GD News

Gillis Delaney Lawyers

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Labour Hire v Outsourced Service

The labour hire industry in Australia is alive and well as businesses continue to explore alternative labour models to minimise their exposure to employment risks.

A successful labour hirer will often find that they become involved in rostering, supervision and the assessment of staffing levels and in some situations the approach to outsourcing changes to require the provision of a service rather than the provision of labour. A labour hirer that once supplied labour may become a complete service provider.

Labour hirers will always owe a duty of care to their employees when they are placed with a host. Where the host is in control of processes undertaken by an employee lent on hire an injury to that employee will often be attributable to negligence on the part of the host.

Often when a labour hire employee is injured proceedings will be commenced by the employee against the labour hirer claiming work injury damages and against the host, claiming damages assessed under the Civil Liability Act 2002. When the Courts come to apportion liability between the labour hirer and the host the factual matrix which reflects the arrangements between the two businesses must be carefully considered.

Whilst the proportion of liability attributed to the host as against the labour hirer will turn on the facts it is regularly argued that a labour hirer's liability is limited to 20-25% based on cases such as *TNT v Christie* and *Maricic v Dalma*. But are times about to change?

As the labour hirer assumes more responsibility for processes its liability for injuries to its employees will increase. These changes bring an increased risk that the labour hirer will be principally liable for injuries to its employees rather than the business that has engaged the labour hirer.

In some circumstances a host's involvement in processes which have been outsourced may be so minor that the labour hirer will be solely liable for the injury to its employee, as was seen in the recent Court of Appeal decision in *U*nilever *Australia Pty Limited v Pahi* and *Swire Cold Storage Pty Limited v Pahi.*

Pahi's case is significant for two reasons:

- it demonstrates that a labour hirer that assumes supervisory responsibility and control over the tasks allocated to its employees may be solely liable for injury to its employees, and
- the NSW Court of Appeal considered the High Court's decision in *Leighton v Fox* has application to the labour hire industry and that a business that engages an independent contractor such as a labour hirer does not necessarily have control over the hired employees and the duty owed by a hirer is not the same as that owed by the employer.

Tricia Pahi sustained a repetitive strain injury to her left wrist during the course of her employment as a process worker with ESP Techforce Pty Limited ("ESP"), a labour hire company. ESP had been engaged by Swire Cold Storage Pty Limited ("Swire"). Swire had entered into an

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arrangement with Unilever Pty Ltd t/a Streets Icecreams ("Streets") to repack some of Streets' products at Swire's premises, where the items were already in cold storage. Swire, with Streets' consent, had engaged ESP to provide the workforce to undertake the physical task of repackaging. ESP invoiced its labour charges to Swire. Swire paid ESP and then separately invoiced Streets for the ESP amount plus 15 per cent.

The repackaging system had been designed by ESP and was undertaken in a cool room at Swire's premises which had a cold storage facility. Although Streets did not have any kind of contractual relationship with ESP, Streets would provide instructions on the quantity and type of products to be repackaged directly to ESP, with a copy given to Swire.

On a daily basis an employee of Streets, emailed a 'purchase order' to Cassandra Pennington-Collins, ESP's project manager, who acted as a full-time on site supervisor of the work performed pursuant to ESP's contract with Swire. Streets also forwarded a copy of the purchase order to representatives at Swire. The purchase order specified the type and quantity of ice cream products that were to be repackaged.

Swire allocated a portion of a cool room within the cold storage facility to ESP employees for the purposes of carrying out the repacking. Some time after ESP's contract commenced, a Swire employee informed Ms Pennington-Collins that the ESP employees could not be "in the freezer this long" and that they should be given five minute breaks. Ms Pennington-Collins said that she then introduced five minute breaks.

Forklift drivers employed by Swire removed pallets of the identified product from the freezers, as well as pallets containing flat, unassembled cartons, and transported them to ESP's designated packing area. Sometimes, the pallets were full and sometimes, about half full. Male employees of ESP carried the containers and cartons from the pallets to the sorting tables. Over the course of the day, ESP employees, directed by Ms Pennington-Collins, manually repackaged the products into smaller cartons before they were returned to the freezer by Swire forklift drivers.

Ms Pennington-Collins designed, implemented and monitored the workflow system undertaken by ESP employees. If she was not present, an ESP work team leader supervised the repackaging work. ESP was also responsible for ensuring that the safety and hygiene requirements of dealing with food products were observed. There was a system known as Hazard Analysis Critical Control Point (HACCAP), which required, for example, the wearing of gloves and hairnets in food handling areas. ESP provided the necessary equipment and apparel for compliance with HACCAP and then invoiced Streets directly for the cost of these items.

ESP employees engaged to work on the repackaging of the ice cream products were obliged to undertake a one-day induction at Swire, which was conducted by a Swire employee. This induction was primarily for the purpose of acquainting the ESP employees with matters such as the layout of the warehouse, the emergency exits and obvious dangers.

Pahi commenced proceedings against Swire and Streets, alleging that her carpal tunnel injury was caused by their failure to take due care in overseeing and to some extent, directing her work for ESP. Pahi was unable to sue her employer as she did not reach the threshold of 15% whole person impairment required to bring a claim for work injury damages under the Workers Compensation Act 1987.

At Trial, the Trial Judge found that Pahi's injuries were caused by the negligence of both Swire and Streets. A third of the award was deducted to represent the negligence of ESP.

Swire and Streets appealed to the Court of Appeal.

The Court of Appeal found that neither Streets nor Swire had any liability to Pahi. The key to the determination was that ESP was an independent contractor responsible for its own employees.

Justice Beazley who delivered the leading judgment noted that:

> *"Both Streets and Swire submitted that the trial judge erred in finding that each owed a duty of care to Ms Pahi .... In essence, their case was that neither owed Ms Pahi a duty of care to ensure that ESP implemented safe work practices and, if there was any causative negligence in Ms Pahi having sustained injury, it was caused by ESP's failure to implement or maintain a safe system of work.*
>
> *Swire pointed out that it was not alleged that it had failed to engage a competent contractor. Although this was a labour hire case, the undisputed evidence was that ESP, through Ms Pennington-Collins, designed the system of work*

and retained supervisory control over its daily implementation, either personally or through ESP team leaders. Swire gave no instructions, either to Ms Pennington-Collins or ESP employees, as to how the repackaging work was to be carried out. Its involvement with ESP employees was limited to: the induction; general safety requirements; moving and returning the pallets of product to and from cold storage; and specifying when and where within its premises the work was to be carried out.

The case did not involve any allegation that the static conditions of the Swire premises were unsafe. In any event, the induction process that Swire had in place was clearly directed to the satisfaction of its obligations in that regard."

The Court of Appeal commented on the decision of Leighton v Fox and noted that in that case the High Court emphasised that a duty of care owed by a principal was not co-extensive with that of an employer. The Court of Appeal determined that the Trial Judge, in finding against Swire and Streets, effectively required both Swire and Streets to do all in their power to ensure ESP employees were provided with a safe system of work. There was not a duty on either Streets or Swire to control the system of work that had been implemented by ESP.

Justice Beazley ultimately found that, stated:

"(The Trial Judges findings) were based in large measure on the pre-Leighton v Fox authorities in this Court. However, as the decision in Leighton v Fox demonstrates, His Honour's reasoning that underlines these findings cannot stand. The consideration of what, hypothetically, was within Streets capacity or power was not to the point. The control of the work to be performed was with ESP. This was so even though Streets gave daily orders specifying the quantity of product to be repackaged. If the staffing levels were inadequate to undertake the work in a safe manner, that was a matter for ESP to address under its contract with Swire, as in fact it did. The lack of complaint by Streets demonstrated that completion on the day of the order was not mandatory. …

Further, Streets is not the principal in the contractual arrangements whereby ESP provided personnel to carry out the repacking work. The considerations His Honour raised … involved the notion that Streets either could have specified to Swire that a certain number of employees should be engaged, or it could have reduced its scheduled requirements. These propositions ignore the legal aspects of the relationship between the parties, the actual factual circumstances and the legal obligations that thereby arose. There is nothing negligent in Streets specifying the quantity of goods to be repackaged. It engaged Swire to arrange for that work to be undertaken. Swire, in turn, engaged ESP to perform that work. How ESP managed the workload was entirely a matter for it. In accordance with the principles stated in Stephens v Brodribb, there was no duty on Streets to control the system of work implemented by ESP."

Streets engaged Swire to arrange for work to be undertaken. Swire, in turn, engaged ESP to perform that work. How ESP managed the workload was entirely a matter for it. In those circumstances Streets and Swire did not owe a duty of care.

Justice Allsop noted:

"Here, ESP was the employer. It was responsible for and carried out direct supervision. There was nothing to lead to any conclusion or apprehension in either Swire or Streets that ESP was not willing or able to understand, undertake or fulfil its duties to its employees who were carrying out work within the overall context of Swire's operations for the commercial interests of Streets. The substance was that ESP, alone, carried the duty of care owed to the respondent."

The decision is significant in that the decision extends the Leighton type principles away from construction sites. The decision is also significant in that it again emphasises that each case involving labour hire companies must be decided on their facts. It is not simply enough to consider decisions such as *TNT v Christie* and *Maricic v Dalma Formwork (Australia) Pty Limited* and argue that an employer who hires his employees to a host will have a liability limited to 20-25% of any claim for damages brought by an injured employee. In this case, although ESP was a labour hire company, ESP was responsible for devising the system of work and supervising it.

This case is clearly distinguishable from what can be described as a basic labour hire model however as businesses move to outsource services rather than simply source additional labour those that supply labour need to be aware that providing a more extensive service will increase the risk that a labour hire company will be found solely liable for an injury to its employee with no contribution from the hirer. The end result for labour hire companies that offer a more extensive service will be significantly increased workers compensation premiums flowing from claims by injured workers where the host has not played a role in the injury.

A tough decision for Mrs Pahi who despite her employer being found negligent cannot recover any damages. A sigh of relief from the liability insurers for Streets and Swire as the outsourcing of services ensured they were not exposed to damages claims from ice cream packers that develop RSI. And concerns for the labour hire industry as businesses move to outsource services rather than hire labour.

Moving to an outsource model for the provision of services rather than labour can reduce employment risks. That however comes at a cost and potentially removes a business' control over a process. However, control can be managed by contractual arrangements. As a consequence of *Pahi's* case we may well see a change in the way businesses use labour hire. Or will we see another appeal to the High Court?

Professional Indemnity Insurance- Section 54 Applies To Third Party Actions Against Insurers

Professional indemnity policies are commonly known as "Claims Made and Notified Policies". In *East End Real Estate v CE Heath Casualty & General Insurance Ltd* the Court found that section 54 of the *Insurance Contracts Act 1984* ("the Act") was effective to prevent a claim from failing merely because the claim against the insured was notified to the insurer after the expiration of the period of insurance cover. The Court extended the operation of section 54 to acts which form part of the definition of the insured risk.

The High Court in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* confirmed that section 54 can be engaged by an omission by the insured to give notice of an occurrence even if that omission results from a deliberate choice by the insured. In this case the insured first became aware of the circumstances of a claim during the period of cover. The policy provided cover for circumstances notified during the period of cover. The High Court held that section 54 was therefore engaged to prevent the insurer from refusing to pay the claim despite the failure to notify the claim.

Justice Cole in *Breville Appliances v Ducrou* commented that:

> *"Australia is now in a unique position throughout the world in that it is the only country in which there cannot be an effective 'Claims Made and Notified' insurance policy ... an insurer cannot, by appropriate words, define the risks to be covered by the policy where that risk depends upon an act or omission of the insured"*

Perhaps not surprisingly the NSW Court of Appeal in *Gorczynski v W&FT Osmo Pty Ltd* has confirmed that Section 54 has an even wider application than thought and can apply to circumstances where an insured does not make a claim on an insurer and a party that has a claim against an insured seeks to sue the professional indemnity insurer direct.

In NSW the *Law Reform (Miscellaneous Provisions) Act 1946* (the "Act") provides a claimant with the right to join an insurer as a party in proceedings to bring a claim against an insurer rather than the insured in specified circumstances. The circumstances include the insolvency or impecuniosity of the insured.

Section 6 of the Act provides:

> *"6 Amount of liability to be charge on insurance moneys payable against that liability*
>
> *(1) If any person (hereinafter in this Part referred to as the insured) has … entered into a contract of insurance by which the person is indemnified against liability to pay any damages or compensation, the amount of the person's liability shall on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, be a charge on all insurance moneys that are or may become payable in respect of that liability.*
> *.....*
> *(4) Every such charge as aforesaid shall be enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured; and in respect of any such action and of the judgment given therein the parties shall, to the extent of the charge, have the same rights and liabilities, and the court shall have the same powers, as if the action were against the insured:*
>
> *Provided that, except where the provisions of subsection (2) apply, no such action shall be commenced in any court except with the leave of that court. Leave shall not be granted in any case where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim, have been taken.*
> *So what happens where the policy arranged by the insured is a claims made and notified policy and a claim was not notified by the insured."*

This scenario was recently considered by the NSW Court of Appeal in *Peter Gorczynski v W & F T Osmo Pty Limited*.

Osmo, a firm of consulting structural and civil engineers, was retained by neighbours of Peter Gorczynski to provide various certificates to Leichhardt Municipal Council with respect to certain construction works relating to a building located at the rear of the neighbour's property which was attached and/or adjacent to a building on Gorczynski's property. Osmo issued certificates to the Council and relying on those certificates the Council granted building certificates retrospectively authorising the construction of the building.

Gorczynski commenced proceedings in the Land and Environment Court against the neighbours and the Council for the purpose of obtaining an order that the building work, the subject of the Council certificates, be demolished. As a consequence of the institution of the proceedings the Council issued an order for demolition of part of the building. Subsequently the Land and Environment Court ordered the demolition of those parts of the building which had not been demolished pursuant to the Council's order.

Gorczynski sued Osmo claiming damages which were reflected by the costs of the proceedings taken by him to enforce the demolition of the building and argued Osmo had been negligent in the issue of the certificates. Osmo elected not to defend the proceedings in the District Court and a default judgment was entered with damages to be assessed. Osmo is impecunious and unable to meet any award of damages which might be made against it.

At the time the certificates were issued by Osmo it held successive insurance policies covering it against claims inter alia of professional negligence. Osmo itself did not, at any time, notify the insurer that it had been served with a Statement of Claim or that any claim had been made against it by Gorczynski or that it proposed to make a claim against the insurer under the policies.

Gorczynski sought to proceed in a claim against the insurers under section 6 of the Act.

The relevant provisions of the policy provided that the insurer indemnified Osmo against legal liability for any claim for compensation first made against the insured during the period of cover and which is notified to the insurer during the period of cover in respect of any civil liability whatsoever and howsoever incurred in the conduct of the Professional Business Practice.

The policy also provided that if during the period of cover the insured became aware of any fact or circumstance that might give rise to a claim under the policy and elects to give notice in writing to the insurer of such fact or circumstance, then any claim which may subsequently arise out of such fact or circumstance shall be deemed to be a claim during the period of cover provided that such written notice is given during the period of cover or within 28 days after its expiry.

Claim was defined to mean:

a) the receipt by the insured or any written or verbal notice of demand for compensation made by a third party against the insured: or
b) any writ, Statement of Claim, Summons, application or other originating legal or arbitral process, cross claim, counter claim or third or similar party notice served upon the insured.

The insurer in this case argued that it was entitled to disclaim liability for the claim and the Court was either prohibited from granting leave to join the insurer or it should not exercise its discretion to do so. Gorczynski argued that Section 54 of the *Insurance Contracts Act* came into play.

Section 54 of the *Insurance Contracts Act* provides that where the effect of a contract of insurance is that an insurer may refuse to pay a claim, either in whole or in part by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act which could reasonably be regarded as being capable of causing or contributing to a loss in respect of which an insurance cover is provided, the insurer may not refuse to pay the claim by reason only of that act.

When this case came before the Supreme Court the Trial Judge noted that:

> *"An indolent or malevolent, insured (especially if impecunious and nothing to lose) could, by merely refraining from or failing to give the proper notice, entitle the insurer to disclaim the policy, thereby thwarting an attempt by a third party claimant to exercise a right conferred by S6. In such circumstances if the insurer were held entitled, by reason of the failure of the insured to notify, to disclaim to the insured, it would equally be entitled to disclaim a claim made by a*

third party, and it would be futile to grant leave under Section 6(4), it might therefore be assumed that leave under Section 6(4) would not be granted."

Nevertheless the Trial Judge thought that such circumstances would defeat the objectives of Section 6. The Trial Judge ultimately concluded the application for leave failed on the following grounds:

1. *"By the policies, Osmo was covered against a claim of the kind made by the plaintiff in two eventualities:*
    a. *that the claim made by the plaintiff was first made against Osmo during the (a) period of cover, and was notified (by Osmo) to QBE during the (a) period of cover or;*
    b. *that Osmo became aware during the (a) period of cover of facts or circumstances that might give rise to a claim under the policy and elected to notify QBE of such fact or circumstance within the (a) period of cover or 28 days thereafter.*
2. *The evidence did not disclose the date on which Osmo issued its certificates which gave rise to the alleged breach of duty. It therefore does not disclose whether the alleged breach of duty occurred during any period of cover.*
3. *The demand made by the plaintiff on Osmo was made outside the period of cover.*
4. *Osmo did not, during any period of cover, notify QBE of any fact or circumstance that might give rise to a claim against it.*
5. *Osmo was therefore not covered against Gorczynski's claim."*

An appeal followed, however the insurer in resisting the appeal did not seek to support the Trial Judge's reasoning as her factual findings were incorrect. The evidence tendered at trial clearly established that the Osmo certificates were issued in 1999 during the period of cover. There was also evidence that during the period of cover Gorczynski had in correspondence warned Osmo that if the Council determined the building application on the basis of Osmo's certificate he would have no choice but to sue Osmo for negligence or deceptive conduct / representation. Correspondence from Gorczynski's lawyers to Osmo also noted that the solicitors had warned the insurer that Osmo had issued false certifications and this would probably result in Court action and claims against Osmo's policies.

Gorczynski's solicitors had also telephoned QBE during the period of cover and allegedly told the insurer's claims officer there was an ongoing dispute over a false certification in certificates issued by Osmo and it was likely to end up in Court action and a claim against Osmo. The insurer's officer allegedly provided a policy number and confirmed the currency of the insurance.

The substantive issue for determination by the Court of Appeal was whether or not Section 54 applied in the circumstances of this case.

The Court of Appeal rejected an argument by the insurer that Section 54 has no application where a claim has never been made by the insured during the period of cover. The insurer argued that Section 54 had no application where a claim had not been made by the insured and that even if such a claim had been made by third party, Section 54 has no application in such circumstances.

The Court of Appeal noted that it is essential to differentiate between a claim by a third party on the insured and a claim on the insurer for the purpose of Section 54(1). Although the former must, in claims made and notified policies, be made within certain time limits set out in the policy, there is no temporal requirement for the making of a claim against the insurer for payment on the contract of insurance.

The Court of Appeal noted there is no authority which identifies what is a "claim" for the purposes of Section 54(1) of the Insurance Contracts Act and the Court of Appeal determined that a claim for the purpose of Section 54(1) of the Insurance Contracts Act was made against the insurer in this case when the application seeking leave to join the insurer was filed. The claim was for payment of insurance monies payable under the policies and over which Gorczynski was entitled to a charge pursuant to Section 6(1) of that Act. Accordingly, a claim had been made on the policy which could potentially enliven Section 54 of the *Insurance Contracts Act*.

The Court of Appeal noted the more substantive argument for the insurer was that any claim needed to be made by the insured, Osmo.

The Court of Appeal rejected QBE's argument, determining there was no policy reason why Section 54(1) of the *Insurance Contracts Act* should be limited to claims by the actual insured and that ""claim as referred to in Section 54 includes claims which are brought by third parties pursuant to the provisions of the *Law Reform (Miscellaneous Provisions) Act,1946*.

Accordingly, the Court determined that Section 54 would have application to the claim by Gorczynski.

However this conclusion was of no benefit to Gorczynski as the Court of Appeal ultimately concluded that it should not exercise its discretion to grant leave to commence proceedings against the insurer as Gorczynski's claim against Osmo was in all likelihood statute barred. The Osmo certificates had been issued in 1999 and the evidence available to the Court demonstrated that part of Gorczynski's claim included loss and damage which had occurred in the later part of 1999 and the action against Osmo had not been commenced until 5 May 2006 more than 6 years after the cause of action accrued and outside the limitation period.

The Court of Appeal noted that the insurer was entitled to assert the limitation defence available to Osmo and this was a factor that the Court must take into account when determining whether or not an application for leave to join an insurer under Section 6(4) of the *Law Reform (Miscellaneous Provisions) Ac 1946* is considered as it is highly material to the exercise of the discretion to join the insurer.

In this case, the Court concluded that the prospect that the limitation defence will fail at trial was so remote it mandated that the Court should not exercise the Court's discretion and grant leave to commence proceedings against the insurer to enforce a statutory charge. The Court noted this was a case where the Court could confidently find that Gorczynski's claim against Osmo was statute barred prior to the filing of the Statement of Claim on 5 May 2006 and that dictated as a matter of discretion that Gorczynski should not have leave to enjoin the insurer.

Whilst the limitation point disposed of the application the case serves as a warning to all insurers that Section 54 can and will come into play in claims made by third parties upon insurers pursuant to Section 6 of the *Law Reform (Miscellaneous Provisions)* Act *1946* even where an insurer has not received notice of a claim or notice of the circumstances of a claim from the insured during the period of cover in a claims and claims notified policy.

The Approach of the Court to the Interpretation of a Broadform Liability Policy

The interpretation of an insurance policy is not always an easy matter and sometimes extrinsic documents can assist in clarifying the intention of at least one of the parties to the contract of insurance. Wordings in policies can develop as a consequence of gaps identified in different insurer's wordings. Polices are often developed for industry associations and group schemes by a broker in consultation with an insurer. In the lead up to the finalisation of wordings reference may be made to wordings of other insurers.

However when a dispute arises over the extent of coverage or the application of exclusion clauses extrinsic material will not necessarily be admissible in Court when a Court comes to interpret the ultimate intent of the insurance policy as was seen in the recent judgment of the NSW Court of Appeal in *QBE Insurance (Australia) Limited v Vasic*.

The intention of the parties to an insurance contract must be derived from a mutual understanding between the parties and material created before the policy was effected will not always be used by the court to aid in the interpretation of the policy.

Ahmed El Hayek commenced proceedings against Ms Vasic and Mr Ferry seeking damages for injury suffered by him after he was badly burnt in the early hours of a morning in a fire in shearers' quarters at Mulga Creek Station at Byrok. The property was owned by Vasic and Ferry. Vasic and Ferry had effected a broad form liability policy with QBE and MMI. Vasic and Ferry made a claim on the policy which was declined by QBE and MMI. As a consequence QBE and MMI were joined as parties in the proceedings.

The policy documents were comprised of a broad form liability policy with an adjustment note issued by the underwriting agent and a closing advice from SSAA Insurance Brokers.

El Hayek and his father attended the property and the property owners were paid an amount of money for accommodation and hunting. They were directed to the shearers' quarters being the accommodation that was provided. At about 4.30 am the shearers' quarters caught alight whilst El Hayek was asleep and he suffered severe injury and loss and damage. El Hayek was a minor and did not own a shooter's licence but his father did. El Hayek and his father intended to stay on the property for the purpose of El Hayek's father engaging in hunting upon the property after using the shearer's quarters for overnight accommodation.

The relevant coverage clause in the broad form liability policy was as follows:

"Covering the insureds for legal liability to third parties for bodily injury and/or property damage caused by an occurrence in connection with the insureds' activity of allowing licensed shooters on their properties for the purpose of hunting only."

El Hayek in his Statement of Claim alleged that the property owners had failed to obtain Council approval for the change of use of the shearers' quarters to tourist accommodation.

So did the clause in the policy which limited coverage to occurrences in connection with the activity of allowing licensed shooters on their properties for the purpose of hunting only extend to circumstances where shooters were injured whilst staying overnight?

At the trial the insurers sought to tender the proposal which contained a description of business operations as "farming and shooting".

In addition the insurers sought to tender the proposal and policy wording of a previous policy taken out by the insured. Even though neither of the insurers were aware of these documents when the broadform liability policy was effected it was argued the documents should be taken into account in construing the policy of insurance between the property owner and the insurers as the policy had been developed to cover a gap in cover which SSAA considered existed and SSAA had approached the insurers to develop an endorsement to their broadform liability wording to cover that risk. The gap arose from the wording in the Wesfarmer's policy that excluded claims for firearms as follows:

"For personal injury or damage to property caused by or arising directly or indirectly from any activity involving the use of a firearm, unless the injury or damage to property is directly caused by use of the firearm by you or by someone you have agreed to pay to use the firearm."

The fourth document the insurers sought to tender was a statement from an insurance broker who at the relevant time was the executive of SSAA, a registered broker that was a wholly owned subsidiary of the Sporting Shooters Association. His statement included the following comments:

"This insurance cover was developed by me as Chief Executive of SSAA Insurance Brokers Pty Limited, as a gap cover insurance for the purpose of covering rural land owners for their liability for negligence to licensed shooters whilst out hunting on their properties. The policy was developed in the late 1990s as it became apparent that some public liability policies excluded cover for incidents arising from the use of firearms on rural properties and excluded indemnity for the property owner's liability to licensed shooters. We did market research and noted that while approximately 80% of policies provided cover, there was a gap in the market for the other policies, and that a new cover could be made available. The gap insurance was to provide cover in relation to liability to licensed shooters that is excluded from public liability policies held by persons owning or operating rural properties."

The trial judge concluded that the extrinsic material could not be used to construe the terms of the policy and that the policy did respond. The trial judge was of the view that the coverage clause was not as narrow as the insurers claimed. In his view, once it was established that the licensed shooters attended the property with the subjective purpose of hunting only, then there was no reason to limit coverage by reference to the activities of the licensed shooters rather than the activity of the insureds in allowing them on to the property.

An appeal to the Court of Appeal followed. The question for the Court of Appeal was whether or not evidence which was said to indicate the purpose or object of the transaction, including its genesis, background, context and market could be tendered to assist in the task of the interpretation of the construction of the written contract (the policy).

Justice Allsop noted:

"The Wesfarmers policy did not form any part of the genesis of the QBE policy. That a fact represents part of the history as to why one party came to a contract does not make it admissible. The reasonable person who is hypothesised to understand the words of the contract is placed in the position of the contracting parties, or, if relevant, their agents – not one or some only of them. That requires a fundamental element of mutuality of known facts and background. To permit, under the guise of the reasonable person, background facts known only to one person to be attributed to the reasonable person would tend to reintroduce a subjective understanding of one party by permitting or requiring the contract to be interpreted by reference to one party's knowledge only. This is revealed in this case by the attempt to rely on Mr Low's evidence of so called genesis or purpose. His evidence was no more than the subjective aims and intentions of the person, not even someone representing a party."

Justice Allsop went on to note:

> *"The notion of what is known to parties does not require the facts to be present to the mind and consciousness of the contracting parties at the time of contracting. The whole construct is one that places the reasonable person whose understanding is critical in the neutral position that the parties were in. This involves attributing to the reasonable person what the parties knew in the context of their mutual dealings."*

The Court of Appeal noted the High Court's views in Codelfa Construction Pty Limited v State Rail Authority of NSW which were "*generally speaking facts existing when the contract was made would not be receivable as part of the surrounding circumstances as innate to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious, knowledge of them will be presumed*."

When considering what can be tendered to assist the Courts in the interpretation of a contract of insurance Justice Allsop noted:

> *"It is clear from the binding Australian authorities that the scope of the surrounding circumstances, knowledge of which is to be attributed to a reasonable person in the situation of the contracting parties (not one or some only of them), is to be understood by reference to what the parties knew in the context of their mutual dealings. … this does not involve a species of constructive notice. Constructive notice implies a degree of enquiry by reference to some external standard. Just because something is available to be found does not make it relevant, if the parties did not know of it. The reasonable person may be taken to know of things that go beyond those that the parties thought to be important or those to which there was actual subjective advertence by the parties. Further, the circumstances may include such things as the legal context of the transaction, especially if a market is involved. Nevertheless the scope of the relevant material is necessarily bound by the objective task of the reasonable person giving meaning to the words used by the parties in the circumstances in which the contract came to be written by reference to what the parties knew. …"*

The Wesfarmers policy and proposal policy were not admissible. The statement of Low was not admissible. Therefore when turning to the construction of the text of the coverage clause the Court considered the clause and noted that the policy was a commercial contract to be read in its totality commercially and sensibly and the coverage clause should be interpreted as follows:

> *"The coverage clause covers the insureds for liability for different types of injury and damage caused by an occurrence which must have a connection with a certain activity. The activity is that of the insureds of allowing licensed shooters on their properties for the purposes of hunting only. That is what Ms Vasic and Mr Ferry did. Their activity was to allow licensed shooters, in this case the plaintiff's father, on the property for the purpose of hunting only. The occurrence that occurred was in connection with that activity because, as was known to the insureds, the plaintiff's father came onto the property for the purpose of hunting, and the connection was not broken by the fact that he was accompanied by his son. Further, as was known to the insureds, the activity included remaining on the property overnight and seeking of shelter in the shearer's quarter for that purpose. In those circumstances which could be reasonably anticipated both at the time of the contract formulation and later, the occurrence of an injury to one of the hunting party (including a non shooting member of the party) is the very kind of thing that would fall within the notion of an occurrence in connection with allowing licensed shooters on the properties for the purpose of hunting only. …"*
>
> *If the parties' intention, objectively ascertained, had been to limit cover to licensed shooters only and also in that regard only for the activity of hunting, as was submitted, a different structure and wording would plainly be apposite. Here in my view the circumstances of the occurrence were plainly in connection with the activity of allowing the plaintiff's father on the property for the purpose of hunting only."*

So at the end of the day the policy responded.

Generally a liability insurance policy will seek to limit its operation by limiting claims to specified business activities. Sometimes a claim is made which an insurer believes does not fall within the coverage provisions and it is necessary for the Courts to determine the intention of the parties when the contract of insurance was entered into. However, the intention of a promoter of a scheme may not be the intention of the insured.

The use of words in connection with when describing an insured's activity can be problematic as was seen by the result in this case. The phrase may be sufficient to ensure that the defined business activity encompasses anything which is reasonably incidental to the business activity. In this case where visitors were allowed on to the property for hunting and remained there staying overnight in accommodation the coverage clause in the policy was engaged even where the owners had not secured Council approval for tourist accommodation and the description of the business activity did not include the supply of tourist

accommodation.

When crafting a description of business activities and coverage clauses insurers need to carefully turn their minds to any liability that should be excluded and incorporate appropriate exclusion clauses if necessary. An endorsement incorporating an appropriately worded exclusion would have defeated the claim in this case.

Insurers should also be aware that extrinsic material cannot always be used to assist the Court when it interprets the terms of a policy and material will only be admissible where the extrinsic material helps to clarify the intention of both parties and the material was known to by both the insured and the insurer.

The Civil Liability Act And Obvious Risks

In NSW the *Civil Liability Act* (the" Act") has been in operation since 2002. That Act essentially codified many of the common law principles of negligence. Since the introduction of the Act courts have continued to apply common law negligence principles when considering claims without necessarily referring to the provisions in the Act. That approach has not necessarily led to errors, however this approach was clearly criticised by the High Court in *Adeels Palace Pty Ltd v Moubarak* when the High Court made it clear that NSW courts must apply the principles found in the provisions in the *Act* when assessing claims.

Following the judgment of the High Court in *Adeels Palace* the NSW Court of Appeal has reinforced that approach and is strongly advocating the need for judges to apply the Civil Liability Act principles when determining a claim as was seen in the recent decision of the NSW Court of Appeal in The Council of the City of *Greater Taree v Wells*. The judgment in Wells case provides a guide on how courts should consider whether or not a risk is an obvious risk for which a defendant need not provide a warning and also highlights the potential problems that arise when trial judges fail to analyse the provisions of the Act when determining negligence claims.

Daryl Wells was injured whilst cycling along a pathway in Taree when he failed to observe a metal chain that had been strung across the mouth of the pathway that entered Queen Elizabeth Park. Wells was catapulted over the handlebars of his bicycle when the front wheel of his bicycle collided with the chain. Wells sued Taree Council for damages, alleging that Taree Council had been negligent in placing a chain across the pathway.

The Council argued that the chain across the pathway was an obvious risk.

The incident occurred at about 7.30 am on a Saturday morning. Wells was an experienced cyclist and was cycling with a friend. According to Wells, new concrete had been laid at the entrance into the park and in the days prior to the accident the chain had been strung across the pathway at the entrance between two poles. According to Wells, he did not see the chain until he was only about 10 to 12 feet away and although he braked, he did not brake in sufficient time to avoid the chain. Wells was unsure of the speed he was going at the time of the collision as it would have increased as he had been travelling down a hill. Wells' friend, with whom he was cycling, estimated they were only travelling at a speed of about three kilometres per hour. Significantly, Wells had cycled this particular route the previous Sunday but at that time there had been no chain across the entrance to the park. The evidence demonstrated the chain had been placed across the pathway only two days before the accident.

Wayne Hull, the supervisor for Parks & Reserves, employed by Taree Council, conceded that the chain was likely to be missed.

At trial Wells was successful. The Council appealed.

The Court of Appeal agreed with the Trial Judge that the Council had been negligent but it was then necessary to consider whether or not the chain was an obvious risk.

Justice Beazley of the Court of Appeal noted that the trial judge's findings on negligence were as follows:

> *"I find that [the Council) clearly was negligent in erecting the chain between the two poles. The location of that chain was unexpected by any regular user of the park. There was an absence of any warning to users of the park of its existence. Its colour made it difficult to pick up as one approached it, particularly on a push bike. Its presence was not obvious. Its existence was obscured having regard to the surrounding environment. I find, having regard to all of the provisions of*

section 5 (of the Civil Liability Act) that the Council was negligent. I do not accept that the chain could be described as an obvious risk as understood in terms of Section 5F of the Civil Liability Act. …. I have had regard to the principles of negligence and the law generally but also in regards to section 5 of the Civil Liability Act. I find that the Council did owe a duty to (Wells) and breached that duty."

Justice Beazley noted that the reasoning of the trial judge made no reference to section 5B and 5C of the Act nor did he refer to section 5D which relates to the question of causation. It was noted that section 5 is a definition section in the Act. Justice Beazley noted:

"notwithstanding a tendency for judges to cling to Mason J's formulation in Wyong v Shirt, claims for personal injury damages are now governed by the Civil Liability Act, subject to the exclusionary provisions of Part 1 and perhaps cases which involve positive acts of negligence."

Justice Beazley noted that in *Adeels Palace Pty Limited v Moubarak* the High Court warned that if attention was not directed to the Civil Liability Act first, there was a serious risk that "*enquiries about duty, breach and causation would miscarry*." Justice Beazley then went on to closely consider section 5B of the Civil Liability Act taking some time to apply the trial judge's findings to the analysis of the general principles set out in section 5B of the Civil Liability Act namely was the risk foreseeable, was the risk not insignificant, was it probable that the harm would occur if care was not taken, what was the likely seriousness of the harm and what was the utility of the activity that created the risk of harm. Applying the facts to those principles the Court of Appeal upheld the trial judge's finding that the Council had been negligent but it was then necessary to consider whether or not the chain was an obvious risk.

The previous decisions have determined that whether a risk is obvious is to be determined objectively. The question of obvious risk also requires a determination of whether the Council's conduct involved a risk of harm that would be obvious to a reasonable person in the position of Wells. This included the knowledge and experience of the relevant area and conditions.

The Court of Appeal stated:

"In the present case, the circumstances were that a chain was placed across the mouth of the path. The path commenced a short distance from Macquarie Street. The path was accessed by the respondent by crossing Macquarie Street, where he was concerned with traffic on that road and traffic coming from the Aquatic Club. The chain was swung low and blended into the colour of new concrete underneath. The Council was aware of the colour of the concrete because it put the chain in place. The respondent had ridden this pathway before but there was no chain across it on those previous occasions. However, a reasonable person in the position of the plaintiff might be taken to be aware that conditions in the open environment are not static. Changes can occur within relatively short periods of time, due to either natural or human intervention."

The Court continued:

"In my opinion, although a reasonable person in the position of (Wells) could not expect the conditions along or in respect of the path would not change, a chain which may not be visible to a cyclist taking reasonable care, until a short distance before coming upon it, is not an obvious risk."

Whether or not there is an obvious risk depends on the facts of each case. In this case the fact that the chain was not readily distinguishable from the pathway and could not be observed meant that the chain was not an obvious risk.

The judgment is also interesting from the point of view that the Court specifically noted that the parties did not argue that the cycling was a dangerous recreational activity and therefore the provisions of section 5L of the *Civil Liability Act* which provides that a defendant is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity. This comment could give rise to speculation that the style of cycling was possibly a dangerous recreational activity however the finding that the chain was not an obvious risk would have put an end to any defence under section 5L even if the section was raised as a defence.

Claims in NSW must be determined by reference to the principles in the *Civil Liability Act* and general references to the principles without a proper analysis of the facts against those principles may lead to errors. In this case there was no error however the criticism of the judgement from the Court of Appeal highlights that trial judges must assess the facts against the *Civil Liability Act* principles when determining claims.

Two Actions and the Same Damage Can you Settle One Claim and Not Affect the Other

Where a person is injured and suffers loss and damage the injuries are caused by more than one negligent party. Problems arise when one defendant in the litigation is prepared to compromise a claim where another is not. With Courts focused on an alternate dispute resolution and mediation it is not uncommon for the various defendants involved in claims to approach the resolution of a claim in a different manner. Nevertheless the settlement of a claim by one defendant can and will be problematic where the settlement against one party does not compensate the injured person for the full loss claimed. Potential problems arise in NSW as a consequence of section 5 of the *Law Reform Miscellaneous Provisions Act 1946*(the "Act").

Section 5 of the Act provides that:

> (*1) Where damage is suffered by any person as a result of a tort (whether a crime or not):*
>
> *(a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage,*
>
> *(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered… against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action,*
>
> *……*
>
> *(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.*

So does the settlement of an action which results in a consent judgment being entered by the Court trigger section 5(1)(a) of the Act so that any remaining action is not viable except where the consent judgment is not satisfied and if the judgment is not satisfied are the damages recoverable in the remaining action limited to the amount specified in the consent judgment? This scenario was recently considered by the NSW Court of Appeal in *Nau v Kemp & Associates*. Nau was an employee of the Department of Education and Training. Between August 2002 and December 2002 she was referred by her employer for rehabilitation services for a supervised gymnasium programme. The rehabilitation provider devised and supervised an exercise programme which was said to have caused damage. In addition between March and August 2004 while carrying out work at a school opened by her employer Nau was given inappropriate work which brought about an injury to her right shoulder.

Nau commenced proceedings against the rehabilitation provider in 2005 alleging that the exercises were inappropriate and caused her to suffer an injury to her shoulder and shock.

In 2007 Nau commenced another action this time against the State of NSW who was responsible for the Department of Education and Training alleging negligence on the part of her employer in the period from March 2004 to August 2004 and also alleging the employer was liable for the treatment imposed by the rehabilitation provider.

The actions were listed to be heard together. A mediation was held. Shortly after the mediation the 2007 action was settled, terms of settlement were signed and the Court entered a consent judgment in favour of Nau for $220,000 inclusive of costs, clear of compensation payments made. Following the settlement of that case the lawyers for the rehabilitation provider sought to have the proceedings maintained against the rehabilitation provider dismissed on the basis Nau had already recovered damages from another tortfeasor and section 5(1)(b) of the Act prevented her from receiving any greater sum than the judgment in the 2007 action and thus continuance of the 2005 action was an abuse of process.

A District Court judge ultimately acquiesced to an application to dismiss the 2005 action. Nau subsequently appealed. Section 5 of the Act has been subject to much criticism by the Courts. It has been said that the purpose of section 5(1)(b) is to prevent excessive recovery by a plaintiff consequential on the creation of multiple causes of action against tortfeasors. The section is designed to effectively prevent double dipping.

So was the judgment given in the 2007 action a judgment that limited Nau's compensation recoverable in the 2005 action to

the amount specified in the judgment less that part of the judgment that was satisfied by the defendant in the 2007 action?

Not according to the Court of Appeal.

The Court of Appeal concluded that the term "damages awarded by the judgment first given" contemplates a determination of the Court rather than a consent judgment.

Sackville JA concluded that section 5(1)(b) of the Act does not apply to a consent judgment which provides for a tortfeasor to pay damages to a plaintiff in respect of the "damage" he or she sustained where the consent judgment does not follow an assessment of damages by a Court. Section 5(1)(b) has no application where the judgment first given has not involved a judicial assessment of damages.

Campbell CJ reached the same conclusion and noted:

> *"If the action against the (rehabilitation provider) proceeds to trial, and liability is established, clearly (Nau) will be unable to receive from the (rehabilitation provider) damages to the extent that she has already been compensated by the State for the damage that she has suffered. There will be a problem in ascertaining how much of the damages that the State paid is to be attributed to exacerbation of (Nau's) condition that arose from the activities of the (rehabilitation provider), when the sum that the State paid her is a lump sum that covers damage sustained from three separate incidents, only one of which involved the (rehabilitation provider). There may also be difficulties concerning how the court should treat the fact that the real value that (Nau's) settlement attributed to the damage that she sustained in those three incidents is not $220,000 – it will be necessary to take into account that that sum was inclusive of costs, and also that (Nau) was entitled to keep the amount of workers compensation benefits that the State had paid to her or for her benefit. That there are these difficulties is not a reason for being dubious about the construction of section 5(1)(b) at which I have arrived, because those problems would exist if section 5(1)(b) had never been enacted in a form that applied to several concurrent tortfeasors. "*

McColl J also concluded that the term "*damages awarded*" in the Act referred to an amount which a Court has decided to award.

Accordingly the Court of Appeal determined that the trial judge was wrong to dismiss the 2005 action. Section 5(1)(b) had no application to the circumstances as damages were not determined by the Court.

The Court of Appeal concluded that a plaintiff must give credit to a defendant in any successive action. The credit shall reflect the amount received under the settlement of the first action. Of course there may be problems calculating that credit. There may need to be a trial within a trial to determine the compensation payable in respect to the damage as well as the portion of a settlement that relates to the damage. A defendant in a successive action will be entitled to raise a defence of satisfaction. If that is done, and the defendant establishes that the money was paid to the plaintiff in circumstances capable of attracting the rule against double satisfaction or double compensation it will be incumbent on the plaintiff to show that the money was not received by way of compensation for the loss.

So in this case the order made by the District Court judge dismissing the 2005 proceedings was set aside and the notice of motions originally filed which sought orders that the 2005 proceedings be dismissed were themselves dismissed.

Nau is now at liberty to proceed with the claim against the rehabilitation providers and no doubt the assessment damages will turn into a complicated state of affairs as the Court attempts to apportion the damages in the settlement between the three separate incidents alleged against the State of NSW to determine how much of the settlement sum was payable for the damage for which the rehabilitation provider is liable. However, as noted by the Court of Appeal this determination would have needed to have occurred if the 2007 and 2005 actions had been heard together.

The compromise of the claim by the State of NSW will ensure a complicated assessment of damages for the remaining action and the lawyers for the rehabilitation providers may rue the day they failed to reach a compromise of the claim.

Plaintiffs can now take comfort in the fact that they are able to compromise one action for damage without limiting their entitlement to damages in another action for the same damage. However compensation received as a result of the settlement will ultimately reduce any damages award in the subsequent action. There can be no double dipping.

New National Consumer Credit Laws

Do you arrange premium funding? If so, from 1 July 2010 you need to have a credit licence or be a company representative of a credit licencee. If you registered with ASIC before 30 June 2010 you have until 31 December to obtain a licence or become a company representative.

The licensing of providers of consumer credit, credit assistance and intermediaries involved in those processes commenced on 1 July 2010. The commencement of licensing follows a three month registration period which permitted businesses involved in the supply of consumer credit to register with ASIC and continue with business without a licence for a grace period which expires on 31 December 2010. Registered businesses will need to apply for an Australian Credit Licence or become an authorised representative of a credit licensee before 31 December.

You can no longer register with ASIC to take advantage of the grace period. If entities or individuals have not registered, the law requires that they stop engaging in credit activities until they are granted a credit licence or have become a representative of a credit licensee. There are civil and criminal penalties for businesses or individuals that provide regulated credit without a credit licence or authorisation.

An application by NIBA seeking exemptions for insurance brokers from the requirement to register and/or obtain credit licences was rejected.

The National Credit Act requires people who engage in the following credit activities to be licensed:

- providing credit under a credit contract or consumer lease;
- benefitting from mortgages or guarantees relating to a credit contract;
- providing credit services in relation to a credit contract or consumer lease; and
- providing other prescribed credit activities.

Intermediaries are required to be licensed. There may be a chain of intermediaries between the consumer and the lender and the vital element is that the intermediary's role, wholly or partially is to secure a credit contract with a credit provider. Everyone in the chain must be licensed. There are some people or organisations exempted and they include registered tax agents, point of sale retailers, lawyers and receivers and liquidators.

Underwriting agencies and insurance brokers involved in the referral of clients to insurance premium funders will be subject to the National Credit Code. Businesses involved in premium funding will be regulated by the new National Consumer Credit Laws.

If you have not registered, you must not engage in credit activities until you obtain a credit licence or become a credit representative of a licensed credit provider otherwise you will face both civil and criminal penalties.

No doubt premium funders will be keen to facilitate a process for underwriting agencies and insurance brokers to continue to refer business without the need to secure a licence. If you have not registered with ASIC and do not wish to apply for a credit licence, you should approach the premium funders immediately with a view to becoming a credit representative of the funder. You can be a credit representative of more than one funder.

A credit licensee must provide details to ASIC of all credit representatives. Further credit representatives will still be subject to the National Credit Code but the reporting requirements will be managed by the licensee. Times are changing and the work involved in referring clients to premium funders will be effected by the new National Consumer Credit Laws.

The Reform Of Australian Privacy Laws

The Rudd Government's proposed reform of Australian privacy laws is underway with the release of the Exposure Draft Australian Privacy Principles.

If the Exposure Draft Australian Privacy Principles become law, businesses will need to:

1. review their approach to privacy and redraft privacy policies to provide details of their approach to privacy in light of any new Australian Privacy Principles;
2. review processes that deal with the collection and dissemination of information and the transfer of personal

information overseas;
3. review marketing strategies and the impact that the Australian Privacy Principles would have on marketing;
4. develop ways to deal with individuals who choose to interact with a business anonymously or using a pseudonym.

The Australian Privacy Principles are intended to replace the Information Privacy Principles (which apply to Commonwealth agencies) and the National Privacy Principles (which apply to certain private sector organisations). A new Privacy Act will ultimately be introduced which will replicate many of the existing Privacy Act principles and refine existing obligations by reference to the Australian Privacy Principles.

The release of the Exposure Draft is the first step in the reform process. The Senate Finance and Public Administration Committee is conducting an inquiry into the Exposure Draft and a Companion Guide which has been released to explain the draft Australian Privacy Principles. The Committee is seeking submissions from the public which must be lodged by 27 July 2010. This is your chance to provide input on the draft Australian Privacy Principles. The Committee is not due to report on its findings until 1 July 2011 as there will be additional consultation through the release of more exposure drafts.

The additional Exposure Drafts which will be released during the next 12 months will focus on:

1. the introduction of comprehensive credit reporting and enhanced protection for credit reporting information;
2. specific privacy protection for information relating to health;
3. the functions and powers of the Australian Information Commissioner.

Whilst there is no timetable for the introduction of the proposed reforms we can look towards late 2011 for the implementation of the changes.

The Exposure Draft Australian Privacy Principles and the Companion Guide can be found at :
www.aph.gov.au/Senate/Committee/fapa_ctte .

There are 13 draft Australian Privacy Principles which would apply to private sector organisations bound by the Privacy Act.

Australian Privacy Principle 1 – open and transparent management of personal information. The emphasis on this principle is on how information is handled. A business must take reasonable steps to implement practices and procedures and systems that ensure businesses comply with the Australian Privacy Principles. A business will need to specify how it discloses personal information to overseas recipients and identify the countries in which the recipients are located

Australian Privacy Principle 2 – Anonymity and Pseudonymity. Individuals must have the option to identify themselves using a pseudonym or without identifying themselves when dealing with a business where that is practical.

Australian Privacy Principle 3 – Collection of Solicited Personal Information. Personal information must not be collected unless it is reasonably necessary for, or directly related to, one or more of the business' functions or activities. The information must be collected directly from an individual. Sensitive information must not be collected except with consent.

Australian Privacy Principle 4 – Receiving Unsolicited Personal Information. Where an entity receives personal information, that information must be protected even where the business has done nothing to solicit the information. Unsolicited information must be treated in accordance with the Australian Privacy Principles.

Australian Privacy Principle 5 – Notification of the Collection of Personal Information. A business will need to make an individual aware of certain matters at the time personal information is collected. An individual will need to be made aware of how and why the personal information is or will be collected and how the collecting entity will deal with the personal information.

Australian Privacy Principle 6 – Use or Disclosure of Personal Information. Personal information can be used or disclosed for the purpose for which it was collected or a related purpose that the individual would reasonably expect. Exceptions to the rule include consent to use or disclosure by the individual, or disclosure which is reasonably necessary for the defence of the legal or equitable claim.

Australian Privacy Principle 7 – Direct Marketing. Extra limitations will be imposed on businesses that use or disclose personal information to promote or sell goods or services directly to individuals. This principle will not apply to electronic

marketing or telemarketing which is governed by the Spam Act and the Do Not Call Register Act. Personal information can be used in marketing if the individual would reasonably expect the information supplied to be used that way or with the consent of the individual. The individual will have the right to "opt out" from marketing.

Australian Privacy Principle 8 – Cross Border Disclosure of Personal Information. Business' must ensure that the Australian Privacy Principles cannot be avoided by disclosing personal information to a recipient outside Australia. Business will need to take steps to ensure that an overseas recipient of information takes reasonable steps to ensure there is no breach of the Australian Privacy Principles in relation to the personal information. Appropriate arrangements need to be put in place before the disclosure of information overseas. Whilst the Australian Privacy Principle cannot apply to an overseas entity, any breach of an Australian Privacy Principle by the overseas entity will be taken to have been committed by the Australian entity that disclosed the information overseas.

Australian Privacy Principle 9 – Adoption, Use or Disclosure of Government Related Identifiers. Individuals must not be identified by identifiers such as Medicare numbers. The intention is to ensure that identifiers issued by Government agencies are not used as a de-facto national identity number.

Australian Privacy Principle 10 – Quality of Personal Information. Reasonable steps are required to ensure that personal information collected, used or disclosed is accurate, up to date and complete.

Australian Privacy Principle 11 – Security of the Personal Information. In line with International Best Practice, personal information must be kept securely. Reasonable steps must be taken to protect information from misuse, interference, loss, unauthorised access, modification and disclosure. Personal information must be destroyed if it is no longer needed for the purposes for which it was collected.

Australian Privacy Principle 12 – Access to Personal Information. Individuals will have the right to access their information. Individuals will have the right to request that information which is inaccurate, irrelevant or out of date is corrected.

Australian Privacy Principle 13 – Correction of Personal Information. An obligation is imposed on a business to correct personal information if it is inaccurate, out of date, incomplete or irrelevant.

Conclusion

The reform of Australian Privacy Laws is underway. This review will progress over the next 12 months. The release of additional Exposure Drafts will provide businesses with the opportunity to provide input to the Senate Committee on the proposed changes. For now, businesses do not need to take any action unless they wish to make a submission to the Senate Committee but changes to privacy laws are underway and we will keep you appraised of developments.

OH&S Roundup

More Than A Fine

In NSW the Occupational Health & Safety Act ("OH&S") provides Courts with a wide range of powers to deal with breaches of the OH&S Act. Whilst the usual focus for a business that is prosecuted is the ultimate fine, businesses should not lose focus on the fact that the additional powers available to the Courts include a power to make an order that a business publish information about their conviction for an offence.

Recently three prosecutions for breaches of the OH&S Act arising out of the same incident resulted in the Industrial Relations of NSW ordering the three defendants to publish information concerning their conviction and the Court drafted the terms of the advertising. The advertisement that was required to be placed not only in English but in various languages as follows:

"Inspector Ochoa v East Sun Building Pty Ltd IRC 1212 of 2009

Inspector Ochoa v Williams IRC 1214 of 2009 and

Inspector Ochoa v Mulder IRC 1215 of 2009

The WorkCover Authority of New South Wales charged three defendants with breaches of the Occupational Health and Safety Act 2000. Each pleaded guilty and each has been convicted of an offence under the Act. The Industrial Court of New South Wales has ordered that the defendants place and pay for this advertisement to warn others of the risks involved in residential house building sites. In these proceedings an owner builder used a project manager to arrange for

renovation work to be carried out. The project manager used a contractor to do plastering work. That contractor used subcontractors to do that work. One of the subcontractors, in turn, used a number of persons who could not speak or understand English. Only that subcontractor could talk to them. One of these non-English speaking workers was working on some planks about three metres off the ground. A plank broke; he fell and was seriously injured. Neither the project manager nor the subcontractor had prepared a safe work method statement for this job. No one had organised proper scaffolding for this part of the work to be carried out. No one told the injured worker he should not have done the work that way. No one supervised him to make sure he did the work safely. The project manager, the head plastering contractor and the plastering subcontractor were all prosecuted and convicted of breaches of the Act.

Anyone carrying out or involved in building work must make sure that all safety measures are taken and should get help from the WorkCover Authority of New South Wales if they are not sure of their responsibilities under the Occupational Health and Safety Act 2000"

The facts of the case were not controversial. The owner builders of residential premises engaged Mulder as the project manager and foreman at the premises. Mulder was a sole trader and has one employee, his son who is an apprentice carpenter. Mulder held a builders licence. Mr Williams and his wife had a partnership known as Southern Cross Plastering which was engaged by Mulder to undertake plasterboard and gyprock work. Mr Williams arranged for three subcontractors to assist him in the completion of the plasterboard work at the premises including East Sun Building Pty Ltd. Mr Gao was the general manager of East Sun Building Pty Ltd and the husband of the sole director and shareholder of the company. Gao had control of the day to day operation of the company. East Sun Building Pty Ltd. An employee of East Sun Building Pty Ltd was seriously injured when a timber plank which was used in scaffolding broke and the employee fell more than 3 meters suffering serious injury.

During the course of the hearing of the guilty pleas, WorkCover and the defendants both agreed to the publication of information about the conviction. The defendants no doubt sought to moderate the ultimate fine that was to be imposed by acquiescing to the publication.
For one defendant this worked well with Williams escaping a fine. The reason Williams escaped a fine were noted by the Court to be:

".. the assessment of culpability at the low end of the spectrum, the fact that (Williams) did have in place processes and procedures to deal with his occupational health and safety obligations, albeit that they were not pursued to the extent necessary, that on the evidence (Williams) has been required to sell an asset to meet his own legal costs, that he is faced with a costs order sought by the prosecutor and the fact that (Williams) has undertaken to participate in the expenditure of an amount of up to $1000 for the placement of advertisements under s 115 of the Act. …I am persuaded that, on balance, (Williams) should be given the benefit of that section (first offenders provisions that allow the court to find an offence proven but not record a conviction). Accordingly, I will proceed to conviction but will not impose any monetary penalty per se."

The Court however noted that Williams will be liable for the prosecutor's costs up to up to $17,000.

As to the others East Sun Building Pty Ltd was fined $80,000, Gao $4,000 and Mulder $8,000 and each is also liable to pay the prosecutors costs.

So did the agreement to participate in publishing information concerning the convictions reduce the penalty?

Skin Cancer Claims And Workers Compensation

It has long been accepted that skin cancers or skin disease caused by prolonged exposure to the sun in the course of employment fall within the disease provisions of the NSW Workers Compensation legislation. If the skin disease is contracted prior to the commencement of employment, but aggravated by repeated exposure to the sun whilst in the course of the employment, it falls within section 16 of the Act. If the skin disease was solely due to some related exposure in the course of employment, then section 15 of the Act will apply. The crucial element in both situations is the operation of sections 15 and 16 of to "deem" a date of injury for the purposes of the payment of weekly compensation or lump sum compensation for permanent impairment.

His Honour Judge Keating (President of the Workers Compensation Commission) examined the operation of the disease provisions in Gunnedah Shire Council v Brookes (2010) NSW WCCPD 68. The worker had been employed by Gunnedah Shire Council from 2 April 1986 until his retirement on 1 February 2008 at the age of 67. For the majority of his employment,

he worked in the parks and gardens section as a plant operator, maintaining lawns and gardens in public areas. As a result of exposure to sunlight in the course of his employment, Brookes suffered multiple skin cancers around his face, ears, neck, temple, back and arms. This was not disputed and the employer accepted that employment was a substantial contributing factor to the injury sustained, mainly an aggravation of a disease. The critical issue was the deemed date of injury. If the injury was deemed to have happened on or before 30 June 2004, then Allianz Workers Compensation would have been the responsible party. Any deemed date of injury after 30 June 2004 would have been the responsibility of State Cover Mutual Limited as a specialised insurer.

Sections 15 and 16 of the Act specify that for the purposes of deeming a date of injury, the date will be either at the time of the worker's death or incapacity or, if death or incapacity has not resulted from the injury, at the time the worker makes a claim for compensation with respect to the injury. The Arbitrator in this matter had initially determined the deemed date of injury was on or about 7 April 2004 when the worker was absent on sick leave and was treated by his doctor for a significant skin cancer excision. Allianz had argued that incapacity within the disease provisions did not mean a physical incapacity for work, but rather an incapacity for which weekly compensation could be claimed. The worker had taken sick leave on or about 7 April 2004 and, as he was now retired, claiming weekly compensation for that paid sick leave would have been a fruitless exercise.

His Honour Judge Keating noted that despite some treatment for skin cancers prior to 30 June 2004, the medical evidence was such that the disease injury suffered by the worker was aggravated by exposure to sunlight which continued beyond 30 June 2004. Indeed, it was for several more years until he retired in February 2008. The first real incapacity was in December 2004 following a significant surgical procedure to remove cancerous growths from his neck and right arm. Judge Keating commented that incapacity first occurs when the physical incapacity results in some loss of wages, even if there had been a physical incapacity to attend employment previously but this had not resulted in any loss of wages. The loss of time from work to attend a doctor's surgery for treatment did not constitute a relevant incapacity when applying the disease provisions.

This decision is a timely reminder in that for the purposes of deeming a date for a disease claim, incapacity is not to be strictly equated with a worker consulting his doctor but rather with reference to incapacity that gives rise to an entitlement for weekly compensation. Whilst the receipt of brief medical treatment may involve an incapacity for work, if there is no medical evidence to confirm an incapacity giving rise to an entitlement to weekly compensation, then this will not be constituted as the deemed date of injury.

Payments Of Weekly Compensation Whilst A Worker Is Overseas

Deputy President Kevin O'Grady of the Workers Compensation Commission recently examined the eligibility of workers who are permanently resident overseas to have payments of weekly compensation made for incapacity. In the case of Evans-Toyne v Dream Homes (NSW) Pty Limited. The worker suffered an injury in 2004 whilst in the course of his employment. The worker received payments of weekly compensation in June 2004 and these continued until 27 February 2008 when he travelled to the United Kingdom. The payments of weekly compensation were subsequently terminated as he had left the Australian jurisdiction. Since that time the worker remained in the United Kingdom and attempted to have his payments of weekly compensation restored.

Section 53 of the Workers Compensation Act, 1987 allows for payments of weekly compensation to be made to a worker who is resident overseas on the basis that their incapacity is likely to be of a permanent nature. Workers seeking to rely on Section 53 need to approach the Workers Compensation Commission to seek a determination that the incapacity for work resulting from the injury is likely to be of a permanent nature. Deputy President O'Grady determined in this matter there was enough medical evidence to determine the worker had been totally incapacitated for work from February 2008 to date. However this was insufficient for the worker to continue payments of weekly compensation on a permanent basis. The worker would need to satisfy the Commission that his injury resulted in incapacity "likely to be of a permanent nature". That is, the incapacity must be lasting and likely on the balance of probabilities to be of an indefinite duration. It does not however mean that the incapacity will continue for "all time".

This approach is consistent with the concept of permanent impairment. Very often workers suffer a deterioration in their condition and can achieve further compensation for lump sums. Provided there is sufficient evidence to demonstrate it is "likely" for impairment or incapacity to be of a permanent nature, then ongoing payments of weekly compensation will continue whilst a worker is resident overseas.

How Long Should Injured Workers Be On Suitable Duties?

When an employee suffers an injury, whether work related or not, employers have a number of pieces of legislation they have to consider. These considerations extend to:

- obligations to provide injured workers with suitable duties (Workplace Injury Management Act 1998);
- restrictions on terminating injured workers (Fair Work Act 2009 and Workers Compensation Act 1987);
- Anti Discrimination Act 1997;
- the Disability Discrimination Act 1992.

The obligation to provide suitable duties to an injured worker is a positive obligation and requires consultation with the worker, his fellow employees and rehabilitation providers. However, employers should be aware of difficulties that may arise when it becomes either uncommercial for an employer to continue to provide the suitable duties or the suitable duties are no longer assisting the employee's rehabilitation back to their normal pre-injury duties.

An employer may come to the decision they have to consider terminating the employee because:

- of economic reasons; or
- an inability to continue to find suitable duties for the employee to perform.

Employers should be wary of how long an employee has been performing the suitable duties so that the suitable duties actually become the employee's normal duties for the purpose of the contract of employment. In other words, the original duties described or inferred in the contract of employment are varied by the prolonged change in the employee's duties.

In a recent decision, the Full Bench of Fair Work Australia determined that an employee who had been performing suitable duties for a year was properly terminated on the basis he was not fit for the inherent duties of his original position.

Allan John Button was employed by J Boag & Son Brewing Pty Ltd (Boags) from 20 June 2005 until his employment was terminated on 1 September 2009 because he was unable to fulfil the inherent requirements of his job.

Mr Button was born with a congenital defect in his bladder. This defect led to the removal of his bladder and the surgical installation of a drain known as an ileal conduit. Complications associated with that condition restricted Button's function at work. Button's condition that prevented him from performing his normal duties was not work related.

Boags arranged for an occupational therapy assessment of Mr Button. As a result of the assessment the following permanent restrictions came to apply to Button: avoid kneeling and squatting, no lifting above 5 kg, avoid lifting from floor level and no running or jumping.

As a result he was unable to perform the inherent requirements of his original position. The employer was aware of Button's permanent restrictions. Subsequently it modified its work practices so as to allow a colleague of Button, Mr Jensen, to assist him in the performance of his (now modified) duties.

It was later resolved that Button's employment be terminated and he was provided with notice of his termination.

At first instance before Senior Deputy President Kaufman, Button succeeded in arguing that he was able to perform the inherent requirements of his modified position. It was found, at first instance, that there was no valid reason for Button's termination.

After he was given notice of termination but before that termination took effect, Button contravened Boag's alcohol policy and was found guilty of drink driving. His employer also sought to rely on that contravention as grounds to terminate his employment during the unfair dismissal proceedings. Those arguments were rejected – in the Tribunal's terms Button had been all but terminated at the time of the drink driving offence. The Tribunal also emphasised that the employer had a right to stringently enforce policies regulating alcohol consumption:

Boags appealed the decision of SDP Kaufman. On Appeal the Full Bench said

> *"It is well established that a valid reason is one which is "sound, defensible or well founded", but not "capricious, fanciful, spiteful or prejudiced". An inability to perform the inherent requirements of a position will generally provide a valid reason for dismissal. But this will not invariably be so. For example, the dismissal may be prohibited by State*

workers compensation legislation or otherwise unlawful. It is highly likely, bordering on certain, that there could be no valid reason for the dismissal in that event. Further, a dismissal based on incapacity to perform the inherent requirements of a position may not be a valid reason for dismissal if the employee has a capacity to perform the inherent requirements of their job"

The Full Bench found error in SDP Kaufman's reasoning. It found:

"The Senior Deputy President proceeded on the basis that Mr Button was able to, and had been, performing the inherent requirements of the restricted duties in which he had been working since October 2008. … when an employer relies upon an employee's incapacity to perform the inherent requirements of his position or role, it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered."

The matter will now be reheard in part to determine whether or not Button was able to perform the inherent requirements of his original position.

This case puts into sharp focus the need for employers to examine the impact of the provision of suitable or permanently modified duties on both their occupational health and safety and insurance obligations.

Button had only been performing the modified duties for less than 12 months. The issue remains whether an employee who has been performing modified duties for in excess of two years would be able to argue his contract of employment had been varied to provide that his inherent duties he is required to perform are the modified duties he has been performing for the extended period.

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