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Can a Work Injury Damages Settlement affect a Claimant's Entitlements Under an Income Protection Policy?

Income protection policies of insurance will generally provide cover to persons who have suffered a serious injury or medical condition which affects their capacity to work.

Benefits are usually in the form of monthly payments representing a proportion of the claimant's monthly income as at the date of injury or medical condition.

Some income protection policies form part of a group life insurance policy issued by a life insurer to a superannuation trustee for the benefit of its members who sustain injury or disability arising from the performance of the member's employment duties.

In those circumstances the monthly benefit for loss of income is usually reduced to account for any compensation payments for economic loss received by the member under any workers compensation, pension or Social Security legislation.

What if a member received moneys from the settlement of a work injury damages claim during the period when monthly benefits under the income protection policy were also payable?

Are the settlement moneys treated as benefits received under workers compensation legislation?

Would the monthly benefits payable under the income protection policy be reduced?

The NSW Supreme Court recently considered these issues in *Susan Buswell v TAL Life Limited*.

Susan Buswell was a member of the NSW Police Force who attained the rank of Senior Constable.

TAL, a registered life insurer, entered into a group insurance policy with FSS Trustee Corporation Pty Limited to provide income protection cover to Police Officers of the NSW Police Force who were members of the First State Superannuation Scheme.

Buswell was medically discharged from the NSW Police Force as a result of psychological injury arising from her employment.

There was no issue Buswell was entitled to a total disability benefit under the policy issued by TAL. Pursuant to the policy terms and conditions benefits were payable at 75% of Buswell's pre-disability income subject to any benefit offset.

The relevant policy wording contained the following clause:

> *"The amount of any benefit payable in respect of an Insured Person for a month will be reduced by any Other Disability Income which accrues to that person during that month."*
>
> *"Other Disability Income" was defined in the following terms:*
>
> *"Other Disability Income means any income (other than Return to Employment Income) which an Insured Person may derive during a month for which the Benefit is payable and includes:*
>
> *(b) any benefit under any workers compensation, statutory compensation, pension, Social Security or similar schemes or other similar State, Federal or Territory legislation ...*
>
> *If it can be shown that a portion of the lump sum represents compensation for pain and suffering or the loss of use of a part of the body, we will not take that portion into account as Other Disability Income."*

Buswell made a claim for work injury damages in respect of her psychological injury.

She also claimed benefits under the income protection policy issued by TAL.

Buswell and the NSW Police Force (as her employer) entered into a settlement deed in which Buswell was to receive $300,000 in settlement of her work injury damages claim after deducting her costs of $50,000.

TAL was made aware of the settlement.

TAL informed Buswell the settlement would constitute Other Disability Income and would affect her income protection benefits under the TAL policy.

TAL advised Buswell her entitlement to monthly income protection benefits would be reduced by $5,000 per month.

Buswell brought proceedings at the Supreme Court, Sydney in the Court's Equity Division seeking a declaration the $300,000 settlement moneys paid to her in her work injury damages claim did not fall within the definition of "Other Disability Income" in the income protection policy issued by TAL.

She sought further orders to reinstate her monthly benefits under the TAL policy and for TAL to pay all arrears owing to her plus interest.

TAL opposed the relief sought by Buswell.

The matter proceeded to hearing before His Honour Justice White.

Buswell argued a damages award for personal injury is not income but a capital asset arising from a loss of earning capacity, not for the loss of income.

Further, it was contended for Buswell that damages paid pursuant to a settlement are not "income" for the purpose of taxation.

Buswell also submitted the payment in satisfaction of her claim for damages was not a benefit under a workers compensation scheme or under workers compensation legislation noting the work injury damages claim was brought under the common law, modified by the *Workers Compensation Act 1987* (NSW) ("WCA").

Senior Counsel for Buswell distinguished between payments of statutory compensation which are called "benefits" under the WCA and common law damages which are not "benefits".

TAL did not dispute the work injury damages settlement moneys would not be treated as income for the purpose of taxation nor did it dispute that common law damages were not "benefits" under the WCA.

TAL submitted the definition of "Other Disability Income" in the policy was wide, such that any "income" did not need to be earned and it was sufficient if it were derived by the insured person.

Justice White rejected the submissions of TAL and accepted Buswell's claim for entitlement to the monthly benefits unaffected by her work injury damages settlement.

White J made the following remarks:

> *"It would be anomalous if an award of damages for loss of earning capacity were treated as if it were Other Disability Income received in the form of a lump sum. The amount of weekly payments of compensation already paid in respect of the injury is to be deducted from the damages awarded or otherwise paid as a lump sum and is to be paid to the person who paid the compensation. But the amount of those compensation benefits would have been deducted from the monthly benefits under the policy. The policy makes no provision for them to be reinstated."*

Further in his judgment Justice White stated:

> *"... according to ordinary concepts the receipt of damages for personal injury, or a settlement sum in compromise of a claim for damages for personal injury, is capital and not income. The reason that income tax is not payable on the settlement sum is not because of any special provision peculiar to taxation law, but because it is not income according to ordinary concepts."*

His Honour held the word "income" under the income protection policy was to be given its ordinary meaning.

TAL was not entitled to treat the work injury damages settlement paid to Buswell as Other Disability Income.

Buswell therefore succeeded in her claim against TAL and the Court made the declaration and orders sought.

This decision is consistent with long standing authority regarding how the Courts treat the payment of damages, whether by way of settlement or judgment, for loss of earning capacity arising from injury or disability.

The interpretation given by the NSW Supreme Court to the policy wording in this instance reinforced the principle that "benefits" payable under workers compensation legislation, for the purpose of the income protection policy, does not include modified common law damages such as those payable in settlement of a work injury damages claim.

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Life Insurer held to have Acted Unreasonably in Declining a TPD Claim

In previous editions of GD News we have summarised various Court decisions which highlighted the duties upon a life insurer, when determining a claim for TPD benefits, including an obligation to act reasonably in forming an opinion as to whether or not a claimant has satisfied the insurer of an entitlement to the TPD benefit under the policy.

This issue again arose for consideration by the NSW Supreme Court in the recent decision *Folmer v Vic Super Pty Limited & Anor*.

Susan Folmer commenced working with Aspire Mental Health Service ("Employer") as a community development officer and counsellor in late 2007 and ceased in late January 2008.

She claimed she had been unable to work since then, that she would never work again and as a result, she was entitled to a TPD benefit which had not been paid to her.

Vic Super was the trustee of the Victorian Superannuation Fund which provided benefits including a TPD benefit to members of the VS Fund.

A corporate predecessor of AMP Life Limited ("AMP") entered into the relevant group life policy for the benefit of members of Vic Super including Folmer.

In October 2014 Folmer lodged a claim with Vic Super for payment of a TPD benefit under the policy in the sum of $90,000. Vic Super in turn lodged the TPD claim with NMLA in January 2015.

In May 2016 the insurer sent a "procedural fairness" letter to the solicitors for Folmer in which the insurer stated before it made a final decision it wished to give Folmer an opportunity to review the relevant documents on which the insurer would base its assessment.

The procedural fairness letter identified the evidence available to the insurer and invited Folmer to provide any further evidence and submissions in support of her claim.

The insurer declined Folmer's claim. In 2017 AMP (as the insurer now was) provided reasons for the declinature.

Folmer's solicitors subsequently corresponded with AMP requesting the insurer reconsider its decision, which AMP declined.

Folmer commenced proceedings at the Supreme Court, Sydney against Vic Super and AMP.

During the course of the hearing Folmer abandoned her claim against Vic Super and proceeded only against AMP. Folmer claimed an entitlement to payment of the TPD benefit in the sum of $90,000 plus interest and costs.

AMP denied liability for the claim.

The matter proceeded to hearing before his Honour Justice Hallen.

His Honour noted the relevant policy wording which provided an entitlement to a TPD benefit in the following terms:

> *"... in relation to an Insured Member who has been in gainful work at any time during the two years immediately preceding the Date of Disablement:*
>
> *(a) (i) the Insured Member has been continuously unable to work because of injury or illness for the TPD Waiting Period; and*
>
> *(ii) in the Insurer's opinion (after considering medical and other evidence satisfactory to the Insurer) the Insured Member is unable ever again to work for reward in any business, occupation or regular duties for which he or she is reasonably qualified by education, training or experience;*
>
> *For the purposes of this definition business, occupation or regular duties means:*
>
> - *full time business, occupation or regular duties where the Insured Member was working at least 15 hours per week at the Date of Disablement ..."*

The TPD waiting period was six months.

Counsel for Folmer summarised the relevant issues for the Court's determination as follows:

The evidence at the hearing established the following facts:

- As at the date of the hearing Folmer was a 47 year old unmarried female with no children.
- Although she left school at the age of 15 she was highly educated and trained having undertaken various tertiary studies including obtaining a Bachelor of Arts (Humanities), Bachelor of Social Work and Masters of Social Work degrees.

- Between 1994 and 2005 Folmer at different times held various positions with different organisations in different States of Australia as a counsellor, youth support worker, disability support worker, case worker, social worker and researcher.
- Prior to commencing her employment with the Employer, Folmer was involved in a single vehicle motor vehicle accident in which she was intoxicated at the time of the accident. Following her arrest she was taken into Police custody and allegedly assaulted by the Police.
- She also had a history of depression and anxiety at various times prior to the motor vehicle accident and the alleged assault by the Police.
- She made a complaint to the Tasmanian Police regarding her treatment following the accident. A Court subsequently ruled the bruises she said she had sustained during the assault were in fact self inflicted. She was charged with and subsequently convicted of making false statements.
- Between January 2008 and 2018 Folmer enrolled in several tertiary courses including a PhD in philosophy of modern social work but was unable to complete any of those courses, allegedly on medical grounds.
- After her cessation of employment with the Employer in January 2008 Folmer sustained physical injury in an assault by a former boyfriend which had an aggravating effect on her alleged anxiety and depression.
- During the period after her cessation of employment with the Employer Folmer also cared for her elderly mother which was also said to have impacted on her psychological condition.

AMP contended:

- the medical evidence available to AMP did not support a conclusion that Folmer was unable to work because of injury or illness at the time of her ceasing work with the Employer in January 2008; and
- the evidence available to AMP did not reasonably justify the formation of an opinion that as at July 2008 the plaintiff was unable ever again to work for reward in any business, occupation or regular duties for which she was reasonably qualified by education, training or experience.

Hallen J identified the relevant questions for the Court's determination as follows*:*

"It is necessary to consider whether the views expressed by the insurer can be shown to have been unreasonable on the material then before it or whether it had not considered the correct question and that, in considering that question, and informing itself as to matters material to its determination, the insurer had not acted fairly and reasonably. The latter ground would include taking, or failing to take, particular matters into account if doing so, or omitting to doing so, would constitute not acting fairly and reasonably having due regard for the interests of Folmer."

His Honour rejected AMP's contentions regarding the state of the medical evidence which had been provided to it at the time it issued its procedural fairness to Folmer's solicitors. His Honour held the medical evidence demonstrated Folmer was suffering from both psychological and some physical disabilities at the time she ceased work in January 2008.

Further, his Honour held it was clear from those documents Folmer's ability to work for remuneration was impaired because of those conditions which included PTSD, panic disorder and depression.

Justice Hallen also rejected AMP's contention that Folmer did not meet the definition of TPD by reason of her maintaining her academic studies throughout 2008 and subsequently. His Honour highlighted that Folmer's participation in tertiary studies could not be equated with her ability to hold down full time employment based on her education, training and experience.

His Honour also held that the insurer limited itself to the fact that Folmer was not attending for treatment by a medical practitioner without giving any regard to her taking medication as a form of treatment.

In all of these circumstances Justice Hallen held in favour of Folmer and ordered AMP to pay her the TPD benefit in the sum of $90,000 plus interest which was to be calculated in accordance with His Honour's reasons.

This decision illustrates the principles we have previously highlighted in earlier case summaries involving TPD claims regarding the insurer's obligation to act reasonably when determining a TPD claim.

An insurer must not limit itself to a narrow interpretation of medical evidence including forms of treatment received by a claimant which includes medication for psychological injury.

Breach of an insurer's obligation provides a mechanism for the Court to intervene and decide for itself whether, having found the insurer to have acted unreasonably, a claimant meets the TPD definition under the policy creating an entitlement to the TPD benefit.

In this case the Court held in favour of the claimant against the insurer.

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Passive Care – is there an entitlement to damages?

In New South Wales Section 15B of the *Civil Liability Act* 2002 provides that in certain circumstances damages can be awarded for the loss of capacity to provide domestic services. In order for such damages to be awarded the Court must be satisfied the person requiring the care is a dependant, the dependant was not, or will not be, capable of performing the services themselves by reason of their age or physical or mental incapacity and there is a reasonable expectation that but for the injury the claimant would have provided the services to the dependant for at least six hours a week for at least six months.

The effect of this section was recently considered by the NSW Court of Appeal in *Amaca Pty Limited (under NSW Administered Winding up) v Raines; Seltsam Pty Limited v Raines.*

Percy Raines sued Amaca and Seltsam for damages that arose as a consequence of his exposure to asbestos and asbestos dust in around 1967 and late 1975 to early 1976. In August 2016 Raines was diagnosed with mesothelioma. At the time he was married to Robin Raines with whom he had two children, Stephen and Richard. In 1996 his son Richard was involved in a catastrophic motor vehicle accident that required provision of around the clock care, some of which was paid for by his employer's worker's compensation insurer. Further, his wife Robin had sustained injury in 1981 that led to two operations to her lower back. Robin was 77 years of age at the time of the hearing.

Both Robin and Richard required domestic assistance which was provided by Percy prior to his diagnosis. Some of the assistance provided was 'passive', which the Court described as 'constant supervision, and availability to step in in case of emergency.'

The matter originally proceeded to hearing in the Dust Diseases Tribunal. It was agreed between the parties Percy Raines should be paid $470,000 however the parties could not agree on the amount that should be paid for the loss of his capacity to provide gratuitous domestic services to Robin and Richard. The matter therefore proceeded to hearing before Kearns DCJ in the District Court who awarded damages of $1,479,000 including damages for loss of capacity to provide domestic assistance for the past and future. The damages were based on the assessment of Dr Obeid, a geriatrician, who gave evidence in relation to the number of hours of care Raines was providing to Richard and Robin.

Both Amaca and Seltsam appealed.

The questions that arose on appeal were:

- whether the definition of "gratuitous domestic services" under the Act allowed for damages of loss of capacity to provide "passive care";
- whether Percy Raines was entitled to damages for loss of capacity to provide care to Richard if "passive care" for Richard was provided by both him and Robin;
- whether damages should not be awarded for Percy Raines' loss of capacity to provide services to Richard if they would be provided by the workers compensation insurer.

The appeal was dismissed. It was noted in his judgment Kearns DCJ determined that the amount of damages to be awarded for the loss of Percy Raines' capacity to provide gratuitous services to Richard and Robin should be assessed on the basis he provided services to Robin for eight hours a week and Richard, 73 hours a week. In Richard's case there was nine hours a week of active care (noting he was provided with commercial care paid for by the worker's compensation insurer) and 64 hours a week passive care.

In relation to the issue of passive care and whether damages could be awarded for care of this nature, Justice White in his judgment stated:

> *"When Richard was injured Percy and Robin left their home to move to his in order to provide around the clock care. That care included what Deane and Dawson JJ described as "protective attention" (see Van Gervan v Fenton) ... It is clear from that passage that in Their Honours' view 'protective attention' was a service. It also appears that if a full time live in housekeeper were required the time spent by the housekeeper by being on hand to deal with any calls that might be required on her or him would amount to the rendering of a service. ... There is no reason that supervision or protective attention should not be a service that falls within the definition of "gratuitous domestic services" in Section 15B(1). Whether it is a service of a kind that the claimant's dependants were not capable of performing by reason of their age or incapacity within the meaning of Section 15B(2)(b) is a different question that was not raised before the Tribunal."*

His Honour also rejected an argument that Richard's needs were met by his workers compensation insurer.

The end result is that Raines' estate can be compensated for the provision of passive care. The Court's findings that the damages for domestic assistance that can be awarded pursuant to section 15B can include passive care has the potential to significantly increase such damages awarded in future claims.

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CONSTRUCTION ROUNDUP

Developer bonds for new strata construction

The NSW's Government's long awaited developer bond scheme came into effect earlier this year. Governed by the *Strata Scheme Management Act 2015* (NSW), it applies to building contracts entered into after 1 January 2018 for residential or partially residential (mixed use) strata properties that are more than four storeys high. The purpose of this scheme is to ensure that a fund of money is set aside by way of a bond to cover the cost of defect rectification in strata developments. This is particularly desirable given the high number of developers and builders that have previously disappeared from the scene soon after completing the sale of all the units in a development, leaving the owners corporation and individual lot owners with the often significant cost of rectifying defects in the building.

In this article, we look at the procedure for lodging and claiming the developer's bond, and the issues that are likely to arise in the process.

Creation of portal account and lodgement of bond

In order to be entitled to apply for an occupation certificate for the development, the developer is required to lodge a bond to cover the cost of rectifying building defects in the development.

The developer must first create an account on an online portal maintained by Fair Trading NSW. This portal account includes contact emails for each of the developer, the owners corporation and the builder, and the project is given a unique identifier number by Fair Trading. All communications with respect to the bond are to be made through this portal. When setting up the portal account, the developer is required to upload into the portal copies of various documents, including the development approval, the building contract, specifications, warranties, reports and certificates.

At this stage, the developer is also required to lodge a bond (through the portal) for 2% of the contract price (plus pay a fee of $1,500). There are fall backs if the contract price cannot be easily determined or is in dispute.

The bond is to be either a bank guarantee or a bond issued by an authorised deposit-taking institution or an authorised general insurer. Whether a bond or bank guarantee is provided, it is to be unconditional (which means absent any fraud or lack of good faith it is "as good as cash": *Wood Hall Limited v. The Pipeline Authority* [1979] HCA 21; *Clough Engineering Limited v. Oil and Natural Gas Corporation Limited* [2008] FCAFC 136).

A failure by the developer to lodge a bond through the portal account prior to the issue of an occupation certificate can attract a fine of up to $22,000.

Appointment of building inspector

Within 12 months after the occupation certificate is issued, the developer must appoint a building inspector to undertake an inspection of the development and provide a report.

The inspector must be a member of a strata inspector panel. In NSW, this includes members of:

- the Housing Industry Association;
- the Master Builders Association of New South Wales;
- the Australian Institute of Building;
- the Australian Institute of Building Surveyors;
- the Australian Institute of Building Consultants;
- the Institute of Building Consultants Inc;
- Engineers Australia;
- the Australian Institute of Architects;
- the Association of Accredited Certifiers.

The regulation provides that each listed body is to determine if a person is qualified and competent enough to perform building inspections and provide reports for the purpose of the scheme. However, it is not clear from the websites of these organisations what (if any) special training or qualification they require to be included as a member on a panel of strata inspectors. Potential inspectors introduced through these bodies include building consultants and similar experts with professed experience in providing building reports and in acting as expert witnesses, but they do not appear to be required to have any other particular expertise or skill. The HIA has not set up a panel and says it does not intend to do so.

The inspector must be "independent" of the project's stakeholders and must not have taken any part in the design, construction or certification of the building – any connection with the developer or the project is to be disclosed by the developer and/or inspector. This is obviously dependent on honest and open disclosure. Section197 provides that an inspector is not lacking independence merely because he has obtained work from the developer re other projects (although the regulations say that this must be disclosed). Therefore, the concept of "independence" is not considered to be undermined by a particular inspector obtaining regular work from a developer (although it could obviously affect his duty under s.198 to act impartially).

The developer uploads on to the portal the details of the inspector. The portal will email the owners corporation with these details. The owners corporation can either approve or not approve the appointment. If

they reject the appointment, the developer repeats the process. If 12 months expire and no inspector is appointed, then the Secretary of the NSW Department of Finance, Services and Innovation is to appoint someone from the panel and notify everybody. The developer is to pay all the costs of the inspector.

First (interim) report

The inspector is to carry out his inspection (he has certain powers of access to the common property and individual strata lots) between 15 and 18 months after the occupation certificate is issued. He is to upload a copy of his report on to the portal. The developer, builder and owners corporation thus can each access and download a copy of the report.

If no defective works are identified in the report, then the developer can apply to the Secretary to decide that there is no need to arrange the inspector to also produce a later, final report. In this case, the interim report becomes the final report.

The developer, the owners corporation, a strata lot owner or the builder can apply to the Department to review the Secretary's decision in this regard. Such an application must be made within 14 days of notice of the decision being given. The application must be made in writing through the portal and must specify the reasons for the application, along with any extra information relied upon.

If defects are identified in the interim report, the developer is to arrange with the builder for the defective building work to be fixed. The legislation does not specify who is to pay the cost of this rectification work (and clearly there are likely to be disputes in this regard). Note that the bond cannot be used to pay for rectification work.

Final report

Within 18 months after the issue of the occupation certificate, the developer must arrange a final report from the inspector (or a replacement inspector if the first is no longer available). Noncompliance can lead to a fine of up to $22,000. The inspector's final report must be issued through the portal to the developer, the owners corporation, the builder and the Secretary no later than two years after the issue of the occupation certificate, and must be confined to the defects identified in the interim report (ie no additional defects are to be identified). There is clearly a potential overlap in the time frames for the two reports and very little time allowed for fixing the defects, which would be challenging to overcome. However, the Secretary can extend the time for issuing the final report.

Following the issue of the final report, all or part of the building bond "can be claimed or realised by the Secretary" to pay to the owners corporation to pay for the rectification of defective work – either by consent of the developer, or if the final report identifies defective work that has not been rectified (or sufficiently rectified). Such an application must be made by the owners corporation to the Secretary within 14 days of the later of:

- two years following completion of the building work covered by the bond; or
- 60 days after the final report is uploaded to the portal.

Note that an individual lot owner is not entitled to claim any part of the bond.

If no defective work is identified in the final report, the bond is to be released in full to the developer.

The Secretary gives 14 days notice to the developer and the owners corporation via the portal of any proposed payment.

The developer, the owners corporation, a strata lot owner or the builder can apply to the Department to review the Secretary's decision to pay or release the bond (but not if the bond has already been paid or released). If such an application is made, then the bond is not to be paid or released until the application is withdrawn or determined.

Following payment, the balance of the bond is to be released to the developer, and any excess not used by the owners corporation for defect rectification is also to be repaid to the developer.

Potential issues with process

While the process appears to provide an element of comfort to owners corporations and individual lot owners, there is scepticism in the industry about whether it will be effective to cover the cost of defect rectification.

Some potential issues are discussed below.

- Amount of bond – Two percent of the contract price is not really much of a bond. To put this into perspective, the cost of constructing a development of 500 units would be approximately $200 million. 2% of this contract price would equate to only $4 million. A major defect such as water-proofing or a structural issue can easily cost more to fix.
- Relationship between developer and inspector – While the inspector has a duty to act impartially, it is very similar to the role of the superintendent when assessing claims made under the building contract. The temptation is for the inspector to identify as few defects as possible (or just defects that can be blamed on the builder), so that he does not jeopardise further work from the developer.
- Lack of control by owners corporation – While the owners corporation is kept in the loop, they have no control over the process. Also, their interaction with the process depends on them accessing the email address on a regular basis and acting quickly to challenge the Secretary's decisions.

This can be problematic if they need to first arrange a meeting of the executive committee or all the owners.

- Timing of inspections and release of bond – Many latent defects will not come to light within the first 18 months of construction being completed. Many waterproofing defects are only identified as a consequence of persistent rain or major storm events, and cracking in the structural components may not appear immediately or be visible during an inspection. There is also the issue that the final report cannot raise new defects. However, once the serious defects really become apparent, the bond is likely to have already been paid out.
- Declaration that interim report is to be a final report – If the interim report does not recognise any particular issue as a defect, then there is a risk that this interim report will become declared to be the final report and the bond will be released. However, at this stage the building will not be even two years old. If the owners corporation wants to challenge this outcome, it only has 14 days to act.
- Liability to pay for rectification work – If the builder and the developer are in dispute as to whether a defect is in fact a defect – or who is responsible for the defect – then the builder is not likely to carry out the rectification work in a timely manner, if at all. It remains to be seen how the developer bond process may end up affecting the parties' rights and entitlements in a later (separate) court proceeding by the owners and owners corporation to rectify defects in the work.
- If the Secretary's decision to pay or release the bond is reviewed by the Department, there is an issue whether at this point the challenge to the Secretary's decision has been fully "determined" and the bond must be paid or released. In this case, the stakeholders may need to make an urgent application to the Supreme Court for an injunction restraining the Secretary from directing the release of the bond.

The developer bond scheme is still in its infancy and since the projects to which it applies are still likely in the construction phase, the application of the scheme has not yet been seen in practice.

However, although the scheme may provide some comfort to owners corporations and lot owners to address minor defects, it is unlikely to have any impact where the defects are major and thus costly to fix, or where the defects have come to light after the issuing of the interim report. Stakeholders are therefore likely to need to continue to pursue their rights through court action.

Since there are strict time limits for pursuing claims for defects in new developments, we highly recommend that owners corporations and individual lot owners seek legal advice as soon as the defects are first identified. Unfortunately, if they wait to ascertain whether the developer bond will cover the cost of rectification, they may find out that the bond is inadequate or does not cover the defect, and they may be out of time to take any other action.

At Gillis Delaney we have experts who can advise and assist with respect to claiming defect rectification costs from the developer bond, and also in recovering the cost of rectifying more serious or significant defects in buildings.

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Questionable motives of contractor relevant to stay of adjudication determination

The *Building and Construction Industry Security of Payment Act 1999* (NSW) was enacted in order to stamp out the practice of developers and head contractors delaying making payments to subcontractors and suppliers on construction projects. The "pay now, argue later" processes in the Act are designed to facilitate cash flow down the contractual chain and thus reduce the high number of insolvencies plaguing the industry.

While a successful payment claim under the Act can provide a contractor, subcontractor or supplier with essential cash on an interim basis and put them in a stronger position to negotiate a wrap up of the project, there is still the risk that some will abuse the processes of the Act in order to obtain a "cash grab", and then immediately place their companies into administration – without paying their subcontractors and suppliers and other creditors.

This risk was a consideration of the Supreme Court of NSW in the recent case of *Greenwood Futures Pty Limited v. DSD Builders Pty Limited* ([2018] NSWSC 1407 and [2018] NSWSC 1407).

Greenwood had engaged DSD to construct a number of townhouses at Jesmond, NSW. Under the building contract, DSD was entitled to be paid specific amounts upon certain milestones being reached.

By 12 March 2018, DSD considered that it had reached the fourth milestone (being the "enclosure stage") and it accordingly submitted a payment claim for $220,000. On 16 April 2018 Greenwood issued a payment schedule for $nil on the basis that the enclosure stage milestone had not yet been reached.

On 7 April 2018 (before Greenwood had issued the payment schedule for the previous payment claim), DSD submitted a second payment claim. This was identical to the first payment claim in all essential details.

Neither the first nor the second payment claim included

the supporting statements (required by section 13(7) of the Act) confirming that all subcontractors and suppliers to the project had been paid.

DSD referred the second payment claim to adjudication. However, when the adjudicator sought an extension of time to deliver his determination, DSD withdrew its application.

In the meantime, Greenwood purported to terminate the contract with DSD on the basis that they had breached the contract. DSD denied the breach and asserted that the contract had not been effectively terminated.

DSD served a third payment claim on 30 April 2018. It was again identical to the earlier payment claims, but attached what purported to be a supporting statement under section 13(7).

On 7 May 2018, Mr Daniel Roberts (a principal of DSD), provided what purported to be a payment schedule served on behalf of Greenwood. In this document, Mr Daniels stated that he was an agent of Greenwood, and in this capacity he certified that DSD was entitled to the full amount it had claimed.

On the same day, DSD lodged a second adjudication application based on the third payment claim and Mr Roberts' purported payment schedule.

However, on 14 May 2018 Greenwood served its own payment schedule denying that DSD was entitled to any payment due to (amongst other things) Greenwood's own entitlement to set off the cost of completing the works and rectifying defects. On the same day, Greenwood lodged a response to the second adjudication application consistent with its position as set out in the payment schedule.

Also on 14 May 2018, for reasons that were not explained in the trial, DSD withdrew the second adjudication application. (Greenwood disputed that DSD was entitled to withdraw its application but its demand to the nominating authority that a determination be delivered was disregarded.)

The next day (15 May 2018), DSD communicated to Greenwood that the latter's asserted termination of the contract had been in breach of its terms, and itself purported to terminate the contract.

On the same day, DSD lodged a third adjudication application, based on the third payment claim and on Greenwood's 14 May payment schedule. On 25 May 2018, Greenwood lodged an adjudication response, in identical terms to its 14 May response.

The adjudicator failed to deliver a determination within the ten day period required by the Act, and DSD exercised its right under the Act to withdraw the adjudication application and to lodge yet another application.

The adjudicator nominated to determine the fourth adjudication application delivered a determination that DSD was entitled to be paid $220,000, and that Greenwood should pay the costs of the adjudication.

Greenwood commenced proceedings in the Supreme Court of NSW seeking an order that the determination was void. Greenwood argued that:

- the first and second payment claims were invalid for the purposes of the Act because they lacked the required supporting statement;
- the first three payment claims had purported to be based on the same milestone event and thus there was no reference date to support the later payment claims (rendering those claims invalid);
- in the absence of a valid payment claim, DSD had not been entitled to make an adjudication application and the determination delivered as a consequence of this application was void.

McDougall J first considered the issue of whether a payment claim that lacked a supporting statement in contravention of section 13(7) of the Act was thereby rendered invalid. He noted that in the recent decision of *Central Projects v. Davidson* (discussed in our June 2018 newsletter) Ball J had held that since section 13(7) already stipulated a penalty as the consequence of contravening this requirement, it was not necessary that there be the added consequence that the payment claim was invalid.

However, McDougall J also noted that he had earlier commented in *Kitchen Xchange v. Formacon Building Services* that his view was that a payment claim without a supporting statement would be invalid, and this statement had been cited with approval by the Court of Appeal in *Kyle Bay Removals v. Dynabuild Project Services* and in *Duffy Kennedy v. Lainson Holdings*.

When considering which approach should now be followed, McDougall J pointed out that while his own statement in *Kitchen Xchange* had not been the ratio decidendi of that case, the issue had been central to the Court of Appeal's reasoning in *Kyle Bay Removals* and *Duffy Kennedy*. In those circumstances, his Honour said that he was bound to follow that approach, and hold that the first and second payment claims submitted by DSD were invalid as a consequence of their failure to include supporting statements.

Turning to the question of whether the third payment claim had been validly served, McDougall J held that there had been a series of reference dates available to DSD which had supported its earlier payment claims, and which also supported the third payment claim. However, his Honour also held that since the time for Greenwood to serve a payment schedule in response to the third payment claim had not yet expired, DSD had not been entitled to lodge the (second) adjudication application that had been based on that claim.

In this regard, his Honour was highly critical of Mr Roberts' action in purporting to act as Greenwood's agent and issue a payment schedule. His Honour made the following comment:

> "*The kindest thing that one can say about this document is that it was, at the very least, an outrageous misuse of whatever authority DSD, or Mr Roberts, might have had under the agency to which he referred. There are other, less kind, descriptions that could be applied*."

Since both the first and second payment claims were invalid, it followed that each of the first and second adjudication applications based on these payment claims was a nullity.

The question then arose as to the status of the third and fourth adjudication applications. McDougall J noted that since the adjudicator nominated with respect to the third adjudication application had failed to deliver his determination within the ten day time period stipulated by the Act, DSD had been entitled under section 26 of the Act to withdraw its application, and it had done so. As a consequence, his Honour held that the fourth adjudication application had been validly made.

Greenwood had also submitted that the adjudicator had failed to carry out his statutory function and independently value DSD's entitlement to payment; however his Honour did not agree. In his Honour's view, the contractual terms entitled DSD to payment if the relevant milestone had been reached, and the amount of that payment was dictated by schedule 2 to the contract. His Honour also commented that even if the adjudicator had failed to properly value the work that was the subject of the payment claim, such an error would not have been jurisdictional.

It followed that the adjudication determination was not void and the Court therefore ordered that DSD was entitled under the Act to payment of the amount that had been determined. However, Greenwood sought a stay of execution of that order on the basis that there was an overwhelming risk of DSD being placed into liquidation. McDougall J ordered such a stay for eight days and gave leave for the parties to make submissions about whether the stay should be extended. This issue was dealt with in a further hearing held approximately three weeks later.

Greenwood tendered expert reports to the effect that it had a counterclaim against DSD of at least a similar amount (if not more) than the amount to which the adjudicator had determined that DSD was entitled – a claim that Greenwood was pursuing through NCAT. Greenwood had also submitted that the risk of DSD becoming insolvent (and thus Greenwood not being entitled to recover the amount paid to DSD) was over and above the normal risk of insolvency that McDougall J noted as a feature of the building and construction industry.

In this regard, McDougall J cited Keane JA's comment in *RJ Neller Building Pty Limited v. Ainsworth* that:

> "*The mere existence of the very kind of risk on which the provisions of [the Act] in favour of the builder are predicated would not ordinarily be sufficient of itself to justify a stay of an execution warrant based on the registration of a certification of adjudication*."

However, senior counsel for Greenwood had pointed to a number of circumstances that showed the risk of DSD's insolvency was higher than usual.

The financial statements that had been lodged by DSD had not been audited but had been signed by a director of DSD. McDougall J noted that these financial statements had some "curious anomalies" with respect to the stated contributed equity in the company, as well as a failure to account for tax payable on the profit earned by the company.

Greenwood also pointed to a history of corporate dealings by the principals of DSD. McDougall J agreed that it was open to infer from this history that DSD's principals were engaged in "phoenixing". "Phoenixing" is the practice of allowing companies to become insolvent and placed into liquidation in order to avoid paying creditors such as subcontractors and suppliers, and creating new companies which effectively carry on the same business.

McDougall J also noted that DSD had subcontracted out all the work on the project through a related company, which itself had been placed into liquidation.

McDougall J stated:

> "*There is, in my view, very strong evidence that Mr Roberts and Mr Shankar have engaged in structuring their affairs in such a way so as to avoid, wherever possible, paying their liabilities. That is not something the Court should overlook. In addition, there is evidence that DSD engaged in a practice of misusing, if not abusing, the processes put in place by [the Act] for the recovery of claims … It may also be noted that Mr Roberts was prepared to engage in a flagrant misuse of an authority given in an attempt to gain an advantage for DSD* …"

His Honour also noted that there was no evidence that DSD had any ongoing projects and thus would suffer prejudice if it did not immediately receive the adjudicated amount.

Overall, McDougall J held he was comfortably satisfied that there was a very real risk, well over and above the normal risk of insolvency, that if Greenwood recovered a verdict in NCAT for the amount of its cross claim, it may not be paid. On the contrary, his Honour considered that "*there is every reason to think that Mr Roberts and Mr Shankar will do what they can to ensure that it is not paid*".

In those circumstances, his Honour extended indefinitely the stay of execution of the adjudicator's determination.

This case is extremely interesting, since it shows that the courts will take into account not only the intended purpose of the Act to facilitate the payment of construction contractors, but also the public policy consideration in not condoning or assisting in any way sharp practices by the parties, including the undesirable practice of phoenixing in the construction industry.

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Claims and dispute resolution on construction projects

The construction industry is notorious for the number of disputes that arise between its participants. There is usually a great amount of money spent (and at stake) in any development or infrastructure project, and construction companies and subcontractors often have insufficient cash reserves to be able to ride a project that goes bad. Combine these factors with risks that cannot be controlled (such as inclement weather and unforeseeable adverse site conditions) and there is a greater likelihood of a dispute arising.

However, as with many aspects of life, it is better to prevent a dispute arising in the first place, rather than attempting to settle a dispute that has already seen the parties entrenched in their respective corners.

The best way to prevent a dispute arising while protecting and maximising each party's entitlements is to properly understand and administer the contract. After all, the contract documentation records the agreement between the parties as to who is to bear the risk of something unexpected occurring. It is often the case that the question of who is to bear the cost of an unexpected event escalates into a formal dispute simply because one of the parties have not followed the formal and time requirements of the contract, and this has made it difficult (or impossible) for the other party to accommodate the claim.

In this regard, it should be remembered that the party who has prepared the contract has nominated the procedures to be followed based on its own needs – which may include how its financing for the project has been arranged, or its own obligations under a contract further up the contractual chain.

For example, a subcontract may require the subcontractor to notify the head contractor within two business days if an issued direction constitutes a variation to the scope of work, with a formal fully-priced claim to be submitted within five business days. The reason for such a time frame may be that the head contractor has a similar time frame under its own contract, and may not be able to pass on the variation to its client once that time frame has elapsed.

Imagine that the subcontractor waits until the end of the project to submit a sizeable claim, ostensibly because it was not able to fully calculate the effect of the variation until it had finished its work (a common assertion). A head contractor faced with such a claim that it cannot submit further up the contractual chain will almost certainly reject it, leading to further argument between the parties.

However, if the subcontractor had been more transparent with the contractor – immediately notifying it of the variation and submitting an interim claim while reserving its rights to update the claim as and when the cost of the variation became clearer - then the contractor would have been able to submit its own claim to its client, and the resolution of these claims would be likely to be a simple matter of negotiation between all three parties. A claim made within the contractual time frame can be handled with diplomacy (and ideally also with a sense of collaboration or negotiation); a surprise late claim (particularly a large one) is always going to be received badly.

Therefore, tight contract administration is an absolute essential on a project. In fact, we recommend that if a project has a higher risk of an issue arising (perhaps due to the way the risks in the contract have been allocated, or the risky nature of the site, or the financial risk taken by one or more of the parties) the project manager and contract administrator should be provided with clear advice and instructions on the time frames and other requirements of the contract, rather than leaving this to their own interpretation.

But what if a dispute does arise?

Once again, it is advisable to ensure that the contractual provisions are strictly followed.

Most contracts require a formal notice of dispute to be issued (sometimes within a limited time frame) in order to trigger the dispute process. The contract will also set out an agreed procedure for attempting to resolve the dispute. It may be stipulated in the contract that each step of the procedure must be followed before the next can be undertaken, or before any alternative measures (such as court proceedings) can be implemented.

It is important to understand that any notice of dispute that is issued will set the parameters of the dispute, and a poorly worded notice may preclude associated claims being made – either as part of the dispute or in the future. Therefore, we strongly recommend that legal advice be sought before issuing a formal notice of dispute.

It is common that the first step in the dispute resolution procedure following the issuing of a notice of dispute is a meeting between the executives of each of the parties to try to resolve the dispute. In this regard, while the executives need to be fully briefed on the issues leading to the dispute, it is not conducive to agreeing a settlement of the dispute if the people who have already been actively engaged in the dispute

(and thus have an emotional investment in it) also attend the meeting.

At this first meeting, further information may be requested or required for a settlement to be considered and negotiated. If so, a strict timetable (and the precise steps to be taken) should be recorded in the minutes with a confirmatory letter being issued after the meeting.

It can also be agreed to hold multiple meetings before the dispute is progressed into the next step of the contractual dispute resolution process. However, we strongly recommend that any such agreement is also confirmed in a letter issued immediately following the meeting, so that there is no suggestion that the claimant is not entitled to escalate the dispute if the series of meetings does not result in a settlement.

A variation on the above discussions is to hold a formal mediation. A mediation is a settlement meeting presided over by a formally trained person who, while remaining neutral on the claims that have been agitated, assists the parties in exploring the various issues and options in order to try to guide them to a settlement.

If a settlement is agreed, then it is advisable to record the terms of the settlement in a formal deed. This has the added benefit of ensuring that the parties fully understand exactly what has been agreed and prevents a later disavowal of the agreement.

If the dispute is not resolved as a consequence of the parties' own discussions or a formal mediation being held, then commonly it is referred to a third party expert for a determination of the matter. This determination can be agreed to be binding or non-binding. Sometimes it is agreed that if the amount at stake is less than a particular amount, then it will be binding on the parties. However, even a non-binding determination can have the value of being indicative of the way that the claims may be judged if they are pursued by way of arbitration or court proceedings, and this may lead to a negotiated settlement.

The expert determination process is like a mini-trial of the parties' claims, usually conducted entirely on paper – similar to an adjudication under the security of payment legislation but not quite as fast paced. A timetable will be agreed (or pre-determined in the contract) for each party to detail its claim or defence of the matters in dispute, and to provide its evidence in support of its position. The expert considers each party's submissions and evidence, and writes a determination of the claims that have been made.

If the expert determination is not binding (or is not a step of the contractual dispute resolution process), then the dispute may be referred to arbitration or court proceedings. Again, it is vital that the parties obtain legal input before commencing either process.

Arbitrations are like a private court proceeding, with a private judge appointed by the parties, conducted with the benefit of confidentiality. In New South Wales arbitration proceedings are governed by the provisions of the *Commercial Arbitration Act 2010*, which adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Commercial Arbitration Act sets out the rules to be followed by the parties in conducting arbitral proceedings, and the extent to which arbitrator's award is reviewable by the courts.

Arbitration and court proceedings can take years before a conclusion is reached and are usually very expensive. They can also require a great deal of input from each of the parties' employees and management – a cost which cannot be recovered even if the party is entirely successful in prosecuting or defending the claim. Further, the unsuccessful party is usually required to pay a substantial portion of the other party's legal costs (as well as all of its own costs). Therefore, the decision to embark on formal proceedings should not be taken lightly.

A difficult project does not have to lead to one of the parties wearing a loss or a major dispute arising. Careful preparation by each party means that issues can be effectively managed as and when they arise. Management needs to conduct effective oversight of the site and administrative personnel to ensure that contractual procedures and time frames are complied with and the company's rights are fully protected.

Most importantly, stakeholders should obtain legal advice at the earliest opportunity – not when the project has already been completed (and options have been lost) or when the parties are firmly entrenched in their positions. The cost of early legal advice is likely to be trivial compared with the cost of formal court or arbitration proceedings if the issue is not handled carefully. A good solicitor will consider the matter holistically and this may be all that is necessary to guide the parties to a successful project outcome rather than World War III.

At Gillis Delaney Lawyers, we have expert construction lawyers who can provide advice and guidance through all phases of construction projects – from documentation to dispute resolution.

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EMPLOYMENT ROUNDUP

Update to Flexible Working Arrangements

In the Family Friendly Working Arrangements case, the Full Bench of the Fair Work Commission had to consider a claim seeking the variation of all modern

awards to include an entitlement (i.e. an enforceable right) to part-time work or reduced hours for employees with parenting or caring responsibilities.

The ACTU contended that the existing regulation regarding family friendly working arrangements was inadequate and failed to assist employees balance their work and family responsibilities. In particular, it was submitted that there was a 'gap' in the safety net regarding flexible working arrangements because the 'right to request' in s.65 of the Fair Work Act 2009 (the Act) does not provide employees with an enforceable right. An employer's decision to refuse a section 65 request is not subject to review or appeal.

The current position

At present, section 65 of the Act, gives 'long term' employees the right to request changes in working arrangements if, for instance, the employee is a carer, a parent of a child who is school age or younger, has a disability, or is 55 years or older.

Employers must provide a written response to requests for flexible working arrangements within 21 days, stating whether the employer agrees to or refuses the request. Employers may refuse the request only on 'reasonable business grounds', but there is no mechanism for testing this requirement.

The Full Bench has found, however, that there is a significant unmet employee need for flexible working arrangements. Other central findings that support flexible working arrangements are:

- The accommodation of work and family responsibilities through flexible working arrangements can provide benefits to both employees and employers.
- Access to flexible working arrangements enhances employee well-being and work-life balance, as well as reducing labour turnover and absenteeism.
- Some parents and carers experience lower labour force participation, linked to a lack of access to flexible working arrangements and to quality affordable child care.
- Greater access to flexible working arrangements is likely to increase workforce participation, particularly among women.
- The majority of employees who request flexible working arrangements seek a reduction in working hours. Parents (predominantly women) seek part-time work to manage parenting and caring responsibilities.
- About one in five workers requests flexible working arrangements each year.
- The utilisation of IFAs (individual flexibility arrangements) for family friendly working arrangements is very low.
- The vast majority of requests for flexible working arrangements (both informal and those made pursuant to s.65) are approved in full.
- Some employees change jobs or exit the labour force because they are unable to obtain suitable flexibility in their working arrangements.

The changes

In its 25 September 2018 decision, the Full Bench has proposed a model term to be inserted in all modern awards to address this need. The new model term supplements the regime in section 65 of the Act and places additional obligations on employers responding to requests for flexible working arrangements.

The major changes are:

- before responding to an employee's request, an employer must discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that takes the employee's circumstances into account
- if an employer refuses the request, the written response must now include:
    - details of the business ground(s) for the refusal and how they apply
    - details of alternative working arrangements the employer can provide to accommodate the employee's circumstances
- employees can now dispute whether employers have correctly followed these processes.

The new model term again does not provide any mechanism for challenging whether business grounds are reasonable.

The proposed model term will apply to all modern awards unless it is demonstrated to the Commission that the achievement of a modern award's objective does not require its inclusion. It will not apply to employees covered by an existing enterprise agreement, although it will need to be considered as part of EA negotiations as it will be relevant to the 'better off overall test'.

Practical implications

The new model term requires employers to enhance their existing processes for managing employee requests for flexible working arrangements. Employers continue to be able to refuse requests based on (genuine) reasonable business grounds.

Steps to insure compliance include:

- Implementing a 'flexible working arrangements' policy that is Act compliant
- Educating staff about how to make a request for flexible working arrangements and how such a request will be handled

- Assessing requests with an open mind, and discussing the request with the employee
- If considering refusing a request, documenting the reasonable business grounds to do so to change his or her working arrangements, your organisation must have, and be able to clearly articulate those reasons.

It is likely the proposed model term will be mandated within the next month or so.

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Extra leave entitlements for shift workers?

A significant controversy has erupted over the entitlements enjoyed by shift workers under the Fair Work Act 2009 (Cth)(the Act) and the National Employment Standards (NES).

If recent indications from the Fair Work Commission and the Federal Court of Australia prove to be right, employees engaged as 12 hour shift workers may be entitled to up to 50% more personal/carer's leave than those working an ordinary 7.5 or 8 hour shift.

The issue arises because section 96 of the NES provides that:

> *(1) "For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave"*

The leave entitlement is expressed in "days" of leave, and not, as is commonly assumed, in hours.

Section 96 is found in Chapter 2, Part 2-2, Division 7 of the Act. Part 2-2 of Chapter 2 sets out the NES, and its constituent Divisions deal with a number of leave and other entitlements – e.g. parental leave, annual leave, community service leave, long service leave and public holidays, as well as personal/carer's leave and compassionate leave, which is the particular subject of Division 7.

Some leave entitlements are expressed as entitlements in months of leave (e.g. unpaid parental leave), some are expressed as entitlements in weeks of leave (e.g. annual leave), some are expressed as entitlements in periods of days of leave (e.g. unpaid pre-adoption leave, paid personal/carer's leave, unpaid carer's leave, compassionate leave) and public holiday entitlements are referable to days and part-days.

Whatever the nature of the period, no distinction is made in the Act amongst the various work patterns which might apply to day workers or various kinds of shift workers or amongst the variety of shift lengths which might be worked, except for the entitlement of some shift workers to an extra week's annual leave.

Section 99 of the Act says:

> *"If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period."*

The period of "paid personal/carer's leave" referred to in s 99, for which an employee must be paid at the base rate of pay for ordinary hours, must necessarily be one or more of the "days" (or part of a day) of leave referred to in s 96. The number of hours normally worked by, for example, an 8-hour day worker and a 12-hour shift worker on a normal or rostered day of work are self-evidently different, by a margin of 50%.

Nevertheless, the entitlement to paid leave is not referable to an hourly equivalent; it is expressed in days, and it necessarily follows, that the possibility exists that the statutory entitlement to 10 days leave (and pay) may result in a greater hourly entitlement (and overall pay) in some cases than in others.

The Fair Work Commission recently refused to approve a proposed Enterprise Agreement (EA) that expressed a personal/carer's leave entitlement in terms of hours (80) on the basis that it was concerned that employees working 12 hour days would not be entitled to their full 10 days NES leave entitlement.

An attempt by the employer to have the EA approval application referred to a Full Bench of the Commission was unsuccessful - *Mondelez Australia Pty Limited [2018] FWC 2140*. The employer sought to argue that the reference to "10 days" in section 96 is to be read as meaning 10 periods of 7.6 hours each, or an entitlement to 760 paid hours of leave per annum.

Vice President Hatcher determined that a similar submission had been rejected in an earlier case in the following terms:

> *"Accordingly we conclude that in the NES provisions of the FW Act, a "week" of annual leave is an authorised absence from work during the working days falling in a seven day period, and a "day" of leave (whether of annual or personal/carer's leave) is an authorised absence from the working time in a 24 hour period. We reject RACV's submission that "week" and "day" are to be read as terms of art referring to a specific number of working hours that may not constitute an actual week or day in a given case. We further conclude that the amount of leave deducted from an employee's leave balance necessarily correlates with the amount of leave taken, so that if a week's annual leave is taken, a week is deducted from the employee's accrued annual leave balance, and if a day of annual leave or personal/carer's leave is taken, a day is deducted from the employee's accrued annual leave or personal/carer's leave balance."*

The result of the Commission's view meant that the clause of the EA which the employer wanted fell foul of the prohibition in section 55 of the Act that any

enterprise agreement may not exclude the NES or any provision of it.

Action has now been commenced in the Federal Court by the employer to seek to overturn this outcome. The Honourable Craig Laundy MP, Minister for Small and Family Business, the Workplace and Deregulation, has intervened in those proceedings. He clearly sees the potential significance, having said of the issue:

> *"The Agreement approval application involves fundamental considerations underpinning the interpretation of the provisions of the Fair Work Act dealing with the accrual, taking, and deduction of paid personal/carer's leave under the NES. Any decision in this particular case is also likely to be generally relevant for the accrual, taking, and deduction of annual leave under the NES."*

Clarification of the correct principles to apply for the accrual, taking, and deduction of NES leave entitlements is critically important for employers, employees and their representatives. A decision is likely early next year.

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WORKERS COMPENSATION ROUNDUP

Workers Compensation Changes Update

In our previous edition of GD News we discussed the Workers Compensation Legislation Amendment Bill 2018 which at that time was proceeding through Parliament but had not yet been assented to.

The legislation was assented to on 26 October 2018.

The following parts of the legislation will commence on a day to be appointed by Proclamation:

Schedule 1 – Amendments relating to dispute resolution;

Schedule 2 - Amendments relating to medical assessments for permanent impairment;

Schedule 3 - Amendments relating to pre-injury average weekly earnings.

The portions of the legislation that have yet to commence will no doubt be the subject of Regulations.

Schedule 5 containing the Amendments relating to indexation commences on 1 December 2018.

The following provisions commence as at the date of assent:

Schedule 4 – Amendments relating to information sharing;

Schedule 6 – Amendments relating to the motor accidents scheme;

Schedule 7.1 – Miscellaneous amendments;

Schedule 8 – Amendments relating to savings and transitional provisions

The commencement date whilst important won't limit the impact of the changes when it comes to the new dispute process.

The transitional provisions make it clear the new dispute process applies to claims irrespective of date of injury or date of claim.

The dispute changes when they begin will apply to:

- an injury received before the commencement of the amending legislation, and
- a claim for compensation made before the commencement of the amending legislation, and
- proceedings pending in the Commission or a court immediately before the commencement of the amending legislation.

However the transitional provisions also provide that the amendments to the dispute process will have no application to compensation paid or payable in respect of any period before the commencement of the amendment, except as otherwise provided by the transitional provisions in the amending legislation.

On one view of the transitional provisions there will be a limit on the retrospective application of the changes but on another where the legislation has provisions stating the changes apply to claims and injuries before the commencement of the legislation that may be enough for the changes to also apply to compensation paid or payable in respect of these claims and injuries.

We will have to wait and see whether workers take up the debate about retrospectivity of the dispute changes and their application to compensation already paid pursuant to work capacity decisions and bring disputes in the Commission that challenge previous work capacity decisions.

A significant amendment that has come into immediate effect deals with the interaction of workers compensation and motor accident claims. Prior to the amendment, as a consequence of the interaction of the motor accidents legislation with the Worker's Compensation Act 1987 it was necessary for an injured worker to repay compensation for treatment expenses from damages recovered under the Motor Accident Injuries Act 2017 even though no damages could be recovered in relation to those expenses. This is no longer the case. The amendments provide that a claimant who recovers damages under the 2017 CTP legislation will only reimburse the worker's compensation insurer in relation to weekly payments. Lump sum compensation will only need to be repaid if damages are obtained for non economic loss in the motor accidents claim. It will not be necessary for a

claimant to repay compensation for medical, hospital, rehabilitation and care.

The landscape for workers claims is changing now that the legislation has been passed although not all changes have commenced at this stage. Further, Regulations which will impact on these changes are yet to be promulgated and once they are made will add additional colour and clarity to the changes to the Workers Compensation Scheme.

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5 years of weekly payments, Section 39 and maximum medical improvement – How does it come together

Section 39 of the Workers Compensation Act 1987 ("WC Act") provides that an injured worker has no entitlement to weekly payments of compensation in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable, however, this provision does not apply where the worker's permanent impairment resulting from the injury is more than 20%.

A question arises as to whether Section 39 can apply when the 260 weeks is up and the worker's permanent impairment cannot be determined where the worker has not reached maximum medical improvement.

Sweeny v Matilda Cruises Pty Limited provides guidance on this issue as well as a worker's rights to have a medical assessment to determine whether they have reached maximum medical improvement.

The case concerned a worker who suffered injury to the right knee on 19 November 2004. Liability for injury was accepted. In February 2005 the worker underwent surgery including an ACL reconstruction and on 22 February 2007 the worker was referred to an approved medical specialist who assessed 12% whole person impairment. On 16 March 2010 the worker underwent a revision ACL reconstruction and in 2010 made a further lump sum claim in respect of their impairment pursuant to Section 66 of the WC Act. After a further assessment and an Medical Appeal the worker was assessed at 12% whole person impairment.

On 1 February 2017 the employer gave the worker written notice his entitlement to weekly compensation would cease towards the end of the year by operation of Section 39.

After the 2012 legislative changes the worker made their "one more lump sum claim" which was finalised in April 2017 at 12% whole person impairment, no change to the previous assessment. However on 2 December 2017 the worker underwent a right total knee replacement surgery.

On 24 January 2018 the worker's solicitors advised the employer by email of the surgery and asked it to concede maximum medical improvement had not been reached and that the worker was not stable for the purposes of whole person impairment. This issue was raised to secure ongoing weekly payments. The employer did not make that concession.

The worker's solicitors lodged an application seeking an assessment under Section 319(g) as to whether the degree of permanent impairment was fully ascertainable. The employer opposed the referral to an approved medical specialist and argued this was precluded by Section 322A of the 1998 Act which prevents the worker from having more than one assessment of permanent impairment post the 2012 legislative amendments. However the assessment was not to determine the impairment it was to determine if maximum medical improvement was reached.

Clause 28C(a) of the Regulations provides that Section 39 of the WC Act does not apply if an assessment of permanent impairment is pending or has not been made where an approved medical specialist has declined to make the assessment on the basis maximum medical improvement had not been reached and the degree of permanent impairment was not fully ascertainable.

The arbitrator dealing with the employer's arguments remitted the matter to the Registrar for referral to an approved medical specialist to assess whether maximum medical improvement was reached.

The insurer sought leave to appeal against that decision arguing the Commission had no jurisdiction to entertain the application because no formal claim had been made. Whilst the application itself was a threshold dispute, the ultimate purpose of the referral was to reinstate weekly payments and no formal claim had been made in respect to the weekly payments.

Secondly, it was submitted in the alternative that the Workers Compensation Commission lacked jurisdiction because no formal claim had been made regarding the application for an assessment of impairment by an approved medical specialist. The claim involved a medical dispute and in the absence of a formal claim there could be no medical dispute between the parties.

On appeal Deputy President Snell determined the worker was entitled to be referred to an approved medical specialist for an assessment as to whether the degree of permanent impairment was fully ascertainable. The worker was entitled to be referred for further assessment as the Arbitrator had done unless he had previously had a further referral on the basis of Part 2A which he had not. It was determined the approved medical specialist referral was valid even though the worker had previously made his one further claim for lump sum compensation in 2017 because he had never been referred for assessment of whether he was at maximum medical improvement for the purposes of Section 39.

The insurer has lodged a Notice of Intention to Appeal and we will wait and see if the outcome is any different.

Applications continue to be lodged in the Workers Compensation Commission seeking an assessment under Section 319(g) of the 1998 Act to ascertain whether the degree of permanent impairment is fully ascertainable.

A worker has an entitlement to ongoing weekly compensation benefits until they reach stability and are assessed for whole person impairment purposes.

There is a difference between an assessment of whole person impairment and an assessment considering whether maximum medical improvement has been reached and when the later is pursued for the purposes of determining whether Section 39 of the WC Act applies an assessment of impairment for one more claim after the 2012 legislative amendments will not prevent the worker from pursuing a maximum medical improvement assessment at a later time.

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Serious and Wilful Misconduct Equals Compensation

A worker's conduct is a relevant factor for consideration in assessing his or her entitlement to compensation under the provisions of the worker's compensation legislation. Where an injury is solely attributable to the serious and wilful misconduct of the worker Section 14 provides compensation is not payable unless the injury results in death or serious and permanent disablement. A worker's serious and wilful misconduct is also a disqualifying factor in relation to journey claims under Section 10. Nonetheless the legislation does not provide a definition of "serious and wilful" misconduct.

A worker's "gross misconduct" can in certain circumstances also take them out of the course of their employment.

In *Ballina Shire Council v Knapp* [2018] NSWWCCPD 35, Deputy President Wood considered whether a worker's serious and wilful misconduct prevented the worker from recovering compensation for serious injuries he sustained in a motor vehicle accident which were compensable under Section 4(a) of the 1987 Act because they arose out of his employment.

On the day of the injury the worker was travelling from his residence at Evans Head to undertake overtime as a traffic controller in Ballina. The facts established he was running behind schedule. The Police investigation established he was driving at between 111km and 120km at the time of the accident (in a 100km speed zone) and it was not yet daylight. He was travelling in a northerly direction along the Pacific Highway and the accident occurred where the single road curved slightly to the right. Immediately prior to losing control of his vehicle, the worker was using a hand held mobile telephone. The evidence established the worker had attempted to call his superior on two occasions immediately prior to the occurrence of the accident. The worker's car collided with an oncoming vehicle whose occupants were killed immediately. The worker suffered severe injuries including the loss of his arm.

The Police Crash Investigation Unit concluded the collision most likely occurred as a result of driver distraction by the worker's mobile telephone. Whilst there was a possible contribution made by consumption of alcohol, this was excluded as an issue in the proceedings because it had not been raised in the Section 74 Notice disputing liability.

Following the accident the worker was charged with two counts of dangerous driving causing death. He pleaded guilty and was sentenced and served twelve months of his sentence in Silverwater Jail hospital.

In the Statement of Agreed Facts tendered to the District Court it was agreed the worker was travelling at a minimum of 111km in a 100km speed zone, that he had made two phone calls to his superior immediately prior to the accident with the last being between four seconds and one minute and thirty seconds before the accident occurred. The sentencing judge observed there was a combination of causative factors being the use of a mobile telephone at high speed and travelling on a major single carriageway highway amid other road users. The judge concluded the momentary inattention fell within the middle range of moral culpability.

In the initial proceedings before the arbitrator, the employer chose not to raise the defence of serious and wilful misconduct under Section 14(2) on the basis the conduct resulted in serious and permanent disablement. At issue was whether the worker suffered injuries arising out of or in the course of his employment, whether his personal injuries occurred whilst on a periodic journey for which there was a real and substantial connection between his employment and the accident out of which the personal injury arose and whether his injury was attributable to serious and wilful misconduct within Section 10(1A) of the 1987 Act.

The arbitrator determined the issues in the worker's favour finding his injury was not attributable to serious and wilful misconduct and he was not guilty of gross misconduct taking him outside the scope of his course of employment.

On appeal the employer did not contest the arbitrator's finding there was a real and substantial connection between the accident and the employment and therefore the journey provisions in Section 10 applied.

The employer contended the arbitrator erred in his finding the injury was not attributable to serious and wilful misconduct, by not looking at the totality of the worker's conduct.

The Deputy President concluded the arbitrator erred in failing to give an explanation as to why he considered the facts of driving "slightly" above the speed limit and using his mobile telephone as part of the totality of the worker's conduct that resulted in the accident. The Deputy President noted there was no issue the worker's injury arose out of or in the course of his employment. The dispute was whether his conduct constituted serious and wilful misconduct pursuant to Section 10(1A) or the conduct constituted gross misconduct taking him outside the course of his employment. The Deputy President accepted the worker's conduct must be look at in its entirety and this included the circumstance in which the accident occurred, the road on which he was travelling and the speed of his vehicle.

The Deputy President stated the phrase "serious and wilful misconduct" comprehends more than negligence, carelessness or the mere disregard of others. The person performing the act must know it will cause injury or act with disregard as to whether it will cause injury and proceed in any event without regard to the risk.

The distraction and inattention whilst speeding on a main highway where there was oncoming traffic made the risk of injury flowing from the conduct at least probable and on any view likely to cause significant injury. The Deputy President stated the seriousness of the conduct should be considered according to contemporary social standards noting using a handheld mobile telephone while travelling at speed and over the speed limit was a serious matter and the risk of injury must be regarded as "common knowledge as a result of a Police advertising campaign". She noted the worker relied upon the two attempted telephone calls to satisfy the requirement in Section 10(3A) of the 1987 Act that there was a real and substantial connection between the injury and his employment. The deliberate nature of his conduct was not challenged in the sentencing proceedings. Therefore she was satisfied the worker's actions constituted serious and wilful misconduct in accordance with Section 10(1A) of the 1987 Act and thus he was disentitled to benefits under the journey provisions in Section 10(1).

The Deputy President then turned to the worker's submission that the telephone calls to his employer for a work purpose clearly satisfied the causal limb of Section 4 that the injury arose out of the worker's employment. The employer argued the conduct took the worker out of the course of his employment and the Deputy President observed that position assumed that but for his conduct the worker was in the course of his employment in the first place.

After reviewing the authorities regarding the notion of "gross misconduct" the Deputy President stated it was incorrect to say that if someone is guilty of gross misconduct they cannot be in the course of employment. She indicated the proper approach was to determine whether the worker suffered a personal injury arising out of or in the course of his employment. An evaluative assessment of whether the worker's conduct constituted gross misconduct was required before consideration as to whether the gross conduct was of such a nature that took the worker out of the course of his employment.

The Deputy President therefore noted the first task was to determine whether the injury occurred in the course of employment which turned on whether he was doing something he was reasonably required, expected or authorised to do in order to carry out his or her duties. The phrase "arising out of employment" requires a causal connection with the employment, that is whether the particular job caused or to some extent materially contributed to the injury.

After reviewing a number of authorities where it was argued the injury did not occur in the course of employment because the worker's conduct had taken them out of employment, the Deputy President noted the connection between the worker's injuries and his employment as summarised by the arbitrator were:

- he was required to travel to the depot worksite;
- he had been issued with a mobile phone; and
- the calls were made on that telephone and the calls were for work purposes.

These factors established a causal connection with the employment and thus his injuries arose out of his employment. She noted he had no other reason to telephone his employer. He was using his work telephone and the only available inference was that the calls were to discuss employment matters. Thus if the injury arose out of employment, misconduct was irrelevant even if the misconduct was such as to take the worker outside the course of his employment. She stated it could not be said the worker's injuries resulted from his actions in making the phone calls occurred in the course of his employment.

In conclusion the Deputy President was clearly satisfied the worker's conduct was serious and wilful and he was aware of his conduct carried a risk of serious injury in accordance with Section 10(1A) of the Act. She was satisfied his injuries were attributable to the conduct and therefore compensation pursuant to Section 10(1) was not payable.

She was not satisfied the worker was in the course of his employment when the injury occurred. Even if he were and his conduct took him outside the course of employment, that did not operate to break the clear causal connection between the injuries and his employment as required by Section 4(a) of the 1987 Act. Therefore she found the worker's injuries were

compensable because the injuries arose out of his employment.

The decision confirms the difficulties faced by employers in relying upon the conduct provisions of the legislation to defeat claims even where there is evidence of and an admission by the worker of gross or serious and wilful misconduct. So long as the worker can establish the injury arose out of his or her employment then the defence will fail.

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