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GD NEWS / AUGUST 2019

IN THIS EDITION

New Licensing Regime For Foreign Financial Services Providers in Australia

If you carry on a financial services business in Australia, you must hold an Australian financial services licence ("AFSL"), unless relief is granted by ASIC or an exemption under the Corporations Act applies.

ASIC currently exempts foreign financial services providers from the requirement to hold an AFSL if:

- the financial services are provided to wholesale clients only;
- the provision of the financial services by the FFSP is regulated by an overseas regulatory authority;
- the regulatory regime overseen by the overseas regulatory authority is sufficiently equivalent to the Australian regulatory regime;
- there are effective cooperation arrangements in place between the overseas regulatory authority and ASIC; and
- the foreign financial services provider meets all the relevant conditions of relief contained in the relevant ASIC instrument granting relief.

This exemption is known as "current sufficient equivalence relief".

In addition there is an exemption for foreign financial services providers with limited connection to Australia dealing with wholesale clients where the provider:

- is not in Australia;
- deals only with wholesale clients; and
- carries on a financial services business only because the person is engaging in conduct that is intended to induce people in Australia to use the financial services it provides.

This is known as current limited connection relief.

However times are changing and ASIC has released a consultation paper which charts the way forward for foreign financial services providers who intend to operate in Australia or offer financial services to

Editors:

David Newey

Amanda Bond

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

Australians. Foreign financial services providers will need an AFSL to provide financial services in Australia.

ASIC has confirmed that it intends to:

- repeal the sufficient equivalence relief and limited connection relief; and
- implement a modified AFS licensing regime to enable eligible foreign financial services providers to apply for and maintain a modified form of AFSL (foreign AFSL).

The foreign AFS licensing regime will be a modified AFSL regime for foreign financial services providers that:

- are authorised in a sufficiently equivalent overseas regulatory regime to provide financial services to wholesale clients; and
- wish to provide those financial services to wholesale clients in Australia.

A foreign AFSL holder will not need to comply with the following provisions in the Corporations Act:

s912A(1)(b), to the extent it requires compliance with reg 7.6.04(1)(a) and (d)	Obligations about notifying ASIC of events that may cause a material adverse change to financial position and maintaining records of training for representatives
s912A(1)(d)	Have adequate resources
s912A(1)(e)	Maintain the competence to provide the financial services
s912A(1)(f)	Ensure representatives are appropriately trained
s912AAC	Meet minimum standards for custodial or depository service providers
s912AAD	Have agreements with sub-custodians to hold custodial property
s912AC	Have adequate financial resources for custodial or depository service providers
All the provisions in Subdivs A and B, Div 2 of Pt 7.8, Div 3 of Pt 7.8	Obligations about handling client money and client property when the sufficiently equivalent protections in the overseas regulatory regime apply to client money paid to, and client property held by, the foreign AFS licensee from a wholesale client in Australia relating to the exempt financial service
s991E	Obligations of licensees in relation to dealings with non-licensees (to the extent the financial product transaction is entered into or arranged outside Australia)
s991F	Dealings involving employees of licensees, if the foreign AFS licensee is only carrying on a financial services business in Australia because it carries on the business of providing eligible financial services under the instrument in Australia
s1017E	Obligations about dealing with money received for a financial product before the product is issued when sufficiently equivalent protections in the overseas regulatory regime apply to the money received from wholesale clients in Australia relating to the exempt financial service

However a foreign AFSL holder will be subject to all other applicable provisions under the Corporations Act, including the obligations to:

- provide financial services efficiently, honestly and fairly (see s912A(1)(a));
- have in place adequate arrangements for management of conflicts of interest (see s912A(1)(aa));
- comply with the conditions on its licence (see s912A(1)(b));
- comply with applicable financial services laws (see s912A(1)(c));
- take reasonable steps to ensure that representatives comply with applicable financial services laws (see s912A(1)(ca)); and
- have adequate risk management systems (see s912A(1)(h)).

In addition a foreign AFSL holder licensee will also be subject to ASIC's supervisory and enforcement provisions including:

- breach reporting requirements (see s912D);
- the requirement to give ASIC reasonable assistance during surveillance checks (see s912E); and
- the power to impose or vary conditions on a licence (see s914A); and vary, suspend or cancel a licence (see s915A and 915B).

There will be a limited extension of existing relief for

exempted foreign financial services providers until 31 March 2020 and then a 24 month transition period until 1 April 2022 when foreign financial services providers operating under current sufficient equivalence relief must have a foreign AFSL. There will be a 6 month transition period until 30 September 2020 for foreign financial services providers relying on existing limited connection exemption to make alternative compliance arrangements.

Moving forward foreign financial services providers who wish to operate in Australia will need an AFSL and can look forward to closer oversight from ASIC in the future.

David Newey
dtn@gdlaw.com.au

Will the APRA Capability Review Bring Change

On 17 July 2019 the Morrison Government released the Australian Prudential Regulation Authority (APRA) Capability Review which followed on the heels of the Hayne Royal Commission and previous recommendations of the Productivity Commission.

There were 24 recommendations, with 19 directed to APRA and the remaining five directed to the Government.

The Review observed the recommendations require "APRA to address variability in its leadership capability and develop a more open-minded culture, adaptable to change and supportive of more assertive engagement of staff with its regulated entities" and "There needs to be more clarity in communication and lines of accountability."

APRA has indicated to Government that it supports all 19 recommendations directed to it and the Government has agreed to take action on all five of the recommendations directed to to the Government.

In response to the Review the Treasurer has announced the Government will:

- ensure that APRA has sufficient powers and flexibility to prevent inappropriate directors and senior executives from being appointed or re-appointed to regulated entities, as part of extending the Banking Executive Accountability Regime;
- consider changes to APRA's regulatory framework including a review of penalties, amending its private health insurance licensing powers and providing APRA with the power to appoint a person to undertake a review of a regulatory entity;
- in establishing the Financial Regulator Oversight Authority, which will oversee both APRA and ASIC, streamline and improve the effectiveness of both APRA and ASIC's accountability arrangements;
- outline its expectations for APRA on superannuation in its next Statement of Expectations; and
- work with APRA and the Australian Public Service Commission to better understand and address any restrictions within the current Australian Public Service Bargaining Framework in order to ensure APRA can attract and retain high skilled staff.

As for the recommendations to APRA the review concluded APRA should be empowered for new challenges and the recommendations included:

- To better prepare for and respond to the consequences of digital innovation and disruption, APRA should increase its IT risk capacity and capability, including through increased collaboration and partnerships. In doing so, APRA should consider the implications of new business models, management and transformation of legacy IT landscapes, greater reliance on third-party providers (for example, cloud providers), and technology-enabled competition.
- "Building upon APRA's strategic initiative to enhance 'leadership, people and culture'. APRA Members should address variation in leadership capability for all management levels. This should include a priority focus on leading change, effective execution and accountability. In addition, APRA should develop a cultural change program that fosters internal debate and contestability.
- APRA should set transparent standards to hold staff and itself accountable for the timeliness of approvals and other commercially-important decisions for regulated institutions. APRA should publicly disclose adherence rates to these performance standards in its external accountability assessment.
- APRA should revise its organisational structure to reinforce the impact of the leadership and cultural changes recommended by the Review and APRA's own strategic plans. APRA should:
  - ❖ restructure supervision divisions along industry lines — banking, insurance and superannuation;
  - ❖ revise management structures and levels, with a view to widening spans of control and enhancing efficiency, speed of decision-making and empowerment;
  - ❖ shift internal configuration to better support industry-focussed strategic activities and more agile ways of working; and
  - ❖ create distinct people-leader and technical-specialist career pathways
- Reflecting its role as an independent prudential regulator, APRA should take a more transparent

and assertive role in articulating the objectives of its macro-prudential policies, the design of the instruments chosen and assessment of its impacts, including on the broader areas of its mandate. APRA should continue to develop its public communication around the extent of systemic risks, conditions required for macro-prudential actions and assessments of any actions taken.

- APRA should change its existing internal norms that create a low appetite for transparent supervisory challenge and enforcement by:
  - ❖ departing from its behind closed doors approach with regulated entities;
  - ❖ adopting a stronger approach towards recalcitrant institutions;
  - ❖ building organisational confidence and improving management support; and
  - ❖ increasing its risk appetite and use of the escalation toolkit.
- APRA should take a more strategic, active and forceful approach in its public communications. As an independent regulator, it should use public communications to shape community and government expectations of it.

The Review confirmed APRA's regulatory approach and culture needs to change.

The future will see APRA building internal capacity and capability and becoming more accountable.

All recommendations of the Review Panel are supported by APRA and the Government and there is a commitment to action all recommendations and with APRA's new enforcement strategy which was published in November 2018 we can look forward to APRA:

- adopting a "constructively tough" appetite to enforcement and setting it out in a board-endorsed enforcement strategy document;
- ensuring APRA supervisors are supported and empowered to hold institutions and individuals to account, and strengthening governance of enforcement-related decisions;
- combining APRA's enforcement, investigation and legal experts in one strengthened support team, and ensuring resources are available to support the pursuit of enforcement action where appropriate; and
- strengthening cooperation on enforcement matters with the Australian Securities and Investments Commission (ASIC).

Interesting times lay ahead for the financial services industry.

David Newey
dtn@gdlaw.com.au

Liability For Obvious Risks

In New South Wales a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk. Further a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk. In addition a person does not owe a duty of care to another person to warn of an obvious risk.

Therefore the categorisation of a risk as obvious can have significant implications for a person that is injured.

The Courts in New South Wales have recently reminded litigants that if a risk is obvious they will have difficulties convincing the Court that a defendant should be liable for the consequences of an obvious risk.

In *Carter v Hastings River Greyhound Racing Club* (Supreme Court of NSW) Jason Carter was injured whilst operating the catching pen gate at the Hastings River Greyhound Racing Club. Carter contended that to operate the catching pen gate he had to wait for the dogs to run past and then move the gate across the track to near the inside railing, leaving enough space between the gate and the railing for the lure to pass after the race finished. When the gate was closed it would steer the dogs off the track and into pens.

Carter moved the catching pen gate and then noticed a dog fall. He was watching that dog when the lure smashed into his left leg, between his knee and ankle.

The ordinary process when operating the catching pen gate was to keep it open during a race and then close it once the race had finished and the lure had travelled past. On the day of the accident Carter was asked by Mr Barker, a committee member of the Club, to operate the catching pen. According to Carter, he agreed as he wanted to help however he did not realise the potential dangers. Although there was an issue as to how many times Carter had operated the catching pen gate the circumstances as to how the accident occurred were not in issue. There was however a real question as to whether or not the Club could be liable.

Firstly, the Club argued the risk was obvious.

Section 5G of the *Civil Liability Act 2002* ("CLA 2002") provides that:

> *"1. In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk. ... "*

Section 5H provides:

"No proactive duty to warn of obvious risk

1. *A person (the defendant) does not owe a duty of care to another person (the plaintiff) to warn of an obvious risk to the plaintiff."*

Harrison AJ, the trial judge, was *"satisfied the risk of suffering serious injury from being struck by the lure if standing in its path would have been obvious to a reasonable person in the position of the plaintiff."*

The defendant also argued that operating the gate was a recreational activity. The CLA 2002 also provides there is no liability for obvious risks of dangerous recreational activities. The trial judge also agreed with this interpretation.

In fact, Carter did not even establish a breach of duty by the Club. Carter attempted to argue the modifications that had been made after the accident requiring the operator to step up into a platform before operating a gate should have been made prior to the accident.

The trial judge did not agree with Carter's argument.

The trial judge stated:

> *"Having considered all the evidence provided, it is my view that the burden of taking these steps was not necessary, because it would be most unusual for a reasonable person operating the catching pen gate to be so distracted that he would remain standing in the path of the oncoming lure. Thus, the probability that the harm would occur if the precautions were not taken was low (Section 5B(2)(a)). I also agree that stepping up into the platform cage arrangement, as required to mount the modified gate, in itself could cause an accident. I note here as well that the social utility of operating the catching pen gate is that it facilitates country greyhound races to be run for the enjoyment of enthusiasts, of which the plaintiff is one."*

The Club was therefore found not to have breached its duty of care to Carter in any event.

Carter's claim therefore failed for a number of reasons, including the fact that the risk was an obvious one and there was no duty to warn Carter of the risk.

That decision was followed by the decision of the NSW Court of Appeal in *Council of the City of Sydney v Bishop*. The circumstances of that accident were very different however the defence of obvious risk was also successful.

Karen Bishop sustained a fracture of her right hip when she tripped and fell on a kerb in a pedestrian precinct in Potts Point on 13 January 2013. Bishop sustained injury when she was walking, as she had hundreds of times previously, from her workplace in Macleay Street, Potts Point to Kings Cross Station, to catch a train home. Bishop was walking south along the walkway in Llankelly Place, when she saw a group of patrons in the restaurants/bars. In order to avoid them she turned to her right, to the footpath that is separated from the walkway by a kerb that gradually decreases in height from about 16cm to become flush with the walkway. At the point where she turned to step from the walkway to the kerb there was about 4-5cm. As Bishop stepped from the walkway to the footpath she tripped on the kerb and fell, sustaining injury.

Bishop was initially successful in the District Court however the Council appealed.

Bishop argued there ought to have been a marking on the kerb to make it more obvious.

The Court of Appeal did not accept this was the case. The leading judgment was delivered by Justice Macfarlan.

Justice Macfarlan stated:

> *"In my view the risk of a person such as the respondent tripping on the kerb was an obvious one for the purposes of Section 5H of the Civil Liability Act. As a consequence the appellant did not owe a duty to warn the respondent of it. As in Ghantous v Hawkesbury City Council, there was a "discernible difference" between the kerb and the lower level and "[T]there was no concealment of the difference in height. It was plain to be seen." Further, as the extracts from that case quoted above indicate, occupiers are entitled to assume that people will take care not to trip on the multitude of obstacles, both large and small, that are likely to be in their paths in walking from one place to another. Pedestrians are not entitled to assume that they are traversing a "level playing field" ...*

"There was nothing in the circumstances of the present case that rendered it necessary for the appellant to draw further attention to the step constituted by the concrete kerb. It was a hazard of an ordinary character that a person walking through the pedestrian precinct could be expected to encounter and could be expected to watch out for."

Bishop's argument that the gutter should have been painted yellow was rejected with the Court noting Bishop was aware of the gutter and paint would not have added to Bishop's knowledge of the risk.

Justice Brereton in dissent, found that the risk was not an obvious one.

His Honour stated:

> *"The presence of the kerb, at the point of which the plaintiff tripped on it, was not so obvious that, from the perspective of an occupier considering the hazard which it represented, it could confidently be predicted that a person walking along Llankelly Place in the circumstances which I have described would necessarily have become aware of, or alerted to, its presence. As I have observed, the plaintiff's prior knowledge that there was a kerb for part of the length of Llankelly Place is irrelevant to whether the risk was*

obvious to a reasonable person in her position. In my judgment, in the circumstances which I have described, the condition, let alone the risk, would not be obvious to a person in the position in which Ms Bishop was."

Justice Brereton was however in the minority and the Council was successful in the appeal. The risk was an obvious one.

Obvious risks do not give rise to liability per se. The Courts have again reminded us that injured persons must be taking care for their own safety.

Amanda Bond
asb@gdlaw.com.au

Can A Defendant Cross Claim Against A Concurrent Wrongdoer In An Apportionable Claim?

Since the introduction of the proportionate liability provisions under Part 4 of the *Civil Liability Act 2002* (NSW) ("CLA") more than 15 years ago, a defendant in an apportionable claim may nominate one or more "concurrent wrongdoers" in the Defence to the claim if it is alleged those other wrongdoers caused or contributed to the plaintiff's loss or damage.

The Court is required to apportion liability for loss or damage suffered by a plaintiff against each defendant and any other concurrent wrongdoer(s) even if not sued by the plaintiff, provided one or more of the defendants have pleaded the concurrent wrongdoer(s) in the Defence.

Each defendant and/or concurrent wrongdoer's liability is limited to that proportion of the loss or damage the Court considers to be just having regard to the extent of that defendant or concurrent wrongdoer's responsibility for the loss or damage.

It is also true that a defendant against whom judgment is given under Part 4 CLA cannot be required to contribute to any damages or contribution recovered by a plaintiff from another concurrent wrongdoer.

Similar provisions exist in federal legislation.

Does this mean that a defendant in an apportionable claim cannot issue a cross claim seeking indemnity and/or contribution from another concurrent wrongdoer?

What if a defendant has independent rights against the concurrent wrongdoer outside the proportionate liability regime?

These issues were recently considered by the NSW Court of Appeal in *Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd*.

Lindsay and Faith Northcott ("Northcotts") brought proceedings against Landpower in the NSW District Court claiming damages in contract, negligence, and arising pursuant to the *Trade Practices Act 1974* (Cth) and *Australian Consumer Law*.

The various causes of action were in relation to a combine harvester used by the Northcotts in their agricultural cropping business and involved the adequacy of an investigation into the failure of an engine in the harvester and its subsequent replacement.

Landpower denied all allegations against it and further pleaded the claims by the Northcotts were apportionable claims within the meaning of *Competition and Consumer Act 2010* (Cth), s87CB, the TPA and CLA, s35(1).

The Defence went on to plead several concurrent wrongdoers including Penske.

A Reply was filed on behalf of the Northcotts in which they denied the allegations concerning the alleged concurrent wrongdoers and said their claim was not an apportionable claim.

Landpower also brought a cross claim (and subsequently an amended cross claim) against Penske. None of the other alleged concurrent wrongdoers were joined as cross defendants.

Landpower alleged that it entered into a separate agreement for Penske to undertake engine work and that Penske owed Landpower a duty to do various things and to warn Landpower of certain matters.

The amended cross claim pleaded a claim by Landpower for joint tortfeasor contribution pursuant to *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s5.

Further, the amended cross claim included allegations of misleading and deceptive conduct by Penske and negligent misrepresentation based upon a series of representations alleged to have been made by Penske to Landpower in contravention of the TPA and/or ACL.

It was contended on behalf of Landpower that Penske owed separate duties to Landpower independent of the claims by the Northcotts which were said to be apportionable claims.

Penske filed a motion for summary dismissal of the amended cross claim which was opposed by Landpower.

The hearing of that application proceeded before her Honour Judge Gibson who granted the application and summarily dismissed the cross claim.

At the hearing before the primary judge Landpower conceded that its claim for joint tortfeasor contribution under LRMPA, s5 must be dismissed by reason of the statutory prohibition under CLA, Part 4 precluding defendants in an apportionable claim from seeking contribution from each other.

However, Landpower did not abandon its remaining claims which it was argued arose independently of any joint and several liability for which the proportionate liability provisions applied.

Gibson DCJ held the amended cross claim did not disclose a *bona fide* cause of action independent of the claim against Landpower.

Landpower sought leave to appeal from her Honour's decision.

The application for leave and the appeal hearing proceeded concurrently before Bell P, Macfarlan & Payne JJA of the NSW Court of Appeal.

By a unanimous decision (per Bell P, Macfarlan & Payne JJA concurring), leave to appeal was granted and the appeal was upheld.

The learned president took a different view to the primary judge concerning the independent rights vested in Landpower to allege a breach by Penske of separate duties which Penske owed to Landpower.

Justice Bell stated that Landpower had properly conceded before the primary judge that its claim for joint tortfeasor contribution ought be dismissed but it was correct to maintain its remaining claims against Penske.

His Honour observed the proportionate liability provisions and the legal authorities which have considered them do not stand for any general proposition that cross claims are not or never have been permitted where there is said to be an apportionable claim.

Bell P highlighted that allegations concerning concurrent wrongdoers will usually require the Court to make findings of fact (and apply the law) after a hearing where the evidence before the Court can be scrutinised.

His Honour went on to say:

> *"Whether or not a person or entity is a concurrent wrongdoer is not usually capable of being determined on the pleadings and may be far from straightforward where, for example, a novel duty of care is alleged …*
>
> *Where factual inquiries of this character are potentially in play, summary dismissal of the kind that occurred in the present case is quite inappropriate."*

Further:

> *"Legal and factual questions relating to a party's status as a wrongdoer for the purposes of the definition of 'concurrent wrongdoer' and to questions of causation of loss for the purposes of that definition … will frequently, if not invariably, need to go to trial."*

The president contemplated cases where a defendant may well bring a cross claim against a nominated concurrent wrongdoer in an apportionable claim as a claim "in the alternative" if the Court finds either it is not an apportionable claim, or if the nominated concurrent wrongdoer does not in fact have that character.

His Honour also noted that a defendant is entitled to claim relief under a contractual indemnity from a concurrent wrongdoer as that claim is outside the scope of CLA, Part 4 (applying the authority of the NSW Court of Appeal in *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)*.

It was also noted that cross claims for declaratory relief against named concurrent wrongdoers who are not joined as defendants by a plaintiff have also been permitted.

For all of these reasons, Bell P confirmed that a defendant in an apportionable claim is not necessarily precluded from bringing a cross claim against a party who is also nominated as a concurrent wrongdoer, especially where the relief sought in the cross claim is due to independent rights held by that defendant or if those rights fall outside the scope of the proportionate liability provisions.

His Honour concluded:

> *"In my opinion, a defendant who in its defence nominates a party as a concurrent wrongdoer is not by reason of that fact alone precluded from bringing a cross claim against such an entity based upon an independent cause of action it has against that entity."*

The development of the law in this area has thus been clarified, if not expanded, by this interesting decision and the momentum which started with the *Perpetual v CTC* decision in 2013 has been maintained.

The Court makes it clear that cross claims are only precluded in apportionable claims where the relief is for joint tortfeasor contribution under the LRMPA, s5.

A defendant, who claims additional relief arising from independent rights and/or causes of action against the cross defendant, is entitled to have its day in Court!

Darren King
dwk@gdlaw.com.au

CONSTRUCTION ROUNDUP

Building Certification Reform

It seems that lately the media is occupied with stories of high rise apartment buildings needing to be evacuated because of serious defects being discovered in their design and/or construction. In addition, many apartment owners are now discovering that their buildings have combustible cladding installed on them, and those owners (often retirees, investors or first home buyers) are being faced with substantial bills to replace the cladding.

The question being asked is: "Why are buildings not being designed and constructed so that they are safe and compliant with building laws?"

Also being asked is: "Why were these problems not

identified and addressed as part of the building certification process?"

Since its introduction in 1998, the current system of private certification of building developments has been the subject of harsh public criticism.

Many have said that it is a system that is easily rorted. Others have said that it simply does not work. There is a reported lack of public confidence in the integrity of the building industry, particularly given the prevalence of defects in newly built high-rise apartment buildings and the perceived lack of accountability of the developers, builders or certifiers to the ultimate owners. This criticism appears to have been valid, given the recent high profile evacuation of several buildings in Sydney due to serious defects in their design and construction.

Shergold/Weir Report

In August 2017 Chancellor of Western Sydney University Peter Shergold and lawyer Bronwyn Weir were commissioned by the Building Ministers Forum to inquire and report on the effectiveness of compliance and enforcement systems for the building and construction industry across Australia.

The Shergold/Weir report was delivered in February 2018. Overall, the authors recommended the adoption of a national model of legislation to ensure that all building practitioners had better knowledge of, and were required to comply with, the National Construction Code.

The NCC is a performance based code which requires building design and construction to perform to the relevant Australian Standards, rather than prescribing specific building practices and materials. However, the report noted that many builders, designers etc do not have a good working knowledge of the multitude of the applicable Australian Standards. Further, Shergold & Weir found that the current combination of builders designing "on the job" with certifiers' failure to reject non-compliant work was resulting in widespread departures from the requirements of the NCC.

The report made 24 recommendations, including the following:

- Participants in the building industry (such as builders, project managers, certifiers, architects and engineers) should be formally registered so that they can be regulated and made to be accountable for their actions. Consistency across the Australian States and Territories in the requirements for registration (such as education, skills etc) would not only make it easier for mutual recognition by States, but would also boost the economy by encouraging the spread of construction businesses across State borders. As part of the registration scheme, participants would be required to undertake regular compulsory continuing education, with a focus on increasing their knowledge of the NCC.
- The level and methods of collaboration between the various regulators (such as the local council, the building certifiers and the State Building Regulator) should be improved and their regulatory powers enhanced. Included in these reforms should be proactive auditing during the progression of the design and construction, in order to increase transparency and restore the public's trust in the process.
- Fire authorities should be included in the development of fire safety design. The authors comment that fire authorities currently lack confidence that buildings will comply with the minimum fire safety requirements of the NCC (a concern which appears justified given the prevalence of non-compliant combustible cladding on high rise buildings) and this can be overcome by ensuring a suitable level of engagement with fire authorities in the fire safety design process.
- The integrity of the private certification system should be improved in order to increase transparency and reduce the risk of conflict of interest. For instance, the authors recommend that any certifier who provides advice during the design process should be ineligible to certify that that design complies with the NCC.
- Private certifiers should have a greater role in enforcing compliance with the NCC. The authors note that currently many certifiers do not wish to risk the commercial relationship that they have with the builder, but if they do report a non-compliance it is often the case that nothing is (or can be) done about it. The report recommends that certifiers should be given powers to issue directions to fix or stop work where non-compliance is detected, and if the non-compliance is not fixed then the matter should be reported to the government.
- A national database should be established recording details of each construction project, including details of all participants in the project, details of certifications, inspections and enforcement actions, and ongoing maintenance obligations. There would also be the requirement to adequately document how the design and/or construction meets the performance requirements of the NCC. Such data sharing would lead to greater transparency and also facilitate the auditing and regulation of the project and its participants.
- There should be mandatory inspections by the certifiers during the construction process and amendments to the design during the construction phase should be independently certified.
- Specialist areas of design (such as fire safety) should be reviewed by third party experts, such as a government-appointed panel or a registered expert practitioner, and the installation of fire safety systems should be independently inspected

and certified.

- A compulsory product certification system for high risk building products should be established and the BMF should agree its position in this regard. This recommendation arises from the difficulties currently being encountered in identifying the type of aluminium cladding products currently installed on buildings. The report's authors acknowledge that the current CodeMark certification system for building products is already under review following the Lacrosse and Grenfell fires and a report has been requested. They recommend that the product certification system include mandatory permanent product labelling and prohibitions against the installation of high risk building products that are not certified.

Response to Report

In February this year the NSW Government released its response to the Shergold/Weir report. The key elements of the NSW Government's plan are as follows:

- The NSW Government will appoint an expert Building Commissioner to act as the consolidated building regulator in NSW. The Building Commissioner will lead and oversee building regulation and administration in NSW, including:
  - ❖ licensing and authorisation of building practitioners;
  - ❖ residential building investigations;
  - ❖ building plan regulation and audit;
  - ❖ residential building inspections and dispute resolution;
  - ❖ plumbing regulation;
  - ❖ electrical and gas safety regulation;
  - ❖ strata building bond scheme;
  - ❖ building product safety;
  - ❖ building and construction industry security of payment scheme; and
  - ❖ engagement and collaboration with local government.

  The Building Commissioner will have the power to investigate wrongdoing in the industry and implement disciplinary action.
- New laws will require building practitioners involved in designing buildings to submit as-built plans to the Commissioner for audit and to declare that the plans are compliant with the Building Code of Australia. If compliance is on the basis of a "performance solution" rather than strict compliance with the BCA, the practitioner must provide a report explaining this performance solution. This must be done within a reasonable period before construction and/or occupation (as applicable). Disciplinary action will be taken against practitioners who do not comply with these obligations or who improperly make declarations about compliance.
- Building practitioners will need to be registered before they can make declarations about the as-built design. This is intended to bring in those practitioners who are currently not subject to a licensing scheme (such as engineers, draftsmen and commercial builders).
- Legislation will be enacted to provide that building practitioners owe a common law duty of care to owners' corporations and subsequent residential homeowners, as well as unsophisticated development clients. This reform is intended to overcome the doubt and difficulty currently faced by owners' corporations and homeowners in establishing a duty of care was owed by consultants and certifiers as a consequence of the High Court's decisions in *Brookfield Multiplex Limited v. Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 and *Woolcock Street Investments Pty Limited v. CDG Pty Limited* (2004) 216 CLR 515. In these decisions the High Court held that builders and engineers did not owe a duty of care to owners' corporations or subsequent purchasers of commercial property, on the basis that the parties entered into detailed contracts that allowed them to allocate and manage their risk.

Building and Development Certifiers Act 2018

Late last year (prior to releasing its response to the Shergold/Weir report), the NSW Government also introduced the *Building and Development Certifiers Act 2018*.

The proposed legislation is intended to close a number of loopholes that were being taken advantage of by "dodgy operators".

The key introductions in the proposed legislation are as follows:

- The Code of Conduct to be followed by building certifiers is to be strengthened, including prohibiting conflicts of interest such as the certifier having a pecuniary interest in the development. This includes certifiers who would obtain some benefit from the work, or who worked on the design and/or construction of the development or is related to a person who has any of those private interests. This benefit is described as "an appreciable financial gain or loss to the registered certifier" that is not so remote that it cannot be reasonably regarded as being likely to influence the certifier's decisions with the respect to the work.
- The Secretary of the Department of Finance, Services and Innovation is to have new powers to monitor compliance with the Act, and would have the right to take disciplinary action (including the immediate suspension or cancellation of a certifier's registration). The Secretary's new powers will include the power to request and obtain information from third parties in order to be

able to assess whether a certifier should obtain or retain registration.

- Certifiers who do the right thing are to have their licences extended for up to three or five years, while certifiers who issue false or misleading certificates or accept a bribe face a maximum penalty of $1.1 million and/or two years imprisonment.
- There will be new fines of up to $110,000 for corporate certifiers and $33,000 for individuals who do not have adequate insurance in place.
- Section 110 of the Home Building Act 1989 is to be amended to provide that a person who holds a contractor licence is prohibited from unduly influencing or attempting to influence the appointment of a certifier, with fines of up to $110,000 for a corporation and $33,000 for an individual. Undue influence is described as (for an example) making the appointment of a specific certifier a condition of the construction contract, or offering to change the contract price.

The reforms appear to be a step in the right direction. However, the proposed legislation does not specifically address the issue of certifiers being financially dependent on developers for repeat work, and thus being more likely to be tempted to certify work as compliant with the applicable codes and standards.

And while the simultaneous amendments to the *Home Building Act* are intended to encourage consumers to choose their own certifier, the reality is that consumers who do not know the industry will ask their contractors for the names of certifiers, or will allow the contractors to organise the certifier's engagement.

The Act has been passed by both Houses of Parliament and was assented to on 31 October 2018. However, it has not yet come into force by proclamation.

Considering the existing opportunities for rorting and cutting corners on construction projects, one feels that it will not be until a builder or certifier is publicly held accountable for their shoddy work that the public will begin to trust in the system of private certification.

In the meantime, we will need to continue to deal with the legacy of an era in which inadequate designs, undocumented (and potentially dodgy) construction processes, substitute inferior products and/or inadequate certification will impact on (potentially) hundreds of thousands of home owners and residents throughout the country.

It is almost certain that we will continue to see numerous lawsuits against designers and builders for many years to come as these home owners try to deal with the escalating costs of rectifying defects and shoddy work.

Linda Holland
lmh@gdlaw.com.au

The Requirement For Payment Schedules To Provide Specific Reasons For Non Payment

The statutory processes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) allow only short time frames for actions to be taken before statutory rights are triggered under the Act.

In this regard, section 14 of the Act provides that if the recipient of a payment claim made under the Act does not intend to pay the whole amount of that claim, he may issue a payment schedule that identifies the amount that is intended to be paid.

A failure to issue a valid payment schedule will result in the whole claimed amount becoming due and payable, with this statutory debt being enforceable in a court and subject to no right of appeal, set off or defence.

Accordingly, it is vital for a payment schedule to satisfy the prescriptive conditions of the Act.

Section 14(3) of the Act provides that if the amount identified in the payment schedule intended to be paid is less than the claimed amount, "the schedule must indicate why the scheduled amount is less and … the respondent's reasons for withholding payment".

It is settled authority that a payment schedule does not need to have the same degree of formality that might be required in other contexts (such as formal court pleadings): *Multiplex Constructions Pty Limited v. Luikens* [2003] NSWSC 1140; *Clarence Street Pty Limited v. Isis Projects Pty Limited* (2005) 64 NSWLR 448; [2005] NSWCA 391. Similarly, a payment schedule may incorporate other documents into it by simply referring to them. However, the question then arises as to the degree of informality or reference to other correspondence that may have the effect that a purported payment schedule does not satisfy the requirements of the Act and is thus invalid.

This issue was recently examined by the NSW Court of Appeal in *Style Timber Floor Pty Limited v. Krivosudsky* [2019] NSWCA 171.

Style Timber had engaged Mr Krivosudsky to perform floor grinding and topping works at a number of residential construction sites throughout Sydney. A dispute arose between the parties with respect to whether the grinding work had been properly undertaken to prepare the floors for Style Timber's floor boards, and damage allegedly caused to other parts of the works by Mr Krivosudsky's grinding operations.

Mr Krivosudsky issued a number of payment claims with respect to his work. On 30 November 2017 Style Timber's representative, Mr Wang, responded with an email stating (including original imperfections):

> *"Sorry, I was in the hospital in the past few days for my family, so couldn't reply your email.*

If you want, make a appointment with me, come to my office. I will show you the working agreement between Style timber and RK grinding, many emails, photos, videos, back charges from builders and other trades, complains from my clients. You will understand why I can't pay you. The damages you done is more than what you claimed.

Then, it's up to you want you want to do next …"

Mr Wang did not issue any other document that could be considered to be a payment schedule within the time allowed by the Act. Accordingly, upon Mr Krivosudsky commencing proceedings in the District Court seeking summary judgment for the full amount of his payment claims, the question arose whether the 30 November email constituted a valid payment schedule for the purposes of the Act. While Style Timber did not adduce any evidence of the correspondence etc referred to in the 30 November email, Mr Krivosudsky introduced into evidence various emails that had predated that email.

The Judicial Registrar of the District Court examined this correspondence and noted that it was difficult to reconcile the complaints in these emails with the three sentences of Mr Wang's 30 November email. Relying on *Multiplex v. Luikens*, the Judicial Registrar considered that the payment schedule did not allow Mr Krivosudsky to have a full understanding of the extent of the damage allegedly done or the details of the further invoices and delays that formed the basis for back charges in excess of the amount of the invoices. Accordingly, the Judicial Registrar held that the payment schedule did not satisfy the requirements of section 14(3) and thus was not valid as a payment schedule, and in the absence of a valid payment schedule Mr Krivosudsky was entitled to full payment of his claims.

Style Timber sought leave to appeal directly to the Court of Appeal.

Bell P, Leeming JA and Simpson AJA dismissed the appeal, with Leeming JA providing the main reasons for judgment.

Leeming JA noted that it is necessary to construe section 14 as an important constituent part of a narrowly circumscribed statutory regime, serving the particular function of ensuring that subcontractors and suppliers on construction projects were not starved of vital cash flow.

As part of this regime, the payment schedule served two important functions under the Act: (1) to inform the claimant as to the "metes and bounds" of its dispute with the respondent so that it can make an informed choice as to whether to refer the claim to adjudication under the Act; and (2) to articulate the respondent's case in any such adjudication.

His Honour stated that the question of whether a document constituted a payment schedule needed to be something which was readily capable of ascertainment, ordinarily without the assistance of a lawyer. Accordingly, while the document did not need to have the character of formal court pleadings (as discussed in *Multiplex v. Luikens*), it nevertheless required precision and particularity to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.

In this regard, his Honour noted that sometimes the issue can be so straightforward or may have already been so expansively agitated in prior correspondence that the briefest reference in the payment schedule would be sufficient to clearly identify it. However, more often than not the parties see the issues only from their own viewpoint or may not be in possession of all the facts or appreciate the significance of those facts that are known to them.

Leeming JA considered other cases in which purported payment schedules attempted to incorporate other information and documents about the dispute in order to provide the required reasons for non-payment.

In *Minimax Fire Fighting Systems Pty Limited v. Bremore Engineering (WA) Pty Limited* [2007] QSC 333 the respondent to a payment claim seeking payment of additional labour costs, overtime corrections and a refund of a bonus had contended that a single email constituted a valid payment schedule. This email had noted that the claimant's staff had been unskilled ("some of them are hairdressers and barkeepers") but did not address the overtime or bonus components of the payment claim. In those circumstances, Chesterman J had held that the email did not satisfy the requirements of the equivalent Queensland Act and thus did not constitute a payment schedule.

In *Façade Treatment Engineering (in liquidation) v. Brookfield Multiplex Constructions Pty Limited* [2016] VSCA 247, an employee of Multiplex had by email objected to the validity of Façade Treatment's payment claim on the basis that the supporting statutory declaration was inaccurate and Multiplex was unable to ascertain the extent that the costs of certain unfixed items were being claimed. This email had concluded with "*Upon FTE remedy of the above and attached Brookfield Multiplex will be in a position to issue FTE with a payment schedule*".

The Victorian Court of Appeal noted that the email raised "procedural hurdles" rather than responding to the substance of the payment claim. In that regard, they were not reasons for denying the substance of the claims made in the payment claim, but reasons why Multiplex did not intend to pay at that moment. Accordingly, it was to be characterised as more of a "holding position" rather than a substantive response, and thus was not a valid payment schedule.

Leeming JA also considered the evidence of the previous correspondence between Mr Wang and Mr Krivosudsky. Mr Wang's emails had complained of diverse issues with the work carried out by Mr

Krivosudsky at the various projects, but lacked any precision about the specific deficiencies in Mr Krivosudsky's work at each site or the specific damage that had been caused to the rest of the works. Further, Mr Wang's emails did not quantify the amount of back charges that Style Timber contended that it was entitled to apply against the amounts claimed.

Interestingly, Leeming JA suggested that it was perhaps arguable that a payment schedule could incorporate a conversation between the parties by reference; however, the parties would need to provide sufficient evidence of such a conversation (which the present parties had not done). Therefore, the previous discussions between Mr Wang and Mr Krivosudsky could not be considered in the present case.

For these reasons, Leeming JA held that the 30 November email lacked the requisite detail about why Style Timber intended to withhold payment of the amounts claimed by Mr Krivosudsky and thus that email was not a valid payment schedule for the purposes of the Act.

This case illustrates once again that while the processes under the Act are intended to be quick and relatively informal, it remains vital to ensure that claimants and recipients of payment claims understand and strictly follow the requirements of the Act.

Often a quick check by a lawyer of a proposed response to a payment claim can remedy any shortcomings that may invalidate it as a payment schedule. This is particularly important where the history between the parties means that it is likely that the claim is intended to be ultimately referred to adjudication, or where there are substantial moneys at stake.

At Gillis Delaney Lawyers we have expert lawyers who can provide specialist advice about proposed payment claims and payment schedules to prevent arguments about the validity of these documents arising.

Linda Holland
lmh@gdlaw.com.au

EMPLOYMENT ROUNDUP

$170K in Damages for Sexual Harassment

In a recent decision of the Federal Circuit Court in *Hill v Hughes* a victim of sexual harassment in the workplace was awarded $170,000 in damages as a result of sexual harassment by her law firm employer.

The Sex Discrimination Act 1984 (Cth) ("the Act"), seeks to address workplace power imbalances that result from fear, silencing and the harms that flow from sexual hierarchy and as can be seen from this case sexual harassment can result in significant damages awards.

Hill worked for Beesley and Hughes Lawyers under the supervision of Mr Hughes. She was employed as a paralegal after having recently been admitted as a lawyer.

Hill was engaged in a dispute with her former husband and was to attend a mediation with her former husband on Friday, 17 July 2015 and Hughes offered to represent her at the mediation and she agreed.

As consequence of this decision Hill disclosed a great deal of her personal information to Hughes. This included details of the relationship with her former husband, the relationship she had with both her children, relationships she had had with other men after her separation and divorce and her dealings with apprehended violence orders.

Hughes thought Hill was attractive and wanted to be in a relationship with her and communicated that to Hill.

Hill said that on the night before the mediation Hughes telephoned her and said to her, words to the effect of, "I am very happy to be able to represent you. My feelings towards you have grown". Hill said that she felt uncomfortable and apprehensive about this and did not know how to react.

Notwithstanding that Hill wanted to tell Hughes that his comments about his feelings towards her were "entirely inappropriate and unprofessional", she said nothing at first. She said that she just ignored what was said and hoped that Hughes would not communicate with her again in this fashion.

Hughes then proceeded to engage in what the Court concluded was persistent sexual harassment towards Hill by:

- sending her a relentless barrage of emails telling Ms Hill that he loved her and asking her to be with him;
- on a trip to Sydney entering her room and lying on a mattress at the foot of her bed in a singlet and boxer shorts on two occasions
- coercing hugs from her.

Hill ultimately resigned from her role and brought proceedings under the Sex Discrimination Act 1984 (Cth) claiming that Hughes had sexually harassed her

Sexual harassment is defined in s.28A of the Sex Discrimination Act 1984 (Cth) as follows:

Meaning of sexual harassment

(1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a

sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;

(c) any disability of the person harassed;

(d) any other relevant circumstance.

The Act defines "conduct of a sexual nature" to include making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

The Court concluded Hill suffered a psychiatric injury (adjustment disorder with mixed anxiety and depressed mood (chronic)) because of the conduct of Hughes and awarded Hill $120,000 for general damages.

In addition aggravated damages of $50,000 were awarded consequent to the manner in which Hughes had sought to stop Hill from making a sexual harassment complaint and the manner in which Hughes ran the claim where the Judge observed "In the rough-and-tumble of litigation, there are occasions where litigants simply tell lies. In my view, the Respondent(Hughes) has told many lies in this litigation and "has used information that he gleaned whilst acting as her "legal representative" for the sole purpose of blackening the name of the Applicant(Hill) in these proceedings.

All in all damages of $170,000 were awarded to Hill and Hughes was also ordered to pay Hills costs.

Sexual harassment is unwelcome *sexual* behaviour, which could be expected to make a person feel offended, humiliated or intimidated.

The Australian Human Rights Commission has observed examples of sexually harassing behaviour include:

- "unwelcome touching;
- staring or leering;
- suggestive comments or jokes;
- sexually explicit pictures or posters;
- unwanted invitations to go out on dates;
- requests for sex;
- intrusive questions about a person's private life or body;
- unnecessary familiarity, such as deliberately brushing up against a person;
- insults or taunts based on sex;
- sexually explicit physical contact; and
- sexually explicit emails or SMS text messages."

Harassment can occur in many different social settings. Everyone should be able to go to work without being subjected to sexual harassment and where sexual harassment occurs in the workplace employees can recover significant damages from persons that sexually harass employees as well as an employer.

David Newey
dtn@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Which non Pecuniary Benefits are included in calculations for weekly compensation in NSW?

Section 44E of the *Workers Compensation Act 1987* (the "Act") prescribes that for the purposes of calculating weekly compensation the "ordinary earnings" of a worker in relation to a week during the relevant period is the sum of the following amounts:

- the worker's earnings calculated at that rate for ordinary hours in that week during which the worker worked or was on paid leave,
- amounts paid or payable as piece rates or commissions in respect of that week,
- the monetary value of non-pecuniary benefits provided in respect of that week.

Section 44F of the *Workers Compensation Act 1987* (the "Act") stipulates the non pecuniary benefits that are to be incorporated in the calculation of an injured worker's pre-injury average weekly earnings ("PIAWE") and provides:

"The following benefits provided in respect of a week to a worker by the employer for the performance of work by the employer are "non pecuniary benefits" in respect of that week:

(a) residential accommodation;
(b) use of a motor vehicle;
(c) health insurance;
(d) education fees ...."

The monetary value of a non-pecuniary benefit is:

- the value that would be the value as a fringe benefit for the purposes of the Fringe Benefits Tax Assessment Act 1986 of the Commonwealth, or
- in the case of residential accommodation that is not a fringe benefit or is otherwise not subject to fringe benefits tax, the amount that would reasonably be payable for that accommodation, or equivalent accommodation in the same area, in respect of that week if it were let on commercial terms.

From 1 January 2019 the Workers Compensation Commission has had the jurisdiction to determine disputes concerning the calculation of PIAWE.

In the matter of *Plachozki v Core Serve Australia Pty Limited* the Commission was tasked with the analysis of PIAWE where the employer asserted that a motor vehicle it supplied was for work purposes only and the worker had no entitlement to use the vehicle for private use and thus there was no value to ascribe to the vehicle to include in the calculation of PIAWE.

The worker asserted provision should be made in the calculation of PIAWE for a motor vehicle he used which was supplied by the employer and sought an Interim Payment Direction pursuant to Section 297 of the 1998 Act to pay weekly compensation from 26 November 2018 incorporating an amount for provision of the motor vehicle.

The employer determined the amount of the injured worker's weekly compensation excluding any allowance for the motor vehicle as the vehicle. The employer acknowledged the injured worker had a vehicle and a phone provided to him but asserted they were tools of trade and only to be used to carry out employment duties. The employer denied the vehicle was available for personal use and as such, it had no FBT value.

The Commission was asked to determine:

- whether the provision of a motor vehicle constituted non pecuniary benefits pursuant to Section 44E and Section 44F of the 1987 Act for the calculation of average weekly earnings;
- if so, what was the monetary value of the non pecuniary benefit as defined in Section 44F(4) and (5); and
- assuming the vehicle was a non pecuniary benefit, what is the value of any deductible amount during any entitlement period in the calculation of weekly entitlements to the worker.

During the course of the proceedings the worker filed a statement which suggested as part of his contract he was provided with a mobile phone and utility vehicle and recalled being told he could use the vehicle in a 50km radius from his home. The worker did not have a copy of the contract. The employer disputed the contract existed noting the worker was within his probationary period.

The employer:

- denied the worker was provided with a vehicle he could use for personal use;
- asserted under no circumstances was the worker instructed he could use the vehicle for personal use;
- completed the initial PIAWE form declaring the worker received no non pecuniary benefits as part of his employment.

A non pecuniary benefit must have value to the worker and be provided for more than the mere practical carrying out of the work required of him in the employer's enterprise.

The fact the vehicle was used by the worker for work was not enough for there to be a non pecuniary benefit.

The worker bore the onus of establishing a non pecuniary benefit was provided. The Commission found the evidence fell short of details sufficient to establish the vehicle was in fact available for the worker's personal use.

The fact the worker may have thought he could use the vehicle for his own personal use was not the issue. The evidence must be looked at as a whole to discern whether provision of the vehicle was in part for his personal benefit. On the evidence available it was determined it was not and therefore the Registrar's Delegate declined to make an Interim Payment Direction.

In this case the worker claimed an alleged non pecuniary benefit valued at $20,000 per annum should be included in the calculation of PIAWE. As the vehicle was not provided for the personal benefit of the worker the Commission declined to include this sum in the relevant calculation.

Tools of trade do not give rise to personal benefits and are not non pecuniary benefits the value of which must be included in PIAWE calculations.

Naomi Tancred
ndt@gdlaw.com.au

WCC Jurisdiction – Work Capacity Decisions

The Workers Compensation Commission has jurisdiction to determine work capacity decisions made on or after 1 January 2019.

In the recent decision in *Grima v Bursons Automotive Pty Limited* the Commission has clarified whether "existing" work capacity decisions under review are governed under the former Section 44B of the 1987 Act or the new regime introduced by the *Workers Compensation Legislation Amendment Act 2018.*

In this case the worker sustained injury on 10 July 2017 and claimed weekly compensation from 16 July 2017. A dispute arose as to the correct rate of the worker's PIAWE.

A work capacity decision was made by the insurer on 30 April 2018. The insurer advised it did not have sufficient information to calculate PIAWE and used an interim rate. The worker was informed that the calculation of PIAWE was a work capacity decision and if the worker was not satisfied with the decision they could seek an internal review and then a merit review.

On 15 January 2019 the worker requested a review and on 14 February 2019 the internal review outcome was published. The internal review set out the basis of the calculation of PIAWE and referenced the fact that if the worker was not satisfied with the internal review a merit review could be sought.

On 3 April 2019 the worker sought a merit review however the application was dismissed pursuant to Section 44BB(3) of the 1987 Act as it was made outside the 30 day time limit. The worker then filed an application with the Workers Compensation Commission seeking a review of the decision.

The employer questioned the Commission's jurisdiction to hear and determine the dispute noting the original work capacity decision was made on 30 April 2018, before the Commission inherited jurisdiction to deal with disputes in respect of work capacity decisions. The employer asserted the Commission did not have jurisdiction to determine the dispute as the work capacity decision was made before 1 January 2019.

The arbitrator held that where an insurer has made a work capacity decision before 1 January 2019 and it was subject to an internal review at the request of a worker, the date on which the internal review occurred was irrelevant in characterising the internal review as either a review decision or a new decision as submitted by the worker.

The fact the work capacity decision was made prior to 1 January 2019 meant the Workers Compensation Commission's had no jurisdiction to determine the dispute.

Where a work capacity decision has been made before 1 January 2019 an internal review does not restart the clock and the decision has been made before the commencement of the 2018 Amending Act and is not reviewable by the Commission.

Work capacity decisions made before 1 January 2019 will be subject to the review process under Section 44BB of the 1987 Act which includes both internal review and merit review even where the review has not concluded before the 2018 Amending Act commenced.

In this case the Commission determined it had no jurisdiction to deal with the dispute in respect of the work capacity decision where it was made before 1 January 2019.

Naomi Tancred
ndt@gdlaw.com.au

Windfall for Workers with Highest Needs

The 2012 amending legislation sought to restrict workers compensation benefits in order to support the ongoing financial viability of the Scheme.

In recognition of the government's desire to support workers with serious injuries, ongoing benefits were retained by workers who were assessed to have a degree of permanent impairment arising from an injury in excess of 30% whole person impairment. The workers who were initially defined as "seriously injured" workers were categorised as workers with "highest needs" in the 2015 reform package.

These workers are entitled to continuing weekly compensation at the transitional rate until one year post pension age as follows:

> "38A Special Provision for Workers with Highest Needs
>
> (1) If the determination of the amount of weekly payments of compensation payable to a worker with highest needs in accordance with this Subdivision results in an amount that is less than $788.32, the amount is to be treated as $788.32."

The interpretation of the section has recently been tested in a series of decisions in the Workers Compensation Commission and more recently the Court of Appeal in *Hee v State Transit Authority of NSW* [2019] NSWCA 175.

The worker sustained an injury to his cervical spine in the course of his duties as a bus driver in October 2013. He underwent surgery and returned to his usual rostered shifts in May 2014. The parties agreed the degree of permanent impairment arising from his injury was 34%. He received payments of weekly compensation pursuant to Sections 36 and 37 whilst he was absent from work. After his return to work he made a claim for weekly compensation under Section 38A on an ongoing basis for the full transitional rate. The employer disputed the claim.

The worker submitted once a worker has established incapacity within the meaning of Section 33 and satisfied the definition of "worker with highest needs" the worker was entitled to the benefit of Section 38A irrespective of whether any entitlement to weekly compensation under Sections 34 to 38 had been established.

The arbitrator rejected the argument on the basis the worker had "current work capacity" and would have no

entitlement to compensation under Section 37 as he was earning more than 80% of his PIAWE rate.

On appeal the arbitrator's decision was upheld by the President on the basis the effect of the arbitrator's factual finding was that the worker had returned to his pre-injury employment.

This reasoning for the determination was challenged in the Court of Appeal. The majority judgment in the Court of Appeal noted it had been assumed by the arbitrator that because the worker had returned essentially to his pre-injury work regime, he had returned to his pre-injury employment. However the finding made by the arbitrator was that the worker had "resumed his full pre-injury duties". The distinction was considered significant as the arbitrator's assumption failed to take into account the worker's claim that he was working less overtime than he had pre-injury and therefore he had not returned to his pre-injury employment.

Whilst the arbitrator had discussed the conflicting evidence regarding the amount of overtime the worker had worked pre and post injury and gave indications he had doubts about the worker's claims, he made no clear finding rejecting the claim. The Court of Appeal considered this was critical because the determination of whether the worker had "current (diminished) work capacity" depended on it. It was considered this amounted to a failure to accord natural justice. The same error affected the decision of the President.

The Court of Appeal noted if the worker's construction of Section 38A was correct, he would be the recipient of an unwarranted windfall in addition to his current weekly earnings in circumstances where his loss of income was not such as to entitle him to any payment under Section 37(2).

The words in the Explanatory Note and the Minister's Second Reading Speech were considered a powerful indicator the intention was to create an entitlement that took into account post injury earnings of the worker however those words were not enacted. The literal construction of Section 38A was therefore as contended by the worker.

The majority considered the matter should be remitted to the Commission to determine the findings of fact which had not been made as to whether the worker had returned to his "pre-injury employment". That is, whether he had any demonstrated incapacity for his pre-injury employment within the meaning of Section 33.

In his judgment, White JA pre-empted an amendment to the legislation stating the issue could be addressed by reading Section 38A as if it provided:

> *"If the sum of the amount of weekly payments of compensation (C) payable in accordance with this Sub-Division to a worker with highest needs and that worker's (E) is less than $788.32, the amount of (C) is to be increased such that the sum of (C) and (E) is $788.32."*

It remains to be seen whether the legislature takes steps to address the anomalies identified by the Court of Appeal in the application of Section 38A such that a worker with highest needs who earns more is in effect in a better position than one who had low earnings.

Until such time as the legislation is amended, the majority judgment will see workers assessed to have a degree of whole person impairment of greater than 30% and who have returned to work, entitled to the additional payment under Section 38A irrespective of the quantum of their earnings.

Belinda Brown
bjb@gdlaw.com.au