Gillis Delaney Lawyers

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Editors:

David Newey

Amanda Bond

GILLIS DELANEY LAWYERS
LEVEL 40, ANZ TOWER
161 CASTLEREAGH STREET
SYDNEY NSW 2000
AUSTRALIA
T: + 61 2 9394 1144
F: + 61 2 9394 1100
www.gdlaw.com.au

Unfair Contract Term Legislation to Apply To Insurance Contracts

In our May newsletter we warned about a storm front approaching for the insurance industry with the application of Unfair Contract Term ("UCT") legislation to insurance policies on its way. On 27 June 2018 the application of UCT legislation to insurance contracts became a reality with the release of the Government's Proposal Paper for its proposed model with an invite to stakeholders to provide submissions by 27 July 2018. Legislation is likely to find its way to Parliament in 2018.

When the legislation commences it will apply to insurance contracts entered into, renewed or varied after the commencement of the legislation. It will apply to all contract terms for renewals and where insurance policies are varied by endorsement or otherwise it will apply to those variations without impact on the terms in place before the legislation commenced.

An underlying assumption to the introduction of UCT legislation to insurance is that an insurance policy is a standard form contract. The Government's view is:

> *"Consumers and small businesses entering into standard form insurance contracts should have confidence that the contract accurately reflects the cover agreed with the insurer. They should also have appropriate remedies when they suffer detriment as a result of terms in the contract which are unfair."*

UCT legislation is not new to Australia. UCT legislation has applied to all consumer contracts entered into after 1 July 2010 and small business contracts since 12 November 2016. Small business contracts are contracts where at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis) and the upfront price payable under the contract is no more than $300,000 or $1 million if the contract is for more than 12 months.

There has been continuous debate about the extension of UCT legislation to insurance which has been driven by consumer groups and the Government. Most insurance contracts will fall within the definition of

small business contracts likely to be adopted for the UCT legislation.

The proposed UCT protection for insurance contracts is wide. It is proposed that the UCT laws will apply to consumers and small businesses who are parties to a contract of insurance as well as third-party beneficiaries under the contract. Specifically:

- 'consumer contracts' and 'small business contracts' will include contracts that are expressed to be for the benefit of an individual or small business but who are not a party to the contract; and
- third-party beneficiaries would be able seek declarations that a term of a contract is unfair.

Small businesses and consumers who are third party beneficiaries to an insurance contract where there is an expanded definition of insured incorporating other businesses and individuals as insured parties will have the benefit of UCT protections.

Currently UCT legislation provides a term in an insurance contract will be void if it is unfair. A term in a contract is unfair if:

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

However applying this approach to insurance has its complications as the legitimate interests of an insurer include restricting the cover to what is underwritten where the insured's need for cover are endless. To provide guidance to insurers and consumers it is proposed to provide clarity about when a term is reasonably necessary to protect the legitimate interests of an insurer.

We are likely to see a form of scoping of the concept of the "insurer's legitimate interests". Terms that protect legitimate interests will be terms that "reasonably reflect the underwriting risk accepted by the insurer". However there is likely to be a sting in the tail with the addition of a requirement that a term does not protect a legitimate interest if it disproportionately or unreasonably disadvantages the insured. Arguments about cover under a policy being made illusory by exclusions when one has regard to the nature of the policy concerned may find support from UCT protections.

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

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

A term is transparent if the term is:

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

Courts currently have the power when dealing with unfair contract terms to make orders:

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

The following are examples of the kinds of terms identified by UCT legislation as examples of terms that may be unfair:

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

It is proposed that examples specific to insurance contracts will be added to this list. For example, the following kinds of terms could be added:

- terms that permit the insurer to pay a claim based on the cost of repair or replacement that may be achieved by the insurer, but could not be reasonably achieved by the policyholder;
- terms which make the insured's ability to make a claim conditional on the conduct of a third-party over which the insured has no control; and
- terms in a contract that is linked to another contract (for example, a credit contract) which limit the insured's ability to obtain a premium rebate on cancellation of the linked contract.

Insurance contracts are comprised of 3 components:

- the insuring clauses and basis of settlement provisions,
- the exclusions,
- the general conditions.

There are often pre-conditions to cover and whether those pre-conditions go to the subject matter of the contract are likely to result in lively debate as they will not be subject to review if they do.

There are exclusions that operate on the happening of an act and these exclusions may come within the scope of UCT review even though they concern the risk that is underwritten if the condition disproportionately or unreasonably disadvantages the insured.

All general conditions will be up for review under UCT laws.

UCT laws will cause insurers to carefully review a range of usual provisions in insurance contracts including:

- cancellation provisions;
- premium refund clauses;
- provisions dealing with the alteration of risk;
- cross liability clauses; and
- notification clauses, particularly in claims made policies.

We may even see a change to drafting practices for conditions such as the "reasonable precautions condition" found in most policies which requires an insured to exercise reasonable care (whilst covering the insured's negligence). The Courts have read this condition down to import the concept that that requirement seeks to prevent an insured from deliberately courting the risk rather that limit cover where the insured does not take care. Plain language clauses setting out the true nature of the condition may become a necessity.

The introduction of UCT legislation is not intended to limit the way insurers underwrite, rather it is hopes to deliver certainty of cover and eliminate terms that are unfair.

To introduce UCT legislation to insurance contracts the Government has 2 choices, include the changes in the *Insurance Contracts Act* ("ICA") or simply amend section 15 of the ICA which prevents the application of UCT legislation to insurance contracts and then amend the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to incorporate some insurance specific nuances. Both strategies have been floated as a possibility in the Proposal Paper however we feel that the second approach is more likely and seems to be the preferred approach.

It is proposed that the UCT protections will not apply to the "main subject matter" of the contract, a term that will require definition in the legislation, as this concept does not currently exist in Australian UCT laws. The "main subject matter" is likely to be defined narrowly as terms that describe what is being insured. A proposed main subject matter exclusion would introduce a threshold for defining which terms are open to review without any need to consider whether or not the term is unfair.

UCT protections will not apply to upfront pricing and are not intended to be regulate premiums in any way. It is also proposed that the quantum of the excess payable under an insurance contract should be considered part of the upfront price and, therefore, excluded from review under UCT laws.

Insurance contracts that allow a consumer or small business to select from different policy options will be considered standard form contracts and subject to UCT protection.

There will be a major shift in the landscape for insurers and a raft of amendments to insurance contracts as insurers grapple with the risk that clauses in a contract may be found to be unfair.

Consumers and small businesses will have protections in addition to those in the Insurance Contracts Act.

Crafting insurance contracts that do not fall foul of the UCT laws will become an art form as insurers develop techniques in scoping insuring clauses and exclusions without disproportionately or unreasonably disadvantaging the insured when regard is had to the nature of cover offered.

The insurance industry is about to step into a brave new world in Australia, perhaps before the end of 2018.

David Newey
dtn@gdlaw.com.au

National Redress Scheme For Sexual Abuse Victims Commenced On 1 July 2018

The National Redress Scheme For Sexual Abuse Victims recommended by the Commonwealth Government's Royal Commission into Institutional Responses to Child Sexual Abuse commenced on 1 July 2018.

The Scheme has been created by the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 that was passed by parliament on 19 June 2018.

All State and Territory Governments have joined the Scheme to ensure that all past and current Government institutions are participants in the Scheme.

Non–government institutions can join the Scheme subject to the approval of Government Minister responsible for the Scheme so that people who experienced abuse while in their care can access redress.

The following non-government institutions have announced they will join the Redress Scheme:

- the Catholic Church
- the Anglican Church
- The Salvation Army
- the Uniting Church
- Scouts Australia
- YMCA
- Barnardos Australia
- Jewish House NSW.

The list of non-government institutions that join the Scheme will grow with time with applications to participate being accepted until 30 June 2020. A list of participating institutions can be accessed at:

https://www.nationalredress.gov.au/institutions/search

The redress provided under the Scheme is:

- a redress payment of up to $150,000 (no minimum);
- a counselling and psychological component including access to counselling and psychological services provided under the scheme or a payment of up to $5,000 to enable the person to access counselling and psychological services provided outside of the scheme; and
- a direct personal response from each of the participating institutions that are primarily responsible for the abuser.

An assessment framework for determining the redress payment will be developed by the Redress Operator but has not been published at this stage.

Previous compensation payments can affect the redress payment that is offered. This includes payments from other redress schemes and Victims of Crime schemes or out of court settlements. If the payments don't relate to the abuse the subject of an application it won't be considered to reduce the redress payment. Otherwise, the value of any earlier payment will be deducted from the Redress payment. Any earlier payments will be adjusted to today's value. This will be done using an annual inflation rate of 1.9%. An example provided by the redress operator is where a payment of $40,000 made 10 years ago was made that sum would be adjusted to $48,283.84 in 2018. If a person signed an agreement not to speak about their abuse or make any further claim they can still apply for redress.

If a person has already been to court about the abuse that occurred, and the court made a ruling, including awarding damages for the abuse, the person cannot apply to the Scheme for redress from the institution that has already paid compensation.

Participating institutions pay the cost of providing redress to the victim.

Payments under the Scheme are funded by the Commonwealth and reimbursed by participating institutions on a quarterly basis.

Participating institutions must also make contributions towards the administration of the Scheme calculated at 7.5% of the institutions' liability to make redress payments in any quarter.

A person must meet specified eligibility criteria to obtain redress including:

- that the person was sexually abused,
- the abuse is within the scope of the scheme,
- the abuse is of a kind for which the amount of redress payment worked out under the assessment framework would be more than nil,
- one or more participating institutions are responsible for the abuse, and
- at the time of the application, the person is an Australian citizen or a permanent resident of Australia.

The legislation has the following definitions:

> *"Sexual abuse" of a person who is a child includes any act which exposes the person to, or involves the person in, sexual processes beyond the person's understanding or contrary to accepted community standards.*
>
> *"abuse" as sexual abuse and non-sexual abuse.*

Non-sexual abuse of a person is related to sexual abuse of the person if a participating institution is responsible for both the sexual abuse and the non-sexual abuse of the person.

Abuse of a person is within the scope of the scheme if:

- it occurred when the person was under the age of 18; and
- it occurred:
  - inside a participating State or Territory; or
  - outside Australia; and
  - it occurred before the Scheme start day.

An institution (whether or not a participating institution) is responsible for abuse of a person if the institution is primarily responsible or equally responsible for the abuse.

An institution is primarily responsible for abuse of a person if the institution is solely or primarily responsible for the abuser having contact with the person.

Where more than one participating institution has been responsible for abuse the redress payment will be apportioned between the institutions responsible.

Factors used to determine whether an institution is primarily responsible for an abuser include:

- whether the institution was responsible for the day-to-day care or custody of the person when the abuse occurred;
- whether the institution was the legal guardian of the person when the abuse occurred;
- whether the institution was responsible for placing the person into the institution in which the abuse occurred;
- whether the abuser was an official of the institution when the abuse occurred;
- whether the abuse occurred:
  - on the premises of the institution; or
  - where activities of the institution took place; or
  - in connection with the activities of the institution.

Regulations and Rules made pursuant to the Redress legislation can prescribe other factors that will be taken into account when determining the responsibility of an institution.

The Redress Scheme will run for 10 years.

People can lodge applications for redress from 1 July 2018 until 30 June 2027.

Applications can be submitted online, or in paper form by post.

The Scheme operator's website is at https://www.nationalredress.gov.au and the online application can be accessed on the site.

The Scheme applies to all acts that occurred before the commencement of the Scheme.

Applications will be determined on the papers by a decision maker appointed by the Scheme Operator.

Where the Decision Maker considers that there is a reasonable likelihood that the person is eligible for redress an offer of redress to the person is made.

An offer must be open for acceptance for at least 6 months and time for acceptance can be extended.

A person may accept or decline the offer.

If the person accepts the offer, then the person becomes entitled to redress under the Scheme and is required to release participating institutions and officials from all civil liability for the abuse. Those institutions and officials released are the participating institutions determined to be responsible for the abuse, their officials, their associates and the officials of their associates. The abuser is not released from liability.

If the person declines the offer of redress the participating institution and its officials are not released from liability for the abuse.

The acceptance of an offer of redress will remove all civil liability for participating institutions for the abuse.

A person may seek a review of an Offer and on review the offer can be affirmed or varied. A participating institution cannot seek a review of an offer.

Only one application for redress can be made under the Scheme.

A determination of a Decision Maker is not a finding of law or fact made by a court in civil or criminal proceedings however it does result in the imposition of a civil liability on the institution to make payments under the scheme in relation to that redress.

There are restrictions preventing the use of the redress application and documents created solely for the purpose of the redress application in civil proceedings in the event an offer for redress is not accepted.

The death of a person does not bring to an end the rights to redress payments when an application is on foot and the Decision Maker will determine who the payment should be made to.

If the Operator approves a person's application for redress a written offer of redress will issue which includes details of:

- the amount of the redress payment;
- the counselling and psychological component of redress;
- the participating institutions determined to be responsible for the abuse;
- where any responsible institution is a defunct institution that has a representative the person who is the representative;
- the acceptance period for the offer;
- gives information about the opportunity for the person to access legal services under the scheme for the purposes of obtaining legal advice about whether to accept the offer;

- explains the effect of acceptance of an offer (which is about the release from civil liability of the responsible institutions, their officials, their associates and the officials of their associates) should the person accept the offer;
- informs the person that the person will not be able to make another application for redress under the scheme, whether or not the offer is accepted.

Insurers have expressed concerns that details included in an offer may not have sufficient information to permit the insurer to determine whether the circumstances of the abuse give rise to a liability covered under any insurance policy.

Insurers may be concerned that the redress payment is not compensation in the strict sense and may not fall for cover under a typical liability insurance policy. It has been reported in the press that some insurers have determined to step away from meeting redress payments as they do not regard the payments to be compensation leaving the institution liable to foot the cost of the payment or dispute that determination. Time will tell whether insurers accept liability for redress payments on a global basis or on a case by case basis.

A defunct institution (one that no longer exists) can be a participant in the scheme.

If a defunct non-government institution is declared to be a participating institution there must be an agreed representative for the institution and any obligation or liability imposed on a participating defunct institution is taken to be imposed instead on the representative for the institution.

The Scheme applies to people who experienced child sexual abuse in institutions and in formal foster and kinship care settings, where an institution was responsible for placing the child in care.

A participating institution can withdraw from the Scheme by requesting the Minister to revoke the declaration the institution is a participating institution.

Two or more participating institutions may form a participating group for the purposes of the scheme.

Members of the group will be associates of each other.

If a person accepts an offer of redress where a group member is responsible for an abuser, then the person releases the participating institutions determined to be responsible for the abuse (and their officials), as well as all of the associates of that institution(for example group members) and their officials.

All participating groups must have a representative for the group. The representative may act on behalf of each member of the group and representative will be liable for payment of funding contributions of any defaulting group members but will not have the primary liability to make the payment.

Redress is now available to victims of sexual abuse where an institution is solely or primarily responsible for the abuser having contact with the person provided that institution participates in the Scheme. To encourage institutions to opt in to the scheme institutions who participate will be released from civil liability for the abuse where an offer of redress is accepted. A person can make an application for redress, receive an offer and decide not to accept the offer in which case their rights to bring a civil claim are not effected.

The commencement of the redress scheme heralds the beginning of a unified approach by institutions responsible for children in the provision of redress for victims of sexual abuse.

David Newey
dtn@gdlaw.com.au

Personal Payment Orders & Fines. What's the Future for Management Liability Insurance?

Personal payment orders for fines were back in the news in July following the Full Federal Court's determination of penalties in the matter of *CFMEU and Myles v The Australian Building and Construction Commission.*

The case of *Myles* had made its way to the High Court after the Australian Building and Construction Commission BCC's original attempt to obtain orders from the Court which sought to stop Myles from obtaining monies from the Union to pay his fine arising from breaches of the *Fair Work Act 2012.*

In February 2018 the High Court determined that personal payment orders could be made for breaches of the *Fair Work Act* and remitted the proceedings to the Full Federal Court to re-determine the penalty Myles should pay.

The original penalty determined by the trial judge included an order that the union not indemnify Myles for the fine. On appeal the Federal Court determined the orders made by the trial judge were not appropriate as the Court did not have power to make a non-indemnification order quashing that part of the order but did not reset the amount of the penalty. It therefore fell to the Full Federal Court to determine an appropriate penalty where a personal payment order was to apply.

The primary judge originally imposed fines of $70,000 on the Union and $18,000 on Myles for three breaches of the *Fair Work Act*.

When the Full Federal Court came to determining the appropriate penalties in contemplation of a personal payment order being made determined it determined the appropriate penalties were $111,000 for the Union and $19,500 for Myles. This was an increase on the penalties determined by the primary judge. Further, the Full Federal Court determined there was ample

foundation to consider a personal payment order was warranted, particularly in the complete absence of any evidence of contrition or change of approach from either the Union or Myles.

The Full Federal Court observed:

> *"The source of the implication of the power (to make a personal payment order) does not limit or constrain the circumstance of its exercise by some "wait and see" principle. The imposition of the order must be appropriate, not to increase the sting of the proper penalty (as Senior Counsel for the Commissioner accepted) but to ensure, so far as possible, that the burden of the proper penalty be recognised. Here the reasons why in our view a personal payment order can be justified are straightforward. The primary judge said the following ... in support of the non indemnification order:*
>
> *'As I have noted ... a registered organisation such as the CFMEU can only behave in the way it does because individuals within the Union decide that action should be taken. The CFMEU is legally represented and has access to legal advice. Both the organisation and its officials who lead to the contravening conduct seen, on the evidence before me, to be uninterested in whether the conduct is lawful or not, provided they consider the industrial outcome to be sufficiently important. The CFMEU and its individual officers such as Mr Myles operate very much on an end justifies the means basis. The need for an individual to take responsibility for conduct found to be unlawful, and for that responsibility not to be transferred lies behind provisions such as s77A of the Competition and Consumer Act. Where corporate entities are principal actors, it is one of the few mechanisms by which individual behaviour may be changed or affected and the compliance objects of regulatory schemes advanced.'"*

The Full Federal Court determined that a relatively wide payment order was appropriate. The considered the appropriate order was that Myles pay the penalties personally in that:

- he must not whether before or after the payment of the penalties, seek or encourage the Union in any way whatsoever, directly or indirectly, to pay him or for his benefit in any way whatsoever any money or benefit referable to payment of the penalties whether in whole or in part; and
- he must not accept or receive from the Union in any way whatsoever any money or benefit referable to payment of the penalties whether in whole or in part.

The Court declined to make an order that Myles attend the office of the Commission with a personal cheque or bank cheque to pay the penalties. The Court also declined to make an order that affected others besides the Union. The order was directed to prevent the Union from undercutting the sting or burden of the personal penalty.

Ultimately the Court invited the parties to make submissions on the terms of the final order, however it is clear that the personal payment order will be directed at prohibiting the Union from paying funds to Myles directly or indirectly at any time.

The imposition of a personal payment order in this case is grounded upon the principles that the *Fair Work Act* permitted the Court when imposing a penalty, to make any order the Court considered appropriate. Similar provisions are found in work health and safety legislation which governs fines for contraventions of that legislation.

It is clear that personal payment orders are an option available to judges imposing penalties for breaches of the work health and safety legislation.

Management liability insurance provides cover to businesses for fines imposed for contraventions of the work health and safety legislation. A business must pay a premium for that cover however the ultimate penalty is often far more than the premium paid for the insurance. On one view the penalty which is imposed as a deterrent for future breaches does not have the same impact on a business where it is insured for the fine.

The ABCC's success in obtaining personal payment orders and its drive to seek personal payment orders in cases where Union officials have breached Fair Work legislation may well motivate regulators responsible for work health and safety to explore the potential of personal payment orders where companies contravene the work health and safety legislation and have insurance to cover the fine and costs payable to the prosecutor. Personal payment orders would prevent an insurer from paying fines.

The management liability insurance market is likely to be significantly affected if insurers cannot offer insurance to cover fines for contraventions of WHS legislation or are prevented from paying fines as a result of personal payment orders. Insurers may need to look to enhance other benefits to ensure the interest in management liability insurance does not decrease.

Until WHS regulators determine to seek personal payment orders in addition to WHS fines insurers can continue to offer cover for payment of WHS fines. However, once the first personal payment order is made the insurance industry will be faced with a dilemma. The insurance for fines could be offered, leaving it to the Court to determine the circumstances where it is appropriate to make a personal payment order preventing an insurer from paying the fine or cover for fines could be removed from management liability insurance.

If regulators pursue personal payment orders to operate with WHS penalties and a head of steam builds up with continual applications the future of cover

for fines for contraventions of WHS legislation will be in doubt.

A further problem that would arise from personal payment orders for contraventions of WHS legislation by individuals concerns the payment of WHS fines by employers and or their insurers. Personal payment orders may be sought against individuals and directors that have contravened WHS legislation where their employer has contravened that legislation as well. A personal payment order made against the individual would prevent the employer from paying the employee/director's fine. That would be a matter of concern for employees who play an active role in the management of work health and safety in the workplace and for directors who must exercise due diligence in regard to safety matters. Personal payment orders attaching to fines of directors and employees could have far reaching effects and discourage individuals from assuming responsibility for work health and safety matters.

There are interesting times ahead.

Where there are fines imposed for conduct that contravenes statutory obligations and those fines are imposed to deter the occurrence of offences the sting is removed if the fine is insured and penalties which are imposed to discourage re-offending may not have the deterrence effect intended.

We wonder whether Regulators will pursue personal payment orders for contraventions of the WHS legislation where businesses have cover for the fines that are ultimately imposed.

David Newey
dtn@gdlaw.com.au

The Widening Span of Vicissitudes

In personal injury claims the traditional approach has been to deduct 15% for vicissitudes when assessing future economic loss, to account for adverse future changes in circumstances or fortunes unrelated to an accident that could impact on future earnings. Sometimes, for example if an injured person suffers from a health condition that is likely to impact on future earning irrespective of any injury, the deduction for vicissitudes may be greater.

When the *Civil Liability Act* was introduced in NSW in 2002 the legislation specified the matters that the Court must take into account when determining an award of damages for future economic loss. Section 13 provides:

> *"13 Future Economic Loss – Claimant's Prospects and Adjustments*
>
> *1. A Court cannot make an award of damages for future economic loss unless the claimant first satisfies the Court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.*
>
> *2. When a Court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.*
>
> *3. If the Court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."*

Since the legislation was introduced that section has been determined to only apply to future loss of wages.

That however has changed with the recent decision of the NSW Court of Appeal in *Avopiling Pty Limited v Bosevski; (Avopiling Pty Limited v the Workers Compensation Nominal Insurer).*

Riste Bosevski was employed by Professional Contracting Pty Limited and in 2006 sustained injury at a worksite in New South Wales. Two employees of Avopiling were erecting a mast on a pile driving rig at the worksite. There was a primary and auxiliary cable attached to the mast and the auxiliary cable snapped under extreme tension. That was caused by metal objects at the end of the auxiliary cable being pulled into the sheave at the top of the mast. Some of the metal objects were too large to go through the opening and when the cable snapped various metal objects that weighed around 25kg in total were released and fell to the ground. When the accident occurred Bosevski was standing more than six metres away. Bosevski was standing with his supervisor near the pile driving rig and was struck by metal objects that fell as a consequence of the snapped cable. Bosevski sustained injury to his head, neck and chest. Bosevski commenced proceedings in the District Court against Avopiling in 2009 and in 2011 the Workers Compensation Nominal Insurer commenced recovery proceedings against Avopiling pursuant to Section 151Z(1)(d) of the *Workers Compensation Act 1987* (NSW) seeking to recover payments made to, for and on behalf of Bosevski. Avopiling argued in their defence to both claims that any damages ought to be reduced under Section 151Z(2) of the *Workers Compensation Act 1987* due to the negligence of the employer.

At trial before His Honour Rothman J, Bosevski succeeded against Avopiling and was awarded damages in the sum of $2,632,390.93. The workers compensation insurer recovered payments made and interest totalling $919,225.23.

Rothman J determined there was no liability on the part of the employer and further, Bosevski had not been contributorily negligent.

Avopiling appealed in relation to both liability and quantum.

On appeal Avopiling did not dispute that it was negligent however argued that the trial judge ought to have found the employer was negligent and Bosevski was also contributorily negligent. Avopiling also sought a reduction in the award of damages.

The Court of Appeal agreed there was no liability on the part of the employer.

Payne JA noted:

> *"Fundamentally, the primary judge was correct to conclude that Professional Contracting did not know and did not have any reason to have known that it was dangerous for its employees to be anywhere near the construction of the pile driver.*
>
> *It was not demonstrated that Mr Bosevski or his supervisor could appreciate the risk of tension failure on the pile driving rig simply by looking for hazards. It was not shown that they ought to have known of the risk. Similarly it was not proven that the site induction given to Mr Bosevski by Professional Contracting was inadequate. Avopiling did not prove that Professional Contracting knew or ought to have known of the risks involved in assembling a pile driving rig."*

Avopiling were also unsuccessful in arguing that Bosevski's damages ought to be reduced for contributory negligence.

However, Avopiling had more success when it came to quantum.

In relation to Section 13, Payne JA stated:

> *"Mr Bosevski submitted that Section 13 of the Civil Liability Act does not apply to an award of damages for future attendant care. Mr Bosevski submitted that Section 13 should be understood as applying only to the award of damages for the future loss of earnings. That submission must be rejected. The text of Section 13 makes it plain that it applies to damages for future economic loss both in respect of "future earning capacity" and "other events on which the award is to be based". An award of damages for future attendant care is an "other" event on which the award is to be based.*
>
> *Further, in Malec v JC Hutton, which concerned the allowance of damages for future economic loss including a claim for future attendant care, the High Court rejected the traditional common law approach to the assessment of damages for future hypothetical events, which was to determine whether the event would or would not have occurred on the balance of probabilities. The Court held that this approach was inapplicable to hypothetical future events because they are not "commonly susceptible of scientific demonstration or proof" and can only be evaluated in terms of chance ... The High Court explained that the correct approach was to calculate the "degree of probability" ... or "possibility" ... of a future event occurring and then to adjust the award of damages according to that calculation, unless the probability is so low (less than 1%) as to be speculative or so high (more than 99%) as to be practically definite. That approach is now enshrined in the calculation of all future economic loss to which the Civil Liability Act applies: Section 13(2)."*

Payne JA continued:

> *"Having made that finding, however, it is necessary to consider the extent of the "allowance" by way of vicissitudes, against the possibility that other events will intervene": Australia and New Zealand Banking Corporation v Haq ... the necessary exercise is "a form of speculation guided by knowledge of the plaintiff's past and expectations, derived from general experience, as to the future": Malec v JC Hutton. In White v Benjamin, damages for future commercial attendant care were awarded for 30 years with a 15% reduction for vicissitudes notwithstanding a finding that "there is a significant chance that commercial assistance will not be obtained" on the basis that a greater reduction would be "self-fulfilling". In the present case, a discount of 25% should be made to reflect the various risks to which the appellant has drawn attention and the significant chance that commercial assistance would not be obtained."*

There was also a deduction of 10% for future out of pocket expenses.

The Court of Appeal made it plain that vicissitudes ought to be considered and an appropriate discount applied when it comes to an award of damages for not only future economic loss, but also future domestic assistance and future medical expenses. That is an approach that has stood the rigours of time but Payne AJA with whom the White JA and Simpson AJA agreed have determined that section 13 of the Civil Liability Act enshrines that obligation.

Amanda Bond
asb@gdlaw.com.au

Labour Hire Licensing Laws 1, 2, 3

On 19 June 2018 the Victorian Government passed legislation which imposes licensing requirements on labour hire suppliers bringing the number of States with labour licensing laws to three.

With the Shorten Opposition's policies including a rollout of a National Scheme for labour hire licensing a change in the Federal Government could see further expansion of labour licensing laws in Australia

however, to so far other States and Territories have not shown an impetus to join the push for labour hire licensing.

Victorian now has the *Labour Hire Licensing Act 2018* which will commence no later than 1 November 2019 with a six months transition period.

South Australia's legislation is up and running and commenced on 1 March 2018. The legislation is the *Labour Hire Licensing Act 2017*. However, licensing requirements will not be enforced in SA until 1 February 2019 and a review of the scheme is in hand.

Queensland has the *Labour Hire Licensing Act 2017* and there was a 60 day transition period from 16 April 2018 to apply for licences. All labour hire businesses in Queensland must now be licensed.

Each scheme has different nuances however each is designed to protect workers from exploitation by providers of labour hire services.

Labour hire providers must be licensed and must pass a fit and proper person test. There are exemptions from licensing requirements but not consistently across the 3 schemes.

Compliance practices for businesses in the labour hire industry and businesses using labour hire will increase with an additional level of oversight of those businesses. Businesses that use labour hire will need to ensure that where licensing requirements apply labour is supplied by a licensed labour hire business.

There are significant penalties for businesses that contravene the laws which stipulate that businesses must use labour supplied by licensed businesses only.

The maximum penalties for those businesses that supply workers without having a licence and those that use those workers are:

- In Queensland – $378,450 for corporations and for individuals $130,439.00 or three years imprisonment.
- In Victoria - $507,424.00 for corporations and for individuals up to $126,856.00.
- In South Australia - $400,000.00 for corporations and up to $140,000.00 or three years imprisonment for individuals.

Businesses that use and supply labour in South Australia, Queensland and Victoria will need to carefully review the relevant legislation and implement strategies to ensure that contracting practices comply with the new labour hire licensing requirements.

David Newey
dtn@gdlaw.com.au

The NSW Court of Appeal Further Clarifies the Test for Negligence

To establish that a defendant was negligent a plaintiff must prove each of the following:

- the existence of a duty of care owed by the defendant to the plaintiff;
- the defendant breached that duty; and
- the breach caused the injury, loss or damage sustained by the plaintiff.

The enactment of the *Civil Liability Act 2002* (NSW) ("CLA") introduced a statutory regime to govern claims for damages involving allegations of negligence arising from claims that did not involve accidents governed by other statutory regimes such as motor accident claims and workers compensation claims.

The CLA does not specify circumstances that give rise the existence of a duty of care, rather, the legislation focuses on the elements required to establish breach of duty and causation.

Since 2002 there have been numerous decisions of the NSW Court of Appeal where comments have been expressed by various judicial officers suggesting the test in Section 5B of the CLA, which determines breach of duty, has not materially altered the common law test for negligence.

In that regard, the Courts have continued to adopt the authorities expressed in *Overseas Tankship (UK) Limited v The Miller Steamship* (Privy Council) and *Wyong Shire Council v Shirt* (High Court).

However, the importance of the CLA provisions and their correct application in claims for damages involving negligence has been highlighted in judgments of the NSW Court of Appeal for over 15 years.

Most recently, in *Bunnings Group Limited v Giudice*, Antonietta Giudice, the Court considered the correct application of Section 5B of the CLA with respect to breach of duty.

That section provides:

"5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of

harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm."

Antonietta Giudice sustained personal injuries when she tripped and fell as she entered a children's play area within the Bunnings warehouse at Ashfield.

The children's play area had the following features:

- the area was fenced with a childproof gate;
- the floor of the fenced play area comprised shock absorbent matting which appeared to have been installed on the concrete floor surface;
- outside the play area the floor surface was concrete;
- the surface of the play area was slightly higher than the concrete surface of the floor (approximately two inches) and there was an inclined slope of matting at the entrance to the play area creating a gradient consisting of a convex curve from the commencement of the matting at the lip to the point where it becomes level;
- on the concrete surface adjacent to the entrance gate there was a broad yellow painted line which clearly delineated the end of the concrete floor and the beginning of the play area with its safety matting;
- when the gate is closed the yellow line appears underneath the gate and would be less readily seen by any pedestrian.

Giudice was allegedly injured when she opened the gate with her right arm, stepped forward and tripped and fell, landing on her right wrist.

She brought proceedings at the NSW District Court in which she claimed damages by reason of the alleged negligence of Bunnings.

Guidice argued Bunnings breached its duty to her by permitting the gradient to exist or by failing to warn her of it. She did not observe any of the yellow markings at the entrance to the gate and did not see the yellow line underneath it.

She also failed to observe a warning sign attached to the gate immediately facing any pedestrian who sought to enter the play area.

The matter proceeded to hearing before his Honour Judge Wilson.

Giudice contended the incline within the play area was not clearly visible due to the closed gate and it was reasonably foreseeable a person entering the play area could trip and fall.

Bunnings admitted the existence of a duty of care but denied it breached that duty.

The primary judge found in favour of Giudice and awarded damages of $179,600 in her favour after a reduction for contributory negligence assessed at 20%.

Bunnings appealed to the NSW Court of Appeal.

The Court by a unanimous judgment upheld the appeal, set aside the judgment in the District Court and ordered the proceedings against Bunnings be dismissed with costs.

In a joint judgment of Leeming & White JJA and Emmett AJA the Court of Appeal was critical of the methodology adopted by the primary judge when applying Section 5B of the CLA regarding breach of duty of care.

The Court noted:

"The primary judge's reasons worked through each of the seven paragraphs of Section 5B in order, but at a level of generality. At least in the circumstances of this case, where the various precautions for which the plaintiff contended were very different, that discloses error. It neglects the important way in which those paragraphs address different things, and it neglects the way in which the finding in Section 5B(1)(c) is to be made."

The Court of Appeal noted the primary judge's findings that in all of the circumstances a reasonable person in the position of Bunnings would have taken precautions either to remove the risk entirely or reduce the chance of the risk eventuating.

This approach was found to be in error as it conflated the three distinct ways in which Giudice contended that precautions should have been taken. The Court emphasised the following:

"Whether or not a reasonable person in Bunnings' position would have installed a "Watch Your Step" sign is quite different from whether or not a reasonable person in Bunnings' position would have ensured that the surface of the play area was at the same level as that of the concrete floor."

Most importantly the Court of Appeal held that a primary judge must apply Section 5B(2) of the CLA to each particular precaution individually.

The Court held that the burden of installing a Watch Your Step sign was quite different from the burden of aligning the surface of the play area with the concrete surface.

Further, the Court of Appeal held that in circumstances where Giudice admitted she did not observe the warning sign, the findings on causation could not stand in relation to the failure to warn case.

In conclusion, the Court of Appeal held that a reasonable person in Bunnings' position would not have done more than it had already done and further, Giudice had failed to show the risk of harm was not insignificant.

Accordingly the appeal was upheld and the proceedings in the Court below were dismissed.

This decision illustrates that the enactment of the CLA has (despite suggestions to the contrary) codified the law of negligence as it relates to breach of duty of care and causation.

True it is the common law has developed over time and the various authorities continue to be adopted. However the NSW Court of Appeal has continued to emphasise that trial judges must adhere to the test for negligence as set out in Section 5B of the CLA (and Section 5D with respect to causation) such that the legislation is paramount.

In particular, this decision confirms that Section 5B must be applied to each precaution for which it is contended a reasonable person in a defendant's position would have taken to avoid a risk of harm.

This cannot be done by considering all of the alleged precautions in general terms.

Darren King
dwk@gdlaw.com.au

CONSTRUCTION ROUNDUP

Adjudicator's colourful language not lack of procedural fairness

The primary purpose of each Australian State's security of payment legislation is to provide a statutory regime for maintaining cash flow to building contractors and subcontractors and thus reduce the prevalence of widespread insolvency in the construction industry. In NSW, part of this statutory regime is an adjudication process which, by its "brutally fast" time requirements, delivers what has been described as "rough justice".

Given the abbreviated time frames allowed in the legislation, it is to be somewhat expected that the submissions made by a respondent to an adjudication application will be to an extent hastily prepared and not address every allegation or submission in the (often emotive) adjudication application. Similarly, adjudicators under time pressure to deliver determinations of payment claims may not forensically examine every single document and piece of correspondence relied upon by the parties, but instead merely adopt one party's submissions on the facts leading to the dispute.

This was illustrated in the recent case of *Pinnacle Construction Group Pty Limited v. Dimension Joinery & Interiors Pty Limited* [2018] NSWSC 894.

Pinnacle was the head contractor in the construction of an apartment complex at Dee Why. Dimension had been engaged by Pinnacle to install joinery in the building.

Towards the end of the project, a dispute arose with respect to the rectification of defects in Dimension's work. Pinnacle maintained that a significant number of defects remained to be rectified, and it was entitled to back charge Dimension for these costs. Dimension, on the other hand, maintained that it had completed all its defect rectification work and Pinnacle was simply holding back on paying Dimension for its work in order to maintain its own cash flow.

Dimension made a payment claim under the *Building and Construction Industry Security of Payment Act 1999* that was ultimately referred to adjudication. The adjudicator delivered a determination that Dimension was entitled to the payment that it had sought. Pinnacle commenced proceedings in the Supreme Court seeking an order quashing the adjudicator's determination on two grounds: namely that (a) there was no reference date available that entitled Dimension to submit a payment claim under the Act and thus the adjudicator did not have the requisite jurisdiction to make a determination; and (b) the adjudicator had made certain findings without giving Pinnacle an opportunity to be heard on the matter, and thus had denied Pinnacle procedural fairness.

Stevenson J first looked at the precise wording of the contract between the parties to determine whether a reference date had arisen. His Honour noted that notwithstanding that the bulk of the work had been completed and Dimension's payment claim included previously claimed amounts, the specific wording of the contract entitled Dimension to claim moneys that had been retained by Pinnacle to cover defect rectification costs. His Honour held that this entitlement gave rise to a new reference date and thus the adjudicator had the necessary jurisdiction to make a determination.

Turning to the issue of procedural fairness, Stevenson J noted that the authorities required that if an adjudicator intended to make a finding that had not been contended for by either party, then he or she was required to allow the parties to first make submissions on that potential finding, and a failure to do so would potentially be a jurisdictional error. However, not permitting the parties an opportunity to make submissions would not necessarily lead to a conclusion that the adjudicator had denied the parties procedural fairness, unless the matters at issue were material and germane to the adjudicator's decision.

Stevenson J agreed that the adjudicator had used "colourful language" when making adverse findings about Pinnacle's conduct on the project. Included in

the adjudicator's comments were that Pinnacle had "plucked numbers out of the air" in an attempt to substantiate a position that it was not liable to make any further payment to Dimension. However, Stevenson J stated that rather than deciding the claim on an issue not advanced by either party, it appeared to him that the adjudicator had simply accepted Dimension's robust assertions that Pinnacle had not provided any substantiation for its estimates of the costs of defect rectification.

Pinnacle's counsel had argued that the adjudicator's finding attributed an improper motive to Pinnacle and amounted to a finding that Pinnacle had acted in bad faith, dishonestly or recklessly indifferent to the trust. Stevenson J stated that he did not read into the adjudicator's words this "more sinister implication", and thus he could see no procedural unfairness.

The adjudicator had also found that Pinnacle had held back from paying Dimension in order to maintain its own cash flow, and had then paid $25,000 to Dimension "to get" them back to site to carry out rectification works. It appeared that the adjudicator had accepted submissions by Dimension that emails from Pinnacle's employees had demonstrated this motive.

However, on a careful examination of the correspondence, Stevenson J noted that the emails could not necessarily lead to such a conclusion. His Honour commented that the adjudicator was likely to have simply adopted Dimension's submissions in this regard because Pinnacle had not responded to these assertions. His Honour held that although there may have been an error by the adjudicator, such an error did not amount to a denial of procedural fairness.

Pinnacle's counsel had also argued that the adjudicator's findings were so irrational and unreasonable as to be beyond his jurisdiction.

Stevenson J rejected this argument, noting the quick and rough nature of the adjudication process under the Act. In doing so, his Honour accepted Dimension's counsel's submission that it would require a most extraordinary case for a court to find an adjudicator's decision to be unlawful because it is irrational or fails to disclose a logical connection between the findings made and the evidence.

This case illustrates how an adjudicator often gets a "feel" for a project that leads him or her to prefer the submissions made by one party over those made by the other party – particularly where assertions about a party's motives and actions go unchallenged. As long as the other party has been given an opportunity (either in its adjudication response or later by the adjudicator) to respond to these assertions, an adjudicator will not have made a jurisdictional error in accepting the truth of these motives and actions when making his determination.

Linda Holland
lmh@gdlaw.com.au

EMPLOYMENT ROUNDUP

Termination Of A Worker That Is Not Psychologically Fit For Inherent Duties Is Not Unfair

Before an employer terminates an employee that is not fit for work a number of factors must be considered including the employee's physical and psychological capacity to perform the inherent duties of their position.

Employees must be both physically and psychologically fit for their inherent duties.

If an employee cannot perform the inherent requirements of their position an employer is entitled to terminate the worker and the worker will not have recourse to the unfair dismissal remedies found in Section 394 of the *Fair Work Act 2009* provided the employer follows appropriate procedures.

Section 382 of the *Fair Work Act 2009* provides that a person is protected from unfair dismissal if they have completed at least a minimum employment period and they are either covered by a modern award or employed under an enterprise agreement.

Under Section 385 the *Fair Work Act 2009* a person has been unfairly dismissed if the Fair Work Commission is satisfied they have been dismissed, that the dismissal was harsh, unjust or unreasonable and if relevantly, the dismissal was not consistent with the Small Business Fair Dismissal Code or not a case of genuine redundancy.

Commissioner McKinnon in the Fair Work Commission was recently called on to consider a claim for unfair dismissal in *Gillian Levidis v Roger Seller and My Hill Pty Limited t/as Roger Seller*.

In early January 2017 the worker was told her role was changing and she was unhappy about that change and suggested she be made redundant. A one off separation offer was made by the employer but she did not accept it.

As time passed the employer received complaints from fellow staff members about the worker behaving in a negative manner towards the national customer service manager.

The worker made a separate complaint about the bullying behaviour by her colleagues.

A conversation which took place between a manager and the worker about her complaint became heated and the worker left work early due to illness and did not return to work for a few weeks. On her return the worker spoke with the employer about a customer complaint, performance concerns and the two complaints by co-workers and following that meeting

she was issued with a formal warning. The worker did not return to work after that.

The worker engaged an industrial adviser who attempted to negotiate a separation package.

The Commissioner observed the inherent requirements of the worker' role were undertaking computer and phone duties, knowledge of Roger Seller products and systems and the ability to interact positively with customers and staff.

Medical assessments by an occupational physician and a consultant psychiatrist revealed that psychosocial factors of the workplace were affecting the worker' return to work and from a psychiatric perspective she was not fit to return to work.

The Commission noted the evidence established at the time of dismissal the worker was able to physically perform the inherent requirements of her role and accepted the worker' evidence she was physically fit. However the evidence also established at the time of dismissal she was suffering from a psychological condition which prevented her returning to work at Roger Seller. There was no evidence the role could have been performed other than at Roger Seller's premises.

The Commissioner concluded the dismissal related to a psychological condition which prevented the worker from returning to work at the time of her dismissal. The worker had been notified of the reason for her dismissal which was a valid reason relating to incapacity for work and she had an opportunity to respond to that reason for dismissal before the final decision was made. The dismissal was not related to unsatisfactory performance.

In this case a chain of events which the worker considered harassment and intimidation triggered a deterioration of her health however the worker did not approach the Commission's bullying jurisdiction to seek redress where she felt she had been bullied and a decision was made (in consultation with an advisor to the worker) to try and negotiate an exit package with Roger Seller. The Commissioner observed this was a risky strategy and ultimately one without reward for the worker.

At the end of the day the Commissioner concluded that the employees strategy to negotiate an exit package after she perceived she was bullied was an inappropriate strategy.

The worker had not been unfairly dismissed and the employer had acted appropriately in bringing the employment to an end where she was not psychologically fit to perform the inherent duties of her role.

Performance management and complaints about harassment and intimidation often lead to claims by employees for workers compensation payments consequent to psychological injuries as well as unfair dismissal claims where an employee is terminated.

Workers compensation legislation provides additional protections to injured employees as an employer of an injured worker who dismisses the employee is guilty of an offence if the employee is dismissed because the employee is not fit for employment as a result of the injury, and the employee is dismissed within six months after the employee first became unfit for employment.

However employers can terminate the employment of their employee if the employee cannot perform the inherent duties of their position as they do not have the physical or psychological capacity to do so.

David Newey
dtn@gdlaw.com.au

Termination and the Small Business Code of Conduct

The "small business" defence to claims of unlawful dismissal continues to be an important consideration in the current industrial landscape.

Generally, an employee of a national system employer who has been dismissed is protected from unfair dismissal and eligible to make an application for unfair dismissal remedy if:

- they have completed the minimum period of employment; and
- they earn less than the high income threshold (which is currently $142,000 per year); or
- a modern award covers their employment, or
- an enterprise agreement applies to their employment.

On the other hand, however, a termination is not an unfair dismissal if the dismissal was:

- a genuine redundancy; or
- consistent with the Small Business Dismissal Code (in the case of employees of a small business)

In other words, if an employer is a Small Business employer, and if that employer complies with the Small Business Dismissal Code (***the Code***), then the employer will be protected from an unfair dismissal claim, even if the dismissal could otherwise be considered, harsh, unjust or unreasonable. A very valuable right.

As its name suggests, the Code applies to employers who are a small business. A small business is defined as any business with fewer than 15 employees.

To determine how many employees an employer has, it is necessary to include:

- the employee being dismissed (and any others being dismissed at the same time)
- regular and systematic casual employees employed at the time of the dismissal
- employees of associated entities, including those based overseas.

If it applies, what effect does the Code have?

Serious Misconduct

The Code states that:

> *It is fair to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal.*

The Code defines serious misconduct as including 'theft, fraud, violence and serious breaches of occupational health and safety procedures'.

The Fair Work Commission (*FWC*) does not have to make a finding, on the evidence, whether the conduct occurred. All that the FWC is required to determine is whether the employer had a reasonable belief that the conduct of the employee was serious enough to warrant immediate dismissal.

It is not necessary for the employer to convince the FWC that it was correct in the belief that it held.

For an employer to believe on reasonable grounds that the conduct of the employee was serious enough to justify immediate dismissal, the employer must establish that they did in fact hold the belief that:

- the conduct was by the employee; and
- the conduct was serious; and
- the conduct justified immediate dismissal.

The employer must establish that they had reasonable grounds to hold the belief, which is often established by providing evidence of inquiries or investigations the employer undertook to establish their belief.

Other Dismissal

In other cases, a small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned that he or she risks being dismissed if there is no improvement. This can be done verbally, although in writing is significantly more sensible.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response.

Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to the FWC.

In order to preserve the exemption granted by the legislation small business employers should ensure that the keep good records, including:

- evidence that a warning has been given (except in cases of summary dismissal)
- a completed termination checklist,
- copies of written warning(s),
- a statement of termination, and
- signed witness statements.

The protection given by the Code offers small employers significantly greater freedom than large enterprises in terminating employees.

As always, a strict documentary process is the key to ensuring access to that benefit.

David Collinge
dec@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Workers Compensation Recoveries s151Z Recoveries Are Alive And Well

The recent decision of the NSW Court of Appeal in *Coles Supermarkets Australia Pty Limited v Ready Workforce (a Division of Chandler McLeod)* has confirmed that 151Z recoveries are alive and well even where a worker's injuries have been caused by negligence on the part of the employer.

Section 151Z(d)(1) of the *Workers Compensation Act 1987* ("WC Act") provides that:

> *"If the worker has recovered compensation under this Act, the person by whom the compensation was paid is entitled to be indemnified by the person so liable to pay those damages (being an indemnity limited to the amount of those damages)."*

Further, Section 151Z(2)(e) provides that if the worker does not take proceedings against that employer or

does not accept satisfaction of a judgment against the employer, Section 151Z(1)(i) applies as if the worker had not been entitled to recover damages from that employer.

Section 151Z(2)(e) is subject to the proviso that where the compensation paid by the employer exceeds the amount of the contribution that could be recovered from that employer as a joint tortfeasor the indemnity is limited to the amount by which payments exceed the employers theoretical contribution, and if compensation paid by the employer does not exceed the amount of that contribution Section 151Z(1)(d) does not apply but an employer has a defence to any claim for contribution to the extent of the compensation paid.

These provisions ensure that where workers do not sue an employer or do not accept a judgment from the employer, the employer can recover compensation payments made from a person whose negligence caused or contributed to the accident resulting in the worker's injuries. However, as a consequence of thresholds under the WC Act work injury damages cannot be recovered from an employer where their whole person impairment is less than 15%.

Where a worker is not entitled to work injury damages any proceedings they commence against an employer will fail and they will not obtain a judgement against an employer.

In circumstances where the worker has a whole person impairment of less than 15%, Section 151Z(2)(d) will come to the aid of the employer and permit the employer to recover workers compensation payments made as no damages contribution can be recovered from the employer (as the employer is not liable to pay work injury damages).

There has been recent debate following a decision of the Court of Appeal in *South West Helicopters* concerning an employer's entitlement to recover compensation payments under s 151Z(1)(d) where the employer was negligent.

By and large the decision in *Coles v Ready Workforce* has put an end to that debate.

Ms Murphy was employed by Ready Workforce. Her services were lent on hire to Coles. Ms Murphy was injured in circumstances where both her employer, Ready Workforce and Coles were negligent.

Workers compensation payments totalling $135,142.41 were made to or on behalf of Ms Murphy. Ms Murphy did not seek work injury damages from Ready Workforce as she had not reached the whole person impairment threshold to ground a claim for work injury damages.

Ready Workforce commenced proceedings against Coles to recoup workers compensation payments made. The primary judge determined Coles had been negligent and would have been liable for damages of $438,024.92 and that liability for injury should be apportioned 60% to Coles and 40% to Ready Workforce. Had Ready Workforce have been sued it would have only been liable for damages for past economic loss which the primary judge assessed at $259,118.52 and 40% of that figure was $103,647.41. The primary judge awarded Ready Workforce the difference between the compensation payments ($135,142.41) and 40% of the work injury damages ($103,647.41) to result in a judgment of $31,495.00.

Coles appealed, arguing that where the employer had been negligent Section 151Z could not come to the aid of the employer and Ready Workforce cross appealed.

The structure of the Chandler McLeod Group also became an issue in the proceedings with Coles' labour hire agreement being with Chandler McLeod and the employee being lent on hire by Ready Workforce, a company in the Chandler McLeod Group.

With these factors in play the Court was called on to analyse the effect of Section 151Z(1) and 151Z(2)(e). It was also necessary to determine who was entitled to bring a claim for indemnity under s151Z.

In a judgment written by White JA with whom Basten JA and Simpson AJA agreed, the Court determined both the employer, Ready Workforce, and its workers compensation insurer were entitled to bring a claim for indemnity under Section 151Z(1)(d).

The Court observed:

> *"Section 151Z(1)(d) refers to the person by whom the compensation was paid, not the person who was liable to pay compensation. Section 151Z(2)(d) and (e) assume the employer will be the party claiming the indemnity under Section 151Z(1)(e). The Court observes that whilst that might imply a non employer could not claim indemnity under Section 151Z(d), it is clear that an insurer can claim indemnity under Section 151Z(1)(d). In that case the indemnity the insurer can recover will be affected by the third party tortfeasor's right of contribution from the employer. In other words, if the insurer had brought proceedings itself it would be affected by the right of contribution towards damages available from the worker's employer."*

At the end of the day Ready Workforce was the employer, it had sued for indemnity and it was entitled to do so.

Coles also argued that where the employer was negligent there was no right of recovery under Section 151Z(1)((d). That argument was not ultimately pressed.

The Court observed that *South West Helicopters Pty Limited v Stephenson* does not inhibit reliance on Section 151Z(1)(d) by an employer where a worker does not commence proceedings against the employer for damages. In this case Murphy did not take

proceedings against her employer. Therefore, section 151Z(2)(e) was engaged.

The Court observed that whilst Ready Workforce was negligent that did not preclude it from being entitled to claim an indemnity pursuant to Section 151Z(1)(d).

That finding should put an end to any arguments that Section 151Z(1)(d) cannot come to the aid of a negligent employer to ground a recovery where an employer is not sued by a worker or a worker does not accept satisfaction of a judgment against a worker as section 151Z(2)(e) will apply and recovery can then be achieved under Section 151Z(1)(d).

In this case where the tortfeasor's contribution that it could obtain from the employer would be nil as there was no entitlement to work injury damages, the employer would be entitled to recover the totality of the payments.

However, that was not the end of the matter or the ultimate result.

The Court of Appeal was also called on to look at the findings of negligence made against Coles and determined Ready Workforce had not established that Coles had breached its duty of care owed to Murphy.

The end result of that finding was that there was no recovery under Section 151Z as there was no other tortfeasor that caused the worker's injuries.

The worker had slipped on a fine layer of crush dried kibble-like dust from dog food bags. It had a cleaning system in place. Essentially, the Court of Appeal determined that insufficient evidence was available to conclude Coles' system of cleaning was inadequate or to establish what additional cleaning a reasonable person in Coles' position would undertake or what steps it would undertake as a precaution against the risk of injury by slipping. The failure to adduce sufficient evidence meant the claim could not succeed.

In this case a Section 151Z(1)(d) claim for recovery against another party failed, not because Section 151Z does not permit a negligent employer to recover but because the evidence was insufficient to establish there was a wrongdoer other than the employer who caused the worker's injury.

However Coles v Ready Workforce has clarified that Section 151Z(1)(d) is alive and well and will continue to provide employers with the right to recoup payments of compensation made where the employer has not been sued by the worker or where the worker does not accept satisfaction of a judgment for damages against an employer in circumstances where the employer is also negligent.

David Newey
dtn@gdlaw.com.au

Are You an Employer in the Coal Industry? If so, You Must Have Insurance

When the *Workers Compensation Act 1987* underwent substantial amendments in 2001 these did not apply to coal miners.

Schedule 6, Part 18, Regulation 3 of the *Workers Compensation Act 1987* provides that the 2001 amendments do not apply to or in respect of coal miners and the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* apply to and in respect of coal miners as if the 2001 amendments had not been enacted. The practical effect of that is that a coal miner who sustains injury at work is not limited to work injury damages but can claim damages for non economic loss, past and future out of pocket expenses, past and future economic loss and past and future domestic assistance. Damages awarded to a coal miner can therefore be substantial.

Whether or not an injured person falls within the definition of a coal miner can be a complicated question. The injured person must be working in or around a coal mine and an employee may be classified as a coal miner even if the employer does not have a substantial connection with the coal industry.

Sometimes this can create a difficult question as to who should insure the employer in relation to any claim.

On 23 May 2018 the Coal Industry Amendment Bill was assented to. That amendment amended the *Coal Industry Act 2001* to include a definition of "employer in the coal industry" to mean:

> *"Employer in the coal industry means any employer whose employees work in or about a coal mine."*

Section 31 of that legislation requires employers in the coal industry to obtain workers compensation insurance from the approved company for their employees in the industry. The approved company under the legislation is Coal Mines Insurance.

Therefore employers who engage employees who work in or about a coal mine and also undertake mining activities in the coal industry must have a policy with Coal Mines Insurance.

The effect of the amendment is that employers with employees who are engaged in mining activities in the coal industry but do not work in or about a coal mine should have a policy with Coal Mines Insurance to cover those workers.

For example, if employees work some of the time in and about a coal mine, and an employer provides services ancillary to coal mining such as maintenance of equipment and repairs, or construction, that

employer should obtain a policy with Coal Mines Insurance.

If employees are undertaking deliveries to a coal mine and that is the only connection, then a policy with Coal Mines Insurance is not required.

The change is also specifically designed to pick up labour hire following the decision in *Kuypers*, where a labour hire company was found not to be an employer in the coal industry.

The change came into effect on 1 July 2018 however there is a transition period to 30 September 2018. After 1 October 2018 employers who are required to hold a policy with Coal Mines Insurance must ensure they have taken out that policy.

Prior to the amendments only "employers in the coal industry" were required to take out workers compensation insurance with Coal Mines Insurance for their workers in the coal industry. Previously employees who were working in the mining industry would not actually be caught under the Coal Mines Scheme.

Coal Mines Insurance have advised the amendments only capture workers "engaged in mining activities" in the coal industry however that information is simply provided by way of guidance.

Businesses who have employees working in and around a coal mine will need to ensure that a workers compensation policy with Coal Mines Insurance is taken out. Some employers will now need their usual workers compensation policy as well as one with Coal Mines Insurance.

Amanda Bond
asb@gdlaw.com.au