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Not So Good News For Management Liability Insurers

Management Liability insurers face an increased exposure in employment practices liability claims in light of the recent decision of Stevenson J in *Southern Classic Group Pty Ltd t/as Southern Classic Cars v Arch Underwriting at Lloyd's Ltd on behalf of Syndicate 2012 [2018] NSWSC 1272*.

The case serves as a reminder that claims for notice may not be redundancy claims or severance claims within the terms of exclusions in the policy and it is necessary to look at the true characteristics of the employment and the components of a claim when determining coverage.

In this case an indemnity dispute arose between Southern Classic Group ("SCG") and its insurer over the settlement of an employment practices claim conducted by the insurer where a partial contribution to the settlement was made by the insurer who argued components of the claim were excluded.

SCG operates a new and used car dealership in Wollongong and is owned by Mr John Volcanovski. John's brother Gordan was employed in the business from 1992 until 5 March 2012.

Despite the length of his employment, Gordan did not sign a written employment agreement and the terms of his employment were substantially oral, subject to a number of emails (none of which is said to be relevant to a dispute that ultimately arose).

In 2004 Gordan was promoted to Group General Sales Manager, and then in late 2006 to Group General Manager of Southern Classic.

According to Gordan his role was to run the whole dealership and he had full control and full authority to make any and all decisions. He was required to hire and fire staff, make strategic decisions, including as to the human resourcing requirements of the dealership and the various processes and procedures adopted by the dealership.

Gordon reported to his brother John the Dealer Principal for all SCC dealerships, aside from the Skoda dealership as John and Gordon were the Joint Dealer Principals of Skoda.

On 5 March 2012 Gordan's employment with Southern Classic was terminated following an argument with John and John's appointment of Gordan as "Skoda Manager" and as mentor for general Sales Manager in the Ford dealership. Gordan saw this as a demotion. John had determined to take on the role of group general manager effectively ending the need for an employee in that position and Gordon refused to go backwards in his employment and told John to "shove his job" and his employment ended.

Gordan commenced proceedings against SCG in the District Court claiming damages and alleging that SCG had repudiated his contract of employment by requiring that he accept a demotion; or terminated the employment contract or constructively dismissed him; and failed to pay him all of the remuneration and benefits to which he was entitled in respect of various periods prior to his termination.

In his Statement of Claim in the District Court, Gordan alleged that it was an implied term of his employment with SCG that, other than for serious misconduct, SCG could not terminate his employment other than on 18 months' notice.

SCG made a claim under its management liability policy the day after the proceedings were commenced. The insurer exercised its right to appoint lawyers to conduct the defence of the claim.

Gordon relied on an expert report based on assumptions as to the amount of personal expenses SCG had paid for Gordan prior to cessation of his employment and as to the amount of notice to which Gordan was entitled before his employment was terminated. According to Mr Ivey's report, the range of Gordan's claim was somewhere between $465,000 and $985,000.

A mediation took place on 15 February 2017 and the proceedings were settled on the basis of payment by SCG to Gordan of $375,000 plus costs as agreed or assessed. Those costs were then assessed at some $306,000, subject to a pending review by an appeal panel.

The Insurer contributed $100,000 to the settlement and paid half of SCG's costs of defending Gordan's claim on the basis of the view of its lawyers on cover under the policy for the various components of the claim and the application of exclusions. These payments were made on a without admissions and without prejudice basis.

Dissatisfied with the Insurer's calculation of payments under the policy SCG commenced proceedings in the Supreme Court alleging a breach of the terms of the policy and claimed damages and the proceedings were heard by Stevenson J.

Gordan's base salary was $85,000 plus super $29,823 and he received bonuses and commissions over the years. The Ivey report estimated the entitlement to bonus and commission for 12 months at $66,662 and $88,356 respectively.

The lawyers appointed by the insurers in a detailed report provided before the mediation recommended settlement for $300,000, $115,000 for pre termination entitlements, $110,000 for post termination entitlements and costs in the order of $100,000 with the insurer contributing $80,000 (ultimately increased to $100,000). The advice was that Gordan was likely to succeed in establishing he had been constructively dismissed or that SCG terminated his employment. The settlement recommendation was premised on 6 month's notice being appropriate notice. The ultimate settlement $375,000 plus cost settlement was well above the recommendation of the lawyers, effected after the mediation and as a result of discussions between Gordan and John.

The relevant insuring clause in SCG's policy provided the Insurer would pay:

> *"All loss on account of any claim against the company for an employment practice breach".*

"Loss" was defined as:

> *"Damages, compensation, settlements to which we have consented, claimant costs and defence costs which a person or entity becomes legally obliged to pay on account of a claim".*

"Employment Practice Breach" was defined to mean:

> *"Unfair or wrongful dismissal from or termination or discharge of employment (either actual or constructive, including breach of an implied contract)…".*

The policy excluded liability for claims "in connection with…any employment-related benefits" or any "contractual liability".

In SCG's dispute with its Insurer it argued Gordan may well have persuaded the Court that he was entitled to 12 months' notice of his termination and the allowance made by the Insurer for commission and bonus was inadequate. It argued the settlement was reasonable and settlement by John did not prevent recovery under the policy.

Stevenson J confirmed *"liability policies which cover an insured's liability for damages or compensation respond to a claim where the insured reasonably settles a claim against it and thereby agrees to pay third party damages or compensation".*

Stevenson J observed "If the Insurer in this case intended not to cover settlements except where the insurer consented, it would have included in the definition of "loss" words to the effect "*settlements but only if we have consented"*.

Stevenson J regarded the settlement as reasonable.

When it came to the exclusions of employment related benefits the Insurer argued it did not cover any non-monetary benefit, severance or redundancy payment, incentive payment or contractual liability.

However Stevenson J did not accept that the claim was for redundancy or a severance payment. Stevenson J observed:

"Gordan's claim in the District Court was for damages suffered by reason of not being given the notice of termination that his contract of employment required. It was not for a redundancy or severance payment.

Further, were Gordan's claim to be characterised as a claim for a severance or redundancy payment, and to be thereby excluded from cover under the policy, it would render this aspect of the policy to be of almost no value.

Gordan's claim was for damages for dismissal without due notice.

On the face of it, that claim appears to fall squarely within the definition of "Employment Practice Breach": "wrongful dismissal from or termination or discharge of employment").

If the effect of the "severance or redundancy payments" exclusion was to exclude such a claim it would remove from the ambit of the policy a very obvious, and perhaps the most commonly encountered, form of "Employment Practice Breach" likely to occur. "

When it came to the claim in respect of the bonus and commission that could be recovered the policy excluded payments by way of "bonus or incentive payments". Gordon's claim included a claim for loss of bonus and SCG conceded this was not covered however there was a claim for loss of commission which the Insured argued was an incentive.

Gordan's claim included amounts for commissions on car sales lost by reason of not having been given adequate notice of termination of his employment. His remuneration comprised a relatively modest base salary plus commissions on car sales. Those commissions comprised the bulk of his remuneration. Stevenson J concluded:

"Although the prospect of earning commissions no doubt provided an incentive for Gordan to promote Southern Classic's business I do not think that commission payments can be characterised as being an "incentive payment".

The expression "incentive payment" appears in the policy as part of the more global expression "bonus or incentive payments" and was, in my opinion, intended to exclude from liability under the policy one-off or occasional payments designed to provide encouragement or incentive to employees of an insured. The words were not, in my opinion, intended to exclude an insured's liability to compensate an employee for loss of the major component of his or her remuneration, in the event of an "Employment Practice Breach".

Effectively here a commission was seen as part of the total remuneration package and not an incentive.

SCG conceded it could not recover the superannuation claimed as that was a contractual liability and excluded, or the pre termination entitlements.

Stevenson J concluded after examining the various components of the total claim that was compromised and the components that were covered about 55% of the claim that Gordon made should be treated as falling within the terms of the policy. That percentage was deployed by Stevenson J to calculate the insurers obligation to both the settlement sum of $375,000 and the costs of $306,000. The net result for SCG was an increase in payments of about $275,000 with the insurer facing a costs order in relation to the indemnity dispute.

The case highlights the difficulties that can arise when an insurer determines to conduct litigation which involves insured and uninsured components of a claim introducing a potential conflict where lawyers must attempt to apportion liability between insured uninsured components when looking to settle a claim and seeking contribution from 2 parties with different interests.

So what are the take homes for insurers. They are:

- employment practices cover must not be illusory;
- Exclusions that reference bonuses and incentive payments may not apply where such payments are part of the total remuneration package of an employee that should be taken into account in a claim for damages for breach of an implied condition that an employee must be provided with reasonable notice of termination, and for long term employees 10 to 12 months is not off the mark if the contract is silent on the period of notice required;
- a claim for damages suffered by reason of not being given the notice of termination that a contract of employment requires is not a claim for redundancy or severance payment;
- If an insurer intends to have no liability in respect of claims settled without its consent it needs to make that plain in the policy otherwise it will be liable for a reasonable compromise by an insured.

Will there be more attention paid by insurers to exclusions in management liability policies.

Will we see exclusions being crafted to remove liability for compensation for breach of a condition (express or implied) in respect of notice.

Will exclusions be drafted to exclude liability in respect of compensation for commissions and bonuses that are a feature of a total remuneration package rather than a one off payment.

Will we see the definition of “Loss” or “Damage” in policies limiting cover to insurer agreed settlements with provisions covering “settlements but only if the insurer has consented”.

The case sounds a warning to insurers that employment practices claims may have greater potential than anticipated as constructive dismissal claims and termination claims seeking compensation for failing to provide adequate notice are not severance or redundancy claims as many insurers have thought.

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PI insurer defeats claim on ground of fraudulent non-disclosure

A professional indemnity policy of insurance commonly provides cover to directors and officers of companies in respect of wrongful conduct by those directors or officers during the period of insurance.

Such cover usually extends to include defence costs incurred by an insured company director and, depending on the policy wording, may involve those defence costs being advanced to the insured where the director is sued in Court proceedings regarding the alleged wrongful conduct.

However these types of insurance policies usually exclude cover for wrongful conduct which is found to be wilful, reckless, dishonest, fraudulent, malicious or criminal although defence costs may still be advanced to defend any court proceedings against the insured, until there is a Court finding of such conduct falling within the terms of the policy exclusion.

What if the alleged wrongful conduct occurred before the inception of the policy of insurance and such conduct was not disclosed to the insurer before entering into the insurance contract?

In those circumstances does the insurer retain its statutory rights under the *Insurance Contracts Act 1984* (Cth), Section 28 to seek to avoid the policy by reason of the fraudulent non-disclosure by the insured or alternatively seek to reduce its liability to nil by reason of the non-disclosure?

These issues arose for consideration before the Full Court of the Federal Court of Australia in the recent judgment of *Onley v Catlin Syndicate Limited as the underwriting member of Lloyd’s Syndicate*.

On 1 July 2016 the insurer issued to Synep Pty Limited (“Synep”) a labour force liability insurance policy for the period 1 July 2016 to 1 July 2017.

Michael Onley and Adam Cranston were directors of Synep.

There was no issue that Onley and Cranston were each an insured person within the meaning of the policy.

Under the policy the insureds were covered for liability cover (Section 1) and management liability and professional indemnity (Section 2).

Onley and Cranston sought indemnity under Section 2 of the policy.

The claim under the policy arose in respect of proceedings instituted in the NSW Supreme Court by the Commissioner of the Australian Federal Police in May 2017 against Onley and Cranston and numerous companies associated with them seeking a variety of orders under the *Proceeds of Crimes Act 2002* (Cth).

The following day, both Onley and Cranston were charged with criminal offences under the *Criminal Code Act 1995* (Cth) in respect of conduct between June 2016 and May 2017 with the intention of dishonestly causing loss to the Australian Taxation Office.

Onley and Cranston denied the criminal charges and the conduct alleged against them. At the time of the Federal Court hearing, neither company director had entered a plea in the criminal proceedings which had yet to proceed to a final hearing.

The insurer denied liability to indemnify each director principally because Onley and Cranston had allegedly engaged in dishonest conduct prior to entering into the contract of insurance and that such conduct had not been disclosed to the insurer.

The insurer argued this constituted fraudulent non-disclosure by the insureds which allowed the insurer to avoid the policy under Section 28 of the ICA.

Onley and Cranston instituted proceedings at the Federal Court seeking declaratory orders including an entitlement to indemnity under the policy which included provision for their defence costs to be advanced to them to permit them to fund the defence of the criminal prosecution.

The company directors stated their defence costs amounted to approximately $300,000 at the time of the Federal Court hearing.

Chief Justice Allsop referred separate questions to the Full Court of the Federal Court for determination.

Those separate questions involved the proper construction of the policy terms, in particular, the entitlement for defence costs to be advanced and whether the insurer had waived its right to rely upon Section 28 of the ICA.

In a unanimous judgment, the Full Court of the Federal Court comprising Allsop CJ, Lee and Derrington JJ held the insurer was entitled to avoid the policy under Section 28 of the ICA by reason of the fraudulent non-disclosure by Onley and Cranston.

The Full Court noted the policy extension regarding advancement of defence costs was as follows:

> *"If a claim alleges a wrongful act or illegal or improper conduct as described in the dishonest or criminal intent/improper conduct exclusion, then we will advance defence costs and representation expenses in respect of such claim until it is found by way of an admission by you, judgment or adjudication that such insured did in fact commit such wrongful act or engage in such illegal or improper conduct and any amounts previously advanced shall be repaid to us by you within 30 days following a request by us for such repayment".*

The Court observed there was little doubt that both Onley and Cranston would, pursuant to the above policy extension, be entitled to their defence costs being advanced to permit them to fund the cost of their defence of the criminal proceedings, even if the alleged wrongful conduct fell within the policy exclusion pertaining to dishonest, criminal, fraudulent or malicious activity.

However that finding was made on the proviso that such conduct occurred during the policy period, namely 1 July 2016 to 1 July 2017.

Further the Court noted a policy term which included a retroactive date of 1 July 2016 such that the policy would only provide cover with respect to alleged wrongful acts committed after that date.

The Full Court emphasised the basis of the insurer's refusal to indemnify Onley and Cranston was not in respect of allegedly wrongful conduct in which they engaged as company directors during the period of insurance but rather in respect of conduct pre-dating the inception of the insurance contract.

Further the failure by Onley and Cranston to disclose such conduct to the insurer, before entering into the contract of insurance, amounted to fraudulent non-disclosure under Section 28 of the ICA.

As the criminal trial had not yet reached a final hearing in which the presiding judge was yet to make findings regarding whether Onley and Cranston had engaged in criminal conduct, the insureds argued they were entitled to the benefit of the policy extension enabling them to be paid their defence costs by the insurer.

However the Full Court held this policy extension could only provide cover if the insureds had fulfilled their statutory obligation under Section 21 of the ICA regarding their duty of disclosure.

The Full Court held that Onley and Cranston had breached their duty of disclosure by reason of their failure to disclose the conduct in which they engaged with their associated companies before entering into the contract of insurance.

The Full Court made the following observations:

> *"The business model involved a scheme or arrangement in which an associated company undertook to provide payroll services for its clients and received from those clients PAYGW amounts which it then transferred to related companies. Rather than forwarding the PAYGW amounts to the ATO, the related companies transferred the amounts, inter alia, for the benefit of Mr Cranston and Mr Onley but the consequence that the ATO could only enforce the taxation obligations under straw companies. One need only set out the business model in these basic terms to appreciate that it is fraught with the risk that the ATO may seek to recover its lost tax revenue from those involved in the scheme".*

The Full Court went on to say:

> *"At the time of entering into the policy, the facts surrounding the manner in which the payroll business was operating, by the payment of PAYGW amounts to related companies for distribution to, inter alia, the applicants were relevant to the insurer's decision whether to accept the risk and if so on what terms. That would, one would have thought, have been apparent to a reasonable person".*

The Court accepted the insurer's argument that Onley and Cranston were not entitled to escape the consequences of their fraudulent conduct. As a matter of public policy, contracting parties are prevented from excluding liability for their own fraud.

Finally, the Court held in the absence of express wording, the insurer had not waived its rights under Section 28 of the ICA to seek to avoid the policy by reason of fraudulent non-disclosure.

Accordingly the separate questions were answered in favour of the insurer who was entitled to avoid the policy.

This interesting decision confirms the well established principles that an insured cannot benefit from fraudulent conduct particularly where it involves a breach of the duty of disclosure.

In this case, the insureds were left without insurance to fund their defence costs of a significant criminal prosecution against them by reason of their failure to disclose relevant facts to the insurer before entering into the insurance contract.

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Slips And Falls - Where Are We Up To With Slippery Substances On The Ground

In a previous edition of GD News we discussed the fact that since 2010 the NSW Court of Appeal has delivered judgments in a number of cases where slip and fall claims have failed against the occupiers of

supermarkets and fast food outlets. They included slips and falls arising from a variety of circumstances:

- a wet substance on the floor of an express check out (*Harris v Woolworths*);
- pieces of cardboard on a supermarket floor (*Coles v Meneghello*);
- wet steps inside the entrance to a McDonalds store (*Jackson v McDonalds*);
- soapy residue in the common area of a shopping centre outside a supermarket (*Woolworths v Ryder*);
- a puddle of water from a flower display inside a supermarket (*Coles v Bright*);
- a grape in the fruit and vegetable section of Woolworths (*Woolworths Limited v McQillan*).

This trend has continued with the recent decision of the NSW Court of Appeal in *Argo Managing Agency Ltd v Al Kameesy*.

Al Kameesy slipped and fell on a wet patch at the Westfield shopping centre in Liverpool on 28 December 2013. Al Kameesy commenced proceedings against the occupier of the shopping centre (which were resolved by consent prior to the hearing) and the company contracted to provide cleaning services, Atlantic Cleaning & Security Pty Limited. As Atlantic subsequently went into liquidation its insurer was substituted as defendant.

The fall occurred at 10.44 am. The parties agreed at 10.35 am a cleaner employed by Atlantic had inspected the area and at that time there was no wet patch. A second cleaner walked past the vicinity at 10.43 am, a minute prior to the fall.

The trial judge determined when the second cleaner walked past the area he did not look to his left. The trial judge determined the wet patch was at least a metre in one direction and the second cleaner's failure to notice the wet patch was a casual act of negligence for which Atlantic were liable.

Argo appealed.

As White JA stated simply in his judgment, there were three factual issues to be considered on appeal. The first issue was whether it was more probable than not there was water on the terrazzo floor, then how much water was on the floor and finally whether the cleaner, Mr Nguyen, should have seen the water and cleaned it up.

The leading judgment was delivered by His Honour, Sackville AJA, with whom McColl J agreed.

The contract between Westfield and Atlantic required inspections every 20 minutes. There was no dispute between the parties that when another cleaner, Ms Chaemkhuthod, undertook her inspection at 10.35, nine minutes before the accident, there was no wet patch on the floor. As Sackville AJA noted, if Mr Nguyen had not passed the relevant area about eight minutes after Ms Chaemkhuthod it is extremely unlikely that Al Kameesy would have had any argument as the cleaners had complied with their contractual requirements. That would be enough for the cleaners to successfully defend the claim.

The CCTV footage of the fall was in evidence and it was agreed between the parties there was nothing on the CCTV footage that demonstrated the source of the wet patch at the accident site.

The cleaner who passed the spillage, Mr Nguyen, also gave evidence by video link from Vietnam, through an interpreter. Not surprisingly Mr Nguyen had no independent recollection about the incident but his evidence was to the effect he did not notice anything unusual on the floor otherwise he would have stopped to attend to it.

Sackville AJA stated:

> *"The duty owed by Atlantic and Mr Nguyen to patrons of the Centre was not absolute. They were required to exercise reasonable care to detect and remove potential hazards to patrons, including wet patches on the terrazzo floor. The standard to be attained was that to be expected of a cleaner discharging his or her duties of inspection with reasonable diligence and care. A failure to detect a particular hazard did not necessarily involve a breach of that duty. Whether to nor it did so depends on the particular circumstances."*

Sackville AJA agreed with the trial judge's implicit finding the wet patch on which Al Kameesy slipped was present at 10.43 when Mr Nguyen approached the area. Sackville AJA concluded:

> *"There is no doubt the respondent slipped on a wet patch on the terrazzo floor. In my view, however, the evidence does not establish the wet patch extended over more than a very small area. The evidence also indicates that a small wet patch was very difficult to detect because of the design of the terrazzo floor (for which Atlantic was not responsible). I infer that the difficulty was exacerbated because the area inspected by Mr Nguyen was heavily trafficked and he had no reason to expect a wet patch on any given section of the corridor. The position may well have been different if the responded had adduced evidence suggesting that notwithstanding the difficulties of detecting the wet patch a reasonably diligent cleaner should have detected the hazard and removed it. But there was no such evidence.*
>
> *I do not think that it was open to the primary judge to infer from the CCTV footage that Mr Nguyen was remiss in the way he went about the task of inspecting the corridor for hazards. In the absence of an adverse finding as to the credibility or reliability of Mr Nguyen's evidence, there is no sound basis for concluding that he did not conduct the inspection with reasonable diligence and care. On the basis of the*

finding that the wet patch was present at 10.45, Mr Nguyen failed to detect the hazard that led to the respondent's fall. But the duty owed by Atlantic and Mr Nguyen to the respondent and other patrons was to exercise reasonable care to identify and remove potential hazards to their safety. It was not to guarantee that all hazards would be removed. And it is not permissible to conclude with the benefit of hindsight that by reason of Mr Nguyen's failure to detect a particular hazard that he and Atlantic breached the duty of care they owed to the respondent."

In contrast, Coles Supermarkets did not escape liability in a subsequent decision of the NSW Court of Appeal in *Coles Supermarkets Australia Pty Limited v Bridge*.

In that case the customer was on his mobile phone pushing a trolley when he slipped and fell on the wet surface of the supermarket car park in Coffs Harbour. The case did not involve compliance with a cleaning contract but is significant for the Court's finding on contributory negligence.

The car park in question was an underground car park that was accessed by a travelator. At the time of the fall large sections of the floor of the car park were covered in water. In order to get to his vehicle Bridge had to walk through the water.

Bridge sued Coles in the Supreme Court and was successful at first instance and awarded damages in the sum of $688,071.00.

Coles appealed.

The area where Bridge fell was smooth, polished concrete and the area was slippery. A number of emails were tendered by Bridge which demonstrated Coles were aware of an ongoing issue with water on the car park floor. Further, at trial Coles did not call any expert evidence to respond to the opinions of the consulting engineer retained by Bridge.

Bridge maintained his judgment against Coles on appeal.

However, the Court deducted 25% for Bridge's contributory negligence.

Leeming and Payne JJA stated:

"It is very difficult to slip and fall, even if walking on a slippery surface, if one is pushing a trolley and giving reasonable attention to that task. The reason is simple: in addition to the ordinary support and balance of one's feet, there is the advantage of support and balance from at least one, and commonly both, hands on the trolley. Of course the trolley is moving, but it will be doing so generally at the same speed and in the same direction as the person, thus providing a further source of support and balance in the event of a slip.

When Mr Bridge chose to answer his mobile phone, he removed one hand from the trolley, and focused on his handset. We would readily conclude that doing so causally contributed to his falling. His inattention and his having only a single hand on the trolley made it more likely that he could not save himself from his slip and instead would fall to the ground."

So what is the end result? The Court of Appeal has confirmed the approach that where there is compliance with the cleaning contract that should be sufficient for a defendant to escape liability, depending on the particular facts of the case. The Court has also confirmed that even where liability is established when a claimant falls on a slippery substance, inattention may lead to a reduction of damages for contributory negligence.

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Employers and Criminal Conduct - What is the Liability

In 2000 the High Court handed down the landmark decision of *Modbury Triangle Shopping Centre Pty Limited v Anzil* in which the Court determined an employer/employee relationship is one where an employer can have a liability for the criminal conduct of a third party. However, whether or not there will be liability on the part of an employer will depend on the particular facts and circumstances of each case as an employer does not have a strict liability to its employees.

In a recent decision of the Queensland Court of Appeal an employer was successful in defending a claim where an employee was assaulted in the employer's carpark (*Inghams Enterprises Pty Limited v Kim Yen Tat).*

Tat was a shift worker at Ingham's chicken processing factory at Murarrie. Tat was attacked late at night in the factory's car park as a consequence of which she sustained post traumatic stress disorder.

The assault occurred on 1 February 2013. At that time Inghams employed around 600 to 560 shift workers on the afternoon shift. Employees would finish their shift any time between 9.30 pm and 12.30 am however most of the employees would finish between 11.00 pm and 11.45 pm. When the employees finished their shift they would exit the factory through the car park. The evidence was to the effect there were always people wandering around the car park. Further, the car park was lit and had some CCTV coverage. There was a security office with a security guard however that was at a gate between the factory grounds and the car park and the guard did not have a complete view of the car park. In the 12 years the car park had been open prior to the assault there had been no other incidents.

Aaron Brain was a former employee of Inghams who had been dismissed from his employment in early January 2013. On the night in question, prior to the assault, Brain approached a number of Tat's co-workers and had conversations with them. Although the co-workers thought his behaviour was strange they did not report his conduct to the security guard.

When Brain approached Tat, he gave her a false story about his pregnant partner who needed help. He tried to persuade her into his car to show him where the train station was however she declined and walked to her own car. However, before she could close the door Brain approached her and prevented her from doing so. Brain kept talking to Tat, who kept saying she had to go home. He then asked if he could give her a hug and tried to put his hand on her neck. In his hand he held something that looked like a little red light. Tat was able to push him away but felt something stick into her hand. She then ran away and other workers in the car park came to her assistance.

After the incident Inghams issued a notice to its employees advising of the incident and what to do if something similar occurred.

Tat sued Inghams in the District Court and the trial judge found in favour of Tat in the sum of $148,916.87 clear of the refund to WorkCover Queensland.

The trial judge in essence determined that Inghams had breached its duty of care by failing to educate its employees to report suspicious activity.

Inghams appealed.

On appeal the Court of Appeal determined the trial judge was correct in its finding that Inghams had breached their duty of care. Justice Bond stated:

> *"The conclusions which His Honour reached concerning safety awareness training, duress alarms and upgraded CCTV monitoring was specifically supported in the reports and that support not diminished by the oral evidence of the engineers, which His Honour evidently accepted. The conclusion which His Honour reached, that the security measures in place were not aimed at protecting employees from third party violence and that the security officers should actually be performing their duties with that risk in mind, was also supported by the evidence to which His Honour referred and cannot be criticised. The applicant's criticisms of His Honour's findings pay insufficient regard to the content of that evidence and His Honour's acceptance of it. Although His Honour did make reference to the notice which the applicant gave to its workers after the incident had occurred, that reference was as an exemplar of the sort of proactive response which he thought should have been adopted before the incident and, consequent upon an appropriate examination of risk, as a response to risk. His Honour did not make the errors suggested by the applicant. Given that he did not treat the post incident conduct as an admission, it was unnecessary for him specifically to advert to the applicant's submission that he should not do so."*

However, Inghams were successful in their argument that causation had not been established. The Court of Appeal was of the opinion that there was no evidence to support the fact that Brain would have complied with any direction from the security guard.

Justice Bond stated:

> *"I do not think there is a sufficiently secure evidentiary basis to conclude that Brain would have been deterred on the night in question simply by being asked to leave by the security guard. He was determined to do what he had apparently set out to do, and was not necessarily responding rationally to what should, rationally, have been treated as a sufficient deterrent on the night in question."*

Ultimately the Court was not satisfied the breach of duty by Inghams was causative of the injury to Tat.

Although the legislation governing claims against employer in Queensland bears more similarities to the *Civil Liability Act 2002* (NSW) than the *Workers Compensation Act* 1987 which governs cases against employers in New South Wales, the decision demonstrates it is not always the case that an employer will be found liable for acts of a third party. The facts of each case must be closely considered.

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The Royal Commission turns the spotlight on superannuation and insurance industries

The Royal Commission into misconduct in the banking, superannuation and financial services industry was established by the Turnbull Government on 14 December 2017 in which former High Court Justice Kenneth Hayne AC QC was appointed as the Commissioner.

Public hearings commenced in March 2018 with Round 1 focusing on consumer lending practices.

The Royal Commission has subsequently conducted the following public hearings:

- Round 2: Financial advice (April 2018).
- Round 3: Loans to small and medium enterprises (May 2018).
- Round 4: Farming finance and issues affecting regional and remote Australian communities including interactions with Aboriginal and Torres Strait Islander people (June 2018).

On 6 August 2018 the Royal Commission commenced Round 5 of public hearings regarding the

superannuation industry. Those hearings concluded on 17 August 2018.

The following issues were covered during the Round 5 public hearings:

- Duties of registrable superannuation entity ("RSE") licensees including structural and government arrangements, the relationship between the trustees and financial advisors and selling practices.
- Superannuation funds and Aboriginal and Torres Strait Islander members.
- Effectiveness of superannuation regulators.

Senior Counsel assisting the Commission, Mr Michael Hodge QC, made the following remarks during his opening of Round 5 of public hearings:

"… In this fifth round of public hearings, we will examine the conduct of superannuation trustees in Australia … As at March 2018, Australians had superannuation savings comprising approximately $2.6 trillion of assets … The trustee holds the superannuation assets for the benefit of the members, or for the member's dependents upon the member's death. The member is the beneficiary of the trust. The trustees are obliged to act in the best interests of the members.

So what safeguards are there over Australians' retirement savings? That question has particular resonance given the significance of superannuation for our national economy today, and for the financial security of all Australians in retirement in the future".

Senior Counsel went on to say:

"What happens when we leave these trustees alone in the dark with our money? Can they be trusted to do the right thing? If they can, does that mean that the current regulatory system is adequate? If they can't, what must be done to protect Australians' retirement savings and to what extent do the entities that own or control the trustees who are not obliged to act in members' best interests, act in ways that are ultimately detrimental to members, even if they do not technically cause the trustee to breach the trustee's duties".

These comments set the tone for the Round 5 public hearings which included evidence from company officers associated with various RSE licensees as well as from APRA and ASIC.

The Treasury's submission to the Royal Commission on key policy issues noted:

"We have identified the three matters from the case studies to date that point to: numerous failures by firms to adhere to existing regulatory obligations and deal openly and honestly with the regulators; an indifference by a number of firms to delivering good consumer outcomes, as well as a lack of investment by some firms in systems and processes to monitor product performance and staff conduct; and at times an unsatisfactory attitude and approach to remediation where issues have been identified.

While it is for the Commission to reach a judgment on how systemic these problems and the underlying causes are, prima facie these outcomes reflect instances of failures of leadership, governance and accountability at an industry, firm and business unit level. Where misaligned incentives and conflicts of interest have been present, the underlying failings and the poor outcomes have been exacerbated."

Commissioner Hayne has stated he intends to submit an interim report to the Governor General by 30 September 2018. However the interim report will only cover Round 1, Round 2, Round 3 and Round 4 hearings and therefore will not include the recent public hearings into the superannuation industry and the forthcoming hearings in relation to the insurance industry.

In that regard, the spotlight is about to be turned upon the insurance industry during Round 6 public hearings which are listed to take place between 10 September 2018 and 21 September 2018.

The topics to be covered are as follows:

- The sale and design of life insurance and general insurance products.
- The handling of claims under life insurance and general insurance policies.
- The administration of life insurance by superannuation trustees.
- The appropriateness of the current regulatory regime for the insurance industry.

The Royal Commission intends to deal with the above topics by reference to the following case studies:

<u>Life Insurance</u>

- AMP
- ClearView
- CommInsure
- Freedom Insurance
- REST
- TAL

<u>General Insurance</u>

- AAI (Suncorp)
- Allianz
- IAG
- Youi

<u>Regulatory Regime</u>

- Code Governance Committee

- Financial Services Council
- Insurance Council of Australia

This will include natural disaster case studies that were originally to have been examined during Round 4 public hearings and evidence from consumers of their particular experiences.

The Royal Commission has published on its website the following background papers that were submitted at the Commission's request:

- *Background Paper 14: General Insurance*

  Dr Ian Enright, Peter Mann, Professor Rob Merkin QC & Greg Pynt

- *Background Paper 15: Catastrophes and Natural Disasters Insurance*

  Dr Ian Enright, Peter Mann, Professor Rob Merkin QC & Greg Pynt

- *Background Paper 20: Natural Disaster Insurance*

  Australian Government, The Treasury

- *Background Paper 26: Some features of the general and life insurance industries*

  Financial Services Royal Commission

- *Background Paper 27: Reforms to general and life insurance*

  Australian Government, The Treasury

- *Background Paper 28: Group life insurance*

  Dr Ian Enright, Peter Mann, Professor Rob Merkin QC & Greg Pynt

- *Background Paper 29: Life insurance*

  Dr Ian Enright, Peter Mann, Professor Rob Merkin QC & Greg Pynt

In Background Paper 20 authored by the Treasury the following is stated on page 12:

"The need to remedy ASIC's limitations in dealing with claims, was reiterated (in respect of insurance claims handling generally) in ASIC's October 2016 report on Life Insurance Claims: An Industry Review.

Treasury was asked to examine this matter further and undertake targeted consultation on the merits of regulating claims handling conduct as a financial service. Given the potential to overlap with the work of the Royal Commission, however, the Minister for Revenue and Financial Services announced in March 2018 that the work being done by Treasury to enhance ASIC's oversight of insurance claims handling would now be considered pending the outcome of the Royal Commission."

In Background Paper 26 authored by the Royal Commission, the following observations were made about the life insurance industry:

- As at 8 February 2018 there were 29 authorised life insurers in Australia.
- The five largest life insurers by total investment-linked industry assets for financial years ending in the 12 months to December 2017 were:
  - AMP Life (58%)
  - OnePath Life (28%)
  - Westpac Life Insurance Services (5%)
  - Colonial Mutual Life Assurance Society (5%)
  - TAL Life (1%)
- The five largest life insurers in the non-investment linked (risk-based) life insurance sector as a percentage of non-investment linked industry total assets were:
  - AMP Life (33%)
  - Challenger Life Company (16%)
  - Colonial Mutual Life Assurance Society (6%)
  - MLC (5%)
  - AIA Australia (5%)
- As at August 2017 more than 70% of Australian life insurance policies were held through superannuation funds.

In the same Paper, the following observations were made about the general insurance industry:

- As at 30 June 2018 there were 95 entities licensed to provide general insurance in Australia.
- However, not all insurers were licensed to provide all types of insurance and some insurers concentrated primarily on commercial not consumer-oriented insurance.
- It is therefore likely that there are no more than 34 insurers providing general insurance to consumers in Australia.
- Of those 34 insurers, the largest five insurance companies together earned 82% of gross earned premiums for the financial year 2017/18, ranked as follows based on their respective gross earned premium market share:
  - AAI (23%)
  - IAG (21%)
  - QBE (15%)
  - Allianz (14%)
  - Insurance Manufacturers of Australia (10%)

In Background Paper 27 authored by the Treasury, the following observations were made:

- The Federal Government recently accepted recommendations by the ASIC Enforcement Review to make section 13 of the *Insurance*

Contracts Act 1984 (Cth) a civil penalty provision allowing ASIC to take action against an insurer found to have breached its duty of utmost good faith thereby protecting consumers from egregious conduct by insurers.

- The Unfair Contract Term provisions in the ACL and ASIC Act do not apply to insurance contracts although the Treasury has, in June 2018, began consulting on a Proposals Paper to extend UCT laws to insurance contracts relating to both life and general insurance.

We await with interest the evidence to be adduced during the Round 6 public hearings and the findings of Commissioner Hayne in due course.

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CONSTRUCTION ROUNDUP

NSW Bans Use of Aluminium Composite Cladding in Multi Storey Buildings

On 10 August 2018 the NSW Commission of Fair Trading gave notice of a ban on the use of aluminium composite panels with a core comprised of greater than 30% polyethylene by mass in any external cladding, external wall, external installation, facade or rendered finish in certain multi-storey buildings in New South Wales. The building product ban commenced on 15 August 2018 and will remain in place until it is revoked and applies to multi-storey residences with a rise in storeys of three or more for certain classes of buildings and a rise of four or more storeys in other classes.

Exceptions apply where the products pass approved testing and are not deemed combustible.

Fair Trading suggests that strata owners who have concerns about external cladding should contact their Owners Corporation or their Local Council or relevant fire safety professional to assess their building.

The ban has retrospective effect. It applies to all buildings including those under construction.

The use of a banned product is a major defect for the purposes of home building statutory warranties and owners have a period of up to six years in which legal proceedings can be commenced against a builder for breaches of building statutory warranties.

Fair Trading has announced the ban does not stop an Owners Corporation from pursuing a claim under the Strata Bond Scheme in respect of Bonds lodged by developers/builders and Owners Corporation can use all or part of the bond to pay for rectification of any defective building work that is identified in a final inspection report including the use of a banned product.

Existing buildings that have banned products will become “affected buildings” within the meaning of the legislation and the Commissioner for Fair Trading can issue an Affected Building Notice in respect of the building which must be given to the owners and occupiers of the building, the Local Council or relevant enforcement authority and the Commissioner of Fire & Rescue.

The banning of the cladding does not automatically require rectification of affected buildings however Local Councils and enforcement authorities will have the power to require rectification. Local Councils or the relevant enforcement authority can make a Building Product Rectification Order in respect of an affected building. That notice can require an owner to undertake remediation works.

The NSW Government continues with its deliberations on the way to manage registers for affected buildings.

Upcoming changes are likely to include the need to register buildings with cladding and following registration owners will need to submit a statement about the cladding material used on the building, the level of fire risk the cladding presents and what actions might be necessary to address those risks.

The use of aluminium composite panels utilising polyethylene presents significant challenges for the building industry and owners of multi-storey buildings with aluminium composite panelling irrespective of when the cladding was installed.

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Security of Payment Claims

One of the greatest challenges to participants in the construction industry is maintaining a healthy cash flow. The subcontractors and suppliers are often small operators who survive from project to project, and a single bad debt can force them into insolvency or bankruptcy. The head contractors are often juggling the progress claims made by their subcontractors and suppliers with their own attempts to get paid by the developer. A difficult or poorly managed project can easily and quickly destroy a once-successful construction company, with the domino effect of ruining the businesses of those down the contractual chain.

While Australia has seen many prominent players in the construction industry fail for this reason, there are many more small businesses that are badly affected or fail when a top tier or middle tier company goes into insolvency. Many would be surprised to learn that around 20% of all insolvencies in Australia are invariably in the construction industry. Since this

industry is a large and integral component of the Australian economy, it is vital that these issues are effectively addressed.

The concept of a legislative scheme to facilitate timely payments to subcontractors and suppliers on construction projects in order to protect their cash flow is not unique to Australia. Similar schemes are in operation in many countries – starting with the United Kingdom in 1996, New Zealand in 2004 and Singapore in 2005 – as well as some states of the USA and provinces of Canada. Hong Kong is also shortly to commence a similar statutory regime.

Australia's own security of payment regime commenced in NSW in 1999 with the *Building and Construction Industry Security of Payment Act 1999* and by 2009 all the states and territories had their own version.

While it was originally intended that the security of payment legislation be uniform across the country, the reality is that two different models were adopted – the "East Coast Model" by NSW, Queensland, South Australia, Victoria, ACT and Tasmania, and the "West Coast Model" (which is closer to the UK version) by Western Australia and the Northern Territory.

Recently Mr John Murray AM provided his report to the Federal Government on harmonising Australia's security of payment laws – this was discussed in more detail in our July newsletter. Interestingly, many of Mr Murray's recommendations were based on the existing NSW legislation.

In NSW, the Act applies to any construction contract, whether the contract is in writing, is oral, or is a mixture of both. A "construction contract" is defined as a "contract or other arrangement" for the carrying out of construction work or for the supply of related goods and services. "Construction work" includes demolition, preparatory, construction and ancillary work on infrastructure, industrial, commercial and retail projects but specifically excludes the extraction of minerals or natural gas (ie mining) and the construction of residential housing (which is instead governed by the *Housing Act 1989*). However, work ancillary to mining or housing construction (such as preparatory civil works) may fall within the scope of the Act.

The provisions of the Act operate in parallel with the relevant construction contract and any attempt to contract out of the Act is void: section 34.

Pursuant to section 8 of the Act, a person who has undertaken to carry out construction work or to supply related goods and services becomes entitled to progress payments at certain specific times, which are known as "reference dates". If the contract does not determine when each reference date is to arise, then the Act provides that the reference date is to be the last business day of each month.

When such an entitlement arises, in order to trigger the processes and rights under the Act, the person carrying out the construction work (the claimant) must serve on the person who is liable under the contract to pay the claimant (the respondent) a payment claim that complies with the specific requirements of the Act. These include identifying with some precision the relevant construction work and the amount said to be due to the claimant.

If the payment claim is made by a head contractor, it must also include a statutory declaration (supporting statement) that all subcontractors and suppliers on the project have been paid. Knowingly swearing a false supporting statement can attract a fine of $22,000 or a prison sentence of three months (or both).

Following receipt of a payment claim, if the respondent wishes to dispute the amount claimed, it must serve a payment schedule within ten business days which identifies the amount it intends to pay and the reasons why this amount is less than that claimed. A failure to serve a payment schedule within this time frame may mean that the claimant becomes automatically entitled to payment of the full amount claimed.

If the claimant is a head contractor, the due date for paying the amount claimed or scheduled is no later than 15 business days after the claim was made. If the claimant is a subcontractor or supplier, the due date for payment is 30 business days after the claim was made. If the claim is for work ancillary to housing construction, then the due date for payment is 10 business days after the claim. Any contractual provision that attempts to make the due date for payment later than these statutory time frames is to have no effect: section 11(8).

If the respondent fails to pay the amount claimed or scheduled by the due date for payment, the claimant not only has the right to suspend work on the project, it also is entitled to sue the respondent in court for the outstanding amount as a debt due. In such proceedings, the respondent is not permitted to raise any matter in defence of the claim or to bring any cross claim against the claimant in relation to the contract.

If a payment schedule has been served and the claimant wishes to pursue the full amount claimed, it can apply within 10 business days of receipt of a payment schedule to have the claim formally adjudicated. The respondent has five business days to provide a formal response, and the adjudicator must provide his or her determination within 10 business days, unless the parties agree to additional time being allowed to the adjudicator. The adjudicator also has the power to determine which of the parties is to be liable for his or her fees in the adjudication.

The amount determined by the adjudicator to be due to the claimant is also enforceable as a court judgment, and the respondent has no general right of appeal.

As a consequence of the strict timeframes specified by the Act for the making and adjudication of payment claims, any disputed claims are invariably fully

adjudicated within a matter of weeks after the claim is first made. While a claimant may prepare a detailed and comprehensive claim over a matter of months with the intention of triggering the processes in the Act at a later date, these time limitations mean that the respondent can be taken by surprise and have very little opportunity to properly defend or respond to the claim. Similarly, the adjudicator needs to make a determination based only on the limited information put before them, which (due to the imbalance of preparation by each of the parties) may lead them to prefer the claimant's case.

However, importantly, whether the claimant recovers the amount due to it as a debt due or as an adjudication determination enforced by the court, this only has an interim effect while the project remains ongoing. A final reconciliation of the claimant's overall entitlement to payment for the project may lead to the claimant being liable to reimburse the respondent for any overpayment previously made under the processes of the Act. Similarly, an adjudicator's determination during the course of the project is not binding in any later litigation or arbitration with respect to the contract.

While the timeframes prescribed by the Act have been described by the High Court as "brutally fast", they are consistent with the overall purpose of the security of payment process to keep the cash flow moving down the contractual chain on a "pay now, argue later" basis. The onus is put on the developer or head contractor to provide a proper and timely response to payment claims, at the risk that the claimant will become legally entitled to the full amount claimed, at least in the short term.

As a matter of strategy, a claimant may try to ambush a respondent with a detailed, well prepared claim (particularly over the Christmas/New Year holiday period), knowing that the odds are in favour of the claimant receiving a cash injection. A claimant who has already been paid a significant sum of money for the project will usually be in a stronger position to negotiate with the respondent a more favourable wrap up settlement at the end of the project. However, most claimants also accept that if they make a security of payment claim against a respondent then the business relationship between them is likely to severely deteriorate or be ruined entirely.

While many parties to construction contracts attempt to make or respond to payment claims under the Act without the benefit of legal advice or representation, a failure to comply with the Act's strict and complicated requirements can lead to a disaster for either party, with a consequential reduction in that party's negotiating power. For that reason, it is highly recommended that a substantial claim be given the same legal support as if it were proceeding through the court system, albeit on a much quicker (and often cheaper) scale.

At Gillis Delaney Lawyers we have experts in construction law who can guide both claimants and respondents through the security of payment processes, with proven successful outcomes.

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Reforms to NSW Security of Payment Legislation

The NSW Government has recently released a Bill to amend the *Building and Construction Industry Security of Payment Act 1999*.

While many of the proposed amendments are consistent with the recommendations made by Mr John Murray in his recent report to the Federal Government on general reform to and harmonisation of security of payment legislation across Australia, the NSW Government has indicated that the amendments have not been driven by that report.

Some of the proposed amendments merely redraft existing provisions into clearer language. However, the Bill also introduces some interesting reforms to the existing security of payment process.

The key reforms are as follows.

Section 8 would be amended to provide that persons who carry out construction work (or provide related goods or services) have a statutory entitlement to a progress payment for their work at least once a month. This amendment is intended to address the confusion that often arises about whether a reference date to support a payment claim under the Act has actually arisen, as well as countering contractual provisions that are intended to "delay" the occurrence of a reference date to the detriment of the claimant.

The statutory entitlement to payment would include a final reference date arising upon the contract being terminated. This proposed amendment is intended to address the situation where reference dates currently do not survive the termination of the contract – an issue that was examined by the High Court in *Southern Han Breakfast Point v Lewence Construction* and discussed in our February 2017 newsletter.

The due dates for payment would be reduced to 10 business days for head contractors and 20 business days for subcontractors. The explanatory note for the Bill observes that while the current stipulated time limits of 15 business days and 30 business days respectively were intended to reduce the payment periods that were previously usually faced by many subcontractors and suppliers, the mandated time frames also had the effect of *increasing* some payment periods. The new time frames are therefore designed to be a middle ground.

Subcontractors would be given the right to inspect the head contractors' records relating to the trust account holding the subcontractor's retention moneys.

Payment claims made under the Act would (again) need to specifically identify that they are made under the Act. This is a reversal of an amendment made in 2014 in which the requirement for such endorsements was eliminated. However, this led to disputes as to whether an invoice which complied with the requirements of the Act was deemed to be a payment claim under the Act – even if the claimant had not intended it to be.

The amendments would include an express provision allowing a claimant to withdraw an application for adjudication at any time prior to a determination being given (usually due to a settlement of the claim being agreed between the parties), as long as notice of the withdrawal is served on the respondent and on the adjudicator. It should be noted that section 29 of the current Act already entitles an adjudicator to be paid for his or her work done and expenses incurred, and thus the parties would need to agree as part of their settlement which party should be liable to pay the adjudicator's fees.

The ten business day time frame for the adjudicator to deliver his or her determination would be triggered by the date that the adjudication response is received rather than when the adjudicator notifies the parties that he or she has accepted the nomination.

The Minister would be able to make a Code of Practice to be observed by Authorised Nominating Authorities (ANAs). This amendment is designed to increase the confidence in the role played by ANAs, including the current perception that an adjudication application lodged with particular ANAs may result in a more favourable outcome for the claimant.

The Supreme Court would be given express power to sever part of an adjudicator's determination that has been affected by jurisdictional error and confirm that the balance of the adjudication determination remains enforceable. This amendment would address the current judicial approach that a jurisdictional error invalidates the whole of the determination: *Multiplex Constructions v. Luikens* and *Watpac Constructions v. Austin Corp*. This also provides some deterrence to challenging a determination for a minor error in the hope of having the whole determination declared void.

A company that has been placed into liquidation would not be entitled to make payment claims under the Act. This amendment is consistent with the overall policy of the Act to transfer the risk of the interim payment to the principal and/or head contractor on a "pay now argue later" approach. However, if the claimant is in liquidation then arguably it no longer needs the money to sustain the cash flow in its business, and any payment made under the Act becomes a final payment for distribution to creditors, rather than merely an interim payment.

Various additional powers would be given to NSW Fair Trading to investigate and enforce contraventions of the Act. These powers would include the issuing of search warrants and seizing documents from parties. This would assist in determining whether contractors are maintaining the required retention accounts and are entirely truthful when swearing supporting statements that their subcontractors and suppliers have been paid.

The penalties for contravening the mandatory provisions of the Act (such as swearing a false or misleading supporting statement or not co-operating with investigating authorities) have generally increased. For example, a company that serves a false or misleading supporting statement faces a maximum penalty of $110,000 and the directors of the company may be subject to executive liability – ie each director may also be personally liable with a fine of $22,000. Furthermore, a person who knowingly swears a false statutory declaration may be subject to a fine of $22,000, or three months' imprisonment, or both.

The closing date for public consultation on the draft legislation is 18 September 2018. Submissions can be made to the NSW Department of Finance, Services and Innovation and all submissions will be made available to the public on NSW Fair Trading's website.

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EMPLOYMENT ROUNDUP

When Is A Causal Employee Not A Casual?

The current structure of Australia's industrial regulation continues to present significant risks to labour hire entities, and their favoured business model.

Increasingly, labour hirers depend on long term contracts with a relatively small number of end user clients. These circumstances regularly see the hirer supply workers for extended (many month) periods, often with the same individuals working the same or substantially the same pattern of shifts week after week.

Many labour hire firms engage such workers on the basis that the workers are "casuals" and pay them accordingly – either at the casual rate set out in any relevant Modern Award or enterprise agreement, or an hourly figure meant to reflect that the workers will not be entitled to leave benefits.

And this is where the real trap lies. Just because the labour hire firm and the worker agree that the worker is engaged as a casual doesn't necessarily mean that the

leave benefits under the *National Employment Standards* don't apply to the worker.

In other words, an employer may be liable to provide annual leave (and other) entitlements to a worker it classes as a casual and to whom it has already paid an hourly rate meant to compensate the worker for leave. How would such a result influence a labour hire firm's margins?

The Full Court of the Federal Court of Australia has recently confirmed (in *WorkPac v Skene* [2018] FCAFC 131) that this is a possible scenario.

Background

WorkPac operated a labour-hire business. It employed Mr Skene as a dump-truck operator from 17 April to 17 July 2010 and then again from 20 July 2010 to 17 April 2014 at coal mining operations in central Queensland.

Mr Skene claimed that he was a permanent fulltime employee of WorkPac and that he was entitled to annual leave and consequential entitlements, or payment in lieu of annual leave upon his employment coming to an end. He said that his entitlement to annual leave derived from a relevant Enterprise Agreement (***EA***) and also the *National Employment Standards* (***NES***). In addition to compensation, Mr Skene sought the imposition of pecuniary penalties on WorkPac for contravention of the FW Act.

WorkPac contended that Mr Skene was a casual employee and not entitled to annual leave and the related entitlements he claimed, either under the Enterprise Agreement or under the NES.

The primary judge held that Mr Skene had an entitlement to be paid on termination in lieu of untaken annual leave under the NES, but not under the EA. The primary judge made orders that WorkPac pay to Mr Skene $21,054.69 by way of compensation and $6,735.03 by way of interest. Otherwise, all outstanding applications were dismissed including Mr Skene's application that civil penalties be imposed on WorkPac.

Employment Facts

In early April 2010, Mr Skene responded to an advertisement placed by WorkPac advertising a position as a truck driver at a coal mine in Central Queensland. He was subsequently notified that his application for the advertised position was successful.

He attended WorkPac's offices and was given a "Notice of Offer of Casual Employment". He executed a document entitled "Casual or Fixed Term Employee Terms & Conditions of Employment".

From April through to July 2010, Mr Skene was employed by WorkPac at the host's mine as a dump-truck operator. His position was "drive in, drive out", meaning that he had to transport himself to and from his workplace at the mine. He worked on rotation so that he worked a number of days and then had a number of consecutive days off.

The Terms & Conditions of Employment Document relevantly included the following terms:

> *CASUAL OR FIXED TERM EMPLOYMENT ASSIGNMENTS WITH WORKPAC*
>
> *5.1 Employment with WorkPac is on an assignment-by-assignment basis, with each assignment representing a discrete period of employment on a Casual or Fixed Term hourly basis.*
>
> *5.3 The employee may accept or reject any offer of an assignment.*
>
> *5.11 Casual employees will serve a 12 month probationary period and Fixed Term employees a 6 month probationary period.*
>
> *5.12 A casual assignment with WorkPac may be terminated at any time by the giving of one (1) hours notice.*
>
> *7.8 Annual Leave*
>
> *All fixed term permanent employees shall accrue annual leave at the rate of four weeks for each completed year of service.*

In about June 2010, Mr Skene commenced searching for a "fly in, fly out" position at a suitable mine site. He found an advertisement for such a position placed by WorkPac, fort a dump-truck operator to work at a coal mine operated by Rio Tinto Coal Australia Pty Ltd ("**Rio Tinto**") in Central Queensland.

Mr Skene telephoned WorkPac and spoke to WorkPac's recruitment co-ordinator. He was told that the position involved 12 hour shifts, on "a 7 days on, 7 days off" roster arrangement. He was also told that after a probationary period of three months, he would be made a permanent employee. He was advised that he would be paid a flat rate of $50 per hour and that flights and accommodation were "included".

About a week later Mr Skene was advised that he had been successful in obtaining the position, and was again advised that his hours would be 12 hours per shift on "a 7 days on, 7 days off" continuous roster arrangement.

Mr Skene attended WorkPac's offices where he was provided him with a "Notice of Offer of Casual Employment" dated 16 July 2010 ("**Notice of Offer**"). The Notice of Offer relevantly provided:

> *Assignment for: RIO TINTO – CLERMONT MINE*
>
> *Assignment Address/Location: Clermont Mine CLERMONT QLD 4721*
>
> *Daily Working Hours: 06:000am – 06:00pm (This may vary and is a guide, any significant changes notify WorkPac) Please note: Your ordinary hours of work shall be a standard work*

week of 38 hours. Additional reasonable hours may be worked in your rostered arrangements. Length of Assignment: 3 Months (This may vary and is a guide only.)

Your Pay rate is a Flat Rate of: $50.00 per hour

Mr Skene commenced working at Rio Tinto's Clermont mine. At an induction performed by a Rio Tinto employee he was informed that his hours of work would be 12.5 hours per shift on "a 7 days on, 7 days off continuous roster arrangement". He was assigned to "C Crew" which was comprised of employees of both WorkPac and Rio Tinto. On his commencement on 20 July 2010, Mr Skene was given a copy of his roster that covered a period ending in December 2010.

Mr Skene was provided with camp-style accommodation located at the mine. On days off his personal belongings were stored in boxes in his allocated room. Mr Skene was provided with flights and accommodation at no cost.

In January 2011, Rio Tinto provided Mr Skene with his roster commencing in January and covering the entirety of 2011. Similarly, in January 2012, Mr Skene was provided with a 12 month roster in advance.

He worked in accordance with his roster. He worked for seven days straight on each day of the week (including Sundays). He also worked on public holidays if his roster called for that. He did not work between 11 and 17 October 2011 and for three days during Christmas 2011.

Mr Skene was paid weekly by WorkPac. He was required to fill out a weekly time-sheet and he was paid for the hours he worked.

In April 2012, Mr Skene was stood down during a shift and not required to work the following day. He was paid for the time he was stood down. A week later he attended a meeting with the manager of WorkPac to discuss conduct allegations, and was terminated. He was removed from the mine and did not work for WorkPac again.

Mr Skene did not work any other shifts apart from those provided for by his rosters. He did not take any paid annual leave during the period of his employment with WorkPac, and was not paid any monies in lieu of untaken annual leave.

Mr Skene's employment at the Claremont mine was:

- regular and predictable. His working arrangements and shifts were set 12 months in advance in accordance with a stable and organised roster;
- continuous, save for one period of seven days that went unpaid;
- facilitated by the fly in, fly out arrangement and the provision of accommodation at no cost to himself;
- the fly in, fly out arrangement was inconsistent with the notion that Mr Skene could elect to work on any day and not work for others;
- there was plainly an expectation that Mr Skene would be available, on an ongoing basis, to perform the duties required of him in accordance with his roster, until such time as the assignment was complete: and
- the work undertaken by Mr Skene was not subject to significant fluctuation from one day, or one week, or one month, or one year to the next. The hours of work were regular and certain as revealed by his pay slips.

Additionally, there was no evidence that employees of WorkPac at the Clermont mine would choose which days of their rostered periods they would work or not work and Mr Skene had no choice in the daily working arrangements during the course of his employment.

The Issues

There were 2 central issues.

First, did the NES apply to the worker? The NES are minimum standards that apply to the employment of "national system employees". Those standards may not be excluded by a modern award or enterprise agreement made under the FW Act.

The question here was what was the proper construction of section 86 the *FW Act*, which deals with annual leave and which provides:

This Division applies to employees, other than casual employees.

The effect of s 86 is to exclude casual employees from the entitlement to annual leave and ancillary benefits provided by the NES. Was Mr Skene a "casual employee" for the purposes of section 86?

Second, did the provisions of the EA mean that Mr Skene had an entitlement to annual leave under the agreement?

The Full Court's Decision

On both central issues the Full Court held that Mr Skene was not a "casual" employee.

In relation to the NES entitlement to annual leave, the Court determined that the meaning to be attributed to the term "Casual employee" in section 86 is the ordinary legal meaning which that term has.

It rejected arguments that the term had a specialised industrial meaning which meant it covered employees whose terms and conditions of employment described them as such. It also rejected an argument that because casual employees were paid a casual loading, that meant they should have no entitlement to annual leave under the NES.

Importantly, the Full Court held that the term "casual employee" has no precise meaning and that whether

any particular employee is a casual employee depends upon an objective characterisation of the nature of the particular employment as a matter of fact and law having regard to all of the circumstances.

The expression "casual employee" is similar to the term "employee". Both have acquired a legal meaning referable to the particular indicia found to be relevant to the characterisation process. For the term "employee" the relevant indicia are applied through what is commonly described as a "totality test".

The characteristic that distinguishes full-time and part-time employment is that those employments are on-going (sometimes called "permanent") employments. On-going employment does not mean lifelong employment, but on-going employment is employment for an indefinite term subject to rights of termination. It is characterised by a commitment by the employer, subject to rights of termination, to provide the employee with continuous and indefinite employment according to an agreed pattern of ordinary time (as distinct from overtime) work. A corresponding commitment to provide service is given by the employee.

What distinguishes a full-time employee from a part-time employee is the pattern of work agreed to. A full-time employee's pattern of work will be the ordinary full-time hours applicable at the particular workplace (e.g. eight hours each week-day). A part-time employee's pattern of work will be a fixed number of ordinary hours, the number of hours being less that the full-time ordinary hours applicable at the workplace, worked at a regular time on regular days (e.g. 9.00 am to 1.00 pm every Monday, Tuesday and Thursday).

In contrast, a casual employee has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer. That characteristic - "any commitment by the employer or the worker to ongoing employment" - captures well what typifies casual employment and distinguishes it from either full-time or part-time employment.

The indicia of casual employment– irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability – are the usual manifestations of an absence of a firm advance commitment.

Whether the requisite firm advance commitment to continuing and indefinite work (subject to rights of termination) is absent or present must be objectively assessed including by reference to the surrounding circumstances created by both the contractual terms and the regulatory regime applicable to the employment.

The payment by the employer and the acceptance by the employee of a casual loading, like the description of the type of employment given by the parties in their contractual documentation, speaks to the intent of the parties to create and continue a casual employment. But the objective assessment will need to consider whether that intent has been put into practice and if achieved, has been maintained.

The objectively demonstrated existence of a firm advance commitment to continuing and indefinite work (subject to rights of termination) according to an agreed pattern of work will ordinarily demonstrate a contrary intent and the existence of on-going full-time or part-time employment rather than casual employment. The key indicators of an absence of the requisite firm advance commitment will be irregularity, uncertainty, unpredictability, intermittency and discontinuity in the pattern of work of the employee in question. Those features will commonly reflect the fact that, whilst employed, the availability of work for the employee is short-term and not-ongoing and that the employer's need for further work to be performed by the employee in the future is not reasonably predictable.

In light of that reasoning, section 86 applied to Mr Skene because he was not relevantly a "casual employee". Likewise, he was not a "casual Field Team Member" for the purposes of the EA, and thus entitled to its annual leave benefits.

The result was that Mr Skene was entitled to annual leave benefits under the NES and the EA.

The grave dangers for labour hire businesses that this case highlights are clear. Financial disaster could be looming.

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Inherent Duties & Reinstatement Rights - Traps In The Future

Employers often face difficulties in addressing the ongoing employment of workers who, for one reason or another, become incapable of performing their duties.

From the perspective of employment law, the interaction of relevant principles can be complex and present potential industrial exposure if not properly followed.

Overlaying that general law position, the provisions of the workers compensation legislation (at least in New South Wales) give significant rights to workers, and can produce for employers outcomes which at best are unintended and at worst are disastrous.

The general law position

Leaving aside for the moment any affect by legislation, the starting point under the general law is relatively simple. If, by reason of some supervening incapacity or

illness or other event, a worker is no longer able to perform the inherent duties of his or her role, then the law treats the contract of employment as having become frustrated.

> *"… the contract is frustrated by that event immediately and irrespective of the volition or the intention of the parties, or their knowledge as to the particular event..."*

That is, the contract comes to an end without any action required by the parties to terminate it.

Questions can arise, of course, as to whether any particular incapacity is actually sufficient to strike at the root of the employment agreement. That is resolved by an examination of the terms of the employment contract, a detailed appraisal of the tasks and functions required of the position, and a precise assessment of the characteristics of the incapacity at present – and its likely future course.

These principles apply regardless of whether the incapacity was acquired as a result of injury at work or in some other way unconnected with employment.

Workers compensation - protection from termination

Where a worker has acquired the incapacity for work as a result of a compensable injury, there is an important restriction on the general law position regarding bringing the employment to the end.

Section 248 of the Workers Compensation Act 1987 (WCA) makes it an offence to dismiss a worker where the worker is dismissed:

(a) because the worker is not fit for employment as a result of the injury, and

(b) within 6 months after the worker first became unfit for employment.

Although not completely clear, "dismissed" for the purposes of the section probably includes the bringing to an end of the employment contract which has become frustrated.

Complexities can also arise in determining when the 6 month period ends – particularly where the relevant incapacity only manifest at some time after the injury was suffered.

As a general rule then, where incapacity arises because of a work injury, an employer may not end the employment within 6 months.

Fair Work Act

If an employment contract has been brought to an end because a worker is not fit for the inherent duties of the role, is there any scope for him or her to bring an Unfair Dismissal claim or an Adverse Action claim under the Fair Work Act 2009 (Cth)(FWA)?

For an Unfair Dismissal claim, it is necessary pursuant to section 385 of the FWA, for the worker to have been "dismissed". Essentially, this means terminated at the instigation of the employer.

Recent decisions of the Fair Work Commission give a very broad interpretation to what actions can constitute termination "at the instigation of the employer". Currently, there seems little doubt that formally ending employment because of incapacity would be classified as at the employer's instigation. This seems wrong in principle, but is the reality at present.

An employer would then be required to justify the "dismissal" as not being harsh, unjust or unreasonable. The primary factor relevant here would be the argument that there was a valid reason for the "dismissal" – i.e. that the employee could no longer perform the role and the employment contract had become frustrated.

Other factors relevant to the process of termination would also have a part to play - looking at whether there was transparency in advising the employee of the employer's proposed course of action, whether the employee was afforded an adequate opportunity to make representation or provide medical evidence and the like.

As far as an Adverse Action claim under section 365 of the FWA is concerned, the position is somewhat clearer.

There are specific exemptions in section 351 of the FWA which prevent the bringing of an adverse action claim in circumstances where the termination was either because of the inherent requirement of the particular position or was not unlawful under a relevant anti-discrimination law.

Although the precise meaning of "inherent requirements" may not be the same as under the general law, broadly, the effect is that there is only a slim prospect that a successful adverse action claim on the discriminatory ground could be brought.

Workers compensation – reinstatement rights

The real sting in the tail in this area comes from the reinstatement rights afforded to workers under the WCA.

Section 241 of the WCA provides:

(1) If an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of a kind specified in the application.

If the employer refuses to reinstate the worker, section 242 empowers the Industrial Relations Commission to make an order for reinstatement.

Critically, such an order can be sought up to 2 years after the date on which the workers employment was terminated.

If the IRC is satisfied that the worker is (now) sufficiently fit, it can order reinstatement to the former position, or:

(a) employment of a kind that is available but that is less advantageous to the worker, or

(b) employment of a kind that the IRC considers the employer can reasonably make available for the worker (including part-time employment or employment in which the worker may undergo rehabilitation).

These are far reaching powers, and add significant uncertainty and human resources difficulties.

Further complications arise in circumstances where the worker in question has brought a claim for work injury damages.

Most importantly, however, the reinstatement rights under the WCA cannot be contracted out of. That means that they are always there.

So, even if an employer has resolved, say, an unfair dismissal claim by agreement with an employee, and considers dealings between the parties to be at an end, a claim for reinstatement might unexpectedly arise many months later.

Even if resisted, the power of the IRC is to make reinstatement orders regardless of the wishes of the employer – a grim realty where a "premium" may well have been paid as part of a settlement, and where a return to the workforce brings with it the prospect of further injury or disputation.

Clearly, ending employment on the "inherent duties" ground should only be undertaken after careful consideration. It has many traps, which remain for a long time.

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WORKERS COMPENSATION ROUNDUP

Further Restrictions on Workers "One More Claim"

Amendments to workers' compensation legislation in New South Wales in 2012 restricted the number of claims for lump sum compensation a worker could make to one only. The interpretation of the amendment and its application to workers who made claims before the amendments and those whose claims that arose after the amendments has been the subject of judicial interpretation all the way to the High Court. It has also been the subject of further clarification by Regulations in 2016.

The application of the amendment was the subject of further clarification in the recent decision of Arbitrator Deborah Moore in *Singh v B&E Poultry Holdings Pty Ltd* [2018] NDWWCC 178.

The worker sustained injury to his back in February 2013 when lifting boxes of chicken. He eventually came to surgery in June 2014.

In 2016 the worker made a claim for lump sum compensation in respect of 13% whole person impairment. The claim was referred to an approved medical specialist ("AMS") who issued a Medical Assessment Certificate ("MAC") assessing 14% whole person impairment of the lumbar spine and 0% for scarring.

The proceedings were discontinued by the worker before any Certificate of Determination issued.

The worker then made a further claim for lump sum compensation in respect of 16% whole person impairment as assessed by another independent medical assessor. The employer offered to resolve the matter on the basis of the previous MAC of 14%. The employer asserted the worker was bound by the earlier MAC which obviated the necessity to issue a Section 74 Notice.

The employer objected to the matter being referred to an AMS on the grounds the worker was bound by the previous MAC and could not bring a second claim in respect of the same injury as a result of the provisions of Section 66(1A) of the 1987 Act.

Before Arbitrator Moore the worker relied upon the principles expressed by President Keating in *Avni v Rizzi Industrial Plastics Pty Limited* where he stated the Workers Compensation Commission Rules allowed a worker to discontinue proceedings and recommence the claim at any time without penalty. He observed the mere issuing of a MAC did not resolve the issues in dispute and a MAC issued in one set of proceedings did not bind the parties in subsequent proceedings. He further stated a dispute was not determined unless the Commission issued a Certificate of Determination.

The employer argued the worker was disentitled from making a second claim because his first claim for lump sum compensation had not been made before 19 June 2012 consistent with the provisions of Clause 11 of Schedule 8 of the 2016 Regulation. The employer also submitted *Avni* was wrong to the extent it permitted an worker who had made a claim and discontinued it to make a new claim.

The employer submitted *Avni* restricted a worker to recommencing a claim but not commencing a fresh claim. Having delayed until after the issuing of the MAC the worker was limited to recommencing subject to the MAC which was the only certificate that could be used in relation to the injury.

Arbitrator Moore expressed the view Section 66(1A) did not necessarily prevent a worker recommencing

proceedings where no Certificate of Determination had issued as in the present case. The more problematic issue in her view was the operation of Section 322A which provides a MAC given in connection with an assessment is the only MAC that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of a worker as a result of the injury concerned. She interpreted the section to indicate the worker simply could not obtain a further MAC.

Section 66(1A) imposed a further restriction in the absence of a claim made before 19 June 2012 that the claim for lump sum compensation was the only claim that could be made in respect of the injury. As the injury occurred in February 2013 it was not possible for any claim to have been made prior to 19 June 2012.

Arbitrator Moore considered the only relief the worker might have available was to seek a reconsideration of the MAC in accordance with the terms of Section 329 of the 1998 Act. This could only be done by the Registrar as an alternative to an appeal against the assessment or by the Commission with its power to refer a matter to an AMS for a further assessment notwithstanding the matter had previously been the subject of a determination by a Medical Appeal Panel. However the section did not allow for an appeal in circumstances where no appeal was allowed.

Arbitrator Moore noted Deputy President Snell had considered the reconsideration potential in *Pidcock Panel Beating Pty Limited v Nicolia* where the worker sought reconsideration of a MAC but in that case the worker was subject to the "one further claim" provision in the Regulations and he had exhausted that right.

After consideration of all the legislative provisions Arbitrator Moore was not persuaded the worker could proceed with his further application. She did not consider in the circumstances of the case the worker was entitled to make a new claim and obtain a new MAC.

It remains to be seen whether the worker seeks to challenge the decision and appeal to a Presidential member on the basis it is affected by an error of law.

Unless and until the decision is overturned it appears that workers who made their first claim for lump sum compensation after 19 June 2012 are restricted to one MAC only. Workers who made claims for lump sum compensation before that date are still restricted to only one claim however they can seek further MACs in accordance with the principles of President Keating's determination in *Avni.*

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What "Permanent Impairment" Really Means Where There Is A Fatality

In our December 2017 newsletter we reviewed the decision of Justice Schmidt in the Supreme Court of NSW in *Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger* in relation to the meaning of the term "permanent impairment" in Section 66 of the *Workers Compensation Act 1987*.

The worker suffered a fatal crush injury to his upper body. He died within a few minutes of receiving the injury during which time he was unconscious.

Liability was accepted for the claim made under the *Workers Compensation Act 1987* for compensation payable on death and for reasonable funeral expenses. A later claim was made by the Estate under Section 66 of the Act for whole person impairment compensation.

An approved medical specialist initially concluded the degree of whole person impairment was 100 per cent. She subsequently reconsidered her decision following delivery of the decision of an Appeal Panel in *Duskovic* determining the requisite degree of permanency was not satisfied where death was inevitable within a very short timeframe.

An Appeal Panel found it was an error to adopt the approach of the Appeal Panel in *Duskovic* and it assessed permanent impairment at 100% on the basis it was highly probable the respiratory system damage would be with the deceased for the remainder of his life.

The employer applied for judicial review to the Supreme Court of the Appeal Panel's decision. Justice Schmidt concluded the Appeal Panel was correct in assessing 100% permanent impairment.

The employer filed an appeal from the decision and judgment has now been delivered by five Justices of Appeal allowing the appeal and setting aside the order made by the primary judge and the decision of the Workers Compensation Appeal Panel.

On appeal the issues were whether the expression "permanent impairment" in Sections 65 and 65 of the *Workers Compensation Act 1987* encompassed impairment so serious that death would inevitably following within a short timeframe and whether the primary judge should have concluded the Appeal Panel erred in setting aside the "Reconsideration Medical Assessment Certificate".

The lead judgment was provided by Payne JA. After considering the text of Section 66 he observed the term "permanent impairment" is not defined in the legislative scheme. He considered the term "permanent impairment" was apt to convey some diminution in function experienced by a worker which was lasting or enduring. The language employed in Section 66 did not readily encompass circumstances where death inevitably followed within a short time after injury.

His Honour also considered the reading speeches in relation to introduction of the current version of Section 66 into the *Workers Compensation Act 1987* which explained the régime established by the Act captured injuries which "can have a significant, ongoing impact on the life of an injured worker".

His Honour admitted the conclusion of the case did not permit a "right line answer" applicable in all circumstances to determination of the question whether an injury which results in death does or does not give rise to "permanent impairment".

Basten JA agreed with Payne JA that there must be some continued and enduring experience of living in order for there to be "permanent impairment".

Section 66(1) created a right to lump sum payment for non economic loss. The right was defined by two characteristics, namely the worker suffering an "injury" and the injury resulting in an "impairment". The impairment must be "permanent" and the "degree" of the impairment must exceed "10%". Basten JA considered for a person to suffer impairment his or her capabilities must be diminished. In ordinary speech death was not described as a diminution of abilities or capabilities. He considered the brief period of survival together with the lack of consciousness were important factors in the analysis for the purposes of the case.

Basten JA also considered the Act sought to identify compensation payable for personal injury or death was evident in the provisions of Section 3 setting out the system objectives. This was further evident in Section 22 which distinguished between death or incapacity of a worker and a permanent impairment suffered by a worker. His Honour therefore considered it was clear the concepts of death, incapacity and permanent impairment encompassed separate forms of loss and separate needs for compensation.

Sackville AJA also agreed with the reasoning of Payne JA noting the expression "permanent impairment" in its ordinary usage connoted injuries or illnesses that have a significant debilitating effect on the person's physical capacities or quality of life for an indefinite period. The expression was not apt to describe the impact of an injury which was incompatible with the continuation of life where the victim survived for a very short period measured in seconds or a few minutes. If the legislation contemplated fatal work related accidents routinely giving rise to permanent impairment claims it might have been expected the statutory assessment process would have specifically accommodated such claims.

Simpson AJA also agreed with the orders proposed by Payne JA noting the purpose of Section 66 was to compensate an injured worker for a loss of quality of life caused by the workplace injury that would continue for the duration of the worker's life. It was not a sensible or reasonable application of the provision to award compensation to an injured worker whose life duration was so circumscribed as to allow no meaningful benefit of the award of compensation to him or her and who had no awareness or consciousness of the loss of quality of life. She considered it was not possible to define the boundaries of compensation available under Section 66.

The Court of Appeal has determined impairment requires an awareness or consciousness of the loss of quality of life suffered as a consequence of an injury. Whether impairment meets a description of "permanent impairment" will involve matters of fact and degree. However it is clear where injuries rapidly cause death such that the diminution in function experienced by a worker is not lasting or enduring there will be no entitlement to compensation under Section 66 for permanent impairment.

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