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Tougher Penalties for Privacy Breaches?

With the election date set the Government has entered caretaker mode and legislative reforms are on hold until after the election. However before caretaker mode commenced the Attorney General announced proposed legislative reforms introducing tougher penalties for privacy breaches.

The Attorney General announced the *Privacy Act* will be amended to include:

- an increase of penalties for entities covered by the Act, including social media and online platforms operating in Australia. Penalties are to be increased from $2.1 million for serious and repeated breaches to the greater of $10 million or three times the value of any benefit obtained through misuse of information and 10% of a company's annual domestic turnover;
- an infringement notice régime with penalties up to $63,000 for companies and $12,600 for individuals for minor breaches of the Privacy Act;
- a Code for social media and online platforms which trade in information with the Code being enforced by the new infringement notice regime;
- expanded options available to the Office of the Australian Information Commissioner to deter breaches with name and shame provisions to permit the OAIC to publish prominent notices about specific breaches and ensure those directly affected are advised of the breach;
- a requirement that social media and online platforms stop using or disclosing an individual's personal information upon receipt of a request from that individual;
- specific rules to protect the personal information of children and other vulnerable groups.

The Australian Competition & Consumer Commission has an enquiry into digital platforms underway and is due to deliver its final report in June 2019.

The Liberal Government's intention was to draft

legislation for consultation in the second half of 2019.

Following the ACCC's report privacy is sure to be on the agenda of the Government no matter which political party ends up driving the reforms.

We will have to wait and see whether the proposed changes telegraphed are implemented and whether any further changes are recommended by the ACCC and implemented.

Privacy remains a hot topic for Australians in 2019.

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Insuring Work Health and Safety Fines & Possible Consequences For Directors

In Australia businesses and directors can arrange insurance to cover fines, legal costs payable to prosecutors and their costs of defending prosecutions brought pursuant to Work Health and Safety Legislation.

In our March Newsletter we looked at the future of this insurance in light of the completion of the Commonwealth Government's 2018 review into the Model WHS Laws and the recommendation that there should be a prohibition on access to insurance for payment of fines for breaches of work health and safety legislation. In addition, it was recommended there be the introduction of a new industrial manslaughter offence.

Insurance for WH&S fines remains a hot topic across Australia. In early April in NSW a teenager was crushed to death and a co-worker critically injured when scaffolding collapsed at the construction site of a multi-storey residential building. There were up to 350 workers at the site at any time. Calls for the introduction of an industrial manslaughter offence are certainly resounding.

However for now you can insure WH&S fines and it is not all bad news for businesses that have that insurance.

n the NSW District Court in the matter of *SafeWork NSW v Macquarie Milling Co Pty Limited ; SafeWork NSW v Samuels [2019] NSWDC 111*, Russell SC DCJ determined it was not appropriate to increase the penalty for an offence merely as there was insurance to cover the fine. The prosecutor had argued the existence of insurance was relevant to consideration of the appropriate fine, that the existence of the indemnity in effect relieved the defendants from the legal consequences of their actions if the penalty was a fine and that the existence of insurance meant that there was no genuine remorse, as the defendants were not accepting responsibility, at least in a financial sense, for their conduct.

The prosecutor also submitted that the existence of insurance was relevant to additional sentencing orders sought by the prosecutor that were needed to address safety concerns.

The additional orders sought, which were ultimately made by Russell SC DCJ included that the Director:

- undertake a course in due diligence training for senior managers and company directors, within six months of the date of these orders;
- undertake a course in work health and safety risk management for supervisors and managers
- within two months of completion of the training prepare a work health and safety due diligence plan (Due Diligence Plan) for the officers of the business, in particular the director, which outlines how the lessons learned through the training have been (or will be) implemented in the workplace, and in particular how the officers will take steps to:
    - acquire and keep up-to-date knowledge of work health and safety matters;
    - gain an understanding of the nature of the operations of the business, and generally of the hazards and risk associated with its operations;
    - ensure the business has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business;
    - ensure the business has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
    - ensure the business has, and implements, processes for complying with its duties or obligations under the Act.
- within two months of the completion of the Due Diligence Plan, arrange and attend a meeting with the SafeWork NSW Inspectorate, to review and finalise the Due Diligence Plan.

The Court also adjourned the matter to a future date after time for compliance with these orders so there was a report back on compliance with the orders.

So what was the case about?

Macquarie Milling pleaded guilty to an offence that on 14 October 2016 as a person who had a work health and safety duty pursuant to s 19 of the Work Health and Safety Act 2011 failed to comply with that duty and exposed Mr Lenard Mullen (Mr Mullen) to a risk of death or serious injury contrary to s 32 of the Act. The maximum penalty for the offence is a fine of $1,500,000. Mr Roland Samuels a director pleaded guilty to an offence that on 14 October 2016 as a person who had a work health and safety duty pursuant to s 27 of the Act, to exercise due diligence to

ensure that Macquarie Milling complied with its duty under s 19(1) of the Act, he failed to comply with that duty and thereby exposed Mr Mullen to a risk of death or serious injury contrary to s 32 of the Act. The maximum penalty for the offence is a fine of $300,000.

Russell SC DCJ observed:

"In s 27(5) of the Act, "due diligence" is defined to include:

(a) *to acquire and keep up-to-date knowledge of work health and safety matters, and*
(b) *to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and*
(c) *to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, and*
(d) *to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and*
(e) *to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act, and*

For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include:

- *reporting notifiable incidents,*
- *consulting with workers,*
- *ensuring compliance with notices issued under this Act,*
- *ensuring the provision of training and instruction to workers about work health and safety,*
- *ensuring that health and safety representatives receive their entitlements to training.*

(f) *to verify the provision and use of the resources and processes referred to in paragraphs (c)-(e)."*

Macquarie Milling produces stockfeed products for farm in its stockfeed mill. A chaff cutting machine processes large amounts of hay and from time to time, would become blocked. Mr McMullen was employed as a mill labourer One of Mr Mullen's duties was to clear any blockages in the conveyor belt in the chaff cutting machine. Mr Mullen was injured whilst operating the chaff cutting machine.

Russell SC DCJ observed the relevant operation was:

"The chaff cutting machine operates by teasers unwinding the hay, which then drops onto a conveyor belt that leads to a flattening wheel, which is connected to a rotating drive shaft with a square steel plate that spins freely. The rotating shaft spins the hay flattening wheel and has three protruding bolts. When the chaff cutting machine is switched on, the shaft rotates at approximately 70 revolutions per minute. On the day of the incident the rotating shaft with the protruding bolts was unguarded. The spinning steel plate was also unguarded.

At approximately 9.40 am on 14 October 2016 Mr Mullen was operating the chaff cutting machine from an elevated control box (or teaser box). The teaser box is approximately 1.5 metres above the ground with a large see-through glass viewing area which allows the amount of chaff entering the machine to be controlled. The teaser box is accessed independently by a series of steps that lead from an area separated from the chaff cutting machine by a corrugated iron wall.

While operating the chaff cutting machine Mr Mullen noticed that the conveyor belt had become blocked. He attempted to clear the hay blockage with a 30 centimetre metal rod, while standing in close proximity to the unguarded rotating shaft, while the machine was still on. As he leaned forward, part of his clothing became caught on one of the three protruding bolts of the rotating shaft, pulling him into the shaft. This resulted in his clothing becoming wrapped tightly around his neck and a deep laceration to his left hand. His left arm and shoulder also became jammed against the housing of the hydraulic motor."

Regulations made under the Act as well as relevant Australian Standards required guarding to be in place.

The rotating shaft had been guarded in the past, however the guarding had been removed and the shaft had been unguarded for at least a few years prior to the accident. Twelve months prior to the incident, another employee was involved in a similar incident where his clothes became entangled in the shaft but he did not suffer any injuries.

Russel SC DCJ observed:

"There was no documented safe operating procedure or any safety manual for the chaff cutting machine, nor were there any Safe Work Method Statements (SWMS). Mr Samuels did not ensure that any of these documents were created or implemented.

Workers were initially instructed on how to operate the chaff cutting machine by an experienced operator. There was no comprehensive instruction or training provided to the workers regarding the safe operation of the chaff cutting machine. Mr Samuels did not ensure that any such instruction or training occurred, nor did he ensure that workers' competency levels were assessed prior to workers operating the chaff cutting machine."

When determining an appropriate penalty the Court looks at:

- the potential consequences of the risk, which may be mild or catastrophic;
- the availability of steps to lessen, minimise or remove the risk; and
- whether such steps are complex and burdensome or only mildly inconvenient.

Relative culpability depends on assessment of all those factors.

It is settled law that:

" that the risk to be assessed is not the risk of the consequence, to the extent that a worker is in fact injured, but is the risk arising from the failure to take reasonably practicable steps to avoid the injury occurring. To discount the seriousness of the risk by reference to the unlikelihood of injury resulting is apt to lead to error. The conduct in question is the failure to respond to a risk of injury, conduct which will be more serious, the more serious the potential injuries, whether or not they are likely to materialize. The objective seriousness of the conduct will also be affected by the ease with which mitigating steps could have been taken."

Russell SC DCJ found that the level of culpability of Macquarie Milling was in the mid-range and Sammuel's culpability was in the lower end of the mid range. Russell SC DCJ applied a 25% discount for an early guilty plea and imposed fines of $180,000 on Macquarie Milling and $22,500 on Sammuel.

Interestingly the Court had been informed that Macquarie Milling and Sammuel had insurance that would cover the fine. That did not impact on the ultimate penalty. Russell SC DCJ observed:

"So far as its impact upon the appropriate fine is concerned, I am of the view that the existence of insurance is a neutral matter. Once it is understood that the insurance policy means that a personal burden is not being imposed on the defendants by a fine (except by way of the excess), there is no reason to adjust the fine upwards, since it is not effectively being imposed on the defendants themselves. However, the existence of the insurance policy is not a reason to adjust the fine downwards either. Part of the sentencing process, and one of the objects of sentencing, is to prevent crime by deterring the offender and other persons from committing similar offences – s 3A(b) Crimes (Sentencing Procedure) Act 1999. The District Court publishes on Caselaw each and every sentencing judgment under the Act. Thus the industrial community is informed of the significant penalties imposed for offences under the Act, which in theory should have a deterrent effect on persons other than the offender. Further, additional purposes of sentencing include to denounce the conduct of the offender, and have recognised the harm done to the victim of the crime and the community – s 3A(f) and (g) Crimes (Sentencing Procedure) Act 1999."

The prosecutor sought a pecuniary penalty as well as additional orders including orders requiring the Director to undertake training and create a Due Diligence Plan which was to be approved by Safework. The judge did not determine that the existence of insurance was relevant to the additional orders however findings that justified additional orders included:

- Macquarie Milling has a prior conviction of a similar nature to the present charge;
- Macquarie Milling has a significant history of inspectors finding that machinery on the premises was unsafe;
- Over the years a disturbingly high number of prohibition notices and improvement notices have been issued to Macquarie Milling;
- The guarding over the rotating shaft had been removed many years before the accident occurred;
- The director did not notice that the guarding was absent from the rotating shaft, even though when he removed the makeshift ladder from time to time, he must have been in the vicinity of the unguarded rotating shaft;
- When Mr Morland came back into the employ of Macquarie Milling in 2017, his inspection of the factory disclosed that there were other machines which should have had guards, but which did not;
- Until this accident, the safety standards in the Macquarie Milling premises were quite poor. So were the methods of training and instruction. The written safety documentation for the factory was virtually non-existent. This was in spite of the fact that Macquarie Milling operated business premises where there are a large number of mechanical machines, many of which were unguarded and could have done significant injuries to operators.

Training orders were appropriate and were made.

The takeaways from this case are simple:

- insurance for WH&S fines should not increase the ultimate penalty imposed on a business;
- insurance for WH&S fines is not being challenged by the Regulators on the grounds the insurance is against public policy;
- the existence of insurance is not a driver to justify penalties or orders in addition to a fine;
- training orders as well as orders requiring the business to create a Due Diligence Plan for officers of a business which must be approved by Safework will be imposed on Directors where appropriate.

WHS regulators can seek personal payment orders in

proceedings where individuals and businesses are convicted for breaches of the WHS Act to ensure that those convicted cannot be indemnified by others for fines however that strategy has not been adopted to date. It did not do so in this case. We wonder whether the outcome in this case will be a lever to drive regulators to consider applications for personal payment orders in future prosecutions.

There are interesting times ahead on the WH&S front for businesses and directors.

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Dual Insurance – The Great Escape

Dual insurance arises where a person or entity is insured against the same risk under two insurance policies.

It is not necessary for the insurance policies to be identical as double insurance will happen when two insurers are liable to indemnify an insured in whole or in part against an obligation to pay compensation.

Dual insurance can arise between a CTP policy and a workers compensation policy.

Dual insurance can arise where a corporation is insured under two liability policies, one taken out by the insured and the second taken out by another party pursuant to obligations imposed on that party under a contract between the insured and that party.

For example, it is not uncommon for a building contractor to take out its own liability insurance and also require subcontractors to arrange liability insurance for the benefit of the head contractor.

Dual insurance causes insurers to look to ways to avoid an obligation to contribute to a liability where both insurers cover the same liability.

We have seen the development of "other insurance" clauses which seek to prevent a policy of insurance from engaging where a second policy of insurance is in play which responds to the risk.

However, Section 45 of the *Insurance Contracts Act 1984* provides that where a provision in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance ... the provision is void.

Accordingly Section 45 presents a problem for insurers who seek to include "other insurance" clauses in a contract of insurance to overcome dual insurance.

However, the High Court in *Zurich Australian Insurance Limited v Metals & Minerals Insurance Pte Ltd* confirmed Section 45 does not apply where there are two contracts of insurance, one taken out by an insured and the other providing benefit to the insured as a third party beneficiary where that insurance was taken out by someone other than the insured.

Consequently other insurance clauses do have work to do where there are two policies of insurance, one taken out by an insured and the other providing cover for the insured although the policy was not arranged by the insured. Section 45 will also have no application where a person is a third party beneficiary under both policies and did not arrange either policy.

Generally there are two types of other insurance clauses.

The first is an excess of other insurance clause which seeks to remove any cover where there is other insurance with the policy responding on a difference in conditions basis and or in excess or the other insurance. A clause in this nature is framed as follows:

> *"This policy is excess over and above any other valid and collectible insurance and shall not respond to any loss until such time as the limit of liability under such other primary and valid insurance has been totally exhausted."*

The second form of other insurance clause is described by the Courts as an escape clause. It seeks to carve out any liability where there is other insurance.

An escape clause is commonly couched in the following terms:

> *"This policy does not cover liability which forms the subject of insurance by any other policy and this policy shall not be drawn into contribution with such other insurance."*

Whether an insurer uses an "escape" clause or an "excess of other insurance" clause is an underwriting decision. It can benefit an insured by reducing claims costs.

Insurers must be mindful that where two insurance policies are engaged each may have a form of other insurance clause. This can lead to a conundrum where the two other insurance clauses cannot be reconciled as they both seek to operate as excess clauses or both seek to operate as escape clauses.

Where both policies of insurance have the same form of other insurance clause the Courts will apply a rule of construction and determine the clauses cancel each other out with the result that each other insuring clause has no application and dual insurance will apply.

However, matters are different where one policy has an escape clause and the other has an excess of other insurance clause.

In *Allianz Insurance Australia Limited v Certain Underwriters at Lloyds*, Rees J was called on to consider the application of dual insurance where there were two liability policies which responded to a claim for compensation by a person injured by a passing car

whilst Baulderstone Hornibrook was building a road. Baulderstone was insured under two policies which recovered the damages payable to the injured worker, one with Allianz and the other with Lloyds. Each policy had other insurance clauses. One was an escape clause and the other was an excess of other insurance clause.

RTA had taken out a contract of insurance with Allianz covering Baulderstone as required by a construction contract. That policy had an excess of other insurance provision. Baulderstone, a subsidiary of Bilfinger Berger Australia Pty Limited, had a public and products/contract works liability policy issued by Lloyds. That policy had an other insurance provision in the form of an escape clause.

Rees J confirmed the determination of dual insurance is a two step approach.

Rees J noted the approach to construction when considering dual insurance is as follows:

> *"First the Courts construe the terms of each policy to determine whether there is, in fact, an overlap in coverage. This may reveal for example that the wording of one "escape" clause is absolute whilst the other is not, with the result that the loss will be cast from the insurer with the absolute clause onto the other insurer."*

If it is possible to reconcile the two policies such that one escape clause is absolute whilst the other is not there will be no dual insurance.

If an examination of both other insurance clauses points to neither policy responding then the second step as Rees J noted is as follows:

> *"Second, in the event that, on close examination, neither policy responds due to the existence of other, then the Courts apply a specific rule of construction which treats the "other insurance" clauses as cancelling each other out such that both insurers are liable."*

Rees J concluded on a proper reading of the policies, the escape clause in the Lloyds policy was absolute with the effect that only the Allianz policy responded to the risk.

The silver bullet in the Lloyds policy was as follows:

> *This policy does not cover liability*
>
> *…which forms the subject of insurance by any other policy and this policy shall not be drawn into contribution with such other insurance*

This decision makes it plain that insurers who seek to include other insurance clauses will fare better and avoid dual insurance if they utilise escape clauses rather than excess of other insurance provisions.

However, insurers need to be mindful where both policies have escape clauses or both have excess of other insurance clauses the clauses will effectively cancel each other out when it comes to construing claims for dual insurance.

So the take homes are:

- Other insurance clauses have a valid role in protecting an insurer from a claim for contribution where other policies exist provided the insured has not arranged only one of the policies or is a third party beneficiary under both.
- Other insurance clauses can be utilised to avoid contribution to claims covered by other insurance policies.
- An excess other insurance clauses trumps no other insurance clause.
- An escape clause which excludes cover for liability the subject of insurance by any other policy trumps no other insurance clause.
- Two policies with the same form of other insurance clauses result in dual insurance applying as the same clauses in both policies cancel each other out.
- An escape clause wins over an excess of other insurance clause to defeat a claim for dual insurance.

Dual insurance claims are alive and well however the decision in *Allianz v Lloyds* makes it plain that it is preferable to have an escape clause in a policy if an insurer is to have any chance of avoiding contribution to liability where 2 policies of insurance cover the same risk.

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No Liability for the Obvious

In the recent decision of *Hawkesbury Sports Council & Anor v Martin*, the NSW Court of Appeal has confirmed personal responsibility is alive and well.

On 4 August 2012 Apaula Martin attended Deerubbin Park in Windsor to watch her son play soccer. The park is owned by Hawkesbury City Council and managed by Hawkesbury Sports Council. Her husband parked the car within about a metre of the fence at the field. The fence at the time consisted of a steel cable between wooden posts punctuated by concrete blocks. After getting out of the car Mr Martin and the children started walking towards the playing field and Mrs Martin followed a little way behind. Mrs Martin did not see the steel cable, felt something catch her leg and fell onto the left side of her body. She sustained a severe injury to her left leg as a consequence of the fall.

At some time prior to November 2011 Hawkesbury Sports Council had been having problems with the

park being used inappropriately including cars and motorbikes driving onto the field.

In around November 2011, to assist with the problems, the Sports Council placed concrete blocks at intervals along the fence. The original fence remained in place.

Shortly after Mrs Martin's fall and following a complaint by Mr Martin the steel cable was removed.

Martin subsequently commenced proceedings in the District Court at Sydney against Hawkesbury Sports Council and Hawkesbury City Council.

The trial judge, Delaney ADCJ, found in favour of Mrs Martin. The trial judge preferred the expert evidence of the plaintiff and found the installation of the blocks by the Councils with the cables remaining in place created a risk of injury. The trial judge however deducted 30% for contributory negligence.

The Councils appealed.

By a two/one majority, Meagher JA and Emmett AJA allowed the appeal.

The Court of Appeal considered photographs of the concrete blocks and ferry cable that were tendered in the District Court proceedings. Their Honours noted although there can be difficulties in using photographs, these difficulties did not arise in this particular case as Mr Martin, the plaintiff's husband, had taken the photographs and also gave evidence the photographs reflected the light and shade as they were at the time the photographs were taken.

Their Honours stated:

> *"What is plain from the photographic evidence is that the positioning of the concrete blocks, post and cable relative to each other meant that someone using reasonable care for their safety could not attempt to pass through a space between the concrete blocks without also noticing the timber posts and cable. Ms Neil's evidence that there was no complaint of any earlier tripping incident and the absence from Mr Martin's request that the cable be removed of any claim that the cable was difficult to see lends some evidentiary support to that conclusion, but considered alone could not justify it.*
>
> *For these reasons we hold that the risk of someone tripping or falling on the cable was "obvious" within the meaning of the Civil Liability Act 2002 (NSW) Section 5F and was not such that a reasonable person in the appellants' position would have taken the precaution of removing the cable notwithstanding that the burden of doing so may not have been onerous and that the "social utility" of retaining the cable was questionable."*

The Councils also appealed in relation to quantum issues, in particular the allowance for domestic assistance awarded by the trial judge. The Councils argued the allowance for domestic assistance was excessive. The Councils also argued as Mr Martin was in receipt of a carer's pension prior to the accident for which he was paid 25 hours per week domestic assistance, Mrs Martin should not receive compensation for any care that fell within that 25 hours.

Simpson AJA, who delivered a judgment in dissent in relation to liability, delivered the sole judgment in relation to quantum.

Simpson AJA was of the opinion the plaintiff should be compensated for domestic assistance needs over and above the care she was previously receiving regardless of whether it fell within the 25 hour period.

Simpson AJA however agreed there were issues with the reasoning of Delaney ADCJ in relation to domestic assistance and reassessed the care.

However given the appeal was successful in relation to liability, the Court did not determine the final reduction of the care allowance.

The reasoning of the majority of the Court of Appeal makes it clear that a defendant will not be liable simply because an accident occurs. Pedestrians must be keeping a proper look out and taking reasonable care for their safety.

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Property Damage v Defective Work - Insuring Clauses and Exclusions – No Cover From Liability Insurance

Liability policies of insurance generally provide cover to the insured for monies which the insured becomes legally liable to pay as compensation or damages in respect of property damage which happens during the period of insurance as a result of an occurrence in connection with the insured's business.

Property damage in the context of a liability policy usually requires some physical injury to or loss of tangible property, including loss of use of that property.

The policy may also provide cover for loss of use of tangible property which although not physically injured or destroyed is nevertheless caused by physical damage or destruction of other tangible property.

These concepts involving "tangible property", "loss of use" and "physically injured or destroyed" are not always straightforward.

In *R & B Directional Drilling Pty Limited (in Liq) v CGU Insurance Limited (No. 2)*, Chief Justice Allsop of the Federal Court considered these concepts in a complex factual scenario and found in favour of the insurer.

In 2015 Regional Power Corporation t/as Horizon Power ("Horizon") engaged Broadspectrum (Australia) Pty Limited ("Broadspectrum") to design, procure and

construct certain works called the Port Headland Substation and Power Transmissions Works.

In 2016 Broadspectrum subcontracted a portion of the above works to RL Industries Pty Limited t/as Longfield Services ("Longfield").

In turn Longfield entered into a subcontract with R & B for R & B to carry out pipe jacking works in order to provide conduit pipes that would carry high voltage and other types of cables to the Port Headland Substation and Power Transmission Works.

The nature of the works carried out by R & B involved the following:

- installation into the ground, under an existing railway line, of a 650mm steel sleeve;
- the sleeve was to be forced forward by hydraulic rams and water being used at the head of the process to flush out the soil through the sleeve;
- a void would therefore be created within the sleeve after removal of soil;
- within the void in the steel sleeve were to be installed five conduit pipes through which the relevant cables would be threaded and would reside.

R & B was not responsible for placement of the cables in the conduit pipes. Rather, R & B was only responsible for placing and fixing the conduit pipes in the steel sleeve.

Once the conduit pipes were placed into the steel sleeve or tunnel, concrete grouting was to be pumped in to fill the void.

In the exercise of pumping the concrete into the tunnel some concrete entered a hole or break in one of the conduits. Attempts to flush the concrete out of the conduit in question were unsuccessful with the concrete in the conduit hardening and making it useless to house any cabling.

Longfield served a notice on R & B pursuant to the subcontract terms requiring R & B to fix the defective work and materials or perform those services again and to make good all damage caused as a result.

R & B's attempts to remove the concrete which leaked into the broken conduit were unsuccessful.

Longfield engaged another contractor who removed the concrete grout and conduit pipes from the steel sleeve and installed new conduit pipes, capable of carrying the cabling, which were successfully grouted and held in place.

Longfield subsequently made a claim upon R & B for the cost of removing the conduits and grouting, wasted expenditure and liabilities which Longfield contended it had to Broadspectrum and others for late delivery of the works.

On a date which is not clear from the judgment, R & B was placed in liquidation.

Longfield lodged a proof of debt in R & B's liquidation for a total of approximately $850,000. This amount constituted the quantum of the claim made by R & B under the CGU liability policy.

It was not in dispute that R & B held a public liability insurance policy with CGU which provided liability cover up to a limit of indemnity of $20 million.

The liability section of the policy was divided into two parts, namely public liability and product liability. However, the judgment only considered the "public liability" section without reference to the "product liability" section. Presumably, it did not have any bearing on the claim or its outcome.

The relevant insuring clause was in the following terms:

"... We will pay all sums that the insured person shall become legally liable to pay for compensation in respect of property damage happening during the period of insurance within the territorial limits as a result of an occurrence in connection with your business or products."

Property damage was relevantly defined as follows:

"Property damage means:

(a) physical injury to or loss of or destruction of tangible property including loss of use of that property and any time resulting therefrom;

(b) loss of the use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by physical damage or destruction of other tangible property."

R & B's claim was rejected by CGU resulting in the Federal Court proceedings.

It was argued for R & B that once the cement grout hardened to fill the tunnel with unusable conduit pipes, the tunnel was damaged because it became useless to Longfield for the purpose of carrying the requisite high voltage cables.

CGU denied liability for the claim on the basis that it did not fall for cover under the insuring clause of the insurance policy and, alternatively, by reason of three exclusion clauses.

The majority of the judgment of Allsop CJ deals with whether R & B established an entitlement to indemnity by bringing the claim within the insuring clause.

His Honour considered several legal authorities from the United States, Canada, England, New Zealand and Australia, being cases which considered similar policy wordings with respect to legal liabilities arising from property damage involving complex factual scenarios as to what constituted tangible property and physical injury or destruction thereto.

CGU argued the steel sleeve was tangible property but the tunnel it created was not. The insurer further submitted the steel sleeve was in no way physically damaged by injury to its physical condition.

R & B conceded this point. However, R & B submitted the damage comprised the making of the tunnel useless for its intended purpose by the grout hardening to fill the tunnel with five conduit pipes, only four of which were usable. This was said to be physical injury to the tunnel, being tangible property.

After careful consideration of the overseas and local legal authorities, Chief Justice Allsop rejected the arguments by R & B.

His Honour described the conundrum arising in this case in the following terms:

> *"The question is a matter of degree, of meaning and of characterisation. What R & B did was plainly defective work. But it can also be seen as injuring or impairing the tunnel, by filling it in a way that meant it was now inadequate for its purpose. On an alternative view, however, the tunnel is not injured; it is and remains sound once the defective work is removed. The tunnel has not been damaged because it can be used again."*

His Honour went on to say:

> *"The cost and consequences of getting to that point again are not meaningfully characterised as the consequences of the physical injury to the tunnel but as the cost and consequences of defective work ... on this view, it can be said that there has been a (temporary) loss of use of tangible property (the tunnel) but that loss of use has not caused by physical injury to the tunnel, but by the placement of defective work in the tunnel. On this view, there has been no physical injury to the tunnel."*

Allsop CJ therefore concluded that the placement of materials within the tunnel were defective requiring their removal from the tunnel. The tunnel itself was not physically injured, rather its temporary loss of use was not caused by physical injury, but by defective works.

In those circumstances, the claim against CGU was unsuccessful.

His Honour went on to consider the applicability of three exclusion clauses in the event His Honour's primary conclusion was wrong in respect of the insuring clause.

His Honour found that the claim would also be excluded under the "property in physical or legal control" exclusion.

However, CGU's reliance upon the other two exclusion clauses were not made out.

This interesting decision illustrates the complexities which can arise in the interpretation of a public liability policy involving a claim for property damage.

Here, the insured was unsuccessful because the thing that was said to comprise the tangible property, namely the tunnel, was not itself physically injured and moreover, its temporary loss of use was rectified without any physical injury or destruction to the tunnel.

In each claim it is necessary to distinguish between the item or items of tangible property which have allegedly sustained damaged or resulting loss of use from claims which are in fact arising from defective work that would generally fall for cover under a separate policy.

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CTP Claims & Contributory Negligence. Is a CARS Determination Binding on an Insurer

What happens when during the course of a matter an insurer makes a settlement offer without deduction for contributory negligence however has pleaded contributory negligence in their defence?

What happens when the CARS assessor makes a determination the defence is not made out and there is no contributory negligence - Is the insurer bound by the CARS assessment?

These issues were considered in *Cahill v Allianz Australia Insurance Limited*, where the Supreme Court determined the insurer was not bound by the CARS assessment as there was an allegation of contributory negligence and therefore liability was not wholly admitted.

The position contrasts with a claim where liability is wholly admitted, as an insurer is bound by the CARS decision. An injured claimant however is entitled to proceed to the District Court of NSW if they do not accept the assessment.

In *Cahill's case* the insurer issued a Section 81 Notice admitting breach of duty of care however pleaded a defence of contributory negligence of 5% due to the claimant's unsafe driving. The parties entered into settlement negotiations. Offers conveyed by the insurer made no reference to any deduction for contributory negligence.

The claim proceeded to CARS assessment. The parties made submissions on their respective positions. The claimant was cross examined however there was no questioning of the claimant on the issue of contributory negligence. A statement from the insured driver was before the CARS assessor during the hearing. During submissions the insurer's Counsel was questioned as to whether any submissions were to be made in relation to contributory negligence. Counsel for the insurer directed the assessor to the written submissions which addressed liability and contributory negligence.

The CARS assessor made a determination where damages were assessed with no deduction for contributory negligence.

The claimant's representatives wrote to the insurer confirming the assessment was accepted however the insured indicated as liability was not wholly admitted,

the determination was not binding on the insurer.

The claimant lodged proceedings in the Supreme Court of NSW to have the assessment confirmed and sought an order the insurer pay the damages assessed by the CARS assessor.

The insurer contended the assessment of damages by the assessor was not binding upon it as it did not wholly accept liability by maintaining the allegation of contributory negligence.

The claimant contended it was open for the insurer to contest the assessment of damages only if the insurer contested liability as found by the assessor. It was submitted as the insurer did not contest any aspect of liability at the assessment conference it was now not open to them to contest any aspect of liability arising from the certificate.

Ultimately the judge determined as there was an allegation of contributory negligence alleged by the insurer the CARS assessment was not binding on it.

The Court determined the CARS Assessor's decision reflected the outcome of an adjudication process with the assessor determining the question of contributory negligence and did not demonstrate the assessor perceived the issue as having been abandoned by the insurer.

The Court reasoned the use of the words *"I find"* in the CARS Assessment in the expression *"Accordingly I find that the claimant is entitled to a full award of damages without any deduction for contributory negligence"* was consistent with the assessor having adjudicated upon and determined an extant issue of contributory negligence. It did not suggest the insurer abandoned the issue.

The Court observed it was inconceivable an experienced claims assessor would make a finding as to contributory negligence in the manner he did if in fact the allegation was abandoned.

The Court determined the insurer at no time prior to the assessment conference, or during the conference, abandoned the allegations of contributory negligence on the basis that:

- the assessor made a determination on the issue of contributory negligence even if not in the insurer's favour;
- the insurer relied upon written submissions which conveyed the insurer's position as to contributory negligence; and
- there was nothing to suggest at any time during the assessment hearing the insurer expressly abandoned the defence.

The Court determined the insurer did not through its own conduct abandon the defence of contributory negligence and therefore the certificate of the assessor was not binding upon it.

The insurer therefore could reject the assessment of damages at CARS in circumstances where liability has not wholly been admitted.

Liability is therefore still in issue unless a defence is expressly abandoned, which it was not in this case.

The above case relates to the CTP scheme in place prior to 1 December 2017.

The CTP scheme in NSW was reformed with the introduction of the *Motor Accident Injuries Act 2017* on 30 March 2017. The commencement date for the new scheme began on 1 December 2017 and applied to motor accidents that occurred after that date. In the new scheme contributory negligence will reduce any entitlement to weekly payments for any period of loss of earnings or earning capacity that occurs more than 26 weeks after the accident.

Contributory negligence must be applied where drugs or alcohol, or any failure to wear a seatbelt or for motorcyclist helmet has been a factor in the accident or injury.

In the assessment of damages under the new scheme the assessor 's determination on liability is not binding on any party however an assessment of the amount of damages for liability under a claim for damages is binding on the insurer, and the insurer must pay to the claimant the amount of damages specified in the certificate as to the assessment if the insurer admits that liability under the claim, and the claimant accepts that amount of damages in settlement of the claim within 21 days after the certificate of assessment is issued.

An allegation of contributory negligence under either scheme would cause liability not to be wholly admitted.

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CONSTRUCTION ROUNDUP

Did the combustible cladding on your building comply with the BCA when it was constructed?

At around midnight on 24 November 2014, a young man from France on a working holiday in Australia left a cigarette smouldering in a plastic food container on the balcony of the 8th floor apartment in which he was living in the Lacrosse Tower in the Docklands area of Melbourne.

The cigarette started a fire that by 2.35am had spread up the balconies of each level of the building and ultimately to the roof of the tower above Level 21, and had compromised the Emergency Warning and Intercommunications System at the building.

To the great credit of the fire crews and other first responders, all 400 or so occupants of the building

were safely evacuated without injury, and the fire was declared to be under control by 2.55am.

However, the rapid spread of the fire was discovered to be largely due to the presence of "Alucobest" aluminium composite wall cladding with a combustible polyethylene core which had carried the fire up the outside of the building and had engulfed all the balconies. Aluminium composite panels with a combustible core were also found to be a significant factor which contributed to the death of 72 people in the Grenfell Tower in London in June 2017. It is therefore apparent that the occupants of the Lacrosse Tower were extremely fortunate to avoid the same fate.

Following an inquiry into the Lacrosse Tower fire, the various owners corporations and individual owners of the units in the Lacrosse Tower who had incurred loss and damage as a consequence of the fire commenced proceedings in the Victorian Civil and Administrative Tribunal against the builder, architect, certifier and fire engineer for damages in excess of $12 million: *Owners Corporation No. 1 of PS613436T & Ors v. LU Simon Builders Pty Limited & Ors* (Building and Property) [2019] VCAT 286. These damages included almost $6 million for the estimated cost of replacing the building's cladding to make it compliant with the Building Code of Australia (BCA).

On 28 February 2019 his Honour Judge Woodward (Vice President of VCAT) handed down his judgment in the case, finding that the builder had breached its statutory warranties provided to the benefit of the various plaintiffs, and that the architect, certifier and fire engineer were each liable to the builder in this regard.

Over the next few issues of our newsletter, we will look at various aspects of the case, the tribunal's findings, and the ramifications for those who have designed, built, certified, purchased or are occupying buildings that have combustible cladding installed on them.

In this article we look at how the Tribunal dealt with the issue of whether the combustible cladding installed on the Lacrosse Tower complied with the requirements of the BCA at the time that the building was designed and constructed.

The BCA is part of the National Construction Code, which provides the minimum necessary requirements for the safety, health, amenity and sustainability of both new buildings and building work throughout Australia.

The BCA is given legislative force in Victoria by Regulation 109 of the *Building Regulations 2006* (Vic) (subordinate to the *Building Act 1993* (Vic)). In NSW Regulation 7 of the *Environmental Planning and Assessment Regulation 2000* (NSW) prescribes that the BCA is applicable to NSW building work.

The BCA provides that a "Building Solution" will comply with the BCA if it satisfies the "Performance Requirements" set out in the BCA. Compliance with the Performance Requirements can only be achieved by:

(a) complying with the "Deemed-to-Satisfy Provisions"; or

(b) formulating an "Alternative Solution" which:

  (i) complies with the Performance Requirements; or

  (ii) is shown to be at least equivalent to the Deemed-to-Satisfy Provisions; or

(c) a combination of (a) and (b).

In the Lacrosse Tower decision, Woodward J considered the parties' submissions as to how the provisions of the BCA should be construed. He agreed that despite the non-legislative nature of documents such as standards and guidelines, many of the interpretive principles generally accepted by courts are also applied in the interpretation of these instruments. His Honour concurred with the reasoning of Lindsay J in *The Owners - Strata Plan No. 69312 v. Rockdale City Council & Anor; Owners of SP 69312 v. Allianz Aust Insurance* [2012] NSWSC 1244 that it is the text of the BCA that should be construed in accordance with the law, and this should not be by reference to what may or may not be the opinion of an expert or an assumption about the practical operation of the BCA amongst experts.

The question for the Tribunal was therefore whether the Alucobest brand of aluminium composite panels (ACPs) met the Deemed-to-Satisfy provisions of the BCA, as those provisions are construed in accordance with the law.

The ACPs installed on the external walls of the Lacrosse Tower were comprised of aluminium sheeting with a polyethylene core. The purpose of the such ACPs is to provide weatherproofing and acoustic insulation for the building, as well as providing pleasing aesthetics. Polyethylene consists of nonpolar, saturated, high molecular weight hydrocarbons, with a chemical behaviour similar to paraffin, and it is highly combustible.

ACPs are now specifically prohibited from use on the external walls of high-rise buildings in Australia: eg *Building Products (Safety) Act 201*7 (NSW). However, the court considered the question of whether ACPs had been a permissible item when the Lacrosse Tower's building permit had been issued in 2011.

Clause C1.12(f) of the BCA provides that certain bonded laminated materials (such as ACPs), though combustible or containing combustible fibres, may be used wherever a non-combustible material is required, where:

(a) each laminate is non-combustible; and
(b) each adhesive layer does not exceed 1mm in thickness; and
(c) the total thickness of the adhesive layers does not exceed 2mm; and

(d) the Spread-of-Flame Index and the Smoke-Developed Index of the laminated material as a whole does not exceed 0 and 3 respectively.

It had been submitted to the Tribunal by the certifier that "laminate" must mean the external layer that has been used to cover another material in the process of lamination.

However, Woodward J's view was that the phrase "bonded laminate material" described the materials that had been through a process of lamination. He commented that the term "laminate" could be used (depending on context) to mean both the composite product and each of its layered parts.

Thus his Honour held that the process of lamination that results in a bonded laminated material involves the binding or connecting together of a succession of layers of one or more materials. Having identified the composite product in those terms, followed by the word "where" (in the sense of "in which"), his Honour considered that the immediately following expression "each laminate" could only refer to each of the bonded layers that together comprise the "bonded laminate" whole.

Accordingly, a "bonded laminate material" could be expected to comprise a bonding material (adhesive) and two or more laminates.

Woodward J also held that C12.1(f) plainly sought to deal in express and precise terms with the potential combustibility of each of these elements. While combustible adhesive was permitted up to a maximum thickness of 2mm, each of the laminates (including the polyethylene laminate) must be non-combustible.

The Tribunal then considered the question of whether a bonded laminated material such as the ACPs could be used as an attachment to a wall notwithstanding their combustibility.

Clause C2.4 of Specification C1.1 of the BCA relevantly provides as follows:

"**2.4 Attachments not to impair fire-resistance**

(a) A combustible material may be used as a finish or lining to a wall or roof, or in a sign, sunscreen or blind, awning, or other attachment to a building element which has the required FRL [Fire Resistance Level] if –

(i) the material … complies with the fire hazard properties prescribed in … Clause 2 of Specification C1.10 …; and

(ii) it does not otherwise constitute an undue risk of fire spread via the façade of the building.

(b) The attachment of a facing or finish … to a part of a building required to have an FRL must not impair the required FRL of that part."

It had been submitted to the Tribunal that if an ACP can be described as a "finish" to a "wall" or as an "other attachment to a building element which has the required FRL", it will be deemed to comply with the BCA if is also meets the criterial in (i) and (iii) of 2.4(a).

However, Woodward J did not accept this submission. His Honour noted that a cursory review of the BCA showed that the term "finish" was generally used consistently with the use in, for example, BCA C1.10(c)(viii) – "a paint, varnish, lacquer or similar finish". His Honour stated that it was far from clear to him how a product with the structure, composition and dimensions of an ACP that is affixed using studwork and provides both weatherproofing and acoustic benefits, can be described as a "finish".

In this regard, his Honour noted that each of the building surveyor experts asserted to the effect that C2.4 was commonly interpreted to include finishes and linings which formed part of the external wall, but those experts had not provided any real analysis of how or why this approach was justified. As a matter of construction, his Honour preferred the view that C2.4 did not include finishes and linings that formed part of the external wall.

Accordingly, his Honour rejected any submission that C2.4 of Specification 1.1 of the BCA provided an available and appropriate pathway for approval of the ACPs at the time that the building permit for the Lacrosse Tower had been issued in June 2011.

The Tribunal thus held that the Alucobest panels were combustible within the meaning of the BCA, and further that no ACP with a polyethylene core complied with the BCA.

If your building has cladding which has been found (or you suspect) to be combustible, then the owners are likely to have an obligation to either replace the cladding or carry out retrofit works to make it compliant with the BCA. At Gillis Delaney Lawyers we can provide expert advice and assistance to guide you through this process, including (if necessary) making a claim against those who designed, built or certified the building in order to recover the rectification costs. Similarly, if you have received a claim with respect to work you have carried out on a building with combustible cladding, we can provide legal advice and representation in your management and defence of the claim.

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Paperless trials in the Construction List – the way of the way of the future?

Construction projects require a great deal of information to be produced – for example: transactional documentation, design drawings, estimates, supplier invoices, timesheets and multitudes of general communications such as emails.

When a dispute arises concerning a construction project, the relevant documentation tends to be printed

and copied multiple times by the lawyers and stakeholders. This leads to a large number of files (both electronic and hard copy) needing to be maintained by the lawyers in the case.

If the dispute escalates to formal court proceedings, as part of the preparation for the hearing the parties will compile a physical court book containing copies of the parties' pleadings and submissions as well as all affidavits and expert reports and the documentary evidence referred to by the witnesses.

As a consequence of the considerable amount of information and documents on a construction project, it is not uncommon for construction litigation to require the creation of a court book consisting of between 50 and 100 arch lever files. This court book is reproduced to create separate copies for each party's lawyer, their senior and junior counsel and the judge, as well as a further separate copy being provided in court for witnesses to use.

These court book volumes are paginated and cross referenced against even more copies of the trial documentation that has already been served by the parties amongst themselves and filed in court.

The cost of copying and maintaining such large multi-volume court books is significant, and contributes to the already high cost of litigation.

In addition, the time taken by each person in court to physically locate relevant documents in separate arch lever files adds to the overall often lengthy period allocated for the court hearing.

There is also the high cost to law firms in copying and storing these documents, and the staff resources required to file, copy and administer all that paperwork.

In the 21st century, one wonders whether construction litigation can be undertaken in a more efficient and cost-effective manner.

Many court jurisdictions are endeavouring to reduce the proliferation of documents in proceedings. On-line court processes permit electronic forms of documents to be filed in court and many judges now routinely order that as part of preparation for a hearing the parties produce the court book in electronic form as well as in hard copies.

However, and notwithstanding the judicial efforts to reduce the paper in litigation, rarely do the participants in a trial totally eschew the paper version of the court book.

Nevertheless, the recent Lacrosse Tower litigation (*Owners Corporation No. 1 of PS613436T & Ors v. LU Simon Builders Pty Limited & Ors* (Building and Property) [2019] VCAT 286) showed that almost paperless trials are not only possible, but can also be desirable.

In this case, the parties and the court each used an electronic form of court book, complete with hyperlinked cross referencing to documents served in the interlocutory stages of the trial.

In his judgment, his Honour Judge Woodward, Vice President of VCAT, described the document management in the trial as follows:

> [14] The parties also showed commendable cooperation in the management of the documents, and this also led to significant time saving. The original tribunal book ran to 79 volumes, increasing to 91 volumes by the conclusion of the hearing. However, only one hard copy of the tribunal book was created for the hearing, and barely used. Instead, most parties, the Tribunal and witnesses worked from electronic copies of documents in portable document format, accessed by hyperlinked document indices. These indices (and the electronic document set) were compiled and managed by the solicitors for LU Simon, under the terms of a protocol settled by the parties, with input from the Tribunal.
>
> [15] During the hearing, documents were displayed for witnesses on a computer screen in the witness box, managed by court staff. The alternative would have involved retrieving the folder containing the relevant hard-copy document from the 91 volume set, delivering the folder open at the correct page to the witness and returning the folder to the set, before repeating the process for the next document. In my estimation, this would have added significantly to the hearing time.
>
> [16] The hearing proceeded on the basis that any document referred to in written or oral opening submissions, in a witness statement or put to a witness during oral evidence, would be treated as tendered unless the Tribunal otherwise ordered. Thus, the onus was on any party wishing to object to any document becoming part of the evidence, to raise that objection at the earliest opportunity after the document was to be treated as tendered in the manner described. While there was some brief debate during the hearing about the status of particular documents, the parties ultimately agreed on a final list of the documents to be treated as tendered in the hearing ...

His Honour's comments aptly describe the time and cost savings that can be made with an efficient electronic document management system in court.

However, electronic document management in the trial can also (in theory) be extended to all stages in the *preparation* for litigation.

Most practitioners in the construction industry would be very familiar with the document management system routinely jointly used by participants in construction projects, incorporating software such as Procore,

Buildertrend and Oracle Aconex. This type of software allows full electronic tracking of the design and construction process (including submissions and assessment of designs and BIM integration), programs, variations, claims and general correspondence.

Construction document management is now generally so comprehensive that if a dispute arises the parties often just extend to their lawyers the necessary access to the project's document management database.

However, in the time-honoured tradition of legal practice, most lawyers select relevant documents from the electronic database, promptly *print out those documents* and then place them in a hard copy file. These printouts are then photocopied (ie another electronic copy is created by the photocopier and then printed) or are scanned multiple times in the litigation for service on other parties.

Ultimately, further hard copies of these documents will be compiled into the court book, and occasionally – and completing the cycle – will be reproduced (again) in electronic form to be incorporated into an electronic court book.

More and more often nowadays, the parties' legal representatives also maintain separate Dropbox-style collections of electronic files for the litigation, in addition to their hard copy files. These electronic files are usually able to be accessed by all lawyers, experts and counsel acting for the party, and facilitate the electronic service of documents on the other parties.

From the above, it can be seen that the missing link is a Dropbox-style system maintained jointly by the parties and the court for the proceedings. Imagine if all pleadings, evidence, orders etc were saved from the genesis of the proceedings in a single set of orderly electronic files accessible by the court and the parties' legal representatives.

The parties' lawyers and counsel could retrieve electronic copies of these documents and annotate or bookmark the documents or individual pages on screen.

An electronic court book could more easily be compiled from the electronic files, along with hyperlinked cross referencing to relevant documents in the litigation.

Many lawyers and members of the bar cannot imagine reviewing legal files without having physical printouts of documents in front of them. Therefore, in order to achieve a truly paperless court proceeding, lawyers, counsel and other participants would most likely need to change the way they work. Resistance to change to fully paperless trials is inevitable. However, there is also much enthusiasm from some members of the bench, as well as various barristers and legal practitioners to embrace a new world.

Like many aspects of the development and practice of law, the evolution of paperless court proceedings is likely to be slow while the participants learn to catch up. However, in construction litigation, we need to remember that participants in construction projects have been using paperless forms of communication and document management for a considerable length of time, and there is no real reason why their lawyers should still need to resort to physical paper.

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EMPLOYMENT ROUNDUP

Failure to follow policies resulted in valid dismissal

Employers invariably do not include workplace policies as a contractual term in an employment contract.

Contracts of employment invariably refer to workplace policies, oblige employees to comply with the workplace policies but expressly state the workplace policies do not form part of the contract of employment.

The reasoning behind this is if a workplace policy formed part of a contract of employment, to vary a workplace policy an employer would require the consent of an employee for that change. Most employment contracts would require the consent of the employee to be in writing.

Consequently, if workplace policies are not part of the contract of employment, they can be varied by an employer without the employee's consent. Simply providing an employee with notice of the change will be sufficient.

However, employees are contractually bound to comply with workplace policies. Most contracts of employment will include a term that an employee must comply with the lawful and reasonable directions of an employer. This would include complying with reasonable and proper workplace policies that are in place for efficient business operations, workplace safety and social harmony in the workplace.

The Fair Work Commission recently handed down a decision in *Hanson v Rhino Rack*, where it was determined that an application by the employee for unfair dismissal should fail as it was found the employee had undertaken a consistent pattern of behaviour that demonstrated a repeated disregard for and refusal to comply with Rhino Rack's lawful and reasonable policies, procedures and directions.

The employee commenced employment on 4 April 2017. His contract of employment included a term that the employee agreed to comply with and adhere to policies and procedures of the employer which are

notified to the employee and that may be varied from time to time. The contract stated that a breach of a policy or procedure may result in the termination of employment including summary dismissal in cases of serious breach as determined by the employer.

The employer had a policy which stated employees must smoke in only designated areas during meal breaks and never indoors within the employer's premises. There was also a policy that stated no food or drink other than water may be consumed in the warehouse.

In early 2018 a number of employees including the employee were observed breaching the no smoking policy. A meeting was called which included the employee. All offending employees were told this was a first and final verbal warning about smoking outside of the designated smoking area and breaching the no smoking policy.

On 6 April 2018 the employee was again observed smoking whilst driving a forklift in the driveway

On 19 April 2018 the employee was observed smoking. He was also observed on 3 May and 9 May smoking outside the designated area.

On 23 May the employee was issued a verbal warning. On 25 May the employee was issued with a written letter noting he had breached the no smoking policy and inviting him to respond by 28 May. No response was made by the employee.

The employee was also observed drinking and eating in the warehouse and was again warned verbally any further incidents may lead to the termination of his employment.

There was also a safety chain across a door which prevented people entering the warehouse unaccompanied by authorised employees. The safety chain was in place for safety reasons. On a number of occasions between September 2015 and August 2018 the employee left the safety chain on the ground when it should have been blocking the entrance to the warehouse.

On 17 August 2018 the employee was issued a show cause letter noting he had breached the no smoking policy, no eating or drinking policy in the warehouse and leaving the safety chain off the doorway which ensured visitors to the warehouse could not enter unless they were accompanied by an employee.

The employee conceded in an interview that he had breached the various policies but stated that he would comply in the future and that none of the breaches had disturbed or adversely effected the operations of the employer.

On 21 August 2018 the employee was handed a termination letter summarily dismissing him stating that the he was being terminated with 2 week's notice because of his serious and frequent breaches of the policies and failure to follow reasonable and lawful directions. The letter acknowledged the employee's statement that he would comply with the policies in the future but the employer considered the undertaking as insincere in light of the counselling and verbal and written warnings that no effect on his behaviour.

Deputy President Binet was satisfied that the employee had breached the no smoking policy on numerous occasions after being given the written warning The Deputy President was also satisfied the employee had breached the no eating or drinking in the warehouse on many occasions after being counselled on the policy. In relation to the safety chain, the Deputy President was satisfied the employee had failed to replace the safety chian and was aware of the company's expectation and direction.

The Deputy President was satisfied the policies and procedures in place at the premises were reasonable and lawful directions. The employee's conduct involved, in aggregate, a consistent pattern of behaviour that demonstrated a repeated disregard for and refusal to comply with Rhino Racks lawful and reasonable policies procedures and directions. The Deputy President was satisfied in those circumstances the employee's conduct constituted a valid reason for his dismissal.

Employers should ensure employees are trained in and acknowledge the policies that govern a workplace. A repeated breach of those policies by an employee may ground a right to terminate an employee as in this case.

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Breaches of the *Fair Work Act* can be costly!

Most employers are nowadays aware of a potential liability that may flow from breaches of the National Employment Standards or the general protections provisions of the Fair Work Act 2009 (Cth) (FW Act).

Many, however, do not seem to recognise the very substantial size of the potential financial impact.

A recent Federal Circuit Court decision (*Keenan v Cummins South Pacific Pty Ltd (No.2) [2019] FCCA 523)* paints a very clear picture.

The applicant had served the respondent for 34 years, during which he occupied a very senior role earning a very significant annual salary. His employment was then terminated. He subsequently found work periodically as an Uber driver earning in the order of $15 000 per annum.

The applicant contended that his former employer had no proper basis for terminating his employment, and alleged that it took adverse action against him in contravention of s 340(1)(a)(ii) of the FW Act. He also

alleged breaches of s 351(1) and s 352 of the FWA.

After a lengthy hearing, the Court found that the employer had taken various adverse action against the applicant - including placing him on a performance improvement program; instituting an "ethics investigations; and ultimately terminating him. These actions were taken, so the Court found, because the applicant had exercised a workplace right to make complaints about his employment.

So much is unremarkable. When the Court came to assess the compensation and penalties, however, the impact of the decision became apparent.

Mr Keenan sought reinstatement. The Court was prepared to order this, despite the employer's submissions that the position had now been taken by someone else; that he had been out of a leadership role for three years; and that reinstatement would require him to report to an executive whom the applicant had said in evidence he did not trust.

The Court said:

> *" … it must not be overlooked that Mr Keenan's loss of employment was the consequence of the respondent's unlawful conduct. It ill behoves the respondent to mount an array of arguments to the effect that the respondent's own internal organisation of its own staff is such as to prevent the court from reinstating Mr Keenan to the position he would still occupy had the respondent not engaged in the prohibited conduct. Put differently, I reject the notion that Mr Keenan is shut out from his primary remedy (reinstatement) merely because the respondent, after engaging in the unlawful conduct, installed an employee to take the very position from which Mr Keenan was unlawfully removed. Nor do I regard it as an acceptable reason not to order reinstatement merely because a more senior employee,… will have contact with Mr Keenan."*

Mr Keenan also sought compensation for the loss of wages he had suffered since his termination. He quantified this claim at his effective annual remuneration for 3 ¾ years – a total of more than $950,000.

The employer argued that no more than the equivalent of 6 month's should be awarded. It argued that such a limit should apply because it was always open to it to terminate the employment by the giving of requisite notice. It also criticised the applicant for not securing alternate employment.

The Court found that had he not been the subject of the matters found to have been contraventions, in all likelihood Mr Keenan would have continued in his employment from late 2015 to the date of judgment. As to the argument that the respondent could at any time have exercised a contractual right to terminate Mr Keenan lawfully for cause, or upon five weeks' notice for no cause, no evidence was adduced in this case that the respondent served a notice of its intention to terminate for either.

Also, the Court was not persuaded by evidence from a witness for the employer that Mr Keenan could readily find alternate work. This, the Court found, was:

> *"…premised on the unreality that a man of Mr Keenan's years who had been terminated in undignified circumstances could readily obtain alternative employment. I found that evidence extremely difficult to accept as a matter of common human experience."*

Next, the applicant sought compensation for hurt and suffering arsing from the contraventions by his employer. The Court determined that $20,000 was appropriate for this.

The Court also accepted that the applicant should have his long service leave entitlements varied to reflect ongoing service, and that superannuation payments should be made in respect of the years of lost remuneration.

Finally, the Court came to consider what, if any, penalty should be imposed on the employer. Various factors were influential:

- The deliberateness of the respondent's conduct is obvious. It was no accident. The respondent's conduct was sustained over a significant period.
- The nature and extent of loss or damage sustained as a result of the breaches was substantial.
- The size of the business enterprise - a substantial global entity - was a relevant consideration.
- The involvement of several persons at high executive level in the respondent was also significant.

Lastly, the Court found that the search for contrition was a search in vain in the circumstances of this case. It imposed a penalty of approximately 80% of the maximum.

In all, an exercise costing over $1 million for the employer. A frightening reminder of the potential cost of human resources mismanagement.

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WORKERS COMPENSATION ROUNDUP

Employment Benefits Payable whilst in Receipt of Weekly Compensation

We often receive queries from employers regarding an injured worker's entitlement to various employment benefits whilst absent from work and in receipt of workers compensation payments.

In our March newsletter we discussed the obligation of an employer to accrue annual leave whilst a worker is off work and receiving workers compensation benefits.

A workers entitlement to superannuation benefits whilst the worker is off work and receiving workers compensation benefits also raises eyebrows.

Generally superannuation contributions are not payable by an employer whilst an injured employee is in receipt of weekly compensation benefits. However if the employee is performing duties while injured, for instance as part of a return to work program, the employer's payments are taken into account in determining the employer's liability to make payment of the superannuation levy. There is no liability for payment of superannuation cast on the employer for payments the employee is receiving as make-up pay from the workers compensation insurer.

Further there may be a liability for the employer to make superannuation contributions if the Act, Award or industrial agreement applying to the employment makes provision for such payments while an employee is absent from work as a result of a work related injury or illness.

On the personal leave front, all employees except casual employees are entitled to personal leave when they are unable to work because of a personal injury or illness. But what happens when an employee who claims personal leave subsequently makes a claim for workers compensation in relation to an injury or illness for which they have received leave payments from their employer?

Section 50 of the *Workers Compensation Act 1987* provides that workers compensation is payable to a worker in respect of a period of incapacity for work, even where the worker has received or is entitled to receive in respect of that period wages for sick leave under any Act, Award or industrial agreement or contract of employment.

Payments of weekly compensation in respect of any period of incapacity for work are deemed to satisfy an employer's liability to pay wages for sick leave. Such payments are deemed to be paid as compensation and not as wages. Therefore such payments would not attract a liability on the employer's part to make payments on account of the superannuation levy.

If a worker is paid wages for sick leave by the employer and there is subsequently an award or agreement that compensation be paid to a worker in respect of that period, the employer's liability to pay compensation is deemed to be satisfied by that payment to the extent of the wages paid.

In *NSW Police Service v Azimi* the employer sought credit for sick leave payments made in proceedings before the Commission seeking weekly compensation. Deputy President Roche stated the provisions of Section 50 do not mean the worker was not entitled to an award in respect of the period when the employer paid sick leave.

The Deputy President stated Section 50(1) makes it clear that compensation is payable "even though the worker has received or is entitled to receive ... wages for sick leave. The part of the award affected by personal leave was deemed to have been satisfied and did not have to be paid again and Mr Azimi was entitled to have his personal leave re-credited. Therefore the worker was not entitled to double payment for the period and the employer was entitled to reimbursement from the insurer for the payments it had made on account of personal leave.

The method of determining an employee's entitlement to personal leave is another area of concern for employers. Most full-time employees have an entitlement to ten days personal leave each year. For employees who work the standard 38 hour week this means a total of 76 hours per week. However recent decisions of the Fair Work Commission have clarified that where a worker's standard days' work is longer than 7.6 hours per day, for instance shift workers who work 10 or 12 hour shifts, their sick leave entitlements are calculated on the basis of these "typical" work days.

The foregoing discussion highlights the difficulties that an employer may face in determining an injured worker's entitlements for employee benefits whilst absent as a result of a work related injury or illness. We have workplace law and workers compensation specialists available to assist you with your enquiries.

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Judicial Review – Admission of Fresh Evidence

An approved medical specialist's ("AMS's") assessment of permanent impairment needs to take into account all of the evidence referred to the doctor and their report must provide reasons for their determinations and rejection of evidence as was seen in the recent Supreme Court decision of *Wentworth Community Housing Limited v Brennan.* In that case the Court determined the Registrar of the Workers Compensation Commission erred in refusing to allow an appeal from a decision of an AMS to proceed in a psychological injury claim where the employer argued the AMS failed to take into account all relevant information. It was held the Registrar erred at law in not allowing an appeal from the AMS assessment to proceed where evidence of conduct potentially contrary to the subjective complaints of injury was not referred to in the AMS report.

On 26 January 2013 the worker suffered a psychological injury as a result of the nature and conditions of employment. The worker was assessed at 24% whole person impairment by an AMS. The

employer lodged an appeal against the decision of the AMS alleging:

- the AMS failed to consider evidence enclosed in the Application to Resolve a Dispute and the Reply;
- the AMS based his opinion solely on the worker's subjective report of symptoms;
- the AMS failed to compare the history obtained from the injured worker to the evidence contained in the documentation.

As part of the appeal the employer sought to rely upon fresh evidence including reports the employer obtained after the AMS assessment as a result of an investigation regarding the accuracy of the history provided to the AMS by the worker.

The Registrar issued a decision refusing the appeal to proceed. The employer then sought a Judicial Review of the Registrar's decision.

The Registrar asserted the AMS had in their possession two surveillance reports and two social media reports which were included in the Reply to Application to Resolve a Dispute and therefore on the face of the Medical Assessment Certificate ("MAC") had regard to the material placed before him including the surveillance and social media reports. According to the Registrar, those reports contained evidence which was consistent with that sought to be relied upon in the appeal.

The employer in the Judicial Review in the Supreme Court argued:

- there was a jurisdictional error and error on the face of the record;
- the Registrar misconstrued additional relevant information for the purposes of Section 327(3)(b) of the 1998 Act;
- the Registrar misconstrued the employer's submission that the AMS's assessment was based upon incorrect criteria because the surveillance and social media reports contradicted the information the AMS relied upon in assessing whole person impairment;
- the AMS failed to have regard to the relevant material included in the surveillance and social media reports;
- the Registrar failed to accept the submission the AMS did not have regard to the injured worker's statement that contained its concessions as to social and fitness activities including participation in ultra runs and staying in Manly every alternate weekend with her partner. These concessions were not recorded in the Medical Certificate ("MAC") issued which permitted an inference to be drawn the concessions and statements were not considered and the concessions had relevance to the assessment of whole person impairment.

The employer argued it was entitled to rely on further evidence as the additional evidence was not available before the medical assessment and could not have reasonably be obtained before the medical assessment took place. Reports obtained by the employer post dated the MAC and commencement of proceedings and were obtained in the investigation conducted in relation to the accuracy of the AMS's history.

Eight grounds of Judicial Review were pursued. Grounds 5 and 6 concerned the Registrar's error in dealing with surveillance and social media reports. Ground 5 was that the Registrar made a jurisdictional error or error on the face of the record by failing to accept the employer's submission the MAC did not refer to and therefore did not consider, the relevant information provided by the employer annexed to the Reply.

The employer argued it was plain and apparent on reading the reasoning by the AMS that the AMS had no regard to the surveillance and social media reports attached to the Reply nor did the AMS have regard to the injured worker's statement responding to those reports. The surveillance and social media reports contained evidence which contradicted the subjective complaints made by the injured worker to the AMS.

The Supreme Court determined the Registrar erred in not permitting the appeal. The Registrar stated the AMS had regard to the material placed before him and that the evidence was broadly consistent with that sought to be relied upon in the appeal in circumstances. The Court determined that the Registrar offered an explanation for the AMS's approach rather than a consideration of the underpinning issue which was whether the AMS had either failed to consider the material shown in the media posts and surveillance reports or simply overlooked them. It was an error of law on the face of the record for the Registrar to not have considered the submission the AMS had either not considered or had overlooked the reports. The Registrar misconstrued the statutory task under Section 327(3)(d) of the 1998 Act and had made a jurisdictional error.

Accordingly the matter was remitted back to the Workers Compensation Commission to be determined in accordance with the law. This will permit an appeal from the AMS to proceed.

Psychological injury claims are complex and doctors that diagnose and assess injuries depend on the information provided by the worker and their recall of complaints, symptoms and the impact on their life.

With the rise of social media the lives of individuals is often on display providing an additional source of information about a worker.

Where issues arise over the credibility of the complaints of injury surveillance is a forensic tool which can be deployed.

Where social media and surveillance reports are referred to an AMS the doctor must take that information into account and their report must address inconsistencies between worker complaints and those reports.

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Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any Court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.