure.

The Absurdity of Two "Excess Insurance" Clauses and Dual Insurance

A public liability policy of insurance, issued to a head contractor at a construction site, will sometimes cover the head contractor and all subcontractors in respect of liability for personal injury suffered by persons working at the construction site caused by the negligence of a subcontractor.

It may also be the case that the subcontractor, in the above scenario, has effected a separate public liability insurance policy providing cover to that subcontractor for the same liability.

The subcontractor would have a *prima facie* entitlement to indemnity under both insurance policies in respect of any claim for damages brought by a person injured at the construction site due to the negligence of the subcontractor.

However, one or both insurance policies may contain an "other insurance" clause, seeking to preclude or limit the cover available to the subcontractor if the subcontractor is entitled to indemnity under the other insurance policy.

One way of "limiting" cover might be for one insurer to provide cover over and above *or* in "excess" of any indemnity provided under the other insurance policy.

In our October 2016 edition of GD News we reported on the NSW Court of Appeal decision in *Lambert*

Leasing Inc & Anor v QBE Insurance (Australia) Limited & Ors.

The case dealt with the operation of Section 45 of the *Insurance Contracts Act 1984* (Cth) with respect to the validity of "other insurance" clauses in two separate insurance policies.

The Court of Appeal upheld previous High Court authority to confirm Section 45 only applies to render an "other insurance" clause void if the insured *entered into* both contracts of insurance.

The relevant insured in *Lambert Leasing* entered into one insurance contract but was not a contracting party with respect to the other. Instead, the insured was a third party beneficiary entitled to indemnity under the second policy. Accordingly the two insurance policies contained "other insurance" clauses that were not void.

The parties in *Lambert Leasing* agreed that, if those "other insurance" clauses were not void under Section 45, they would effectively cancel each other out.

The Court of Appeal observed, without needing to decide the issue, that concession was correct.

This issue was considered by a single judge of the NSW Supreme Court in the recent case of *Foster v QBE European Underwriting Services (Australia) Pty Limited as Managing Agent for Lloyds Syndicate 386*.

The proceedings involved a claim by Brendan Foster arising from personal injury he allegedly suffered during the course of his employment as a plant operator/labourer.

Foster was a labour hire employee who was lent on-hire to perform work for Reed Constructions Australia Pty Limited ("Reed").

Reed had entered into a contract with Roads & Maritime Services ("RMS") for the upgrade of the Central Coast Highway.

The contract between RMS and Reed required RMS to effect a public liability insurance policy that covered RMS, Reed and all subcontractors.

In accordance with its contractual obligations RMS effected a public liability policy with Allianz in 2009 which was renewed during subsequent years.

Reed also effected a separate public liability policy QBE European Underwriting Services and QBE Underwriting as managing agent for a Lloyds Syndicate (hereinafter referred to as "QBE").

The accident involving Foster occurred on 15 December 2011. At the time of the accident RMS held a policy with Allianz which covered Reed in respect of its liability for the claim brought by Foster against Reed.

The QBE policy also provided cover to Reed in respect of the same liability.

After commencing proceedings Reed went into liquidation. The Supreme Court made orders substituting the QBE parties as defendants in place of Reed pursuant to Section 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

As it appeared Reed was entitled to indemnity under both the Allianz and QBE policies the Court made a further order that Allianz be joined to the proceedings as a defendant, as the joinder of that party was necessary for the determination of all matters in dispute.

Allianz and QBE presented five separate questions for determination by the Supreme Court prior to the hearing of the substantive proceedings. Those questions required the Court to determine whether both Allianz and QBE, or one of them, were liable to indemnify Reed for the plaintiff's claim for damages.

The separate questions proceeded to hearing before his Honour Justice Rothman who noted the Allianz policy issued to RMS in 2011/12 was the applicable policy being the year in which Foster's accident occurred.

The 2011/2012 Allianz policy included a provision that, where there were two or more insurance policies covering the liability, the Allianz policy would operate as an "excess" policy such that Allianz would only provide cover in excess of Reed's entitlement to indemnity under another insurance policy.

The relevant QBE policy for 2011/2012, applicable in respect of Foster's accident, also contained an "excess insurance" clause in circumstances where a principal of Reed (here, RMS) had agreed to effect a separate policy of insurance covering the same loss or liability (here, the Allianz policy).

It followed that Reed was entitled to indemnity under two separate policies of insurance in which Reed was the contracting party with QBE but was not the contracting party in respect of the Allianz policy issued to RMS.

Rothman J held the "other insurance" clauses in the QBE and Allianz policies were not void under Section 45 of the ICA as Reed was not the contracting party with *both* insurers.

Rothman J went on to observe:

> *"... the effect of an excess clause in each contract would be that neither of the contracts of insurance provided cover. However, if neither insurance policy indemnifies for the loss or damage then the excess clause in each insurance policy would not operate to exclude the liability of the insurer. In modern parlance this is a 'catch-22', or a wholly circular and self defeating proposition".*

Justice Rothman noted the observations made by the NSW Court of Appeal in *Lambert Leasing* concerning the correctness of the concession made by the parties

that each other insurance clause would effectively cancel the other out.

His Honour held:

> *"...each of those excess clauses creates an absurdity which, when taken together, and giving each policy its ordinary, grammatical and commercial interpretation, requires a construction that the 'other insurance' must be operative and not contain a similar 'excess clause'. In those circumstances, both the 2011 Allianz policy and the QBE policy operate to indemnify Reed for the loss or liability, if any, occasioned by the damage to the plaintiff and for which the plaintiff sues."*

Justice Rothman also noted that dual insurance would exist as between QBE and Allianz in those circumstances.

Consistent with the NSW Court of Appeal's decision in *Lambert Leasing,* the decision of Rothman J in *Foster* demonstrates that if an insured is a contracting party with an insurer under one policy and a third party beneficiary under another:

- Section 45 of the *Insurance Contracts Act* does not operate to void an "other insurance" clause in one or both policies.
- However, where both policies contain an "other insurance" clause (including an "excess insurance" clause) they will effectively cancel each other out.

The result is that both insurance policies will provide cover to the insured and dual insurance will exist between the insurers. The insured may choose which policy under which to claim indemnity and that insurer may claim contribution from the other insurer.

This situation would not arise if only one of those insurance policies contained an "other insurance" clause and the other policy did not. In that event there would be no dual insurance between insurers because the liabilities for which each insurer provides cover would not be coordinate liabilities in accordance with dual insurance principles.

It is therefore significant when considering any claim for equitable contribution pursuant to dual insurance principles to carefully consider the policy wording in both insurance policies to ascertain the following:

- Does each policy contain an "other insurance" clause?
- Is the insured a contracting party or a third party beneficiary?
- Does Section 45 of the Insurance Contracts Act operate to void the "other insurance" clauses?
- Do the "other insurance" clauses effectively cancel each other out?

It appears there is an increasing trend in the insurance industry for underwriters to include, in any public liability policy, an "other insurance" clause or an "excess insurance" clause in an attempt to limit the liability of an insurer in circumstances where an insured is entitled to indemnity under another insurance policy.

The benefits of doing so are clear. First, the insurer would avoid liability to indemnify the insured in respect of the claim by the injured party. Second, the insurer would avoid liability for dual insurance contribution.

However, the implications arising from the *Lambert Leasing* and *Foster* decisions of the NSW Supreme Court suggest that if more and more insurers include "other insurance" or "excess insurance" clauses in their policies, the outcome for the insurance industry will be at odds with the underwriters' intention.

Specifically, there is likely to be an increasing exposure for insurers both in respect of the claim by an injured party for personal injury damages and the claim by an insurer for dual insurance contribution despite the underwriters' intention to preclude or limit an insured's entitlement to indemnity by reason of other insurance.

This will make it difficult for underwriters to accurately price the risk, where a premium is calculated based on the inclusion of an "other insurance" or "excess insurance" clause that may end up having no effect, resulting in the ambit of cover under the policy being extended beyond that which was intended when the policy was issued.

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TPD Claims: A Helpful Recap

In the recent decision of *Carroll v United Super Pty Limited*, Justice Slattery of the NSW Supreme Court determined a claim for total and permanent disablement benefit under a group life policy issued by Hannover Life Re of Australasia Limited ("insurer") to United Super Pty Limited ("trustee"), the trustee of the Construction and Building Union Superannuation Fund of which Nicholas Carroll was a member.

Carroll, a self employed builder, ceased work in March 2012 due to pain caused by bilateral hip dysplasia, a congenital condition characterised by abnormal tissue growth.

He claimed the payment of a $104,000 TPD benefit from the trustee who referred his claim to the insurer for determination.

In summary both the trustee and insurer declined Carroll's claim for TPD benefit on several occasions resulting in Carroll commencing proceedings at the NSW Supreme Court.

The case proceeded to hearing before Slattery J over nine days with his Honour finding in favour of Carroll.

The Court ordered the insurer to pay the TPD benefit to the trustee so those funds would be made available to Carroll.

The Court found both the trustee and the insurer had breached their duty in determining the TPD claim. In that event the Court undertook its own assessment and concluded Carroll was entitled to the TPD benefit.

The decision of Justice Slattery is a lengthy one in which his Honour considered the particular facts of the case and provided detailed reasons for the Court's determination in favour of Carroll.

Slattery J summarised the duties of a trustee and insurer and the interpretation of an "ETE" clause which we list below as a helpful recap of those issues that we have addressed in previous articles appearing in this series:

Standing to Sue

- A member of a superannuation fund for whom the trustee has obtained insurance cover has standing to seek an order that the insurer pay the trustee the amount due to the trustee under the insurance contract.
- The member has standing to bring a claim both under the deed against the trustee and under the policy against the insurer.

Duties of Trustee

- In making its determination a trustee has a duty to apply a trust fund in accordance with the trust deed.
- A trustee is not obliged to give reasons for its decision.
- However, where a trustee discloses reasons, it is required to act in good faith on a real and genuine consideration of the material before it and for the purpose for which it was conferred with sound reasons.
- Where no reasonable person in the position of the trustee could have reached that decision, a failure of good faith, a failure of genuine consideration or a lack of proper purposes may be inferred.
- The ambit of any challenge to a trustee's decision is restricted to a consideration of the material available to the trustee.
- The general rule where a trustee has failed to discharge its duties in considering a member's claim is to refer the matter back to the trustee for reconsideration.
- If the Court vitiates an insurer's decision upon breach of an insurer's duty of utmost good faith and embarks on a second stage inquiry to determine if a claimant is totally and permanently disabled within the policy definition, there may be no further work for the trustee to perform and no need to remit the matter to the trustee for further consideration as it can be dealt with by the Court.

Duties of Insurer

- An insurer dealing with a claim against it owes an insured a duty of utmost good faith, sometimes also described as a duty of good faith and fair dealing.
- The duty imposes an obligation on the insurer to exercise its rights and discharge its obligations as conferred by the contract of insurance with the utmost good faith.
- The insurer's obligation of utmost good faith is contractual, not fiduciary.
- Under a contract for insurance if an element of insurance liability is expressed in terms of the satisfaction or opinion of the insurer the insurer is obliged to act reasonably in considering and determining that matter.
- The insurer's decision will also be liable to be reviewed and avoided by the Court if in forming an opinion (about a claimant's disability) the insurer misdirects itself in law (that is to say, asks itself the wrong question), takes into account an irrelevant consideration or fails to take into account a relevant consideration.
- The criterion of reasonableness of an insurer's decision is whether the opinion formed by the insurer was not open to an insurer acting reasonably and fairly in consideration of the claim.
- The insurer's assessment of reasonableness is not made by reference to entirely objective criteria but must be unreasonable on the material then before the insurer.
- The assessment of reasonableness does not require the Court to undertake a review of the merits of the insurer's decision.
- If the view taken by the insurer is shown to have been unreasonable on the material before it then the decision can be successfully attacked.
- The Court must not substitute its own view for that of the insurer by reference to additional material not before the insurer.
- The duty of utmost good faith is broader than the implied term obliging the insurer to act reasonably and applies to all aspects of the claims handling process.
- The duty does not imply a higher or stricter standard than the implied term requiring the insurer to act reasonably in considering and determining the matter.
- The duty is not to be equated with the implied obligation to act reasonably in forming an opinion concerning or being satisfied about a particular matter, nor are the two standards the same.
- The duty requires the insurer to form the opinion itself and to act with the utmost good faith in doing so and it is not sufficient that some other insurer

acting reasonably could have reached the conclusion it did.

- The insurer must give reasons for its decision.
- An insurer's statement of reasons for declining a claim should be understood as a practical document intended to inform the claimant of the basis of the decision rather than providing detailed reasons with reference to the evidence being relied upon, comparable to a judgment of a Court or Tribunal.
- If the insurer seeks an opinion from an expert it must provide the expert with all the information relevant to the expert's opinion.
- The insurer is not required to ask the expert to address specific provisions in the policy as the insurer is making the ultimate decision and not delegating it.
- Experts and the insurers who rely upon them should attend to evidence relating to the individual insured and the insured's characteristics rather than to general statements of hope or expectation about the circumstances or conduct of anyone suffering from the condition in question.
- Where an expert's opinion about an insured's circumstances or capacity for employment depends upon an assumption it may be impermissible for the insurer to rely upon the expert's opinion as to that matter unless the assumption is verified.
- If the insurer does not comply with its duty of utmost good faith the Court may itself determine the question whether the insured suffered from total and permanent disablement.

Correctly Interpreting an "ETE" Clause

- In 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.
- The words "unlikely" and "ever" in the phrase "unlikely ever to be able" have both been closely considered. The word "unlikely" in the formulation has been said to mean improbable in the sense of a less than 50% chance.
- However, expressing the word unlikely as requiring a less than 50% chance does not invite a statistical test as the formula is not concerned with what is likely in the population as a whole but rather whether having regard to what is known about the insured, he or she was unlikely ever to be able to engage in any gainful profession, trade or occupation for which he or she was reasonably qualified by reason of education, training or experience.
- The issue is whether it is unlikely the insured would actually obtain paid employment for which the insured was qualified by education, training or experience, not whether in theory the insured may obtain employment at that time.
- Capacity to perform "regular remunerative work" is different from the capacity to perform a particular work task and it does not follow because a person is physically capable of performing one or more tasks, that person has an ability to engage in remunerative work.
- The fact some further training may be required does not preclude a conclusion the claimant was reasonably fitted to carry out the further occupation.
- Even part time work may qualify as regular remuneration work but casual work or other work of an intermittent nature would not qualify.
- Where it can be accepted there is no availability of local work (based on a claimant's existing education, training or experience) in the claimant's local area, it seems difficult to justify assessing a claimant as not being TPD if the cost of relocating to find available work of that kind elsewhere would make accepting that distant work an economically unviable decision.

The decision of Justice Slattery in *Carroll v United Super Pty Limited* helpfully sets out all of the above duties and other issues relevant to assess a TPD claim and may assist insurers and trustees in the industry.

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Can you be liable for injuries to an independent contractor?

In our previous issues of GD News we have discussed various cases which consider whether or not a company can be liable for injuries to its independent contractor.

The most well know decision on this issue is the 1986 High Court decision of *Stevens v Brodribb*, in which Brennan J stated:

> *"An entrepreneur who organises an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organising the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he is creating the risk ... and his duty is more limited than the duty owed by an employer to an employee."*

Whether or not an entity can be liable for injury sustained by an independent contractor can be a difficult question.

This issue was recently considered by Latham J of the

Supreme Court in the decision of *Tsoromokos v Australian Native Landscapes Pty Ltd.*

John Tsoromokos was an employee of Pitlane Mechanics Pty Limited. He and his wife were the sole directors and shareholders of that company. On 17 September Tsoromokos was carrying out repairs of a fuel tank of a Volvo loader that was owned and operated by Australian Native Landscapes at Eastern Creek. Whilst he was attempting to move the bash plate, which weighed approximately 200kg, to access the fuel tank, the bash plate fell on Tsoromokos' right arm, as a consequence of which he sustained serious injury.

Tsoromokos commenced proceedings in the Supreme Court at Sydney against Australian Native Landscapes. Australian Native Landscapes joined Pitlane, Tsoromokos' employer by a cross claim for breach of contract and a claim for indemnity and/or contribution. The employer subsequently cross claimed against Australian Native Landscapes, seeking indemnity pursuant to Section 151Z(1)(d) of the *Workers Compensation Act* 1987.

Tsoromokos gave evidence he was told by Cooper and Lennox, both employees of Australian Native Landscapes, to attend Eastern Creek on 17 September 2007 in order to service the L181 loader. Tsoromokos was advised he only had a day to complete the job. Tsoromokos indicated he required an offsider to drive the forklift and Cooper agreed to this. Tsoromokos started the repairs. He was only able to find one extension tine for the forklift and as he could not balance the bash plate on one tine he rang Lennox who was at the Badgerys Creek premises, to request the tines. The tines were not delivered. In the meantime, Tsoromokos decided to prepare the job as best he could and he was struck by the bash plate.

Tsoromokos argued the poor condition of the bolts on the loader were causally related to the accident as they did not have sufficient strength to hold the bash plate after the weld failed. Tsoromokos argued that Cooper had instructed him to use unsuitable bolts on an occasion when Jackson had tack welded the other side of the loader.

Australian Native Landscapes asserted that the injury to Tsoromokos was consistent with him lying under the loader after completely removing the bolts on the right side knowing the left side was welded and attempting to prise the bash plate away from the underside, expecting the tack weld to break.

Latham J was of the opinion that generally Tsoromokos was an unreliable witness. There also was a dispute as to the circumstances of the accident.

This was not enough for Australian Native Landscapes to escape liability for injury to their independent contractor.

Latham J noted Tsoromokos accepted he was not owed a duty of care as an employee. Rather, the duty would be such as propounded by Brennan J in *Stevens v Brodribb Sawmilling Co*. Latham J rejected that such a duty was owed as the repair and maintenance of the machinery was under the control of Tsoromokos.

However, Latham J then went on to consider the particular circumstances of this incident, in conjunction with the provisions of the *Civil Liability Act* 2002. Latham J noted that a reasonable person in the position of Australian Native Landscape would have ensured the weld was rectified and appropriate bolts inserted after realignment of the plate, which had not occurred.

Latham J stated that:

> *"But for the failure by the defendant to rectify the weld over a period of five months, the plate would not have fallen and injured the plaintiff. The joint expert opinion confirmed that, most probably, the weld broke just before the plaintiff was beginning to crack the third bolt, whereupon the plate dropped immediately.*
>
> *The defendant was responsible for rectifying any known defect that would expose the plaintiff to the risk of serious injury in carrying out maintenance or repairs. The defendant owed the plaintiff a duty of care in this respect which was breached by the defendant's failure to rectify the weld. The plaintiff suffered serious harm as a result of the breach."*

However, Tsoromokos was not entirely successful as Latham J was of the opinion if Tsoromokos had conducted a full visual inspection of the loader he would have observed the tack weld and realised he should not proceed unless the plate was supported. Contributory negligence was assessed at 40%.

In terms of the liability of the employer, Latham J noted the liability of an employer is not absolute and stated:

> *"The employer must be in a position to know the risks that are occurring or likely to occur. In circumstances where I have found that the defendant's failure to rectify the weld was the relevant causative omission, Pitlane did not know and could not have foreseen the risk of harm to the plaintiff."*

So the end result for Tsoromokos was despite there being questions as to the manner of his evidence, he was able to establish liability on the part of Australian Native Landscapes.

Although the plaintiff was in effect an independent contractor, it was the negligence of Australian Native Landscapes and its failure to fix the weld that caused the accident. In those circumstances Tsoromokos was successful in his claim. The employer also had success in achieving recovery of payments.

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CONSTRUCTION ROUNDUP

The twists and turns of a payment claim

The recent case of *Seymour White Constructions Pty Limited v. Ostwald Bros Pty Limited (in liq.)* [2018] NSWSC 412 has not only highlighted the need to be accurate in documenting the parties' negotiations into a written contract, but has also provided a useful analysis of how parties need to navigate their way through the *Building and Construction Industry Security of Payment Act 1999* (NSW) when making adjudication applications.

Seymour White had been engaged by NSW Roads and Maritime Services to carry out roadworks on the Pacific Highway at Grafton. Seymour White had subcontracted part of the work to Ostwald.

On 28 July 2017 Ostwald submitted a payment claim under the Act for $6,351,066.08. Seymour White served a payment schedule that identified their intention to pay only $2,505,237.58.

On 24 August 2017 Seymour White terminated Ostwald's subcontract under a provision that allowed termination without cause. The next day, Ostwald was placed into administration.

However, Seymour White in the meantime had not paid the amount stated in its payment schedule, and a dispute arose as to when such a payment was due.

On 27 September 2017 Ostwald made an application for adjudication of its payment claim. A determination was issued on 6 November 2017 in which the adjudicator determined that Ostwald was entitled to payment of $5,074,218.27.

Seymour White disputed that the adjudication application had been made within the time limit prescribed by the Act, and commenced proceedings in the Supreme Court to challenge the validity of the determination. After various interlocutory orders were made by the Court to address the fact that Ostwald was now under administration, the substantive matter was heard by Stevenson J.

The first issue was whether the contract needed to be rectified to reflect the true agreement of the parties.

The contract was in the usual format, comprised (in part) of a Formal Instrument of Agreement, Special Conditions and General Conditions of Subcontract, with precedence in that order. The standard wording in the particulars that formed part of the general conditions allowed two options for the due date for payment of progress claims – one of which was a payment period of within 30 days of the end of the month of the claim. The particulars also stated that if neither option was selected and the head contract was in the form of the NSW Government GC21 contract (which it was in this case) then the due date for payment would be 15 business days after submission of the payment claim. In the executed contract, the option for a 30 day payment period after the end of the month of the claim had been ticked.

However, one of the special conditions of the contract provided that the due date for payment would be within 15 business days after Seymour White received the payment claim.

Importantly, if the due date for payment was only 15 business days after receipt of the payment claim, then Ostwald's application for adjudication would have been made too late and the adjudicator would have lacked jurisdiction to make a determination.

Ostwald claimed that the relevant special condition had been included as a result of a mutual mistake of the parties and they sought an order that the contract be rectified by the deletion of the erroneous special condition.

In considering this point, Stevenson J examined the evidence of the parties' negotiations of the contract. As is common nowadays, the parties had prepared and exchanged a "Departures Table" (ie a schedule of the issues remaining between them and their respective positions). This document showed that Seymour White had not been prepared to negotiate any further its 30 day payment period due to the timing of its pay runs, and Ostwald had apparently decided not to press its proposed alternative wording. Furthermore, on the same day that the contract had been executed, Ostwald had signed a "Provider Establishment Request Form" issued by Seymour White that had stated that the payment terms were "30 Days from Month End unless otherwise arranged". As further corroboration, evidence was adduced that Seymour White had usually (but not always) made payments to Ostwald on or after the 30th day of the month following delivery of a payment claim.

Stevenson J referred to the High Court's enunciation of the principles relevant to rectification in *Simic v. New South Wales Land and Housing Corporation* [2016] HCA 47. The test propounded by the High Court requires one to ask "What was the actual or true common intention of the parties?" as established by clear and convincing evidence. His Honour also noted that rectification is concerned with the subjective and actual state of mind of the parties, objectively ascertained.

His Honour held that the "irresistible" inference from the Departures Table was that Seymour White had meant what it had said: that its proposed payment terms were not negotiable. Further, the subcontract conditions had confirmed the parties' common intention, as had the "Provider Establishment Request Form".

Seymour White had submitted that if rectification were to be granted, then this would have the effect of giving the adjudicator statutory power and impose on him statutory duties that he would not otherwise have had. However, Stevenson J did not see this as a reason to refuse rectification in the circumstances of this case. He noted that the making of an order of rectification would have the effect of confirming the position that the adjudicator had assumed: that the contractual timeline was such that a valid adjudication application could be made and he thus had jurisdiction to make the determination.

His Honour also noted that the consequence of rectification was that the contract would be treated as having been in its rectified form as from its execution and therefore had the effect that the due date for payment of Ostwald's 28 July 2017 payment claim was 30 August 2017. Since Seymour White had not paid the scheduled amount by 30 August 2017, Ostwald was entitled to take the actions prescribed by sections 16 and 17 of the Act.

Section 16 of the Act relevantly provides that a person who has made a claim for payment but has not been paid the amount set out in a payment schedule issued in response is entitled to:

(a) recover the unpaid portion of the scheduled amount as a debt due in court; or

(b) make an application for adjudication.

Section 17(1)(a) of the Act provides that a claimant may apply for adjudication if the respondent provides a payment schedule but:

> *"(i) the scheduled amount indicated in the payment schedule is less than the claimed amount ….; or*
>
> *(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment …*".

Section 17(3) of the Act requires an application under paragraph (i) to be made within 10 business days after receipt of the payment schedule. By comparison, an application under paragraph (ii) is to be made within 20 business days after the due date for payment.

Seymour White had contended that the entitlements in section 17(1)(a)(i) and (ii) were alternatives, and should be treated sequentially. Thus, if a claimant received a payment schedule stating an amount less than the claimed amount, then paragraph (i) applied, and only if that paragraph did not apply would paragraph (ii) potentially be enlivened.

However, Stevenson J did not agree with this analysis or that paragraphs (i) and (ii) were alternative entitlements. He pointed out that, as a practical matter, there would be no reason for a payment schedule to be issued for the same (or a higher) amount than claimed and therefore on Seymour White's construction there would never be a circumstance in which only paragraph (ii) was engaged.

His Honour held that the ten business day time limit applied if only paragraph (i) was engaged, and the 20 business day time limit applied if paragraph (ii) was <u>also</u> engaged.

In this case, Ostwald had made an adjudication application within 20 business days following not having been paid the scheduled amount by the due date for payment; his Honour thus held that the application had been validly made.

Despite having ruled that the adjudication application was valid, Stevenson J examined the further issue as to whether a party who has elected to make an application for adjudication that is later declared to have not been validly made in accordance with the requirements of the Act is also entitled to commence proceedings in court to recover the unpaid amount. His Honour noted that there was conflicting authority on the matter.

In *GJ Coles & Co Limited v. Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 McHugh J (as his Honour then was) had stated (at 525):

> *"One of the basic doctrines of common law jurisprudence is the failure to perform a <u>mandatory</u> condition imposed by statute invalidates the doing of any act dependant on the fulfilment of that condition. In so far as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this basic doctrine." (Emphasis in original)*

In *Kell & Rigby Pty Limited v. Guardian International Properties Pty Limited* [2007] NSWSC 554, Bergin J (as her Honour then was) had applied McHugh J's reasoning and had come to the conclusion that a failure to comply with the mandatory provisions of section 17 of the Act meant that an application had never been "made" and thus the claimant was permitted to commence proceedings in court to recover the unpaid debt.

However, in *Schokman v. Xception Construction Pty Limited* [2005] NSWSC 297 Einstein J had commented that it could not have been the intention of the legislature to permit a claimant to make an adjudication application and then later to commence proceedings with respect to the same payment claim – to require the respondent to deal with two separate and sequential processes would not be consistent with the fast track and interim nature of the Act's regime.

McDougall J in *Rubana Holdings Pty Limited v. 3D Commercial Interiors Pty Limited* [2008] NSWSC 1405 had assumed Einstein J's reasoning to be correct; however his Honour did not criticise the decision in *Kell & Rigby* in his later decisions (including as a member of the Court of Appeal in *Chase Oyster Bar Pty Limited v. Hamo Industries* (2010) 78 NSWCA 190).

Stevenson J commented that the question was whether the words "adjudication application" in section 16 should be construed as including a document purporting to be an adjudication application, even if that document did not satisfy the requirements specified in section 17(3) for a valid application, and which did not satisfy the definition of "adjudication application" in section 4 of the Act. In his Honour's opinion, the answer to that question is "No".

As a final point, Stevenson J looked at the effect of the winding up of Ostwald on whether the Act continued to apply to the parties' dispute. His Honour noted that this would require Ostwald to continue to be a "claimant" within the meaning of the Act.

Stevenson J considered the decision of the Victorian Court of Appeal in *Façade Treatment Engineering Pty Limited (in liq) v. Brookfield Multiplex Constructions Pty Limited* [2016] VSCA 247. In that case, Warren CJ, Tate and McLeish JJA had held that a "claimant" under the equivalent Victorian legislation was a person who had "*undertaken to, and continued to, carry out construction work*" (emphasis added). The Court of Appeal had reasoned that a company in liquidation "*cannot carry out construction work*" and therefore could not fall within the meaning of the term "claimant".

Stevenson J noted that he was obliged to follow the Victorian Court of Appeal's decision in *Façade Engineering* unless he concluded that their Honours' reasoning was "plainly wrong". In this case, his Honour did think it "plainly wrong".

In particular, his Honour noted that the Victorian Court of Appeal's reasoning arose from the text of the relevant section of the Victorian Act; however, their Honours had not considered the definition of "claimant" provided by that Act. This definition (in similar terms in both the NSW and Victorian Acts) provides that a "claimant" is a person who serves a payment claim under the Act. There is no requirement in the definition that a person's status as a "claimant" depends on whether that person has undertaken to carry out construction work. His Honour also noted that there is nothing in the text of either Act to compel the conclusion that a person who, by serving a payment claim, attains the status of "claimant" somehow loses that status by reason of (if a company) being wound up or (if a person) becoming bankrupt.

Stevenson J also pointed out that in circumstances where the person serving a payment claim had completed all his work, he would no longer be "undertaking to carry out work" (in the present or future tense); however he would still be a "claimant" and entitled to serve a payment claim.

Accordingly, Stevenson J concluded that the Victorian Court of Appeal had been "plainly wrong" in *Façade Engineering* and the correct approach is that Ostwald remained a "claimant" notwithstanding that it had been wound up.

However, section 553C of the *Corporations Act 2001* (Cth) automatically applied to the matter upon Ostwald appointing administrators. The effect of this section is to substitute for the parties' rights under the contract and for the right of Ostwald to recover from Seymour White any amount found to be due to it. As a consequence, Stevenson J stated that he could see no option but to stay any judgment that Ostwald obtained by reason of the filing of the adjudication certificate following the adjudication determination until the parties' rights were finally determined by the account that now needed to be taken under section 553C.

This case illustrates not only the need for accuracy in preparing contract documentation, but also how the parties need to be acutely aware of the impact and ramifications of each action taken in a dispute. It would be prudent for a party trying to navigate their way through such complex issues to seek legal advice at an early stage to ensure that they do not prejudice their rights at any stage of the process.

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EMPLOYMENT ROUNDUP

WHS Obligations – Duties Where You Influence or Direct Work of Others

Prosecutions for breaches of the Work Health and Safety legislation in Australia present challenges for businesses.

Duties are imposed on businesses to ensure the health and safety of all persons that come in contact with the business or undertaking.

Under section 19 of the Work Health and Safety Act 2011 (NSW) (the "Act") a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

- workers engaged, or caused to be engaged by the person, and
- workers whose activities in carrying out work are influenced or directed by the person.

To establish a breach of s 19(1) of the Act, the prosecution has to establish that the defendant was conducting a business or undertaking.

The prosecution must also prove that there was a "worker" exposed to a risk.

Under section 7 of the Act a person is a "worker" if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:

- an employee, or
- a contractor or sub-contractor, or
- an employee of a contractor or sub-contractor.

A question arises as to whether the prosecution must establish the "worker" was both a person engaged or caused to be engaged by the defendant and was a worker whose activities in carrying out work were influenced or directed by the defendant.

This is a critical issue where subcontractors with specialist skills are contracted particularly where a business relies on the specialist contractor to do what they must do with little or no supervision as they have no expertise in that area.

However the recent decision of Russell J in *SafeWork NSW v Cosentino Australia Pty Limited [2018] NSWDC 47* confirms there "the main object of the Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and work places by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks" and the intention in the legislation is to impose duties on two types of workers, those engaged, or caused to be engaged by the person and those whose activities in carrying out work are influenced or directed by the person. Accordingly there is no need for a direct contracting relationship all that is needed is direction of a worker.

Cosentino Australia pleaded not guilty to a charge that being a person conducting a business or undertaking who had a health and safety duty under s 19(1) of the Work Health & Safety Act 2011 (the Act) to ensure so far as is reasonably practicable the health and safety of workers while the workers are at work in the business or undertaking, it did fail to comply with that duty and the failure to comply with that duty exposed Orkzai to a risk of death or serious injury contrary to s 32 of the Act.

Mr Orkzai was seriously injured at the premises of PMG Stone when he was delivering a load of very heavy stone slabs. In the course of unloading the slabs from the back of a four tonne truck driven by him, nine slabs toppled away from an A-frame on the tray of his truck and fell upon him. The nine slabs were stacked on one side of the A-frame, and the other side had no slabs upon it at the time of the incident. The slabs were placed on the A-Frame by an employee of Cosentino Australia.

Transport Contract Services Pty Limited (TCS) engaged drivers, including Mr Orkzai, to drive in New South Wales for two separate companies – Century Couriers (NSW) Pty Limited and Civic Transport. The business of both Century Couriers and Civic Couriers was same-day urgent courier and taxi trucks. Mr Orkzai worked as a sub-contract owner/driver.

Cosentino Australia contacted Century and engaged it to perform two delivery jobs and the delivery of the slabs to Cosentino was one of these jobs.

A business has a duty to ensure, so far as is reasonably practicable, the health and safety of workers that are directly engaged to carry out work for their business or undertaking, are placed with another person to carry out work for that person, or are influenced or directed in carrying out their work activities by the person while at work in the business or undertaking.

Russel J after hearing the evidence concluded:

> *"(Cosentino Australia) failed to instruct its workers that they were not to load stone slabs on A-frames on trucks in a manner directed or requested by the truck driver which was contrary to the safe loading system. The written Plan told workers never to load otherwise than in accordance with the Plan and to always load in accordance with the Plan. This was broad enough to cover, to my mind, not listening to any truck driver who was proposing a system of loading which was not in accordance with the safe loading system mandated by the Plan. However, when Mr Hyatt (an employee of Cosentino Australia) capitulated to the less than strident demands of Mr Orkzai on the day of the incident, for no reason which was ever explained, his action was that of the corporate defendant and thus he failed to instruct Ms Dowson not to load the slabs in the manner directed by the truck driver."*

Cosentino Australia had failed to take reasonable precautions to ensure the health and safety of Mr Orkzai. It mattered not that Mr Orkzai was not an employee or subcontractor to Cosentino Australia.

Russel J in his judgement referred to a Victorian decision *in R v ACR Roofing Pty Limited (2004) 11 VR 187* where Justice Nettle said:

> *"Those being the facts, I consider that it would make little sense to interpret 'engaged by' so as to restrict the operation of the section to contractors with whom the employer is in contractual relations. It does, however, make evident sense, and in my view it was intended that the expression include the engagement of any contractor in relation to matters over which the employer has control, either (a) under a contract entered into between the contractor and the employer; or (b) under a contract entered into between the contractor and some other person. Thus in my opinion a contractor could just as well be regarded as engaged by the employer in relation to matters over which the employer has control if the contractor were engaged directly by the employer under a contract with the employer, or by another contractor under a sub-contract, or by a sub-contractor under a sub-sub-contract, or under a sub-sub-sub contract or some remoter species of sub-contract; regardless of the layers of contractual relations that might separate the contractor from the employer."*

Russel J found Mr Orkzai was a sub-sub-contractor in

relation to Cosentino Australia, who was at work in the business or undertaking of the defendant. He was thus engaged by Cosentino Australia, or caused to be engaged by them, within the meaning of s 19(1)(a) of the Act.

Russel J also found that Mr Orkzai was a worker whose activity in carrying out work in the business or undertaking of Cosentino Australia was influenced by Cosentino Australia's employees, and thus by Cosentino Australia.

Mr Orkzai insisted that the truck be loaded in the way which he put forward. However, his activities were influenced by Cosentino Australia as its overhead crane had to be used and one of Cosentino Australia employees had to operate that crane. Two Cosentino Australia employees had been trained in the appropriate safe loading procedures for slabs i.e. the slabs had to be balanced on both sides of the A-frame and their activities on the day led to an imbalance on the A-frame, and this imbalance was only exacerbated once the Yennora slabs were taken off one side of the A-frame. That was enough to sheet home liability to Cosentino Australia.

Businesses need to be aware that duties imposed by the Work Health Safety legislation are owed to ensure Under section 19 of the Work Health and Safety Act 2011 (NSW) (the "Act") a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers that fall into each of the following categories:

- workers engaged, or caused to be engaged by the business
- workers whose activities in carrying out work are influenced or directed by the business.

The duties extend to those contracted by a business, employees of sub-contractors, sub-sub contractors and even persons that are simply that are simply influenced or directed by the business.

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Casual Employees

We have examined in past editions of *GD News* some of the fundamental issues relating to the commencement of an employment relationship.

While many of the concepts are broadly understood, it is worthwhile drilling down into some detail, because there can be surprises lurking!

This month we look at casuals in the workplace.

Why hire casuals?

The ability to engage workers as and when needed is of great commercial benefit to employers. A flexible and "casual" labour force allows for more precise matching of expenses to sales.

Often, "casuals" are engaged by an employer because it is thought that they involve less paperwork and do not involve the "lost hours" of paid leave.

What is a casual employee?

A casual employee:

- has no guaranteed hours of work
- usually works irregular hours (but can work regular hours)
- doesn't get paid sick or annual leave
- can end employment without notice, unless notice is required by a registered agreement, award or employment contract.

How is casual different to full-time or part-time?

Full-time and part-time employees have ongoing employment (or a fixed-term contract) and can expect to work regular hours each week. They are entitled to paid sick leave and annual leave.

Full-time and part-time employees must give or receive notice to end the employment.

What do casual employees get?

Casual employees are entitled to:

- a higher hourly award or agreement pay rate than equivalent full-time or part-time employees. This 'casual loading' is paid because they don't get benefits such as sick or annual leave
- 2 days unpaid carer's leave and 2 days unpaid compassionate leave per occasion, each year
- unpaid community service leave
- unpaid pre-adoption leave
- unpaid 'no safe job' leave

Long term casual employees

Some casual employees work regular hours or the same days each week for a long period and become 'long term casuals'.

Long term casuals stay as casual employees unless they formally change to full-time or part-time employment. They don't automatically become permanent employees, even if they are called 'permanent casual'. They get their casual entitlements regardless of how regularly they work or how long they work for.

Something that is little known is that after 12 months of regular employment, and if it's likely the regular employment will continue, a casual employee can:

- request flexible working arrangements – s65(2)(b) and s12
- take parental leave. – s67(2) and s12

They don't get paid leave or notice of termination, even if they work regularly for a long time.

Protection from unfair dismissal

Generally, it is necessary for employees to have served a defined 'period of service' with an employer in order to qualify for protection from unfair dismissal; under the *Fair Work Act 2009* (Cth).

For small business employers that period is 12 months; for other employers the period is 6 months.

Because the nature of casual employment is that each shift is essentially a new and separate contract of employment, casuals do not normally accrue a qualifying period of service.

The *Fair Work Act* alters that position.

It provides that work performed by full-time, part-time and regular and systematic casual employees counts towards qualifying the necessary period of service. (It excludes those employees employed for a specified period or task or for a season or training contract).

The rationale for this appears to be that full-time, part-time and regular and systematic casual employees all have in common that their employment is regular and systematic.

The critical factor for casuals is that to qualify, they must have had a reasonable expectation of continuing in employment with the employer on a regular and systematic basis.

Just as with casual conversion in awards and with eligibility for certain leave under the NES the clear intention is to exclude from jurisdiction only those employed on an itinerant, occasional, non-systematic, or irregular basis.

Changing to full-time or part-time employment

A casual employee can change to full-time or part-time employment at any time if the employer and employee both agree to it. This should always be recorded in writing.

Also, some enterprise agreements and modern awards contain a process for changing casual employees to full-time or part-time. The details of these vary quite extensively, with some providing for almost automatic conversion once the qualifying period is reached.

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WORKERS COMPENSATION ROUNDUP

Highest Needs – Are you entitled to wages no matter what?

Section 38A of the *Workers Compensation Act 1987* (the "Act") introduces the concept of minimum weekly compensation of $788.32 per week for highest needs workers (more than 30% whole person impairment) if the amount of weekly compensation which they are assessed as entitled to is less than the minimum amount. However the minimum is only payable if there is incapacity and section 38A does not create an automatic entitlement to the minimum payment as was seen in *Hee v State Transit Authority of NSW* [2018] NSWWCCPD 6.

Hee sustained injury to the cervical spine in the course of his employment with State Transit Authority. He underwent an urgent cervical laminectomy and did not work between 24 January 2014 and 31 May 2014. He returned to pre-injury duties on 1 June 2014.

A period of incapacity subsequently followed and the worker made a claim for compensation which was disputed by the employer. The dispute came before the Commission and at conciliation the employer agreed to pay weekly compensation based on pre-injury average weekly earnings of $1,391.35 gross for an agreed period.

Subsequently the worker settled a claim for lump sum compensation in respect of his 34% whole person impairment by way of a complying agreement.

After the settlement of the lump sum claim the worker made a claim for weekly compensation pursuant to Section 38A of the Act claiming weekly compensation at the rate of $788.32 per week as adjusted from 17 October 2013 to date on the basis he was a worker with highest needs.

On 17 May 2017 a work capacity decision pursuant to Section 43 of the Act was issued stipulating Hee was not entitled to weekly compensation as he had resumed his pre-injury duties on a full time basis.

Hee disputed that decision in the Workers Compensation Commission.

Workers with highest needs must establish incapacity within the meaning of ss34-38 of the Act to be entitled to payments under s38A.

Section 38A makes it plain that the additional special benefit is only payable if prerequisites are satisfied. These include that:

- there must be a determination made of the amount of weekly compensation payable;

- there must be an amount of weekly compensation payable consequent to the determination;
- the amount of compensation must be an amount that is less than $788.32 per week.

The employer argued the Workers Compensation Commission did not have jurisdiction to deal with the dispute pursuant to Section 43(3) of the Act on the basis the dispute was in respect of a work capacity decision and the Commission was precluded from dealing with the dispute.

Senior Arbitrator Capel disagreed determining:

- The Commission retained jurisdiction to order weekly compensation as long as the determination was not inconsistent with the work capacity decision;
- The notice of 17 March 2017 was not in fact a work capacity decision;
- The worker was not earning less than what he would otherwise have been entitled to pursuant to Section 37 and therefore had no entitlement to payments of compensation pursuant to Section 37 or Section 38A.

The worker having failed in the compensation claim then challenged the Arbitrator's determination. President Keating dealt with the appeal.

The key question was whether the worker was entitled to the minimum stipulated under Section 38A if their ordinary entitlement under Section 37 of the Act was nil. The answer to that question was no. President Keating dismissed the appeal and confirmed Senior Arbitrator Capel's decision.

President Keating determined the minimum payment under Section 38A is only payable if there was a determination of a weekly amount payable arising out of incapacity and assessed amount must be less than $788.32 per week.

The President observed:

> *"It seems plain that the general purpose of inserting Section 38A into the legislation is to ensure that workers with highest needs receive additional weekly compensation payments compared to those workers with an impairment of 30% or less. That is not to say that all workers with highest needs receive the additional compensation. Such compensation is only available to those workers who meet the conditions set out above."*

The President went on to conclude:

> *"A worker with highest needs and an established incapacity is not entitled to the additional benefits pursuant to Section 38A merely by reason of satisfaction of those criteria alone. More is required. The benefits provided for in Section 38A are only payable where a worker has established that there is an amount of weekly compensation payable applying the provisions of Sections 34-38 that is less than $788.32. A worker, such as Mr Hee, who is unable to establish any amount of weekly compensation payable arising from the compensable injury is not eligible for the additional benefits under Section 38A."*

Whilst the worker met the criteria of being a highest needs worker he had no incapacity as the Arbitrator had assessed the weekly entitlement at nil and that determination was not challenged in the Appeal.

Section 38A of the Act does not create an automatic entitlement to minimum weekly compensation of $788.32 per week for workers with highest needs, rather it establishes a minimum entitlement for those highest needs workers with an incapacity who but for Section 38A would be assessed as entitled to less than $788.32 per week.

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The Technicalities of "Artificial Aids" aid Workers in Avoiding s59A Restrictions

The 2012 Amendments introduced a cap on payments of compensation for medical and related expenses under Section 60 and for all but seriously injured workers compensation for treatment, service or assistance given or provided ended twelve months after a claim for compensation in respect of the injury unless weekly payments of compensation had been paid in which case the entitlement ceased 12 months after the worker ceased to be entitled to weekly payments of compensation.

In 2015 amendments were introduced which exempted the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries) as well as modification of a worker's home or vehicle and secondary surgery from this restriction.

The interpretation of "artificial aids" was the subject of a recent appeal determination of Deputy President Snell in *Pacific National Pty Ltd v Baldacchino* [2018] NSWWCCPD 12 which is likely to have far reaching ramifications for Scheme Agents in interpreting and applying the restrictions of Section 59A.

The worker suffered an injury at work in 1999 when he twisted his left knee when stepping down from a ladder. Liability was accepted and the worker underwent left knee arthroscopy and medial meniscectomy in 1999.

In proceedings in the Workers Compensation Commission in 2012 there was an assessment by an approved medical specialist ("AMS") of 15% whole person impairment. The AMS stated there was no evidence of any pre-existing pathology before 1999, referring to radiological investigations undertaken

shortly after the original injury. The AMS determined medial compartment osteoarthritis in the claimant's left knee followed the initial medial meniscus tear.

In 2013 consent orders were entered in respect of 15% loss of efficient use of the left leg at or above the knee together with an award for compensation for pain and suffering under Section 67.

In early 2016 the claimant was advised by his treating surgeon he required a total left knee replacement and a claim was made for the cost of that surgery. An IME opinion obtained by the insurer was to the effect the worker's condition was constitutional and entirely unrelated to the original work injury and therefore a Section 74 Notice issued on the basis the insurer denied the worker suffered any injury to the left knee.

By the time the matter reached the Workers Compensation Commission the claimant was in his 67th year and thus even if the surgery was found to be reasonably necessary he was not entitled to the cost of a total knee replacement due to the operation of Section 59A.

The employer's representative argued the proposed surgery was not "as a result of" the original work injury. At first instance an arbitrator accepted the Medical Assessment Certificate gave rise to an estoppel that in 2013 the compartmental osteoarthritis was entirely due to the work related injury in 1999. The arbitrator found the proposed surgery was reasonably necessary as a result of the injury sustained on 27 October 1999.

The matter was relisted for further hearing on whether the provisions of Section 59A prevented the worker from obtaining compensation for the cost of the proposed surgery.

The arbitrator dealt with the authorities when considering the historical context of the words "artificial members" and/or "artificial aids" in Section 59A(6). The arbitrator accepted he was bound by the reasons given by the Court of Appeal in *Thomas v Ferguson Transformers Pty Limited* [1979] 1NSWLR 216, where it was stated "An artificial aid … is anything which has been specially constructed to enable the effects of the disability (the result of the injury) to be overcome. … the essential quality of an artificial aid is that it is an aid specially tailored to the needs of a person, which flowed from the injury. The artificial aid is specific to an injured person."

In relation to the claim for total left knee replacement surgery the arbitrator noted the provision of a total knee replacement is designed to alleviate the worker's increasing knee pain associated with severe medial compartment arthritis and restore function in the lower limb. He found the nature of a total knee replacement was clearly an artificial aid as defined in *Thomas* in that it is specifically designed for the worker to overcome the effects of his disability. Thus the arbitrator was satisfied the provision of a total knee replacement fell within the meaning of "other artificial aids" in Section 59A(6) of the 1987 Act.

Accordingly the arbitrator found the worker was entitled to an order under Section 60(5) that the insurer pay for the provision of a total knee replacement.

An appeal from the decision was lodged by the employer which saw the arbitrator's orders confirmed. SIRA also intervened in the proceedings, supporting the arbitrator's original decision.

The employer's argument that *Thomas* was determined thirty-eight years ago did not mean it no longer had application. The plain wording in the statutory definitions dealing with "artificial aids" had changed very little since then. It had been subsequently frequently applied in the Court of Appeal, the former Compensation Court and the Commission.

The arbitrator's reliance on the decision in *Thomas* was supported by *Ex parte Campbell* and a number of other legal authorities regarding statutory interpretation to the effect that:

> "*once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute…the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them*".

After recounting the history of the amendment of Section 59 in the 2012 legislative changes Deputy President Snell stated:

> *"The repeated use of substantially identical words in these provisions with only very minor changes, is consistent with an intention that they have the same meaning as when the phrase 'artificial aids' was construed in Thomas."*

The Deputy President also rejected the employer's argument that the "artificial aids" referred to in Section 59A(6) were restricted to" aids that are external, visible and externally accessible to an injured worker's body". It was noted that artificial teeth, eyes and even hearing aids could be partially internal and partially external and they were clearly not excluded from the Section. A total knee replacement replaces a part of a leg, except that it happens below the flesh.

Whilst each case needs to be determined according to its own facts, the decision in *Baldacchino* demonstrates wherever reasonably necessary surgery that is prima facie precluded by the operation of Section 59A, involves the use of any "thing" which has been specially constructed to overcome the effects of disability flowing from an injury, the surgery will fall within the exemption created by Section 59A(6).

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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.