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GD NEWS / JULY 2018

IN THIS EDITION

Class Actions- Contingency Fees for Lawyers and Tighter Regulation of Litigation Funders

The future of class action litigation in Australia is under review with the release in June of the Australian Law Reform Commission's (ALRC) Discussion Paper on its Inquiry into Class Action Proceedings and Third-Party Litigation Funders in Australia. Public submissions on the Paper are invited and must be lodged by 30 July 2018. There is sure to be a major shake up when it comes to funding class actions if the proposals of the ALRC are adopted.

Litigation funders in class actions that charge contingency fees based on a percentage of the settlement have enabled thousands of Australians to obtain redress through legal actions when an action by an individual was beyond their financial means.

The predominant sources of funding for class actions, other than litigation funders, have been law firms with the capacity to offer services on a 'no win, no fee' basis. Unlike litigation funders, law firms are not permitted to charge contingency fees and usually bill based on inflated hourly rates and a permitted uplift of 25% of the fees as the law firms have put payment of their fees at risk.

Litigation funders seek to maximise returns on investment and closely monitor the process with purse strings being closely controlled.

Litigation funders often pay lawyers running the class action a percentage of their fees leaving the balance of the fees at risk and payable on a successful outcome with a 25% uplift.

Lawyers owe duties to the court and to the class action members but are being paid by the litigation funder. The class action members are unlikely to be in a position to negotiate the terms of the funding agreement and lawyers often build a book of class action members and then approach a litigation funder for financial support and do the deal on the contingency fees to be charged and the funding for their fees.

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There can be competing class actions where the litigation funding is provided differently.

Often potential members of a class action are excluded from any spoils as the Courts have permitted the class to be limited to members whom have signed a funding agreement with the litigation funder and/or a legal retainer with the lawyer running the class action.

The Courts can regulate the ultimate contingency fee charges as it has the ultimate power to approve settlement and will only do so if the settlement is in the interests of class members.

It seems a lot to deal with for a potential class action member.

The ALRC has looked into:

- conflicts of interest between lawyers and the litigation funder;
- conflicts of interest between the litigation funder and plaintiffs;
- prudential requirements, including minimum levels of capital for funders;
- distribution of proceeds of litigation including the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders;
- character requirements and fitness to be a litigation funder;
- the relationship between a litigation funder and a legal practice;
- the costs charged by solicitors in funded litigation, including but not limited to class action proceedings.

This ALRC Discussion Paper on the ALRC website runs for more than 100 pages.

The discussion paper has come down on the side of closer regulation of funders but has opened the door for lawyers to charge contingency fees. That is sure to change the landscape for litigation funders with competition from lawyers to share in the spoils.

The key recommendations include:

- licencing under the Corporations Act for litigation funders with requirements for funders to have sufficient resources (including financial, technological and human resources),adequate risk management systems, have a compliant dispute resolution system, and be audited annually.
- lawyers acting for the representative plaintiff in class action proceedings, should be permitted to enter into contingency fee agreements.
- an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis.
- a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis.
- under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order.
- there should be specialist accreditation for lawyers involved in class action law and practice.
- the Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting.
- the Court rules should provide that all class actions are initiated as open class actions and where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so.
- litigation funding agreements with respect to a class action are enforceable only with the approval of the Court.
- any approval of a litigation funding agreement and lawyers' costs agreement for a class action is granted on the basis of a common fund order, that is, the costs are shared across all that benefit from the class action not only those that signed up for the class action.

Will there be a cap on contingency fees? Probably.

The paper moots that there should be a rebuttable statutory presumption that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%. That could result in a very large contingency fee however there would still be control by the Court to prevent unfair fees.

Lawyers involved in class actions who chase contingency fees rather than litigation funding will be looking for after the event legal expense insurance to cover adverse costs orders and funding of disbursements.

The ALRC maintains concerns about the reasonableness for contingency fees in personal injury claims and a question hangs over whether it is appropriate for contingency fees to be charged in personal injury class actions.

The dynamics of class actions is sure to change.

There will be more lawyers looking to become involved in class actions and the opportunities for legal expense insurers is sure to grow. But will the change drive an increase in class actions in Australia. Time will tell.

For now we have a discussion paper, but change won't be too far away.

As for contingency fees for lawyers, the gates appear to be opening to charge a fee calculated as a percentage of the outcome, at least in class actions.

No doubt any change on contingency fees will lead to calls by lawyers to permit contingency fees across the board for all matters, for example in all personal injury claims, however for that to occur there would need to be the same level of Court supervision of fee agreements as suggested by the ALRC for class actions. That would be an extra step in personal injury claims as there is no requirement for the Court to approve settlements except for minors and those lacking capacity. Calls for contingency fees outside the class action industry, if we can be so bold to call it an industry, are likely to fall on deaf ears, but you never know.

And that's not all folks.

Adding support for the ALRC conclusions the Victorian ALRC released its report into Class Actions and Access to Justice on 20 June. Advocating a nationally regulated regime and recognising the apparent benefits of class actions that "create economies of scale that make it financially viable to take legal action against a well-resourced defendant" the Victorian ALRC has come down in support of:

- contingency fees for lawyers and no legislated cap. The VALRC recommended removal of the prohibition on contingency fees generally, not only in class action claims.
- where contingency fees are charged lawyers should be required to meet disbursements and any adverse costs orders;
- support for common fund orders against all members of the class to ensure costs are shared by all that benefit and removing the need to build a book of class members to secure litigation funding.
- court approval of settlements, and consequently funding agreements and contingency fees with a Court appointed expert to help with assessment of costs.
- stronger regulation and supervision of litigation funders.
- mandatory disclosure of litigation funding agreements to the Court and defendants and publication of user friendly summaries of those agreements for class action members.
- when adverse costs orders are sought against a representative plaintiff additional factors be considered such as the function of class actions in providing access to justice, whether the case is a 'test' case or involves a novel area of law and whether the class action involves a matter of public interest.

That's 2 reports in June in favour of contingency fees for lawyers, one from the Australian Law Reform Commission and the other from its Victorian counterpart. Looks like there is a head of steam building to take class action litigation in a different direction in Australia.

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AFCA – A New External Dispute Resolution Scheme For The Insurance Industry

The insurance industry can look forward to the referral of disputes to a new external dispute resolution (EDR) scheme from 1 November 2018 and the wind down of the Financial Ombudsman Service (FOS) Australia with the establishment of the Australian Financial Complaints Authority ("AFCA") which moving forward will operate a EDR scheme and deal with all complaints from consumers in the financial system.

AFCA will be operated by a not-for-profit company limited by guarantee authorised by the Minister for Revenue and Financial Services (Minister) with financial service licensees as its members and Rules approved by ASIC.

This change will require the insurance industry to review and amend financial services guides and product disclosure statements to reference the new EDR scheme as well as implement procedures to align internal processes with the Rules that will apply in the management of complaints to AFCA by consumers about holders of financial services licences and insurance products.

AFCA replaces the three existing EDR schemes of the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and Superannuation Complaints Tribunal (SCT) so that consumers have access to a single EDR scheme.

Membership of AFCA will be required under law or a licence condition of a holder of a financial services licence. AFCA operations will be funded by contributions made by its members. The scheme will be free to consumers.

In order to facilitate the transition of FOS to AFCA, the membership base, employees and assets and liabilities of FOS have been transitioned to the new operating entity for AFCA (AFCA Ltd).

The AFCA website is up and running and AFCA Ltd is now managing and operating the FOS scheme. Any existing disputes and matters with FOS will continue to be dealt with under the FOS Terms of Reference until they are resolved.

AFCA will:

- be the single point of contact for complainants for EDR services;

- have higher monetary limits;
- be more accountable to users, including by having an independent assessor to deal with complaints about its handling of disputes; and
- have rules (terms of reference) to support its dispute resolution functions and legislation in the case of superannuation disputes.

AFCA will deal with financial service disputes with the following monetary limits:

- a monetary limit of $1 million (amount in dispute) and a compensation cap of $500,000 for most non-superannuation disputes;
- unlimited monetary jurisdiction for superannuation disputes;
- no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence; and
- a monetary limit of $5 million and a compensation cap of $1 million for small business credit facility disputes.

When FOS deals with an insurance dispute it currently has power to order compensation up to $309,000 in a complaint in respect of a general insurance policy and in a complaint against a general insurance broker it can award up to $166,000. Those amounts will move up to $500,000 in respect of insurance products and $250,000 for insurance broker ccomplaints with AFCA.

AFCA has published draft Terms of Reference (Rules) and is consulting industry on the Rules and intends to finalise the Rules and have them approved by ASIC by September 2018.

For insurance disputes the draft Rules provide:

- a time limit for making a claim being the earlier of; six years of the date when the Complainant first became aware (or should reasonably have become aware) that they suffered the loss; and where, prior to submitting the complaint to AFCA, the Complainant was given an IDR Response in relation to the complaint from the Financial Firm within two years of the date of that IDR Response;
- AFCA must exclude complaints about a General Insurance Policy other than a Retail General Insurance Policy, a Residential Strata Title Insurance Product, a Small Business Insurance Product, a Medical Indemnity Insurance Product or a Title Insurance Policy.
- AFCA must exclude a complaint about rating factors and weightings an insurer under a General Insurance Policy applies to determine the insured's or proposed insured's base premium that is commercially sensitive information.
- An AFCA Decision Maker may decide that the Financial Firm is to compensate the Complainant for non-financial loss: (a) for a complaint relating to an individual's privacy rights – injury has occurred to the Complainant's feelings or humiliation has been suffered by the Complainant; and (b) for other complaints – an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Complainant's expectation of enjoyment or peace of mind has occurred.
- An AFCA Decision Maker can award interest and that award can be on top of the maximum compensation that can be ordered.
- An AFCA Decision Maker can order that a Financial Firm pay up to $5,000 towards to consumers costs of brining a complaint.

The types of complaints that can be made in respect of Residential Strata Title Insurance Products, Small Business Insurance Products (as well as the other types of specified products) are limited by definitions in the Rules. Relevantly, definitions are:

Small Business means a Primary Producer or other business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint.

Small Business Insurance Product means a Small Business policy or part of a policy that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of one of more of the following:

- Computer and Electronic Breakdown
- Fire or Accidental Damage –but, in a complaint about an insurance claim that has been made by the Complainant, only to the extent that the insurance cover relates to a Specified Defined Event
- Loss of Profits/Business Interruption
- General Property
- Glass
- Land Transit
- Machinery Breakdown
- Money, and
- Theft,

but excluding cover in relation to any of the following:

- Contractors All Risks
- Fidelity Guarantee
- Legal Liability (including Public Liability and Products Liability)
- Professional Indemnity, and
- Industrial Special Risks

Specified Defined Event, a term referred to in the definition of Small Business Insurance Products means events (however described) as follows:

- Fire/Lightning/Explosion
- Storm/Tempest/Rainwater,
- Flood
- Water from leaking pipes/water systems
- Impact
- Earthquake
- Riot and Civil Commotion or Industrial Disputes
- Malicious Damage
- Fusion
- Spoilage of refrigerated goods

Residential Strata Title Insurance Product means an insurance policy insuring the body corporate of a strata title or company title building that is wholly occupied for residential or small business purposes including:

- Strata Building
- Common Contents
- Personal Accident or Sickness for voluntary workers in or about the strata building or common property

but excluding:

- Professional Indemnity
- Public Liability
- Workers Compensation

For now, consumer complaints will continue to be lodged with FOS but all those references to FOS in a PDS will have no relevance after 1 November 2018. An amended PDS issued after 1 November 2018 will be the order of the day for existing policies. We can also look forward to an update of the General Insurance Code of practice which will need to reference the new EDR scheme.

With an increased jurisdiction and more accountability (as performance of AFCA will be audited by ASIC) the insurance industry can look forward to more consumer claims finding their way to an EDR scheme coming your way.

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Is the Loss of a Superannuation Pension or the Aged Pension a Compensable Loss?

It is a well established common law principle that a person who suffers injury as a result of another person's negligence is entitled to an award of damages for the injured person's loss of earning capacity which is productive of financial loss.

If a claimant suffers a negligently caused personal injury during their working life resulting in a reduction in their income and/or life expectancy the High Court has stated since its 1981 decision of *Todorovic v Waller* that superannuation benefits, like wages, are the product of the exploitation of a claimant's capital asset (namely a capacity to earn an income) such that any loss of superannuation benefits arising from an injury that occurs during a person's working life is to be calculated as a sub-set of a person's loss of earning capacity.

What happens if an injured person's loss does not arise until the injured person is retired from the workforce?

What if, at the time of loss, the injured person was in receipt of a superannuation pension under a statutory superannuation scheme, and the aged pension, but that injured person's life expectancy has been significantly reduced?

Is the injured person entitled to an award of damages for the loss of expectation of the future superannuation pension, and the aged pension, that otherwise would have been received but for the reduction in that person's life expectancy?

The High Court was recently asked to consider these issues in *Amaca Pty Limited v Anthony Latz*.

Anthony Latz retired from his employment in the public service of South Australia in about 2005.

In 2016 Latz was diagnosed with mesothelioma as a result of exposure to asbestos dust and fibre in about 1976 when his employment involved cutting through products manufactured by Amaca.

Between 2005 and 2016 Latz was in receipt of a superannuation pension under the *Superannuation Act 1988 (SA).* His entitlement to the superannuation pension arose from contributions made by Latz to the South Australia Superannuation Fund during his employment in the public service.

In addition, Latz was also in receipt of the aged pension.

As a result of his mesothelioma diagnosis Latz' life expectancy was reduced by 16 years.

Latz instituted proceedings against Amaca at the District Court of South Australia which included a claim for damages to compensate him for the loss of payments that Latz would have received in respect of his superannuation pension and the aged pension but for the reduction in his life expectancy.

The trial judge awarded the full amount of damages claimed by Latz and in doing so rejected Amaca's primary contention that the claims for damages representing loss of superannuation pension and loss of aged pension were not categories of Latz' loss of earning capacity because he was retired as at the date of loss.

The trial judge also rejected Amaca's secondary contention that any damages to be awarded for the loss of superannuation pension should be reduced to account for the circumstances that Latz' partner would receive two thirds of the superannuation pension upon his death.

Amaca appealed to the Full Court of the Supreme Court of South Australia. By a 2-1 majority the Full Court upheld the trial judge's findings that Latz was entitled to damages for both his loss of superannuation pension and the aged pension.

However, the Full Court overturned the primary judge's refusal to reduce those damages awarded for the loss of superannuation pension entitlements to account for the reversionary entitlement of Latz' partner upon his death.

By special leave Amaca appealed to the High Court maintaining its initial position that Latz was not entitled to any damages for loss of superannuation pension and loss of aged pension.

Latz also appealed to the High Court against the South Australian Full Court's decision to reduce the award of damages for loss of superannuation pension by reason of his partner's reversionary entitlement upon his death.

By a 5-2 majority the High Court dismissed Amaca's appeal in respect of the claim for damages representing the loss of Latz' superannuation pension entitlements.

In doing so, the majority upheld the South Australian Full Court's decision to allow those damages. The High Court also agreed with the Full Court that those damages should be reduced to account for Latz' partner's reversionary entitlement upon his death.

However, in respect of the claim for damages for the age pension, the High Court was unanimous in finding this was not a compensable loss to which Latz was entitled.

The minority justices (Kiefel CJ & Keane J) expressed the following views:

> *"The liability imposed by the decision of the Full Court is novel. It is a liability for economic loss not previously recognised by judicial decision in Australia. The expansion of liability in negligence for personal injury so as to include, as compensable economic loss, the loss of the opportunity to enjoy the benefits of financial resources accumulated at the end of the plaintiff's working life is not supported by analogy with previous decisions."*

Their Honours referred to the following categories of compensable loss recognised in the Court's earlier decision of *CSR Ltd v Eddy*:

- non pecuniary loss, being loss of the amenities of life;
- loss of earning capacity;
- actual financial loss, being outgoings incurred by reason of the injury.

Kiefel CJ and Keane J concluded:

> *"The common law of this country has not accepted that the loss of the opportunity to enjoy ones financial resources by reason of premature death is a form of economic loss compensable as such."*

Their Honours held that a satisfactory basis to depart from earlier authority had not been demonstrated.

However, in a joint judgment the majority judges (Bell, Gageler, Nettle, Gordon & Edelman JJ) disagreed in respect of the claim for damages representing a loss of expectation of future superannuation pension.

The majority held that a person's claim for loss of superannuation entitlement, whether it be pursuant to a statutory scheme or otherwise, must be considered within the arrangements specific to that injured person.

Further, the majority judges focused on the loss of superannuation pension as a capital asset which has been lost. It is necessary for a Court to calculate the present value of the future rights associated with that loss of capital asset.

Their Honours stated that the label attached to those future rights, be it an accumulation fund, a defined benefit scheme, a pension scheme, or some other descriptor, is not determinative. As such, the loss is not the loss of some opportunity to enjoy the asset but the diminution in the value of that asset.

The majority justices emphasised Latz would now fail to receive the superannuation pension for the full duration of his pre-illness life expectancy due to the negligence of Amaca. Accordingly, the value of his capital asset constituted by his rights under the *Superannuation Act* had been diminished.

Their Honours observed:

> *"Had Mr Latz' illness presented itself before he retired, he would have been awarded the nett present value of that capital asset. There is no principled basis for denying Mr Latz compensation for his lost superannuation benefit just because the injury or illness which occasioned that loss became apparent only after he commenced retirement. That does not appeal to a sense of justice. It does not accord with principle."*

Accordingly, the majority justices upheld Latz' entitlement to an award of damages for the loss of expectation of his future superannuation pension entitlements but agreed the award must be reduced to account for Latz' partner's reversionary entitlement upon his death.

In relation to the claim for damages for loss of expectation of future aged pension entitlements the High Court was unanimous in deciding the aged pension is not part of remuneration and is not a capital

asset nor is it a result of or intrinsically connected to a person's capacity to earn.

The High Court therefore held a loss of future expectation of aged pension entitlements is not a compensable loss recognised by the common law of Australia.

This interesting decision of the High Court is likely to have significant implications, not only for insurers in the Dust Diseases sector, but for all personal injury claims where, at the time of the injury, the injured person is a retiree who is in receipt of an ongoing superannuation pension and that person's life expectancy has been diminished by the injury.

The Court has effectively expanded the recognised categories of compensable loss to include damages for loss of future superannuation pension entitlements even if the injured person is retired when the loss occurs or first manifests.

It remains to be seen whether the States and Territories decide to implement legislative reform to overcome the Court's decision.

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NCAT does not have Jurisdiction to Determine Disputes Between Residents of Different States

Section 75(iv) of the Commonwealth Constitution provides the High Court of Australia with original jurisdiction in all matters between States or between residents of different States or between a State and a resident of another State.

However, Section 77 of the *Constitution* states the Commonwealth Parliament may make laws:

"(i) defining the jurisdiction of any Federal Court other than the High Court;

(ii) defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States;

(iii) investing any Court of a State with Federal jurisdiction."

In 1903 the Commonwealth Parliament enacted the *Judiciary Act* pursuant to Section 77(ii) and Section 77(iii) of the Constitution.

Section 39 of the *Judiciary Act* excludes the State jurisdiction of State Courts where the High Court has original jurisdiction, or where original jurisdiction can be conferred on the State Court. That section then invests the State Courts with federal jurisdiction subject to certain conditions and restrictions.

The effect of Section 39 of the *Judiciary Act* is that the exercise by a State Court of adjudicative authority in respect of any of the matters listed in Section 75 of the *Constitution*, including matters between residents of different States, is an exercise of federal jurisdiction.

The nature of the jurisdiction under Section 75(iv) of the *Constitution* involving disputes between residents of different States has often been described by the Courts as an exercise of "federal diversity jurisdiction".

Pursuant to Section 77 of the *Constitution* and Section 39 of the *Judiciary Act* a "Court of a State" can be invested with federal diversity jurisdiction to determine disputes between residents of different States under Section 75(iv) of the *Constitution*.

What then is the position with respect to State Tribunals such as the NSW Civil and Administrative Tribunal ("NCAT")?

Is NCAT and other similar Tribunals of other States a "Court of a State" which can exercise federal diversity jurisdiction to determine disputes between residents of different States?

In *Burns v Corbett & Ors*, the High Court confirmed that as NCAT is not a Court of a State for the purpose of Section 77 of the Constitution it therefore cannot be invested with federal diversity jurisdiction to determine disputes between residents of different states.

Garry Burns made separate complaints to the Anti-Discrimination Board of NSW about statements made by Therese Corbett and Bernard Gaynor which Burns claimed were public acts which vilified homosexuals contrary to the *Anti-Discrimination Act 1977* (NSW).

The complaint against Corbett was referred to the Administrative Decisions Tribunal of NSW. The complaint against Gaynor was referred to NCAT.

The ADT found in favour of Burns and ordered Corbett to make a public and private apology. She appealed unsuccessfully to the Appeal Panel of NCAT. The Appeal Panel's orders were entered in the Supreme Court and thereafter Burns brought separate proceedings in the Supreme Court charging Corbett with contempt for failing to make either apology.

As part of her defence to that charge Corbett contended neither the ADT nor the Appeal Panel had jurisdiction in the dispute because she is a resident of Victoria. Burns is a resident of New South Wales. That aspect of her defence was removed to the NSW Court of Appeal.

The complaint by Burns against Gaynor was made in proceedings at NCAT. Gaynor succeeded in having those NCAT proceedings dismissed on the basis there was no public act in New South Wales as required by the *Anti-Discrimination Act*.

Burns appealed to the Appeal Panel of NCAT. Before the Appeal Panel determined the matter there were interlocutory applications made in the Appeal Division of NCAT which resulted in orders for costs being made

against Gaynor, which Gaynor challenged pursuant to leave to appeal to the NSW Court of Appeal.

By a Summons filed in that appeal, Gaynor sought a declaration that NCAT had no jurisdiction to determine the matter as it pertained to citizens resident in different States noting Gaynor was a resident of Queensland and Burns was a resident of NSW.

The NSW Court of Appeal heard both matters together to resolve the common issue of whether NCAT may hear and determine a dispute arising under the *Anti-Discrimination Act* between a resident of NSW and a resident of another State.

Two issues arose for consideration by the NSW Court of Appeal, namely:

- whether the *Constitution* precludes the Parliament of a State from conferring federal diversity jurisdiction on a Tribunal which is not one of the "Courts of the States" referred to in Section 77 of the Constitution (the "Implication Issue"); and
- whether a State law which purports to confer such jurisdiction on a Tribunal is rendered inoperative by virtue of Section 109 of the *Constitution* on the basis that it is inconsistent with Section 39 of the *Judiciary Act* (the "Inconsistency Issue").

In a unanimous judgment the NSW Court of Appeal comprising Bathurst CJ, Beazley P and Leeming JA, held there is no implication from the *Constitution* which prevents State Parliaments from conferring federal diversity jurisdiction on State Tribunals, such as NCAT, in respect of matters falling within Section 75(iv) of the *Constitution*.

However, the Court also held a State Law purporting to have that effect would be inconsistent with Section 39 of the *Judiciary Act* and therefore invalid to the extent of the inconsistency by virtue of Section 109 of the *Constitution*.

The NSW Court of Appeal concluded that NCAT had no jurisdiction to determine the claims by Burns against Corbett and Gaynor.

Burns, the State of NSW and the Attorney General for NSW each appealed by special leave to the High Court. The Attorneys General of Queensland, Western Australia, Tasmania and Victoria intervened in the appeals.

NSW and Burns argued in the High Court that the Court of Appeal's decision on the Implication Issue was correct, submitting that the *Constitution* itself did not remove the federal diversity jurisdiction of State Courts that was recognised in the *Constitution*.

They also sought to overturn the decision of the NSW Court of Appeal regarding the Inconsistency Issue which was ruled in favour of Corbett and Gaynor.

The High Court took a different view to the NSW Court of Appeal regarding the Implication Issue.

Kiefel CJ, Bell & Keane JJ noted it was common ground between the parties that NCAT was not a "Court of a State".

On that basis, their Honours held NCAT cannot be invested with federal diversity jurisdiction to determine disputes between residents of different States. To confirm their conclusion their Honours stated:

> *"The express provision for the exercise of adjudicated authority through Courts capable of inclusion as components of the federal judicature identified by Sections 71 and 77 [of the Constitution] leaves no room for the possibility of an adjudication of any of the matters listed in Sections 75 and 76 by an organ of the Government which is not a Court of a State that may become a component of the federal judicature."*

In their joint judgment, Kiefel CJ, Bell and Keane JJ determined it was unnecessary for them to decide the Inconsistency Issue.

In a separate judgment Justice Gageler agreed with their Honours regarding the Implication Issue but for different reasons.

The other Members of the High Court gave separate judgments containing different reasons for either accepting or rejecting the findings in the joint judgment regarding the Implication Issue and the Inconsistency Issue.

In summary, the High Court concluded by a majority that on the uncontested assumption that NCAT is not a State Court, NCAT cannot be invested with federal diversity jurisdiction to determine disputes between residents of different States.

The appeals to the High Court by Burns and the State Attorneys General were dismissed.

The High Court's decision will have wide ranging implications for matters before NCAT and other similar Tribunals in the other States of Australia.

Those Tribunals frequently deal with matters such as residential tenancy disputes where the tenants and landlord may well be residents of different States.

Usually those Tribunals are invested with specialist jurisdiction to determine building claims between homeowners and builders. If those parties are residents of different States the High Court has ruled they do not have jurisdiction to determine those disputes.

It is perhaps of some interest that the parties involved in the High Court appeal between Burns, Corbett & Others agreed that NCAT was not a Court of a State.

However, before the High Court's decision was handed down, the Appeal Division of NCAT delivered judgment in a separate case in which the Appeal Division held NCAT is a Court of a State and as such has power to exercise federal jurisdiction invested in the Tribunal by various Acts of Parliament.

The decision of the High Court would suggest the NCAT Appeal Division judgment is flawed.

Further, it should also be noted that in December 2017 the *Civil and Administrative Tribunal Act 2013* (NSW) was amended by inserting Part 3A into that legislation thereby providing a mechanism for matters to be heard by an authorised Court (such as the NSW District Court) if the Court is satisfied NCAT does not have jurisdiction to determine the matter because its determination would involve the exercise of federal diversity jurisdiction.

The insertion of Part 3A may well result in an influx of applications to transfer matters from NCAT to the District Court, but it is early days. Watch this space!

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CONSTRUCTION ROUNDUP

Nationally Consistent Security of Payment Legislation May Be On Its Way

A nationally consistent scheme for Security of Payment legislation in the construction industry is a little closer following the release of the Turnbull Government's final report on Security Of Payment Laws which was the result of a review undertaken by John Murray AM. Whilst national consistency is an admirable target the success of the Federal Government's initiative will turn on the willingness of the States and Territories to embrace the report.

Mr Murray has detailed 86 recommendations for nationally consistent legislation that largely reflect the "East Coast model" of security of payment laws.

Overall NSW's security of payment legislation seems to have found favour with Mr Murray with the NSW legislation being seen as providing a suitable model for more than 20 of the recommended legislative provisions that would be used in a national model for Security of Payment legislation.

The recommended approach is holistic addressing the need for cash retentions to be held on trust, statutory trusts be implemented for all parts of the contractual payment chain, and prohibitions on contractual terms that disentitle claims for payment or an extension of time consequent to non-compliance with notice requirements where compliance would not be reasonably possible, be unreasonably onerous or serve no commercial purpose.

Mr Murray recommends the right to make a claim be limited to businesses with an appropriate licence and liquidators should not be able to pursue payments under the scheme. However, Mr Murray suggests Security of Payment rights should extend to the home building sector, increasing the application of the scheme to all sectors of the construction industry.

It is advocated that the trigger for claims should move away from the concept of a reference date in a contract to monthly payments or more frequent payments and payment claims if the contract specifies shorter payment timeframes. Also there should be an entitlement to bring a final claim despite a contract ending and that "pay when paid" provisions in a contract should not defeat a payment claim.

Mr Murray concludes the sanctity of an adjudication result should also prevail with prohibitions on a respondent to a claim preventing them from raising cross claims or defences flowing from terms in a construction contract if it is necessary for the claimant to enforce the adjudication through the Courts.

The current system of appointment of adjudicators was also seen to be an issue. Mr Murray suggests the responsibility for the appointment of adjudicators should move to the Regulator with the role of authorised nominating authorities reduced to nominating adjudicators for consideration by the Regulator. Adjudicators would need to be registered and graded by the Regulator. The Regulator would appoint the adjudicator in a dispute however in disputes where the sum involved was less than $250,000 the parties involved would be able to agree on an adjudicator.

A new concept on the table is the right of review of adjudications in limited circumstances. If the parties agreed on the appointment of the adjudicator no review would be available, however, if the adjudicator is appointed by the Regulator and the amount involved is more than $100,000 a review by the Regulator would be available. The Regulator would appoint the most senior adjudicator available to conduct the review and their determination would replace the original adjudication determination.

Mr Murray also suggests that charges by adjudicators should be fixed where the amount involved is less than $25,000 and legislatively capped for all other claims unless the parties to the claim otherwise agree.

The next step will see debate between the States over the recommendations as well as deliberations over the concept of national consistency for Security of Payment legislation.

As legislative responsibility for security of payment rests with the States and Territories, the Federal Government intends to work cooperatively with them on the findings of the review.

We will need to wait and see whether some States which can be quite parochial and have different nuances in their security of payment regimes to those recommended by Mr Murray will be prepared to embrace change and deliver consistency for the construction industry across Australia.

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Payment by instalments of security of payment claims

As stakeholders in the construction industry are well aware, the *Building and Construction Industry Security of Payment Act 1999* ("Security of Payment Act") includes a "pay now, argue later" regime for the payment of persons who carry out construction work.

This regime prescribes certain time limits for the recipient of a payment claim that has been submitted under the Security of Payment Act to provide a schedule setting out the amount that the recipient intends to pay. A failure to comply with these time limits entitles the claimant to have his claim entered as a court judgment and duly enforced. Alternatively, the claim can be referred to adjudication and the adjudicator's determination can be similarly enforced as a judgment debt.

The policy behind the Security of Payment Act's regime is to ensure that contractors lower down the contractual chain are not starved of the cash flow that they need in order to keep their businesses solvent – particularly while complex disputes are being litigated. It is therefore quite common for adjudicators to determine that contractors are entitled (at least on the interim basis provided by the Security of Payment Act) to payment of large claims for delay costs, variations etc.

However, what if the respondent to the payment claim does not have the financial capacity to pay the judgment debt?

The judgment debtor may wish to apply to the court for an order under s.107(1)(b) of the *Civil Procedure Act 2005* that the judgment debt be paid by instalments. If such an order is made and the judgment creditor wishes to oppose it, then under UCPR 37.3(1) the judgment creditor has 14 days to file an objection with the court. The court will consider various factors including the capacity of the judgment debtor to satisfy the amount of the judgment (including its ability to draw funds from external sources) and the prejudice to the judgment creditor in being denied payment in full at the first opportunity.

But how does that sit with the policy rationale of the Security of Payment Act to ensure that contractors receive timely payment for their work? And should a head contractor who is obliged to pay a subcontractor pursuant to a judgment debt be seeking to have this amount paid by its principal on the project?

This was precisely the issue before the Supreme Court in *SRG Civil Pty Limited v. Brolton Group Pty Limited* [2018] NSWSC 618. Brolton had been engaged by Hanson Construction Materials Pty Limited to complete part of a major upgrade to its processing plant at Bass Point. Brolton had subcontracted part of its work to SRG.

On 23 September 2017 SRG served a progress claim which claimed an entitlement to $1,979,797.88 primarily for variations and delay costs. Since SRG's work was construction work within the meaning of the Security of Payment Act, its progress claim was also a payment claim for the purposes of that Act.

Brolton served a payment schedule on 13 October 2017 which scheduled an amount of $221,817.05. While this payment schedule was served within the relevant contractual timeframe, it had not been served by the statutory deadline of 6 October 2017. As a result SRG became entitled to payment of the full amount of $1,979,797.88 – an entitlement it sought to enforce by having the claim entered as a court judgment (which with interest etc was now slightly in excess of $2 million).

Brolton sought and received an order that this judgment debt be payable by instalments of $150,000 per month. SRG filed an application with the court to have this order set aside.

Brolton had served evidence with the court that it did not have the financial means to pay the judgment debt in full.

SRG had also served evidence that it would suffer prejudice to its financial position and its ability to grow its business if it were denied payment in full prior to the end of the financial year.

The court noted that the legal principles relevant to SRG's application had been identified by McDougall J in *Hellier Capital Pty Limited v. Albarran* [2009] NSWSC 403 and further considered by the NSW Court of Appeal in *In the Matter of Australian Institute of Fitness (Vic & Tas)* [2016] NSWSC 1143. These principles include: (a) whether the judgment debtor has the means to satisfy the judgment (including whether the necessary funds can be drawn from an external source); (b) whether the proposed instalments would see the debt paid within a reasonable time; (c) the necessary living expenses and other liabilities of the debtor; (d) whether the proposed instalment order would be consistent with public interest; (e) whether unreasonable hardship would be imposed on the judgment creditor as a consequence of the debt being paid in instalments; and (f) whether the debtor's financial means are so deficient that the instalments would not be met and the proposed order would thus be futile.

SRG submitted that Brolton had the ability to make a claim under its head contract with Hanson for the amount payable to SRG, and therefore Hanson was an "external source". However, Brolton had not even made a claim for this amount under its head contract.

In response Brolton pointed out that:

- under its head contract it was limited to the guaranteed maximum price of $85 million for all its work on the project;
- it was already close to the limit of the budget allocated to SRG's component of its work;
- the contract provided that Hanson was not liable to reimburse Brolton for amounts that were not "properly due" to subcontractors (and Brolton disputed that the judgment amount was "properly due" to SRG);
- Hanson had indicated that it would not pay the amount claimed by SRG.

N. Adams J considered these submissions and was satisfied that it would have been futile for Brolton to have approached Hanson for the amount owed to SRG, given the terms of the head contract and Hanson's attitude immediately after the payment schedule had been served by Brolton. Therefore, her Honour was satisfied that Hanson was not an external source to which Brolton had access in order to satisfy the judgment debt.

On balance, Adams J considered that the prejudice to SRG in not receiving the full amount by the end of the financial year was such that it outweighed the relevance of Brolton's capacity to pay the judgment debt in full.

The final factor considered by Adams J was whether the making of an instalment order would be inconsistent with the Security of Payment Act and thus offend public policy. However, having regard to the particular circumstances of this case, her Honour did not think that the proposed instalment plan would not be consistent with the purposes of the legislative regime.

While at first glance it may seem that the payment of an adjudicated amount or payment claim by instalments rather than in a lump sum would frustrate the ultimate purpose of the Security of Payment Act to keep cash flowing down the contractual chain during the course of a project, this case illustrates how the courts strive to find a balance between all the competing interests and factors. However, each case such as this one is decided on its specific circumstances, and it would be prudent to assume that an adjudicated amount will be required to be paid in full.

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EMPLOYMENT ROUNDUP

Flexibility at Work

There is an increasing focus on "flexibility" in the workplace. While most people recognise that as a good thing, it is useful to have a sound understanding of just what the limits of flexibility are.

Essentially, there are 2 avenues for introducing employee flexibility:

- flexible working arrangements - certain employees have the right to request flexible working arrangements; and
- individual flexibility arrangements - employers and employees can negotiate to change how certain terms in an award or enterprise agreement apply to them.

Flexible Working Arrangements

Areas which are often the subject of flexible working arrangements include changes to hours of work; patterns of work; and locations of work.

Employees who have worked with the same employer for at least 12 months can request flexible working arrangements if they:

- are the parent, or have responsibility for the care, of a child who is school aged or younger
- are a carer
- have a disability
- are 55 or older
- are experiencing family or domestic violence, or
- provide care or support to a member of their household or immediate family because of family or domestic violence.

Casual employees

Casual employees can make a request for flexible working arrangements if:

- they've been working for the same employer regularly and systematically for at least 12 months; and
- there is a reasonable expectation of continuing work with that employer on a regular and systematic basis.

Requests for flexible working arrangements

Requests for flexible working arrangements must:

- be in writing;
- explain what changes are being asked for; and
- explain the reasons for the request.

Employers who receive a request must give a written response within 21 days saying whether the request is granted or refused. An employer can only refuse a request on reasonable business grounds. If a request is refused the written response must include the reasons for the refusal.

Reasonable Business Grounds

Reasonable business grounds include:

- the requested arrangements are too costly;
- other employees' working arrangements can't be changed to accommodate the request;
- it's impractical to change other employees' working arrangements or hire new employees to accommodate the request; and
- the request would result in a significant loss of productivity or have a significant negative impact on customer service.

Individual Flexibility Arrangements

All awards, enterprise agreements and other registered agreements have to include an individual flexibility arrangement (IFA) clause. If a registered agreement doesn't include one, the model clause from the Fair Work Regulations 2009 applies.

An IFA is a written agreement used to alter the effect of certain clauses in an award or registered agreement. It is used to make alternative arrangements that suit the needs of the employer and employee.

An IFA cannot reduce or remove an employee's benefits or entitlements.

An employer must ensure that the employee is better off overall with the IFA than without it compared to their award or registered agreement at the time the IFA was made. This involves an assessment of the financial and non-financial benefits for the employee, as well as the employee's personal circumstances.

What can an IFA do?

An IFA can change how certain clauses in an award or registered agreement apply to the employee covered by it.

The flexibility clause in an award or enterprise agreement dictates which clauses of the instrument can be changed.

In modern awards, the following can be varied:

- working hours
- overtime rates
- penalty rates
- allowances
- leave loading.

Making an IFA

An IFA can be made at any time.

Both parties must genuinely agree to the IFA. An employee's right to refuse to agree to an IFA is protected by their general protections rights under the Fair Work Act 2009.

When an employer or employee have agreed on what arrangements they want to make it must be put in writing and signed by both. If the employee is under 18 it must also be signed by their parent or guardian.

Ending an IFA

An IFA may be ended at any time by written agreement. Otherwise, the IFA can be ended by giving appropriate notice. For IFAs made under an award, 13 weeks' notice is required. For IFAs under an enterprise agreement, the notice period varies.

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Fighting Employees

A considerable and not uncommon risk for employers is this: What implications arise when employees fight in the workplace?

The recent case of *Kristian Weir v Bechtel Construction (Australia) Pty Ltd* [2017] FWC 6073 provides some useful insight.

An employee made an application to the Fair Work Commission (the FWC) under s.394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy in respect of his dismissal, which he alleged was unfair.

The Employee was employed as a full-time Rigger Intermediate on a remotely located project in the Pilbara region of Western Australia. There were between 4000 to 4500 employees and contractors working on the project.

The employee worked as part of the maintenance team from the start of his employment in late August 2016 until he was dismissed for serious misconduct on 31 July 2017 because of his involvement in a fight.

The incident

One evening 2017, the Employee was in the wet mess at the project village (part of the workplace). The incident that occurred was captured on CCTV footage, which the Employee said showed that the following occurred:

- the Employee was standing having a beer with work colleagues when a person unknown to him walked past him and took the Employee's cowboy hat from his head;
- the unknown person then walked away with the hat;
- the Employee followed the unknown person and grabbed him by the shirt in order to retrieve his hat. The unknown person then threw the hat across an adjacent table;

- the Employee went to retrieve his hat and after picking it up was confronted by the unknown person who verbally and aggressively abused the Employee;
- in a defensive manner the Employee chest bumped the unknown person in order to clear some space; and
- the unknown person then punched the Employee three times in the face.

The Employee reported the incident to Security Officers who attended the wet mess.

Investigation and disciplinary process
The employer conducted an investigation into the incident and reviewed documentation from the Security Officers in addition to the CCTV footage of the incident. The unknown person was interviewed, subsequently responded and after considering the response, the employer dismissed that person without notice.

The Deputy Employee Relations Manager (Mr Harding) met with the employee, his support person, and another manager. The employee was provided with the opportunity to provide his version of events and to view the CCTV footage.

The Employee said that in the meeting the employer alleged he was the aggressor because he had grabbed the unknown person and given him a chest bump. After a short break in the meeting, the Employee said he was handed a letter of termination. It appeared to the Employee that the decision to dismiss was made before the meeting took place and before he had had the chance to explain his version of events.

The Employee informed the managers that when he picked up his hat the unknown person had said *'I don't like you and I don't f…g like cowboys'*.

The Employee reported feeling threatened by the *'cowboy'* comment and explained that the cowboy hat had sentimental value to him and that he had grabbed the unknown person by the shoulder not to be violent toward him but to retrieve his hat.

Having considered the employee's response, the employer formed the view that the Employee's behaviour breached the relevant Code of Conduct (**Code**) which provided:

> *The following forms of behaviour constitute SERIOUS MISCONDUCT; breaches of which may result in disciplinary action that may include, after due investigatory processes being completed, withdrawal of accommodation entitlement and/or termination of employment without notice.*
>
> *Behaviour which constitutes 'Serious Misconduct' includes, but is NOT limited to the following:*
>
> *Fighting, and/or offensive, intimidating or violent behaviour in any form (either initiating and/or in response to actions of another and the project Work Rules.*

Both managers shared the view that the employee should be dismissed. The employee was then told that violent behaviour could not be tolerated and his employment was terminated without notice.

FWC Determination
There were a number of issues in the unfair dismissal proceedings before the FWC, including whether the Code applied to the employee and whether he was obliged to comply with it.

The central focus was, however, whether the employee was in a fight, or engaged in conduct that was offensive, intimidating or violent in any form. If so, did extenuating circumstances exist, such that there was not a valid reason for dismissal?

After consideration of all the evidence the FWC formed the view that the employee was a willing participant in a fight.

The initiator of the interaction was the unknown person whose act of removing the cowboy hat from the head of the employee and tossing it was juvenile. It was not, however, aggressive.

The FWC accepted that the interaction provoked the employee to act, but in pulling the unknown person backward by his shirt, the employee was adopting an aggressive approach as a means to seek retrieval of his cowboy hat.

The action of the employee was disproportionate to that engaged in by the unknown person.

What was initially a stupid act by the unknown person then quickly escalated into an interaction that was open to be characterised as an aggressive or violent confrontation. The provocation by the unknown person was insufficient to justify the employee's conduct.

The FWC also found that the Code regulated the behaviour of the employee in the workplace, and that fighting was in clear breach of it.

Having taken into account each of the matters specified in s.387 of the Act, the FWC was satisfied that the employer had a valid reason for the dismissal of the Employee. The dismissal was not unjust, unreasonable or harsh, and the application was dismissed.

The takeaway from all this is that proportionality is the key factor in workplace violence incidents. Although an employer will not always have the benefit of CCTV footage of any incident, a thorough investigation should provide sufficient evidence to determine who has been the aggressor, and whether any physical response was justified.

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WORKERS COMPENSATION ROUNDUP

When is one more claim just that…

The primary object of statutory construction is to construe the relevant provisions consistently with the language and purpose of all provisions of the statute.

The meaning of the provision must be determined by reference to the language of the instrument viewed as a whole. Legislative instruments must be construed on the prima facie basis that the provisions are intended to give effect to harmonious goals.

One needs to look at the text, language and structure of the legislation. One also looks at the legal and historical context and the purpose of the statute in order to come to a reasonable conclusion as to its meaning and application.

The 1987 and 1998 Workers Compensation Acts were amended in 2012 with the intention of delivering urgent reforms to the Workers Compensation Scheme with a view to better protect injured workers and get the Scheme back into surplus. Amongst other things this included the introduction of a minimal threshold of greater than 10% for whole person impairment claims and a limit of only one claim in order to reduce disputes and administration costs whilst at the same time allowing the Scheme to focus on the more seriously injured workers.

The current version of Section 66 came into effect on 27 June 2012.

Section 66(1) of the 1987 Act establishes a threshold and provides that a worker who sustains an injury that results in a degree of permanent impairment greater than 10% should be compensated.

Section 66(1)(A) of the 1987 Act provides that only one claim can be made for permanent impairment compensation from an injury.

An injured worker who has made a *concluded* claim for permanent impairment prior to 19 June 2012 is not precluded from making one further claim after this date.

Further, an injured worker who made a claim prior to 19 June 2012 which was withdrawn or otherwise was not finally dealt with again is not precluded from bringing that claim after that date. That worker will still be able to bring that claim as well as one further claim for permanent impairment. In these circumstances Section 66(1) does not mean that any claim for permanent impairment does not need to pass the 10% threshold.

It is clear a withdrawn or unresolved claim can be amended before a final determination.

Legislation can be quite difficult to interpret and lead to disputes over claims particularly where it has had a long history of amendment and restrictions have been introduced on bringing further claims as was seen in the recent decision of *Gilliana v Souvenir World (Airport) Pty Limited* [2018] NSWWCC 116.

On 9 September 2003 the worker injured her lower back and suffered a consequential injury to the upper digestive tract. She claimed compensation and liability was accepted.

On 15 February 2007 the worker claimed compensation pursuant to Section 66 for 13% whole person impairment. The dispute was resolved between the parties for 12% whole person impairment.

On 25 October 2011 the worker made a claim for a further 1% whole person impairment. The insurer issued a Section 74 Notice disputing the worker was entitled to make a further claim.

On 12 December 2012 the worker made a further claim for 21% whole person impairment with regard to injuries to the lumbar spine and upper and lower digestive tract. Again, the insurer disputed the worker was entitled to make such a claim as a result of the 2012 amendments to the Act.

The worker lodged proceedings in the Workers Compensation Commission claiming lump sum compensation with respect to the 21% whole person impairment as claimed on 12 December 2012.

On 5 March 2014 an arbitration hearing proceeded and on 14 April 2014 a Certificate of Determination was issued based on a determination there was a causal link between the lumbar spine injury and gastrointestinal injury and the worker was referred for assessment of whole person impairment to an approved medical specialist.

Dr Kumar, approved medical specialist, issued a Medical Assessment Certificate in June 2014 assessing 14% whole person impairment, being 12% for the lumbar spine, 2% for the upper digestive tract and 0% for the lower digestive tract. A Certificate of Determination was issued on 18 July 2014 to this effect.

On 1 November 2016 the insurer referred the worker for examination by Dr Stening, who assessed 25% whole person impairment – 24% lumbar spine and 1% scarring.

On 11 April 2017 the worker's solicitors accepted Dr Stening's assessment, requesting a further Complying Agreement under which the worker would receive a further amount for lump sum compensation.

Even though it was a report commissioned by the insurer, the insurer disputed the worker's entitlement to

make the claim, relying upon the decision of *Cram Fluid Power Pty Limited v Green*.

The worker asserted the claim was valid and the claim was made on 25 October 2011. That claim was never withdrawn or dealt with.

On 15 June 2017 the insurer accepted the assessment of 25% whole person impairment. The insurer provided a Complying Agreement that provided for 25% whole person impairment. It did not make any allowance for additional pain and suffering pursuant to Section 67. The worker did not respond.

The worker lodged proceedings in the Workers Compensation Commission. The insurer withdrew the offer on the basis Section 66(1A) applied and the worker was not entitled to make a further claim for compensation under Section 66 and 67.

The matter came before Arbitrator Wynyard who determined that the worker had exhausted her entitlements pursuant to Section 66 by resolving her claim in 2014 and an award for the respondent was entered.

The worker appealed. The appeal was successful and the Deputy President found there were errors in the Arbitrator's determination and remitted the matter to a different Arbitrator, rather than determine the matter on appeal.

Arbitrator Capel re-determined the matter and issued a Determination on 1 May 2018.

In relation to whether the 2012 claim was a new claim or an amended claim, the arbitrator determined a withdrawn or unresolved claim can be amended before a final determination. The claim made on 25 October 2011 was a valid claim, was capable of being paid and it was not withdrawn or finally dealt with before 19 June 2012.

The letter of demand dated 12 December 2012 making a claim for 21% whole person impairment was not a fresh claim. The arbitrator was satisfied this letter merely confirmed the unresolved claim made initially on 25 October 2011.

Furthermore, the fact the insurer accepted the 25% whole person impairment was indicative of the fact they accepted a valid claim was made and in fact drafted a Complying Agreement for execution. It was only after intervention of solicitors that the insurer disputed liability which the Arbitrator stated was not acceptable.

The claim turned on statutory interpretation.

It was clear the claim made by the worker on 25 October 2011 was a valid claim as it was capable of being paid. It was never withdrawn or finally dealt with prior to 19 June 2012.

The claim made on 12 December 2012 was an amendment to the claim which was previously made and therefore the 2012 amendments did not apply as a consequence of the decision of *Goudappel*.

In the arbitrator's view the terminology used in letters dated 25 October 2011 and 12 December 2012 when read together could only lead to the conclusion the worker intended to make only one claim and therefore was satisfied the claim made on 12 December 2012 was an amendment to the claim made on 25 October 2011. This claim was subsequently finalised in the Commission on 18 July 2014. The claim was not affected by the 2012 amendments and consequently the worker was entitled to bring one further claim for lump sum compensation and did so on 11 April 2017.

Accordingly the arbitrator required the parties to execute a Complying Agreement.

Workers compensation legislation must be read beneficially as a whole.

A claim should only be viewed as determined or finalised once dealt with or paid. If it was not determined or finalised before the 2012 amendments it was not dealt with before the 2012 amendments. The same claim was not the one more claim contemplated by the 2012 amendments.

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A Deed of Release Can Exclude a Subsequent Claim for Industrial Deafness

Despite the prohibition against contracting out of workers compensation liability in Section 234 of the *Workplace Injury Management Act 1998* the recent Presidential determination in *Heidtmann v Rail Corporation New South Wales [2018] NSWWCCPD 23* has upheld the effectiveness of a Deed of Release entered into by the parties following resolution of a work injury damages claim releasing the respondent from all claims sustained whilst in the employ of the respondent, to prevent a subsequent claim for industrial deafness being brought.

The worker was employed as a train driver between 1972 and 2004. In 1995 he received a payment of lump sum compensation for hearing loss.

After he ceased employment the worker made a claim for work injury damages which was resolved in 2012 with payment of an agreed sum. The parties entered into a Deed of Settlement which included a release by the worker from further claims against his employer arising out of or in any way related to the injuries or employment referred to in a schedule for the Deed. The schedule included a reference to the full period of the worker's employment. Included in the description of "nature of injury" was:

"Any other injury suffered or arising out of or during the course of the releasor's employment with the employer between 10 July 1972 and 23 July 2004.

The nature and conditions of employment and any specific injury in the course thereof causing or aggravating injury to the head, neck, whole of spine, all of both upper and lower limbs, trunk, chest, disease, all senses, skin and any primary or secondary psychological injury, functional overlay, internal organs, sexual organs, brain and sequelae excluding latent injury."

In 2017 the worker's solicitors made a claim for payment of compensation for whole person impairment in respect of hearing loss as well as the cost of provision of hearing aids pursuant to Section 60.

The employer disputed liability on the basis of medical evidence which suggested the claimant's impairment fell below the 10% threshold for lump sum compensation and also the terms of the Deed which released the employer from all claims in respect of injury sustained by him whilst in his employment.

The dispute proceeded before an arbitrator who found in favour of the employer.

The arbitrator held that inclusion of the reference to "all senses" in the schedule to the Deed, which was not disputed included hearing loss, was sufficient to establish the settlement payment to the worker was at least in part monetary compensation for loss of hearing. He concluded that hearing loss was not a "latent injury" because the claimant knew he had industrial deafness that was gradually worsening over time throughout his employment and since his retirement. Overall the arbitrator was satisfied the claim in respect of hearing loss was barred by operation of Section 151A(1)(a) of the 1987 Act which provides:

"151A Effective Recovery of Damages on Compensation

(1) if a person recovers damages in respect of an injury from the employer liable to pay compensation under this Act then, except to the extent that sub-section (2), (3), or (4) covers the case:

(a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), ...

The worker challenged the decision and appealed. The appeal was considered by the President, Judge Keating. As the appeal had been filed outside the relevant 28 day period it was necessary for the President to consider the worker's prospects of succeeding on the appeal as one of the matters to be taken into account in exercising his discretion to extend the time for bringing the appeal.

The President agreed the issues in the appeal turned on the construction of the Deed and were the same to be applied to a written contract. He referred to authorities which indicated the principles underlying construction of a written contract indicate it is to be construed by reference to what a reasonable person would understand by the language in which the parties expressed their agreement having regard to the context in which the words appear and the purpose and object of the transaction.

The President found the worker accepted the terms of the Deed would exclude injury in the form of hearing loss if it occurred between the dates specified in the schedule. He rejected the argument from the worker's Counsel to the effect a distinction should be drawn between the injuries which were the subject of the claim for work injury damages and the other injuries noted in the schedule which provided a description of areas of potential liability for the employer. The arbitrator had rejected that submission because the release identified the parties' agreement to release the employer from any claims the worker had, could, would or might have against the employer "arising out of or in any way related to the injuries or employment referred to in the schedule". The injuries referred to in the release could only refer to injuries referred to in the schedule including those described under the heading "Nature of Injury" which included the "nature and conditions of employment and any specific injury in the course thereof causing or aggravating injury to… all senses". This excluded liability for injuries of any kind that occurred during the course of the worker's employment.

As the industrial deafness injury was deemed to have occurred on the final day of the claimant's employment it was released by the operation of the Deed.

It will be interesting to see whether the worker seeks to have the decision reviewed by the Court of Appeal.

We also wonder whether a similar interpretation would be applied in circumstances where a worker was unaware he had industrial deafness until after he ceased employment a settlement deed had excluded all industrial deafness claims even though no previous industrial deafness claim had been made. Will that be enough for Commission to exclude latent injury from being caught by releases under Deeds.

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Limitation Arguments Can Succeed

In New South Wales the *Workers Compensation Act* 1987 provides that an injured worker has three years from the date of injury to commence proceedings against their employer. However, in order to

commence proceedings, the injured worker must satisfy a threshold of 15% whole person impairment and also comply with a number of procedural prerequisites. More often than not, by the time this has occurred more than three years have passed since the injury occurred.

In order to overcome the limitation issues there must be a reasonable explanation for the delay and the extent of actual prejudice must be considered. It has generally been difficult for defendants to successfully argue against an application for leave. Claimants assert that there was a reasonable explanation for the delay as threshold was only recently achieved and often actual prejudice is difficult to prove.

However, in the recent decision of *Gower v State of NSW,* the Court of Appeal upheld a decision by the trial judge who did not grant leave to proceed.

Shane Gower sustained injury on 12 September 2003 when he was struck by a soccer ball that was thrown by a student at the high school where he worked as a casual teacher. As a consequence he sustained a major depressive disorder. The claimant ultimately commenced proceedings in the District Court claiming work injury damages on 23 March 2016.

The claimant was not found to have established the requisite threshold until 13 May 2014 when he received a Medical Assessment Certificate assessing the degree of his permanent impairment of at least 15%.

The claimant filed a Notice of Motion seeking an extension of the limitation period. The State of NSW filed a Notice of Motion seeking an order the proceedings be struck out.

The Notices of Motion proceeded before Gibson DCJ in the District Court who dismissed the proceedings.

The claimant appealed.

Basten JA in the Court of Appeal in his judgment noted that in order to obtain leave to commence proceedings out of time the claimant needed to establish that:

- there was a sufficient and acceptable explanation for the delay;
- he had a reasonably arguable claim of negligence against the State; and
- conducting a trial more than 12 years after the injury was suffered would not cause the State of NSW significant prejudice so as to make the trial unfair.

Basten JA noted that the claimant's assumption was that he was unable to commence proceedings for damages until he had obtained a medical assessment that he had suffered a degree of permanent impairment of at least 15%.

Justice Basten in his judgment after considering the relevant legislation provisions stated:

"Why he did not make a claim within time was a matter about which one can only speculate. The trial judge inferred it was a deliberate forensic decision; it was not necessary to take that step, but it was not material to the outcome.

In June 2005 Dr Parmegiani, consultant psychiatrist, saw the appellant and concluded that, following the incident of 12 September 2003, he had been "rendered totally unfit for work". That report also concluded that the injuries were "not yet at maximum medical improvement" and that "if he were to undergo specialist treatment in relation to his drinking, stabilisation will occur within three to six months…

A further report was in fact obtained from Dr Parmegiani in October 2013, of which the primary judge said that it "could just as easily have been written in 2007". In any event the failure to make a claim within the period was unexplained.

It is of course possible that even had a claim been made within the three year period, proceedings would not have been commenced until after that period. However that possible course of unavoidable delay can carry little weight. First, had a claim been made at an early point, the State would have been on notice from that moment that it faced the prospect of work injury damages proceedings.

Secondly, in the case of a medical dispute, it was a matter for an approved medical specialist to determine whether or not the claimant's condition was fully ascertainable and, if so, the level of permanent impairment. When that would have occurred cannot be said."

White JA in his judgment noted that the trial judge was of the opinion that a fair trial in this case would be impossible. Further, the claimant had been advised of the limitation period by his solicitor and allowed it to expire. In addition, the claimant had not provided a full or satisfactory explanation for the delay. The apparent weakness of the case was a further factor which militated against granting an extension of time.

White JA in his judgment noted there was no dispute the claimant was advised of the limitation period by his solicitor and so in a sense it was true he had deliberately allowed it to expire. However, this was only in the sense that it could be inferred a deliberate decision was taken not to commence proceedings. However, no proceedings could have been taken that would not have been summarily dismissed as at that stage the claimant could not have demonstrated he satisfied the relevant threshold. In addition, following the introduction of new WorkCover Guidelines on 27 October 2006 the claimant could not have brought a claim for lump sum compensation when the amount of whole person impairment could not have been assessed. Therefore the primary judge had erred in relation to the basis of her judgment.

However, White JA declined to extend the limitation period.

A critical factor was the fact that there had been no earlier notification of an intention to bring a claim for work injury damages.

White JA in his judgment stated:

> *"No reason was advanced by Mr Gower as to why Notice of Claim for work injury damages was not served at the same time as the Notice of Claim for lump sum compensation. As noted above, a Notice of Claim for work injury damages can be given notwithstanding that the worker has not been assessed to have suffered a degree of permanent impairment of at least 15%. Moreover, as adverted to below, the fact that a formal Notice of Claim for work injury damages can only be made if the worker is in a position to give a Notice of Claim for lump sum compensation, does not mean that a worker contemplating bringing a claim for work injury damages cannot give informal notice of that intention conditionally on the worker's obtaining an assessment of permanent impairment that would satisfy the threshold imposed by Section 151H. That was not done in this case. The significance of this should be considered in conjunction with consideration of the strength of Mr Gower's claim and evidence of actual or presumed prejudice to the respondent in having a fair trial 15 years or so after the event."*

White JA went on to consider the merits of the case. His Honour noted that in this particular case Gower had provided an unsigned and undated statement that was attached to the Pre Filing Statement but the Pre Filing Statement did not identify the evidence that Gower proposed to give. White JA noted that Section 318(1)(d) of the legislation does not require disclosure of evidence to take any particular form however the evidence to be relied on must be clearly set out in the Pre Filing Statement. In this case, there was simply an allegation it was known students had a propensity to cause injury by throwing or kicking soccer balls at other students or teachers but no disclosure of the evidence relied on to establish that allegation.

White JA also considered the relevant case law in some detail and concluded:

> *"Although in Itek Graphix Pty Limited v Elliott, this Court said that the discretion under Section 151D of the WC Act was to be exercised having regard to the rationales for limitation periods expressed in Brisbane South Regional Health Authority v Taylor, no issue arose in Itek Graphix Pty Limited v Elliott concerning the operation of Section 151H of the WC Act. Section 151H is antipathetic to the rationales for a limitation period identified in Brisbane South Regional Health Authority v Taylor if, perhaps because of psychological injury, no proceeding can be brought for years after the event because the degree of permanent impairment cannot be ascertained. None of the cases has considered what the position is if evidence is lost which would tend against the prospects of a fair trial, but the plaintiff could not have brought a claim for damages before the limitation period expired, or before the evidence was lost, because of the legislative constraints. To adapt the language of Basten JA in Strasburger Enterprises Pty Limited t/as Quix Food Stores v Serna, the limits of the discretion are to be found in the subject matter, scope and purposes of the statute. Where the statute imposes barriers against the bringing of claims that result in delay leading to the loss of evidence, but permits leave to be given for the commencement of proceedings, the proper exercise of the discretion is likely to be highly influenced by whether the claim is apparently meritorious and the degree of prejudice.*
>
> *Brisbane South Regional Health Authority v Taylor, Prince Alfred College Inc v ADC and Itek Graphix Pty Limited and similar cases must all be understood in light of the issues with which those cases were concerned. I do not think that in a case such as the present they require that extension of the limitation be refused if the delay in commencing proceedings has resulted, or is presumed to have resulted, in the loss of evidence that affects the chance of a fair trial. That may be the consequence in a particular case, but it is not an inevitable rule.*
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> *The rationale underlying Clause 3 of Part 6 of the 2006 WorkCover Guidelines (replicated in Clause 7.3 of the 2012 Guidelines) is applicable even if it is not possible for an injured worker to make a claim for work injury damages in accordance with Section 260 of the WIM Act, because the worker is not in a position to make a claim for lump sum compensation. It is still relevant to the exercise of the discretion under Section 151D(2) whether the plaintiff has or has not given notice of his or her intention to make a claim for work injury damages when such a claim could properly be made, so as to alert the employer and its insurer to the prospect of the employer's facing a claim that the injury was suffered as a result of its alleged negligence."*

In this case this had not been done. The fact there was an ongoing compensation claim was not in itself sufficient. Actual prejudice therefore arises and the claimant is not able to proceed with his work injury damages claim.

It remains to be seen whether or not there will be an increase in notifications of potential claims for work injury damages at earlier stages in an attempt to overcome Section 151D issues in the future.

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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.