GD News

Gillis Delaney Lawyers

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Other Insurance Clauses In Insurance Contracts- The High Court Speaks

In Australia it is common to find indemnity and insurance provisions in contracts in the construction, mining and engineering industry where principals seek to impose obligations on their contractors to indemnify the principals for losses which occur as a consequence of carrying out contracted works and requirements that contractors arrange for their insurance to provide coverage for the principal. Some principals seek to impose an obligation on the contractor to arrange an endorsement to their insurance program which provides for cover for the principal in their capacity as a principal responsible for the acts of their contractors. Other contracts seek to impose an obligation on a contractor to arrange for their insurance program to provide cover for the principal as a named insured and for the policy to contain a cross liabilities clause which will ensure that an insurer will not exercise any rights of subrogation against the principal.

Contractors often find themselves in a position where they must accept the terms of the contracts rather than risk losing the job. Some contractors will enter into contracts with onerous obligations to indemnify the principal even where the principal's acts or omissions have partially caused the loss. Also, contractors may be content to accept insurance clauses imposing obligations that require the contractors' insurance to extend to cover the principal as a named insured even where the contractor cannot arrange that cover.

The contractual obligations of a principal and contractor will continue to be a significant issue for underwriters as well as the principal and the contractor as a promise to indemnify may not be subject to insurance cover where the policy does not respond to liability assumed under contract. In those cases the transference of risk is really only as good as the assets of the contractor that are available to satisfy a claim based on the failure to comply with a term of the contract.

However, where a contractor does comply with obligations to arrange for their insurance program to provide cover for the principal as a named insured and the principal also has its own insurance, double insurance and contribution issues between the insurers will arise.

However that may not be the case in the future if underwriters carefully consider the impact of the High Court's recent decision in *Zurich Insurance v MMI*. A prudent underwriter is likely to ensure that its contracts of insurance contain " other insurance" clauses which restrict the operation of a contract of insurance where there is another insurance policy which will respond to the claim.

Effectively where an underwriter has arranged a contract of insurance with a principal the underwriter will not be liable for a claim against the principal where:

- the contract of insurance has an appropriately drafted "other insurance" clause; and
- the contractor has arranged insurance pursuant to a contract with the principal and that insurance provides cover to the principal as a named insured.

Previously, it had been argued that Section 45 of the Insurance Contracts Act, 1984 provided that "other insurance" clauses were void and had no application. However, the High Court has confirmed that the application of Section 45 of the Insurance Contracts Act, 1984 will only apply to insurance contracts where the insured is an actual party to both insurance contracts rather than a named insured in one contract of insurance and a named insured in another (where a contractor in accordance with obligations under a contract between the principal and the contractor has

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arranged cover for the principal as a named insured).

Provisions in general insurance contracts which limit or exclude the liability of an insurer to indemnify the insured party against loss by reason that the party has entered into another contract of insurance in relation to the same risk are rendered void by section 45 of the Insurance Contracts Act 1984 (Cth). In *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* the High Court was called on to consider the application of section 45 and whether the provision rendered void provisions which excluded or limited liability where the insured is a named insured but not a party to the other insurance contract. So what was the case all about?

Hamersley Iron Pty Ltd entered into a contract with Speno Rail Maintenance Australia Pty Ltd in March 1992 for rail-grinding services. Two Speno employees were injured whilst carrying out work and succeeded in damages claims against Hamersley with a judgment in the amount of $1,110,186.35 for one employee and a settlement of $25,000 in favour of the other.

The terms of the contract required Speno to indemnify Hamersley and to maintain insurance against claims for death or injury to any person resulting from the performance of the contract. It was also a term that Speno's insurance policy be endorsed to include Hamersley as a named insured.

Speno entered into an insurance policy with Zurich Australian Insurance Ltd. The policy also named Hamersley as an insured. Hamersley had its own insurance with Metals & Minerals Insurance. Hamersley's insurance policy contained an underlying insurance clause which effectively restricted liability under the policy when there was other insurance in the name of Hamersley which was arranged by contractors of Hamersley.

The wording of the underlying insurance clause was:

> *"UNDERLYING INSURANCE*
> *Underwriters acknowledge that it is customary for the Insured to effect, or for other parties (including joint venture partners, contractors and the like) to effect, on behalf of the Insured, insurance coverage specific to a particular project, agreement or risk.*
> *In the event of the Insured being indemnified under such other Insurance effected by or on behalf of the Insured (not being an Insurance specifically effected as Insurance excess of this Policy) in respect of a Claim for which Indemnity is available under this Policy, such other Insurance hereinafter referred to as Underlying Insurance, the Insurance afforded by this Policy shall be Excess Insurance over the applicable Limit of Indemnity of the Underlying Insurance but subject always to the terms and conditions of this Policy.*
> *In the event of cancellation of the Underlying Insurance or reduction or exhaustion of the Limits of Indemnity thereunder, this Policy shall:*
> *(i) in the event of reduction pay the excess of the reduced underlying limit*
> *(ii) in the event of cancellation or exhaustion continue in force as underlying insurance*
> *but subject always to the terms and Conditions of this Policy."*

Zurich paid the amounts due, in accordance with the terms of its insurance contract with Speno. Zurich subsequently sought contribution from MMI in relation to MMI's liability to indemnify Hamersley under the Hamersley/MMI insurance contract. MMI relied on the underlying insurance clause to limit its liability to the provision of excess insurance, whereas Zurich contended that s 45 of the Insurance Contracts Act rendered the underlying insurance clause void.

The primary judge in the Supreme Court of Western Australia agreed with Zurich, but the Court of Appeal did not. An appeal to the High Court followed.

Double insurance results in contributions from each insurer to a claim and the insured cannot recover payment for the loss twice. In the leading decision on double insurance the Court in Albion Insurance Co Ltd v Government Insurance Office noted:

> *"There is double insurance when an assured is insured against the same risk with two independent insurers. To insure doubly is lawful but the assured cannot recover more than the loss suffered and for which there is indemnity under each of the policies. The insured may claim indemnity from either insurer. However, as both insurers are liable, the doctrine of contribution between insurers has been evolved."*

The concept of double insurance initially led to the development of "other insurance clauses" in insurance policies. Not uncommonly both policies contained "other insurance" provisions.

The beginning for the supposed end for other insurance clauses in Australia was a report of the Australian Legal Reform Commission which led to the introduction of section 45 of the Insurance Contracts Act. The ALRC found:

"There is no substantial justification for any of the various types of 'other insurance' clause. As they may cause the insured's reasonable expectations to be defeated, all forms of 'other insurance' provisions should be rendered ineffective. If more than one insurance is in effect in respect of the same risk, the insured should be entitled to recover the whole of his loss from any one of the insurers, which should then be entitled to obtain contribution from the others."

Section 45 was ultimately enacted in the Insurance Contracts Act in 1984 and provides:

"(1) Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, including a law of a State or Territory, the provision is void.
(2) Subsection (1) does not apply in relation to a contract that provides insurance cover in respect of some or all of so much of a loss as is not covered by a contract of insurance that is specified in the first-mentioned contract."

However the High Court has concluded that there is a role for "other insurance" clauses in insurance policies and they do have an application when the insured is not a party to the contract of insurance. The High Court also concluded that where an insured is a party to a contract of insurance the inclusion of a "other insurance" clause in a policy will not render the contract of insurance void as a whole, rather the "other insurance" clause will be void and have no operation.

The High Court concluded that section 45 was concerned with "other insurance" provisions affecting double insurance only where the insured is a party to the relevant contract of insurance. On its proper construction section 45 did not " does not allow room for a construction which would include a non-party insured among the ranks of those who have "entered into" the relevant contract."

Therefore section 45 did not render void the "underlying insurance clause" in the Hamersley/MMI insurance contract.

Further the High Court held that the term "provision" in section 45 did not operate to render void an entire clause of a contract, of which only one aspect was offensive to section 45.

The High Court noted:

"What s 45(1) makes void is a provision included in a contract of general insurance where it has the effect described in the sub-section. The Act's reference to a provision having a particular effect is not to be read as reference to a discrete collocation of words. Section 45(1) directs attention to a particular operation which the contract would have according to its terms. It renders that operation of the contract void."

At the end of the day the decision of the High Court will be beneficial to everyone. Underwriters will be able to reward principals who implement proper contract management procedures which ensure that their contracting arrangements are such that there is:

- a requirement that the contractor take out insurance in the name of the principal as a named insured; and
- the insurance contracts arranged by the contractor comply with the contractual obligations.

Underwriters will be able to reward those principals that have good contracting practices with better rates. If principals do not wish to seek to impose obligations on contractors to arrange for their insurance contracts to extend to provide cover to the principals as a named insured then underwriters can price the risk accordingly.

We are likely to see a move towards the inclusion of "other insurance" clauses in contracts of insurance as underwriters seek to take advantage of the fact that these clauses will have an effect where the other insurance is arranged by another party pursuant to contractual obligations and in those circumstances the clause will not be void. Other insurance clauses will only be void in their operation where the insured is a party to the other contract of insurance.

As we find that more and more other insurance clauses creep into policies underwriters for contractors are likely to be less inclined to extend cover to principals as a named insured under that contractor's insurance program.

It will be interesting to see how the insurance industry, particularly those involved in the provision of insurance for contractors, will deal with the developments which will result from the High Court's confirmation that "other insurance" clauses in contracts of insurance are not void where the insured is not a party to that "other insurance".

Flood Damage Causes Property Damage-Totally New Fit-out Rather Than Repair - How Do You Calculate Damages

The assessment of a property damage claim is not always an easy matter. Sometimes property is damaged and an insured would prefer not to repair the damage and pocket the supposed repair costs. Sometimes the property damaged was intended to be replaced in any event. These issues will lead to assertions that the damage has not caused any loss.

The way that the Courts will approach the assessment of a property damage claim will always turn on the facts of the case. However, the intention of the owner of the property prior to any property damage will be an important issue in the assessment of damages although not a conclusive issue in the assessment as was seen in the recent Court of Appeal decision in *Gagner Pty Ltd t/as Indochine Cafe v Canturi Corporation Pty Ltd.* The case serves to demonstrate that where damage is rectified and the end outcome is better than the pre-damaged state it is not always appropriate to adjust the damages to take into account the improvement.

Gagner operated a restaurant located above Canturi, a boutique jewellery store in the Sydney CBD. On 28-29 October 2005, the kitchen in the restaurant flooded and water escaped into the jewellery store below, causing damage to the store fit-out. Nevertheless, apart from several hours of being closed on the day the flood was discovered, Canturi continued to trade in the damaged shop for some months. Prior to the flood, the owner of Canturi had been in the planning stages of a complete refurbishment of the interior.

As a result of the flooding, Canturi made the decision to completely refurbish, so as to avoid a lengthy closure and to be able to re-open in time for the Christmas shopping period. Canturi refurbished the entire fit out rather than repair the damaged sections. The refurbishment resulted in the parts of the store that had been flooded being different in various ways to how they had been before the flood.

The trial judge awarded a sum of damages equivalent to the amount that would have needed to be expended to return the store condition to the state it was in before the flood. Canturi did not seek the full cost of the refurbishment it actually carried out.

That award of damages included an amount intended to reflect the quantum that would have been paid as GST on purchases that Canturi would have been required to spend to replace those items damaged in the flood despite the fact that Canturi was registered for GST purposes, and thereby entitled to receive an input credit under the GST legislation for any payments of GST incurred on acquiring goods and services for the purpose of improving the appearance or usability of its shop.

The trial judge held there was an entitlement in the circumstances to a measure of damages equal to the cost of what the restoration of the premises to their former condition would have been, even though the refurbishment actually carried out was more extensive, The judge also awarded GST on that sum.

An appeal to the Court of Appeal followed.

The Court of Appeal noted:

> *"The cost of making good is merely one way of putting a dollar figure on the damage that the plaintiff has suffered, for the purpose of carrying through the compensatory principle. There are circumstances, of which the present is one, when the fact that money has not been spent on the precise items that would need to be acquired to restore property to its pre-damage condition does not prevent the cost of acquiring those items being the appropriate way of giving effect to the compensatory principle. Similarly, in circumstances where profits have been lost as a result of the shop being closed during the time it took to undertake the (loose sense) rectification that was carried out, and a lesser time would have involved in effecting a (precise sense) rectification, the appropriate quantum for loss of profits is the profits that would have been lost during the lesser of those times.* "

But what about the argument that the renovations were going to happen in any event and the damage didn't increase the cost of the overall fit-out? The Court of Appeal noted:

> *"If, before the tort occurred, the Respondent (Canturi) had already embarked on and was likely to carry through a plan for the installation of new fit-out of the type it eventually installed, the proper measure of damages may well have been the increased cost of carrying out the new fit-out by reason of the water damage, beyond what it might have cost had the water damage never occurred."*

The Court of Appeal noted that in some circumstances where there is an intention to demolish and rebuild in some circumstances the damages would not be the cost of reinstatement, but some comparatively small items of temporary repair actually carried out, and actual loss of rent. However that was not applicable in the present case, because the judge has

found that *"the water damage was one of the contributing causes to the whole of the new refit being put in place. "*

The Court of Appeal went on to conclude:

> *"The circumstances of the Respondent (Canturi) in the present case differ markedly from the circumstances of a plaintiff who has completed a development project and sold it, still containing some defects, but for a price that has not been lessened by reason of those defects, to a purchaser who will never require the developer to remedy the defects. They differ markedly from the circumstance of a plaintiff whose property has been damaged but who has arrived at a fixed intention to leave the property in its damaged condition. It is unnecessary for me to say anything about the appropriate measure of damages in those very different situations. "*

Further in determining the allowance for damages the cost of repair was an appropriate assessment and the Court of Appeal concluded:

> *"In the present case, the effecting of the total refit of the premises had the effect that the Respondent (Canturi) no longer suffered any damage in consequence of the flooding, but the refit cost the Respondent (Canturi) money. To the extent that, by effecting the refit, the Respondent (Canturi) obtained more than a rectification of the damage caused by the flood, the compensatory principle requires that it must itself bear the cost of obtaining that extra. While having a total refit has not been shown to be of any particular monetary benefit to the Respondent (Canturi), it was the Respondent's (Canturi's) choice (found to be a reasonable one in the circumstances) to take the shop from being in a damaged condition by effecting the total refit."*

The Court of Appeal noted there have been cases where a primary legal decision-maker has been held to have been mistaken in failing to deduct, from the costs incurred in seeking to make good the consequences of some particular wrong, the value of incidental benefits that the plaintiff has received however a qualification on this principle is that it is not necessary to bring to account, in assessing damages, the extent to which benefits are derived from making good the damage, if the only practicable way of making good the damage involves conferring those benefits as was seen in a case of *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* . In that case the plaintiff's factory was destroyed as a consequence of a breach of contract by the defendant. Reinstatement of the old factory was not legally permissible, so a new factory was built. The rational behind that decision was seen in one of the judgements that concluded :

> *"Further, I do not think that the defendants are entitled to claim any deduction from the actual cost of rebuilding and re-equipping simply on the ground that the plaintiffs have got new for old. It is not in practice possible to rebuild and re-equip a factory with old and worn materials and plant corresponding to what was there before, and such benefit as the plaintiffs may get by having a new building and new plant in place of an old building and old plant is something in respect of which the defendants are not, as I see it, entitled to any allowance. I can well understand that if the plaintiffs in rebuilding the factory with a different and more convenient lay-out had spent more money than they would have spent had they rebuilt it according to the old plan, the defendants would have been entitled to claim that the excess should be deducted in calculating the damages. But the defendants did not call any evidence to make out a case of betterment on these lines* "

However even in circumstances where there is no practicable way of making good damage other than by replacing damaged property with something superior to the damaged item, it can in some circumstances be appropriate to take the superiority of the replacement item into account in assessing the quantum of the damages. Clear evidence will be needed to demonstrate the value of the benefit to bring to account any benefits that accrued in consequence of mitigation of a loss by replacing damaged property. The Court of Appeal concluded betterment was not an issue in this case as:

> *"No attempt was made in the present case to prove that the shop, with its totally new fitout, was more profitable or in any other way more valuable than it would have been if the damage had never occurred. The judge specifically rejected the submission that, before the damage, the plaintiff's fitout was nearing the end of its working life."…. "Of course, to the extent that the installation of the new fitout was more than (Canturi) needed to do to make good the damage caused by the flooding, it cannot recover the full cost of the fitout, but it has not claimed the full cost of the fitout, and the judge has endeavoured to find the means of measuring the extent to which (Canturi) has suffered damage caused only by the flooding."*

So the challenge to the award of damages based on the cost of restoration of the premises to their former condition failed. However the appeal was successful in so far as it was argued that GST should not have been included in the award of damages.

Rejecting the allowance made by the trial judge for GST the Court of Appeal noted:

> *"The respondent (Canturi) would have made a taxable supply whenever it sold in the course of its business an item on which it would be obliged to pay GST, and would make a creditable acquisition for which it would receive a GST input*

> *credit when acquiring goods or services for the purpose of improving the appearance or usability of its retail shop: Under the GST Act, obtaining an input credit for GST paid on a creditable acquisition results in the payer effectively receiving back the amount of that input credit either as a reduction in its GST liability or an increase in its refund entitlement: Hence, for a person registered for GST purposes, payments of GST on goods and services which an award of damages was intended to cover would not be a loss suffered if the acquisition of those goods and services was a creditable acquisition by that person"*

If a plaintiff is registered for GST purposes, and stands to receive an input credit for any GST payments incurred in making good damage, and there is no impediment to the plaintiff receiving the full benefit of the input credit, that GST amount should be excluded from the quantum of any damages

If the plaintiff is registered for GST purposes, and stands to receive an input credit for any GST payments incurred in making good its damage, and there is no impediment to the plaintiff receiving the full benefit of the input credit, that GST amount should be excluded from the quantum of damages recoverable.

So at the end of the day a simple intention that there could be a refurbishment to premises in the future will not defeat a property damage claim based on a claim for rectification of the loss. In this case the outcome may have been different if the Court had found that the new fit-out was arranged before the water damage or had been committed to by Canturi, however the jury was still out on the issue so the measure of the loss was the cost of restoration of the premises to their former condition notwithstanding there was ultimately improvement of the premises past the pre-accident state of the premises.

Case Management - Insurer Not Required To Serve All Affidavits

Case management is an important part of the Court process and in commercial litigation and insurance disputes a Court is likely to require the parties to the litigation to exchange statements or affidavits that set out the evidence which will be relied on by each party. That can cause significant problems for an insurer where disclosure of information by an insurer can place a person in the position where they can tailor their evidence to overcome difficulties which arise as a consequence of that evidence. So what can insurer do if it wishes to keep some of the evidence it has confidential?

In *Lumley General Insurance Limited v Halpin & Ors* the Court of Appeal confirmed that the Court has a discretion to order that an insurer be excused from serving its affidavit evidence.

The Court of Appeal was called on to consider an order of a Supreme Court Judge which had been made that *"the requirement that all affidavit evidence to be relied on by the insurer be served on the insured be waived in respect of certain affidavits"*. The trial judge had made an order in those terms and the insured appealed.

The claim involved a claim on a home and contents policy in relation to the alleged theft of a large quantity of valuable sporting memorabilia. Four affidavits were identified by the insurer, two lay witnesses and two of loss assessors that the insurer wished not to serve. The affidavits concerned enquiries and actions taken by the loss assessors following conversations between them and the insured. The insurer had refused the claim in part based upon concerns that the insured had been untruthful in making the claim.

The insured argued that the Court should not have power to waive the requirement to serve affidavits as this would result in a "trial by ambush".

It was noted that the *Civil Procedure Act* in NSW has an overriding purpose to ensure that the Court facilitate the just, quick and cheap resolution of the real issues in proceedings.

The Court of Appeal noted:

> *"The reasonable entitlement of the defendant to preserve pre-trial confidentiality and the results of its investigations, in the fact of suspected fraud, remains a legitimate interest. The provisions do not give rise to an obligation on the part of all parties in all the circumstances to place all their cards on the table before the trial commences. If that were so, cross examination would need to be conducted by questions on notice. In some cases the uncovering of deceit or fraud might become significantly more difficult."*

Ultimately the Court of Appeal determined that it had power to make orders relieving one party to civil litigation from complying, in whole or in part, with the discretion that would otherwise require that party to disclose to the other in advance of the trial all affidavits and reports to be adduced in evidence at the trial.

In this case the insurer had not admitted the theft pleaded by the insured but had not pleaded fraud on the part on the insured in relation to the alleged theft. In those circumstances, the insured bore the onus of proving on the balance of probabilities that the theft as alleged occurred. The insurer in the circumstances bore the onus of demonstrating the insured acted fraudulently.

Both the trial judge and the judges of the Court of Appeal had the benefit of reading the affidavits and noted the material identified what the authors of the affidavits regarded as inconsistent in the information provided by the insured and challenged important parts of their case. The Court of Appeal noted that when the original trial judge made the order he clearly appreciated that the making of the direction sought by the insurer would disadvantage the insured in that they would be deprived of an opportunity to consider the material in advance of the hearing and to provide any available explanation in their own affidavits. Nonetheless the Court of Appeal noted that there were good reasons founded in the justice of the case for making the direction and permitting the affidavits to be withheld.

The Court of Appeal noted that some judges may take different views of the weight to be accorded to competing considerations when it came to requiring the disclosure of affidavits or the protection of those affidavits from disclosure and some judges might determine that an insured should have a fair opportunity to meet any material adverse to their creditability whilst other judges may determine that the advantages and the interests of justice of not forewarning the insured of the detail the challenges to their creditability outweighed the benefits of disclosure of all evidence. That however was a matter for differences of opinion between judges and did not in this case demonstrate any error of principle by the original trial judge.

The trial judge had power to make an order excusing the insurer from serving the affidavits and the Court of Appeal determined that the trial judge did not err in making that decision.

The case confirms that insurers can seek orders from a Court permitting the insurer to withhold affidavits and evidence where disclosure by the insurer may give rise to the risk that the insured may be inclined to tailor evidence to address the evidence in which that an insurer is entitled to such an order. However the facts of each case will need to be balanced and an insurer will need to apply to the Court to be excused from the need to serve affidavits and the Courts will determine whether or not an order permitting a party to withhold evidence will cause injustice.

Benevolent Payments And The Assessment Of Damages

From time to time a person who is injured who has brought a personal injury claim will receive benefits to help that person deal with their injuries and get on with their life and those benefits tend to temper any loss that the accident causes. Benefits may be provided by a Church or other charitable organisation. Sometimes those benefits are provided as the injured person is involved in the charitable organisation.

A question will arise in the assessment of damages as to whether or not benefits provided after an accident should be taken into account when assessing the ultimate damages to be awarded. The question is should those benefits provided by a third party be taken into account when assessing damages as those payments have really reduced the impact of the loss caused by the injury.

Can the amount of the benefit paid by a third party be deducted from the assessment of damages? The answer will depend on the intention of the party that provides the benefit as was recently clarified by the High Court in *Zheng v Chai*. . The case was about damages arising from a motor vehicle accident on 11 May 2000 at Chatswood between a taxi and a car in which Zheng was a passenger.

In the District Court, Judge Garling, awarded damages of $300,681 to Zheng but declined to reduce the damages by $17,447.91 to take into account certain payments made to Zheng by the Christian Assembly of Sydney Church. The defendant agued the payments were akin to wages paid whereas Zheng argued they were benevolent payments that should not be taken into account in the assessment of damages.

Zheng was a member of the Church which had a congregation of about 200. The Church has no employees and all offices and functions are performed by volunteers. Zheng performed volunteer work at the Church at Roseville from about 2005. She worked for about 20 hours per week. She worked on most days but did not keep regular hours. The work which she performed included answering telephones, speaking to people interested in the Church and occasionally, preaching. Between 26 June 2005 and 24 April 2006 Zheng received fortnightly payments into her bank account to average $580.00 per week. The payments were continuing at a slightly increased rate at the date of trial in August 2007.

The primary judge found that the payments were made by the Assembly from donations to the Assembly, to assist Zheng with

her rent and living expenses. The primary judge held that Zheng was not an employee and, in so doing, rejected the argument that monies were received on account of Zheng's employment.

An appeal to the NSW Court of Appeal followed. The Court of Appeal found that the real intent behind the payments was to enable Zheng to perform volunteer work more effectively for the Church and the payments were more analogous to payments for services. The High Court was then called on to examine this issue.

The approach adopted by the Courts in arguments concerning the reduction of damages for benevolent payments is found in a previous High Court decision of *The National Insurance Co of New Zealand Ltd v Espagne* in which Windeyer J stated:

> *"In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss, if: (a) they were received or are to be received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he might have; or (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages. The first description covers accident insurances and also many forms of pensions and similar benefits provided by employers: in those cases it is immaterial that, by subrogation or otherwise, the contract may require a refund of moneys paid, or an adjustment of future benefits, to be made after the recovery of damages. The second description covers a variety of public charitable aid and some forms of relief given by the State as well as the produce of private benevolence. In both cases the decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather than by cause."*

Windeyer J in Espagne's case had also concluded:

> *"If, out of sympathy for a man unfortunately responsible for a motor accident, someone gives money to the victim, stating that he does so in the interest of the tortfeasor and to diminish the damages he must pay, effect must be given to his intention. If, on the other hand, the donor's expressed intention is that the injured man shall enjoy his bounty in addition to whatever rights he may have to recover damages from the tortfeasor, effect must in my opinion, be given to that intention. And if nothing be said, the intention of the giver may be inferred from the circumstances."*

The High Court when it examined Zheng's case focused on real effect of the payments made to Zheng. In so doing it found three things: First, the payments gave collateral benefit to the Assembly; second, the payments were made for the benefit of Zheng and third the payments were not made to reduce Mr Cai's liability for damages. In effect the Court found that the payments made by the Church to Zheng did not justify a reduction in the damages payable to her.

The decision in Zheng v Cai confirms that voluntary gifts, given for the benefit of an injured person (as opposed to being given for the benefit of a person who caused the injury in an attempt to reduce damages payable) will not reduce a plaintiffs entitlement to damages.

The relevant litmus test as to whether or not a reduction should properly occur will involve an examination of the effect and intention of those payments.

As was noted by the High Court:

> *"The presence of a collateral benefit of this kind to the Assembly could not substitute for the necessary intention on its part to benefit the respondent (Cai) by diminishing his liability for damages at the expense of the award recovered by the applicant (Zheng), the object of the bounty provided by the Assembly. Reducing the applicant's (Zheng's)award without finding such an intention would defeat rather than advance the policy of the law in this area."*

So in this case Zheng's damages were not to be reduced to take into account the payments made by the Church.

National OH&S System Is One Step Closer

A national OH&S System is one step closer to reality with the recent approval of the draft legislation which will be enacted throughout Australia to create a national OH&S scheme from 1 January 2012. On 11 December 2009 the Workplace Relations Ministers' Council approved the form of the model legislation. Model legislation was released for public comment in September 2009 and in our special edition of GD News in September we reviewed the details of the model legislation. Safework Australia received a total of 480 submissions and consequently the model legislation was changed significantly in a number of areas and it is the amended model legislation which has been approved. The model legislation will be enacted

throughout Australia by Decemeber 2011 and an during 2010 the regulations to support that legislation will be developed, once again with a period of public comment and consultation after model regulations are published.

So businesses can start to ready themselves for the brave new world as the framework for the National OH&S system has been finalised; we have the legislative provisions that will ultimately be enacted.

So what were the changes to the model legislation originally released.

Reasonably Practicable

The obligation to ensure the health and safety of workers turns on the concept of what is reasonably practicable. The definition of "reasonably practicable" has changed to clearly identify that the cost of addressing a risk is a key factor in the determining whether or not a business has done what is reasonably practicable.

The definition of reasonable care is as follows:

> ***"What is reasonably practicable in ensuring health or safety***
> *In this Act, reasonably practicable means that which is, or was, at a particular time reasonably able to be done in relation to ensuring health or safety, taking into account and weighing up all relevant matters including:*
> *(a) the likelihood of the hazard or the risk concerned occurring; and*
> *(b) the degree of harm that might result from the hazard or the risk; and*
> *(c) what the person concerned knows, or ought reasonably to know, about:*
> *(i) the hazard or the risk; and*
> *(ii) ways of eliminating or minimising the risk; and*
> *(d) the availability and suitability of ways to eliminate or minimise the risk; and*
> *(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk,*
> *including whether the cost is grossly disproportionate to the risk."*

Obligations On Officers

OH&S duties are imposed on officers of a body. If a body has a duty or obligation under this Act,an officer of that body must exercise due diligence to ensure that the body complies with that duty or obligation. There is a change to the definition of "officer" and the definition now adopts the definition of "officer" found in the Corporations Act. The original draft of the legislation had a broader potential application and businesses will welcome of the more restrictive definition.

The Corporations Act definition is:

> *"officer" of a corporation means:*
> *(a) a director or secretary of the corporation; or*
> *(b) a person:*
> *(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or*
> *(ii) who has the capacity to affect significantly the corporation's financial standing; or*
> *(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or*
> *(c) a receiver, or receiver and manager, of the property of the corporation; or*
> *(d) an administrator of the corporation; or*
> *(e) an administrator of a deed of company arrangement executed by the corporation; or*
> *(f) a liquidator of the corporation; or*
> *(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.*
> *"officer" of an entity that is neither an individual nor a corporation means:*
> *(a) a partner in the partnership if the entity is a partnership; or*
> *(b) an office holder of the unincorporated association if the entity is an unincorporated association; or*
> *(c) a person:*
> *(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or*
> *(ii) who has the capacity to affect significantly the entity's financial standing.*

There will be a definition of due diligence to provide guidance on what is expected of officers. That definition is as follows:

> ***"due diligence** means to takereasonable steps:*
> *(a) to acquire and keep up to date knowledge of work health and safety matters; and*
> *(b) to gain an understanding of the nature of the operations of the business or undertaking of the body and generally of the hazards and risks associated with those operations; and*
> *(c) to ensure that the body has available for use,and uses, appropriate resources and processes to enable hazards associated with the operations of the business or undertaking of the body to be identified and risks associated with those hazards to be eliminated or minimised; and*
> *(d) to ensure that the body has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and*
> *(e) to ensure that the body has, and implements, processes for complying with any duty or obligation of the body under this Act; and*
>
> > *Examples*
> > *A body's duties or obligations under this Act may include:*
> > *• reporting notifiable incidents.*
> > *• consulting with workers.*
> > *• ensuring compliance with notices issued under this Act.*
> > *• ensuring the provision of training and instruction to workers about work health and safety.*
> > *• ensuring that health and safety representatives receive their entitlements to training.*
>
> *(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e)."*

Business should start preparing compliance programs to help ensure that officers will be able to comply with their new duties which are clearly scoped by the definition of due diligence.

Duty Of Workers

Workers will not only need to take reasonable care for their own health and safety; and ensure that their acts or omissions do not adversely affect the health and safety of other persons; they will also need to comply with any reasonable instruction to comply with the legislation given by the business and any reasonable policy or procedure of the business relating to work health or safety that has been notified to workers.

Most Serious Offence

In order to establish the commission of the a Category 1 offence(most serious) the person must engage in conduct that, without reasonable excuse, exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and the person is reckless as to the risk of death or serious injury or illness to that individual. "Serious Injury" is defined in the legislation with a list of injuries that amount to serious injuries.

Duty To Consult Other Duty Holders

There is a new duty for businesses to consult with other duty holders who have a duty in relation to the same matter. Businesses will need to implement effective communication strategies for consultation with businessses that interact with each other when considering workpractices. Proper documentation of all consultation will be crucial.

Court Powers

The key change in this area is that Courts will no longer have the power to impose compensation orders consequent to a breach of the OH&S legislation. Insurers can sigh with relief.The problems which would have confronted a scheme which allowed the Courts to impose compensation orders have been removed by removing the power to make compensation orders.

No Separate Civil Right

The legislation makes it clear that it does not provide a separate cause of action or a separate civil right and this is once again good news for employers.

Right Of Entry

Provisions for union right of entry are not found in the legislative provisions rather the right of entry provisions are already prescribed under the Fair Work Act 2009.

Conclusion

Whilst there were further changes, the changes we have identified represent the most significant changes to the original model legislation. Whilst the new world is 2 years off businesses cannot ignore the fact that a National OH&S system will be a reality for all Australians

Fair Work - Modern Awards and National Employment Standards Start from 1 January 2010

Employers in New South Wales need to welcome the new world of workplace relations from 1 January 2010 as National Employment Standards now become a fact of life for all employers and employees in New South Wales (apart from those employed in the public sector).

Two of the substantive areas of reform introduced by the Fair Work Act had their commencement deferred until 1 January 2010.

Those deferred changes have now commenced and employers throughout Australia are now faced with National Employment Standards and Modern Awards which will impact on employment relationships.

The National Employment Standards prescribe minimum conditions for employees. Therefore employers will need to carefully review their employment contracts to ensure that employee arrangements comply with National Employment Standards.

In addition with the establishment of Modern Awards employers will need to carefully examine the Modern Awards to identify the Modern Award which apply to their business and their employees and ensure that their employment arrangements meet as a minimum the terms specified in the Modern Awards subject to the transitional provisions in the legislation.

From 1 January 2010, 122 modern awards will apply as a common rule to all employees in an occupation or industry as defined in the award. Individual flexibility agreements can be entered with employees varying specific award items (overtime, penalty rates, allowances, leave loading and times of work).

Recent legislative changes have also increased the amount of annual leave that an employee not covered by a Modern Award may "cash out". The position as at 1 January 2010 will be that an employee may cash out any amount of accrued but unused annual leave provided that they retain a balance of at least four weeks annual leave.

The transitional arrangements are complex, and provide:

- The National Employment Standards and Minimum Wages in Modern Awards will apply to all employees (provided the Act applies to the employees and for NSW that means all private sector employees) from 1 January 2010 including those covered by instruments that have been in existence prior to the Fair Work legislation.
- The NES will not override benefits in existing workplace agreements that are at least as beneficial as the NES.
- From 1 January 2010 Modern Awards and the NES will immediately apply to all employees covered by the legislation. The ten minimum employment standards in the NES will apply even if the employer is covered by an existing industrial instrument (that includes pre-reform certified agreements, workplace agreements made under the Workplace Relations Act or a preserved collective State agreement).
- The effect of the transitional provisions is that the Modern Awards do not actually apply to an employee or employer that is covered by a transitional instrument, eg. a workplace agreement, workplace determination, preserved State agreement or AWA, but the base rate of pay under any such arrangement must be not less than the rate payable under the Modern Award. The base rate of pay is the rate of pay payable for the employee's ordinary hours of work but does not include incentive based payments, loading, monetary allowances and overtime and penalty rates.
- Employers that are covered by an ongoing collective agreement must pay their employees at least a minimum rate of pay specified in a Modern Award from 1 January 2010.
- Existing workplace agreements in place prior to 1 January 2010 will continue to operate past their nominal expiry date until terminated in accordance with the current rules for termination or are replaced by new enterprise agreements under the Fair Work legislation. This means agreements will continue until terminated by agreement between the parties or terminated unilaterally after the nominal expiry date by the giving of notice by either party.

The National Employment Standards are minimum standards applying to the employment of employees and relate to the following matters:

- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave and related entitlements;

- annual leave
- personal/carer's leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay;
- fair work information statements.

For NSW all employers in the private sector will now be effected by the NES and their employment arrangements must provide as a minimum the standards specified in the NES. That means redundancy payments, flexible work and maximum weekly hours becomes a fact of life.

So what is specified in the NES?

Maximum Weekly Hours

An employer will not be able to request or require an employee to work more than 38 hours a week for full-time employees unless the additional hours are reasonable. An employee may refuse to work additional hours if they are unreasonable.

When assessing the reasonableness of the hours the following must be taken into account:

- any risk to employee health and safety from working the additional hours;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise in which the employee is employed;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of working additional hours;
- any notice given by the employer or any request or requirement to work the additional hours;
- any notice given by the employee of his or her intention to refuse to work additional hours;
- the usual pattern of work in the industry or the part of an industry in which the employee works;
- the nature of the employee's role and the employee's level of responsibility;
- whether the additional hours are in accordance with any other relevant matters.

It should be noted that modern awards or enterprise agreements may include terms providing for the averaging of hours of work over a specified period and the average weekly hours must not exceed 38 hours for full-time employees.

Request for flexible working arrangements

Employees who are parents or have responsibility for the care of children under school age may request employers for a change in working arrangements to assist the employee to care for the children. The employee will not be entitled to make the request unless they have completed 12 months of continuous service or for casual employees they must be long term casual employees and have the reasonable expectation of continuing employment.

Any request by an employee must be in writing and set out details of the changes sought and the reasons for the changes. The employer must provide a written response within 21 days of receipt of a request stating whether or not the request is granted or refused and refusal can only be on the basis of reasonable business grounds.

What amounts to reasonable business grounds is not defined by the legislation.

Parental Leave

Employees other than casual employees who have completed at least 12 months of continuous service with the employer immediately before the date of birth or expected birth of a child may request parental leave. If the parental leave relates to adoption the 12 month period must be completed before the day of placement or the expected day of placement of the adoption.

In addition if an employee completes 12 months service before the date on which they are due to take a period of unpaid parental leave they will still be entitled to parental leave.

There will be an entitlement to 12 months of unpaid parental leave provided the employee has or will have responsibility for the care of the child. Leave must be taken in a single continuous period and may start from up to 6 weeks before the expected date of birth of the child and must not start later than the date of birth of the child for a female. Concurrent leave is

permitted for parents for up to three weeks. Employees can be required to give the employer a medical certificate containing details of the employee's fitness for work in the last 6 weeks before the expected date of birth and the employer may require a period of unpaid parental leave if the certificate does not certify that the employee is fit for work.

Employers will be required to provide written notice to the employee regarding parental leave at least 10 weeks before the leave is commenced. At least 4 weeks before the intended start of the parental leave the employee must confirm the start and end date for the leave. If less than 12 months parental leave is taken by the employee they can extend their leave up to the 12 month period by 4 weeks notice before the end date of the original leave period. Only one extension is permitted, however an employee and an employer may agree to further extend the period of unpaid paternal leave one or more times.

Employees will be entitled to make an application for an additional 12 months parental leave by written notice at least 4 weeks before the end of the initial parental leave period. A written response to the request must be provided within 21 days by the employer and the employer may refuse a request only on reasonable business grounds. The response must include details of the reasons for the refusal.

Parental leave cannot be extended beyond 24 months after birth or placement of an adoption.

Periods of parental leave can be reduced by agreement of the parties.

Employees will be entitled to take paid leave at the same time as taking parental leave. Personal/carer's leave or compassionate leave cannot be taken during parental leave.

Effectively there will be an entitlement of up to 24 months unpaid parental leave.

On ending unpaid parental leave an employee is entitled to return to the employee's pre-parental leave position or if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

Annual leave

Employees will be entitled to 4 weeks paid annual leave or 5 weeks paid annual leave if an employee is a shift worker as defined in a modern awards or enterprise agreements. Paid annual leave will increase progressively during a year of service according to ordinary hours of work and accumulates from year to year. Paid annual leave may be taken for a period agreed between the employer and the employee and an employer must not unreasonably refuse to agree to a request for leave. Annual leave must be paid at the employee's base rate of pay for ordinary hours of work. Paid annual leave must not be cashed out except in accordance with a modern award or enterprise agreement provision or an agreement between the employer and non award/agreement employees. Annual leave will not be able to be cashed out if the cashing out would result in employees retaining accrued entitlements of less than 4 weeks.

Personal/Carers Leave/Compassionate leave

For each year of service an employee will be entitled to 10 days of paid personal/carers leave. The leave accrues progressively during the year. The leave can be taken because the employee is not fit for work because of illness or personal injury or to provide care and support to a member of the employee's immediate family or the employee's household who require care due to a personal injury or personal illness or an unexpected emergency. The leave is paid at the base rate for ordinary hours of work. Awards and enterprise agreements may include terms providing for the cashing out of paid personal/carers leave by an employee, however, there will always need to be at least 15 days of paid leave remaining on the cashing out of the paid leave. In addition to the paid leave employees will be entitled to 2 days of unpaid carers leave for each occasion when a member of the employee's immediate family or a member of the employee's household requires care or support because of a personal illness or personal injury affecting the member or an unexpected emergency affecting the member. The 2 days leave must be taken continuously or as separate periods by agreement between the employer and the employee. The employee is also entitled to 2 days of compassionate leave for each occasion when a member of the employee's immediate family or the employee's household contracts or develops personal illness that poses a serious threat to his or her life or sustains a personal injury that poses a serious threat to his or her life or dies. Employees must give notice to the employer on taking the paid and unpaid personal/carers leave and the employer may require the employee to provide evidence that would satisfy a reasonable person in relation to the need for the leave. The evidence will include medical certificates.

Community Service Leave

Employees will be entitled to take community service leave for eligible community service activities which will include voluntary emergency management activities and jury service. The government will be able to prescribe other activities for which community service leave may be taken in Regulations. The employee will be required to provide a notice to the employer advising the employer of the period or expected period of absence that may be required by the employee and to give evidence that the employee will be engaging in the activity if the employer requests evidence. Employers will be required to pay the employee whilst they are on jury duty for the first ten days of absence.

Long Service Leave

Employees will be entitled to long service leave in accordance with award-derived long service leave terms. The obligations for long service leave will be found in modern awards and agreements rather than prescribed in the NES.

Public Holidays

Public holidays are prescribed by the legislation and include New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, the Queen's Birthday, Christmas and Boxing Day. Awards and enterprise agreements may include terms providing for substitution of a day or part of a day that would normally be a holiday. Employees must be paid for holidays according to ordinary hours of work.

Notice of Termination and Redundancy Pay

An employer is required to provide written notice to the employee of the termination and the day of termination. Employees will be entitled to make payment in lieu of notice. The following notice periods are relevant:

- employees of not more than 1 year - 1 week;
- employees of more than 1 year but not more than 3 years - 2 weeks;
- employees of more than 3 years but not more than 5 years - 3 weeks;
- employees of more than 5 years - 4 weeks.

Where an employee is over 45 years of age and has completed at least 2 years of continuous service it will be necessary to add a further week to the notice period above.

Modern award and enterprise agreements may include terms specifying the period of notice which must be given in order to terminate employment but the terms will be no less favourable than the above.

There will also be base redundancy pay entitlements. An employee will be entitled to paid redundancy pay on the following basis:

Employee's period of continuous service	Redundancy pay period
at least 1 year but less than 2 years	4 weeks
at least 2 years but less than 3 years	6 weeks
at least 3 years but less than 4 years	7 weeks
at least 4 years but less than 5 years	8 weeks
at least 5 years but less than 6 years	10 weeks
at least 6 years but less than 7 years	11 weeks
at least 7 years but less than 8 years	13 weeks
at least 8 years but less than 9 years	14 weeks
at least 9 years but less than 10 years	16 weeks
at least 10 years	12 weeks

If an employer obtains other acceptable employment for the employee FWA may determine that the amount of redundancy pay is reduced to a specified amount which may be nil but which FWA considers appropriate. The redundancy pay provisions will not apply to small business employers, that is business employers with less than 15 employees.

Employees will not be entitled to redundancy pay if the employee rejects an offer of employment made by another employer that is on terms and conditions substantially similar to and considered on an overall basis no less favourable than the employee's terms and conditions of employment with the first employer and the new employer recognises the employee's service with the first employer for the purposes of the termination/redundancy provisions.
The redundancy provisions will not apply to employees employed for a specified period of time, for a specified task or for the duration of a specified season, an employee who is terminated because of serious misconduct, casual employees or employees to whom a training arrangement has been entered into.

The redundancy provisions will not apply to employees to whom a redundancy scheme in an enterprise agreement applies.

Fair Work Information Statement

FWA has released a fair work information statement which contains information about the National Employment Standards, modern awards, agreement making under the Fair Work Act, the right to freedom of association and the role of FWA and the Fair Work Ombudsman. An employer is required to provide each employee with a Fair Work Information Statement before or as soon as practicable after the employee starts employment.

Conclusion

So, the landscape has changed. It's time to revisit your employment arrangements and update your employment contracts with your employees. Businesses need to carefully consider the impact that the NES will have on costs and ensure their contracting arrangements comply with the NES. Businesses may need to consider changes to their employment arrangements to include provisions that:

- Vary managerial contracts to be consistent with the NES;
- Vary contracts of modern award covered employees to reflect the requirements of both the relevant Modern Award and the NES;
- Insert a clause in contracts of employment which explicitly states that termination paid under the contract is paid to meet NES requirements in respect of notice and redundancy;
- Insert a guaranteed earnings clause for workers whose income exceeds $108,300 per annum. Such a clause lawfully minimises the extent of Modern Award coverage within a particular workplace;
- Vary employment contracts to recognise both unpaid community service leave and make up pay in respect of jury duty and parental leave in accordance with the requirement of the NES.

The raft of legislative changes in the employment space which commenced on 1 January 2010 means that many employees will be subject to different legal obligations in respect of minimum entitlements owed to employees. It is prudent to amend contracts of employment to reflect those new entitlements to minimise the temporal and financial cost of dealing with ambiguity around entitlements going forward.

NSW Workers Compensation- Change In Circumstances

Section 55 of the *Workers Compensation Act, 1987* (the "Act") provides the Workers Compensation Commision with the power to review a previous award of workers compensation where there has been a change of circumstances. So what amounts to a change of circumstances?

Section 55 of the Act provides:

" (1) Any weekly payment of compensation may, because of a change of circumstances, be reviewed by the Commission at the request of the employer or the worker or of the Authority.
(2) On any such review:
(a) the weekly payment may be ended, reduced or increased (but subject to the provisions of this Division relating to the amount of the weekly payment), and
(b) the amount of the weekly payment (if any) shall, in default of agreement, be determined by the Commission.
(2A) If on any such review a weekly payment of compensation is ended or reduced with effect from a day that is earlier than the date of the Commission's order on the review, the Commission may order the worker to refund the amount of any payments made to the worker to which the worker is not entitled as a result of the order on the review.
(3) On any such review, the amount of any weekly payment payable in respect of an injury may be increased to such an amount as would have been awarded if the worker had, at the time of the injury, been earning the wage or salary which the worker would probably have been earning, at the date of the review, if the worker had remained uninjured and continued to be employed in the same or some comparable employment.
(4) A review under this section shall be given such priority as is reasonably practicable, and any necessary directions

may be given to expedite the hearing of the matter. "

The Commission's recent decision in *Carrington Abrasive Cleaners Pty Limited - v - Standen* provides a useful guide as to what is needed to demonstrate a change in circumstances to enable an award of compensation to be reviewed..

Standen was employed with Carrington as a sandblaster / labourer in May 1978. Standen sustained injury to his lower back on 20 February 1979. He sought weekly compensation and the Compensation Court of NSW made an order that the employer pay weekly compensation at varying rates for partial incapacity from 3 May 1980 until 12 January 1984 and then on the basis of total incapacity from 1 April 1984.

In 1994 Carrington filed an application in the Compensation Court of NSW seeking the termination or reduction of the award. The award of compensation was reduced to the sum of $125.00 per week from 16 May 1993 on a continuing basis.

After the variation of the award Standen changed employment, ceased employment and opened his own painting business. He subsequently applied to the Workers Compensation Commission to increase the weekly compensation award from 13 December 1994. He also sought lump sum compensation pursuant to Section 66 and Section 67 of the Act for permanent impairment and pain and suffering.

In deciding whether Standen was entitled to a variation of the award the Commission was called on to consider whether Standen had demonstrated a change in circumstances as required by Section 55 of the Act.

The decision in Standen's case confirmed the applicable principles when considering the criteria to enliven section 55 of the Act are:

- A Section 55 review is not a reconsideration of facts found in the earlier proceedings.
- The review is an examination of circumstances which may have occurred since the original determination.
- If the circumstances represent a change from those prevailing at the date of the original determination, there may be grounds upon which a review should be carried out.
- In applying Section 55 the starting point is an unqualified acceptance of the original decision maker's findings.
- A review will occur only where it is established that the circumstances which were before the original decision maker at the time of the award and upon which the findings in relation to a statutory entitlement were made have changed.
- Relevant circumstances are not restricted to consideration of changes of medical condition or capacity for work.
- The onus is upon the party seeking the review to establish the issue of change of circumstances.

The following facts will have a bearing on any determination pursuant to Section 55:

- Whether an injured worker's condition as a result of the injury has either improved or deteriorated.
- Whether there has been a change as to dependency.
- Whether a worker's earnings have changed.
- Whether there has been a general rise in the level of wages prevailing in the community.
- Any change in the criteria for entitlement to benefits under the legislation.

The facts of each case must be considered against these criteria to ascertain whether there are any relevant changes in circumstances which would warrant a review of the compensation award.

In Standen's case the Commission considered there were at least three relevant changes in circumstances, namely:

- Standen sold his business in April 2004 and his ability to earn had to then be assessed on the open labour market.
- Wage rates in respect of both probable earnings but for injury and his ability to earn have changed significantly between 1994 and 2004.
- The medical evidence suggested a change in Standen's physical condition as a result of the work injury.

The facts of each case must be considered when determining whether a change of circumstances exist pursuant to Section 55 of the Act.

It is important to note that either an injured worker or an employer can make an application pursuant to Section 55 seeking a review of the award in place.

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