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.

Can Insurers Get Their Money Back After Settlement

Sometimes a question arises as to whether or not an insurer can recover settlement monies paid and overturn a settlement when it finds out it was deceived.

In NSW the *Motor Accidents Compensation Act* ("*MAC*") regulates the awarding of damages for injuries sustained in a motor accident. The *MAC Act* contains Section 118 that provides that if it is established by the insurer that for the purpose of obtaining a financial benefit, the claimant did or omitted to do anything (including the making of a statement) concerning a motor accident or any claim relating to a motor accident with knowledge that the doing of the thing or the omission to doing the thing was false or misleading, then:

- a person that has a liability in respect of a payment, settlement, compromise or judgment relating to the claim is relieved from that liability to the extent of the financial benefit so obtained by the claimant; and
- a person who has paid an amount to the claimant in connection with the claim (whether under a settlement, compromise or judgment, or otherwise) is entitled to recover from the claimant the amount of the financial benefit so obtained by the claimant and any costs incurred in connection with the claim.

The approach is not dissimilar to the common law which provides remedies where there is fraud. An insurer who discovered the claimant's fraud before it paid the settlement sum under the general law can rescind the settlement agreement or bring proceedings in equity to enforce its rescission which would have remitted the parties to their original rights and liabilities.

So things are not so certain for a claimant when he settles if a fraudulent claim has involved an element of fraud.

Section 118 of the *MAC Act* was recently considered by the NSW Court of Appeal in *Checchia v IAG Insurance Australia Limited t/as NRMA Insurance*.

Checchia sustained a back injury when his bicycle was struck by a motor vehicle. He brought a damages claim which was settled for $1.2 million. Before the settlement monies were paid NRMA ascertained that Checchia had sustained a back injury in an earlier accident. NRMA refused to pay the settlement monies, alleging Checchia's claim was fraudulent. NRMA argued that had it known of the earlier injury its management of the claim would have been different and it would have only settled the matter for a much lower sum.

The matter came before Rothman J of the Supreme Court, who determined that Checchia had failed to disclose his earlier injury and exaggerated the extent of his injuries but he had not done so for the purpose of obtaining a financial benefit within the meaning of the MAC Act. Rothman J ordered judgment for Checchia in the settlement amount with interest and costs. NRMA appealed from that judgment.

Beazley AJA with whom the two other judges of the Court of Appeal agreed noted that when construing Section 118 It was necessary to look at the subjective intention of the claimant to

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determine what was the purpose of the claimant's act. Beazley AJA commented:

> *"absent an admission by the person concerned, there is rarely direct evidence of a person's subjective purpose or intention. Rather, purpose or intention is to be inferred from the whole of the evidence: ….. The evidence of the person whose purpose is in question may be taken into account: ….. although, … such evidence would ordinarily be treated with great caution. As his Honour also recognised in this case, the evidence relevant to purpose included the fact of the misleading conduct itself ….".*

Beazley AJA also noted that section 118 requires that:

> *"the false and misleading conduct be engaged in for the purpose of obtaining "* a financial benefit *". A person may knowingly engage in false or misleading conduct in circumstances where no claim is available, for example, where a claimant was not entitled to claim compensation because the injury was sustained in non-compensable circumstances. In that case, the inference would readily be drawn that the conduct was engaged in for the purpose of obtaining a financial benefit. Alternatively, a person may be entitled to compensation under the MAC Act but may engage in false or misleading conduct, such as, for example, by exaggerating the extent of disability, or not disclosing a pre-existing injury, for the purpose of obtaining greater compensation than that to which he or she is entitled. Whatever be the content of the false and misleading conduct, it must be for the purpose of obtaining a financial benefit under the MAC Act.*
>
> *Although an insurer may have established the factual matters necessary to satisfy s 118(1), it will not be known whether an insurer will be relieved of liability under s 118(2)(a) in respect of a payment, settlement, compromise or judgment until it is known whether the financial benefit in fact obtained by the claimant was one to which he or she was not entitled. That requires a determination of the financial benefit to which the claimant was entitled on the premise that no misleading statement was made. The quantitative difference between the two, if any, is the extent to which the insurer is relieved from liability pursuant to s 118."*

The Court of Appeal determined there must be correspondence between any financial benefit the claimant was fraudulently seeking and the financial benefit from which the insurer is relieved.

Accordingly, a court will be called on to determine the extent of financial benefit so obtained. This may be difficult where there is a settlement as was noted by the Court of Appeal.

Justice Beazley (with all other judges agreeing) noted that in this case where there was a settlement or compromise, it was necessary to determine "*not what the person guilty of the false and misleading conduct would have obtained in a judgment but the financial settlement that the person obtained in the settlement as a result of the false and misleading conduct*."

This approach will inevitably lead to evidence from claims managers as to what settlement would have been offered blessed with the correct information.

NRMA had provided evidence from a claims manager although the original Trial Judge noted the claims manager's evidence displayed a subjective annoyance at being misled and this subjectivity seemed to colour his assessment of the nature of the claim submitted and the level of incapacity. The Trial Judge had rejected the claims manager's evidence.

The Trial Judge when he considered NRMA's claim had determined the amount the claimant would have obtained in a judgment but this was not the correct approach. The Court of Appeal noted that NRMA bore the onus of establishing both that Checchia's conduct fell within Section 118 and the amount in respect of which it was relieved of liability.

Hanley AJA noted that under the section the insurer must prove that the claimant made his representation with the knowledge that it was false and misleading. Hanley AJA noted:

> *"Where a claimant knowingly makes a misrepresentation to the insurer which is likely, viewed objectively, to induce it to act to its financial detriment, the tribunal of fact will ordinarily infer that his purpose was to obtain a financial benefit.*
>
> *The insurer does not have to establish that the claimant had a clear understanding of the nature or extent of the financial benefit that he might or would obtain if the insurer acted on his misrepresentation. The claimant could normally only make a misrepresentation in order to benefit in some way. The insurer does not have to prove a more focussed purpose.''*

But does exaggeration amount to misrepresentation as the trial judge had concluded that there was the exaggeration was not for the purpose of financial gain. Hanley AJA noted:

> *"There is a real distinction between a claimant who suffers symptoms all the time and one who only suffers them from some time. There is no scope for a finding that the difference was not material."*

Hanley AJA went on to note that:

> *"A finding of deliberate exaggeration compels the inference that the claimant did this for the purpose of obtaining a financial benefit. No other purpose for knowingly making the misrepresentations is plausible. Otherwise why not tell the truth?"*

At the end of the day the Court of Appeal determined that the trial judge erred in his approach and the Court of Appeal remitted the case for retrial to determine NRMA's entitlement. NRMA will be required to prove the financial benefit that was obtained and will be faced with the difficulties of doing so as the Court of Appeal noted that the Trial Judge may well reject evidence of a case manager if it were appropriate to do so. The fact there was a misleading act will not be in issue nor will there be an argument that the misleading act was for a financial benefit, but how much was the benefit.

It will not always be easy for an insurer to establish the extent of financial benefit. As Hanley AJA noted:

> *"It may not be easy for an insurer to establish "the extent of the financial benefit". If the claim had gone to trial and the claimant's credit was damaged the tribunal of fact would apply the onus of proof and discount his claims. It would disallow what he had not satisfactorily proved.*
>
> *The insurer, with the reverse onus under s 118(2), will face the onus discount and fail to recover amounts that it cannot prove were "so obtained". A dishonest claimant who exaggerated a genuine injury may end up retaining more from his settlement than he would have received at a trial."*

Claimants need to be aware that a settlement or judgment does not necessarily bring an end to the claim where an insurer has been misled by exaggerations or misrepresentations. Insurers do have remedies available to them after they have settled a claim if they were deceived. The *MAC Act* and the common law provide an avenue for an insurer to recover monies paid where they have suffered financial detriment by reason of fraud or misrepresentation.

Recreational Services and The Trade Practices Act – The High Court Decides

In a previous issue of GD News we discussed the interaction between the Trade Practices Act 1974 ("TP Act) and the Civil Liability Act in NSW. The TP Act, which has now been replaced by the Competition and Consumer Act 2010, provides protection for consumers and comes into play when persons are injured as a consequence of services provided to consumers. Section 74 of the TP Act which is now repealed provided that in every contract for the supply of services to a consumer by a corporation in the course of a business there is an implied warranty that the services will be rendered with due care and skill. The states and territories throughout Australia have all introduced civil liability legislation to regulate civil liability claims and that legislation provides recreational service providers with rights to limit their liability under contract.

In *Insight Vacations Pty Limited v Young*, the High Court considered the interaction between two pieces of legislation, the TP Act and the NSW Civil Liability Act

Stephanie Young was a passenger in a coach travelling on a motorway in Slovakia. Young was standing next to her seat in order to retrieve an item from the overhead compartment when the driver of the coach slammed on the brakes to avoid a collision. Young was thrown backwards, hit her head on the floor, and sustained injury. The tour was part of a 20 day European Tour that had been purchased by Young in Australia. The incident followed a road rage incident in which the coach driver and driver of the car had been involved previously. Young commenced proceedings in the District Court of New South Wales alleging negligence and alleging a breach of an implied term of the agreement that the tour operator would act with reasonable diligence, care and skill in carrying out the services. The contract for the supply of services contained two exclusion clauses and the District Court of New South Wales determined that these clauses could not be relied on, as they were inconsistent with the terms of the contract implied by the TP Act. Young received damages in the District Court totalling $22,371.00.

There was an appeal to the Court of Appeal.

In New South Wales Section 5N of the Civil Liability Act 2002 provides:

> *"1. Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from a breach of an express or implied warranty that the services will be rendered with reasonable care and skill.*
>
> *2. Nothing in the written law of New South Wales renders such a term of the contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.*
>
> *3. A term of the contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk, operates to exclude any liability to which this division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.*
>
> *4. In this section, recreation services means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity."*

Recreational activities are defined to include any pursuit or activity engaged in for enjoyment, relaxation or leisure.

Section 68(1)(c) of the TP Act renders void provisions in the Contract that exclude, restrict or modify liability for a breach of a conditional warranty implied by the provisions of the TP Act including Section 74.

However Section 74 of the TP Act includes the following provision:

> *"2A. If:*
>
> *(a) there is a breach of an implied warranty that exists because of this section, in a contract made after the commencement of this section; and*
>
> *(b) the law of a state or territory is the proper law of the contract, the law of the state or territory is the proper law of the contract, the law of the state or territory applies to limit or preclude liability of the breach, and recovery of that liability (if any) in the same way, as it applies to limit or preclude liability, and recovery of the liability, for breach of another term of the contract."*

Section 68B of the TP Act also provides that:

> *"A term of a contract for the supply by a corporation of recreational services is not void under Section 68 by reason only as the terms excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:*
>
> *(a) the application of Section 74 to the supply of the recreational services under the Contract; or*
>
> *(b) the exercise of a right conferred by Section 74 in relation to the supply of the recreational services under the Contract; or*
>
> *(c) any liability of the Corporation for a breach of a warranty implied by Section 74 in relation to the supply of the recreational service under the contract."*

In the Court of Appeal the appeal by the tour operator was refused based on the majority judgment of Basten J and Sackville AJA who concluded the exclusion clauses could not apply.

Insight appealed to the High Court.

The High Court delivered an unanimous judgment dismissing the appeal. The High Court held that Section 74(2A) of the TP Act picks up and applies as surrogate Federal laws, the State laws that apply to limit or preclude liability for breach of an implied warranty. However, Section 5N of the Civil Liability Act is not picked up, as it does not meet that description. Section 5N does not of itself limit or preclude liability but permits parties to enter into contracts that exclude, restrict or modify certain liabilities. The NSW law was inconsistent with the TP Act as it provided a right to a recreational service provider to contract out of liability rather than remove the right in the legislation.

In addition the Court noted the NSW Civil Liability Act could have no application in any event as the incident did not occur within New South Wales, therefore Section 5N did not apply.

The High Court stated:

> *"That construction of the provision reads 'contract for the supply of recreation services' as a compound expression.*

The relevant geographical limitation of the compound expression directs attention to the place of performance of the contract. Where are the relevant recreation services to be supplied? And once that reading is adopted, it follows that it is not a necessary nor appropriate to construe the sub-section as importing any other geographical limitation (or extension) of its operation. More particularly, if Section 5 as it is read, as it should be, as the provision which is hinted about the place of performance of the relevant contract, there is no satisfactory basis upon which the provision could be construed as including, in the class of contracts to which Section 5N(1) applies, contracts that are to be performed outside New South Wales but whose governing law, is the law of that state. Reading Section 5N(1) has hinged on the place of performance of the contract best gives effect to the purposes and text of the provision when it is read in its statutory context."

The High Court also noted that the first part of the exclusion clause read "where the passenger occupies a motor coach seat fitted with a safety belt" and therefore the clause should be read as referring only to times when a passenger is seated, not to times when the passenger stands up to move around the coach. Further it was noted that the contract did not require passengers to remain seated at all times.

The High Court therefore held that Insight was liable for a breach of an implied contractual warranty and the contractual exclusion of liability had no effect.

But things have changed since 1 January 2011. The Trade Practices act is now known as the Competition and Consumer Act and the Act now permits a term of a contract for the supply of recreational services to a consumer to exclude, restrict or modify, or has the effect of excluding, restricting or modifying liability of the person for a failure to comply with a guarantee under the Act. Therefore the issue in Insights case will not arise for contracts entered into after 1 January 2011.

However the decision in Insight provides a warning to all suppliers of recreational services that exclusions in their contracts will not be effective where the recreational services are provided outside NSW.

Duty Owed To "Reactor Rat"

In recent times it has become harder for claimants to succeed against entities other than their employer. In decisions such as *Leighton v Fox and Unilever v Pahi* the Courts have found that the responsibility of an employer to its employee was paramount when the employer was performing services for others with the employer being solely liable for injuries sustained by an employee. A win against an employer alone may be a hollow victory as the damages that can be obtained against an employer are substantially less than the damages that can be obtained from any others who have played a role and contributed to the cause of the injury.

However it will not always be the case that the employer is solely liable for injuries to employees engaged in the provision of services for others. Those that engage others to provide services can have a liability as a result of the overall supervision of the services and or the supply of equipment.

The High Court has recently determined that Zurich Financial Services Australia Limited ("Zurich"), the insurers of WOMA (Australia) Pty Limited ("WOMA"), were liable for injuries sustained by Geoffrey Kuhl ("Kuhl"), an employee of Transfield, where Transfield was providing services to WOMA and WOMA was supplying plant and had an overall supervisory role over the services provided.

Kuhl sustained injury on 19 November 1999 during the course of his employment with Transfield Construction Pty Limited ("Transfield"). Pursuant to Section 93E of the Workers Compensation and Rehabilitation Act 1981, Kuhl was barred from bringing a claim in negligence against Transfield as he did not meet the requisite threshold. Kuhl therefore commenced an action in the District Court of Western Australia against WOMA (Australia) Pty Limited ("WOMA") and Hydrosweep Pty Limited ("Hydrosweep"). Both companies were deregistered after Kuhl's injury but prior to commencement of proceedings. Kuhl therefore made an application pursuant to Section 601AG of the Corporations Act 2001 to join the insurers of WOMA and Hydrosweep to the proceedings. Zurich was the insurer of WOMA at the relevant time.

Kuhl's claim was unsuccessful in the District Court and in the Court of Appeal of Western Australia. Kuhl however obtained leave to appeal to the High Court.

Kuhl commenced employment with Transfield in September 1999. He cleaned reactor grid floors at a plant owned and operated by BHP Billiton in Port Headland, Western Australia. The reactors cooked "fines", small pieces of iron ore, which

changed the composition of the fines into hot briquetted iron (HPI). Kuhl, performing the role colloquially known as "reactor rat", had the task of entering the reactors, breaking up any solidified waste material with a jackhammer or sledgehammer and then removing the accumulated fines and other wastes using a vacuum. As of November 1999 Transfield was solely responsible for cleaning out the reactors including using the vacuum hose. Another Transfield employee, who was known as the "hole watcher" would look through a window into the reactor whilst it was being cleaned to monitor the "reactor rats" and test gas levels. Transfield also had supervisors on site and those supervisors would allocate the work to each employee and conduct meetings to discuss safety amongst other things. WOMA provided a vacuum truck, the vacuum hose and other equipment relevant to the vacuuming system. WOMA would set up the equipment and supply two operators for the system; one to operate the truck and another to check and maintain the line. WOMA would also assist in clearing any obstructions in the vacuum hose when Transfield employees were unable to do so. For a period in November 1999 Hydrosweep supplied a vacuum truck and two operators to WOMA.

At about 4.30 am on 19 November 1999, whilst Kuhl was vacuuming the relevant reactor, a blockage occurred in the hose. Kuhl left the reactor to try and free the blockage. The evidence at trial was that blockages would occur frequently, sometimes up to 20 times per night. Some blockages were able to be cleaned by Transfield employees shaking the hose, hitting the blockage with a shovel or other measures. Blockages that could not be fixed were dealt with by WOMA employees or people provided for the use of WOMA. On this particular occasion Kuhl had been unsuccessful in unblocking the hose and a Mr Kelleher, an employee of Hydrosweep but provided for the use of WOMA under WOMA's direction made a gesture to Kuhl that was interpreted by Kuhl as indicating the hose had been unblocked. In fact, the blockage had not been removed. Kelleher had then passed the hose back to Kuhl and sometime after Kuhl's arm was sucked into the hose.

The majority of the High Court allowed the appeal and made an order setting aside the orders of the Court of Appeal and District Court in entering judgment against Zurich in the amount of $265,000.00. The High Court held that WOMA had a duty of care to users of the hose and this extended to risks in relation to the passing of the hose. The Court also held that WOMA had breached that duty by failing to issue instructions not to pass the hose, while the power was turned on. WOMA had also failed to install a break box close to the head of the hose that could have broken the vacuum pressure. QBE, the insurer of Hydrosweep, however, maintained their successful defence of the claim. No doubt Transfield would also have been liable if they were able to be sued.

The High Court in a majority judgment stated:

> *"That is not to say that WOMA owned no duty to Mr Kuhl. The evidence established that WOMA provided the truck, set up the hose, was responsible for any blockages in the hose and was to provide two personnel, one for unblocking the hose and the other for supervising the operation of the truck. The hose provided had suction operating at 1500 pounds per square inch (some 50 times more powerful than a common household vacuum cleaner), had a diameter of 4 to 6 inches and was strong enough to suck up lumps of solidified iron ore material larger than 6cm in diameter and, indeed, to suck up Mr Kuhl's arm with such force that it took two men to free him. The hose extended over a total distance of up to 60 metres from the truck. From this evidence, it can hardly be said that it was not reasonably foreseeable, in light of the power of the hose, that a person using the hose might suffer injury if WOMA did not take reasonable care in providing appropriate equipment. . . . WOMA exercises the level of control over the vacuuming facility both in its ability to turn the truck off and with its responsibility for clearing blockages. WOMA was not responsible for the training of Mr Kuhl, nor was Mr Kuhl subject to WOMA's control. However, the supervision of the vacuuming facility by WOMA's servants, and it's obvious knowledge that persons like Mr Kuhl would be using the vacuuming hose for the purpose for which WOMA provided the hose, indicates that it was reasonable to require WOMA to have persons like Mr Kuhl in contemplation as people who might be put at risk by WOMA's negligence in providing and operating the vacuuming facility."*

The case is fairly simple one on its facts but no doubt holds out some hope for claimants. WOMA had the responsibility for supervising the vacuuming facility and in these circumstances owed a duty of care to Kuhl. Interestingly Hydrosweep escaped liability even though they employed Kelleher as the Court found that Kelleher was under WOMA's direction. It is not as simple as "delegate the task to someone else and you have no responsibility." Outsourcing can minimise risks but businesses cannot escape the fact that they have a responsibility for their equipment and the method of use of the equipment when when the equipment is used by someone that supplies services to the business.

Australian Privacy Laws

In our August 2010 edition of GD News we reviewed the status of the Rudd Government's proposed reforms of Australian

Privacy Laws. At that time an exposure draft had been released setting out possible changes to the Australian Privacy Principles. At this stage legislative change has not resulted.

The Commonwealth Government has now released a Senate Committee Report on Privacy Protection in Australia. The Senate Committee noted its inquiry coincided with the European's Commission review of the General European Union Legal framework on the protection of personal data, as well as consideration by the Attorney General's Department of a mandatory data retention scheme based on that adopted by the EU in 2006. The inquiry also follows on the heels of a United States Preliminary Report released in December 2010 by the Federal Trade Commission on "protecting consumer privacy in an era of rapid change" and the recommended framework for business and policymakers in dealing with consumer privacy issues.

There were 29 written submissions made to the Senate Committee and public hearings were held. There are 128 pages in the report and there are nine recommendations.

The most significant recommendation is that the Government accept the Australian Law Reform Commission's recommendation to legislate a cause of action for serious invasion of privacy.

The other recommendations include that:

1. Before pursuing any mandatory data retention proposal the Government undertake:
   (a) an extensive analysis of the costs, benefits and risks of such a scheme,
   (b) justify the collection and retention of personal data by demonstrating the necessity of that data to law enforcement activities,
   (c) quantify and justify the expense to internet serve providers of data collection and storage by demonstrating the utility of data retained to law enforcement, and
   (d) ensure Australians that data retained under such scheme will be subject to appropriate accountability, and monitoring mechanisms and will be stored securely.
2. The Australian Privacy Commissioner's complaint handling role be expanded to more effectively address complaints about the misuse of privacy consent forms in the online context. It is recommended that the Privacy Commission develop guidelines on the appropriate use of privacy consent forms for online services.
3. The small business exemption should be amended to ensure that small businesses which hold substantial quantities of personal information or which transfer personal information off shore are subject to the Privacy Act, 1988.
4. That the Office of the Privacy Commissioner in consultation with web browser developers and ISPs and the advertising industry develop and impose a code which includes a "do not track" mode.
5. That the Privacy Act extend to all organisations which collect information from Australia in the online context to ensure that those organisations are subject to the Privacy Act, 1988.
6. That all Australian organisations that transfer personal information overseas are fully accountable for protecting privacy of that information.
7. That the Government consider the enforceability of the Privacy Act and if necessary strengthen the powers of the Australian Privacy Commissioner to enforce off shore data transfer provisions.

We need to wait and see whether the Federal Labour Government takes up any of the recommendations of the Senate Committee. The Labour Government did not have a majority of members on the Committee.

However, the release of the Report is sure to bring Privacy issues back in focus and may result in potential changes concerning Privacy legislation returning to the Federal Government's agenda of legislative reform.

Interest on Judgments in NSW

The NSW Court of Appeal in Woolworths Limited v Strong has recently provided some clarification on the way that interest on judgments is calculated pursuant to the Civil Procedure Act 2005.

Strong brought proceedings against Woolworths claiming damages for personal injuries suffered in an accident. She was successful at Trial and an appeal followed. The Trial Judge granted a stay of the judgment provided 50% of the verdict

monies were paid. Woolworths paid 50% of the verdict monies. Ultimately Woolworths succeeded in their appeal and obtained an Order for Restitution requiring Strong to repay the monies that Woolworths had paid. There was no dispute that Strong had to repay the monies plus interest, however a dispute arose as to the method of calculating interest. The sole issue before the Court of Appeal was the rate of interest that was required to be paid.

Strong argued that she should only have to pay interest at market rates and the appropriate measure of the market rate was The Reserve Bank of Australia ("RBA") rate. The Court of Appeal noted that it was the practice of the Court "to award restitutionary interest at the rates prescribed for judgments unless special circumstances exist." The Civil Liability Procedure Rules prescribe the rate of interest that is payable. Effectively, from 1 July 2010 the relevant rule, the UCPR 36.7 was amended to provide the prescribed rate at which interest is payable was the cash rate last published by the RBA plus 6%.

Rule 36.7 provides the prescribed rate at which interest is payable is:

- in respect of the period from 1 January to 30 June in any year –the rate that is 6% above the cash rate last published by the RBA before that period commenced, and
- in respect of the period from 1 July to 31 December in any year – the rate that is 6% above the cash rate last published by the RBA before that period commenced.

The Court of Appeal determined that the change introduced by the Rule was not retrospective. Accordingly, interest calculated prior to 1 July 2010 needed to be based upon the prescribed rate in the Regulations that existed prior to 1 July 2010 which were set rates.

The Court of Appeal confirmed the applicable rates of interest were:

- 1 March 2009 to 30 June 2010 – 9%;
- 1 July 2010 to 31 December 2010 – 10.5%; and
- 1 January 2011 to date - 10.75%.

As the RBA cash rate adjusts so will interest rates payable in the future.

Incidentally Strong has sought leave from the High Court to appeal the primary decision on liability in the case and was successful in that application. The High Court will hear that appeal later this year and we can look forward to the High Court's comments on liability in slip and fall accidents in shopping centres.

Shadow Directors

The *Corporations Act* contains provisions that impose obligations on directors. In particular, Section 588G provides that a director of a company that incurs a debt at the time that the company is insolvent may be personally liable for the debt. The *Corporations Act* also contains definitions including a definition of a "director" which includes shadow directors who are the persons who control the directors in that the director of the company or body are accustomed to act in accordance with that person's instructions or wishes. The extended definition does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity or the person's business relationship with the directors of the company.

A director of a company is defined to be a person who:

- is appointed to the position of a director; or
- is appointed to the position of an alternate direction and is acting in that capacity; or
- the directors of a company are accustomed to act in accordance with the person's instructions or wishes.

The NSW Supreme Court in Buzzle Operations Pty Limited (in liquidation) v Apple Computers Australia Pty Limited concluded that the Corporations Act definition of directors which is intended to catch shadow directors can catch a company and therefore a company can be a director for the purposes of the obligations imposed on directors by the Corporations Act. The case also provided guidance on the tests relevant to the determination of "who is a shadow director" and now that the Court of Appeal has been called on to consider the case, further clarification has been provided.

To understand the decision it is important to examine the relevant facts of the case.

Buzzle Operations Pty Limited ("Buzzle") acquired the stock and business of six retailers (Apple resellers of Apple computer

products). The Apple resellers took shares in Buzzle's holding company. It was intended that a short time after Buzzle had established the merged business, it's holding company would be floated on the Australian Securities Exchange and the shares issued to members of the public.

Each Apple reseller had entered into reseller agreements with Apple Computers Australia Pty Limited and as part of the merger the Apple resellers transferred their stock, plant and equipment and goodwill to Buzzle. Apple Computers' consent was needed to the merger because Apple had a charge over the assets to be transferred to Buzzle. Apple Computers' consent was also required for the assignment or transfer of the reseller agreement.

The proposed float did not proceed. Buzzle's business failed. Apple Computers appointed receivers pursuant to their charge and an application was filed to wind up Buzzle.

A liquidator was appointed to Buzzle. The liquidator commenced proceedings against Apple Computers and others alleging that Apple Computers was an officer of Buzzle.

Buzzle alleged that upon merger of the Apple reseller business, Apple Computers issued invoices in excess of $6 million for the stock that was transferred from Apple resellers to Buzzle.

Buzzle made a number of payments to Apple Computers on behalf of the resellers. The liquidator argued that when those payments were made Buzzle was insolvent and the transactions were uncommercial transactions and sought an Order directing Apple to repay the monies to Buzzle. In addition, the liquidator sought to recover the monies from Apple Computers, arguing that it was a shadow director and liable for insolvent trading.

Justice White determined that in light of the facts that emerged in the case Apple Computers was not a shadow director. Effectively it was noted that commercial arrangements between companies would not be enough to trigger the shadow director provisions even where a company has significant influence over the conduct of the business by virtue of those commercial arrangements. Justice White determined that acting in a particular way in light of commercial ramifications will not be sufficient to demonstrate that and there must be a causal connection between the instructions or wishes of the shadow director and the act taken by the directors for a person or company to be a shadow director.

The liquidator was not content with that decision and appealed to the NSW Court of Appeal which recently handed down its decision upholding Justice White's findings.

The Court of Appeal generally agreed with Justice White in his findings on the shadow director case. Justice Young (with whom the two other Justices of the Court agreed) set out the various principles that emerge from the leading authorities to determine whether or not a person is a shadow director. Justice Young commented:

> *"First, not every person whose advice is in fact heeded as a general rule by the board is to be classed as a de facto or shadow director.*
>
> *Secondly, if a person has a genuine interest of his or her or its own in giving advice to the board, such as a bank or mortgagee, the mere fact that the board will tend to take that advice to preserve it from the mortgagee's wrath will not make the mortgagee, etc a shadow director.*
>
> *Thirdly, the vital factor is that the shadow director has the potentiality to control. The fact that he or she does not seek to control every facet of the company or the fact that from time to time the board disregards advice is of little moment.*
>
> *Fourthly, …(the) proposition that the evidence must show "something more" than just being in a position of control must be shown. The whole of the facts of the case must be shown to see whether that power to control was put into practice. The emphasis that one must judge on the whole of facts and circumstances is made many times over in the leading cases, …….*
>
> *Fifthly, although there are problems with cases where the board of the company splits into a majority and minority faction, so long as the influence controls the real decision makers, the person providing the influence may be a shadow director.*

The Court of Appeal noted the primary judge decided the case bearing these propositions in mind, particularly Proposition four. The Court of Appeal found no error in this approach.

A person is not a shadow director merely because they impose conditions on their commercial dealings with a company. There needs to be a causal connection between an alleged shadow directors "instructions or wishes" and the company's actions. The Court of Appeal also noted the instructions or wishes must also be in relation to board activities and not just managerial decisions with the distinction being a question of fact. However, the instructions or wishes do not have to be in relation to every board activity.

As Hodgson JA noted:

> *"In my opinion, the statutory formula contemplates a director as being accustomed to act in accordance with the instructions or wishes of a person, in the sense of treating those instructions or wishes as themselves being a sufficient reason so to act, rather than making their own decisions in which those instructions or wishes are merely taken into account as one factor, external to the management of the company, bearing on what is in the best interests of the company."*

Justice Young concluded that:

> *"For the directors to collectively be accustomed to act in accordance with a person's instructions or wishes there must be a pattern of behaviour established from acting in accordance with instructions and should not be established from acting in accordance with wishes regarding management matters."*

At the end of the day a company can be a shadow director, however exercising influence over a company supported by contractual rights will not necessarily place a company in the position that it is a shadow director. Commercial arrangements between companies will not be enough to trigger the shadow director provisions even where a company has significant influence over the conduct of business by virtue of those commercial arrangements. However, habitual compliance over a period of time with "wishes or instructions" can result in a finding that a company is a shadow director where there is a causal connection between the "instructions or wishes" and the acts taken by the directors.

Joining Insurers In Proceedings

The NSW Court of Appeal has recently confirmed that the Uniform Civil Procedural Rules in NSW provide an avenue to join an insurer to proceedings without the need to proceed against the insurer pursuant to section 6 of the Law Reform (Miscellaneous Provisions) Act 1946. The Law Reform Miscellaneous Provisions Act 1946 provides that in certain circumstances the liability of an insurer to a third party is a charge on insurance proceeds payable by an insurer to the insured in respect to that liability and that the charge may be enforced by the third party directly against the insurer.

The Court of Appeal in CGU Insurance Limited v Bazem Pty Limited ("Bazem") was called on to consider the correctness of an order, which had been granted by a trial judge providing a claimant with leave to proceed against an insurer.

Bazem had engaged an architect. CGU were the architect's insurer. Bazem commenced proceedings against the architect claiming damages for breach of contract and for the supply of architectural services in a negligent fashion. The architect was named as one of the insured in a civil liability professional indemnity insurance policy. Under the policy, the insurer was obliged to indemnify the architect against certain types of civil liability claims including claims for damages for breach of duty and unintentional breaches of the Trade Practices Act 1974.

Initially the insurer assumed the conduct of the architect's defence however it ceased to do so and informed the architect that it declined to indemnify the architect under the policy. The basis of denial was an alleged non-disclosure and misrepresentation by the architect. Bazem sought to issue an Amended Statement of Claim, which proposed to claim a declaration against the insurer, that the insurer was obliged to indemnify the architect under the policy. The trial judge granted leave to Bazem to proceed with that claim. The insurer challenged the trial judge's decision and the matter came before the Court of Appeal.

The insurer argued that to permit the joinder of the insurer in these circumstances would render section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 superfluous and could lead to the joinder of every insurer in any proceedings. Bazem argued that there were common question of fact, which would be subject of both the claim against the architect and the claim that it would make against the insurer.

The Court of Appeal noted that the powers given by the Uniform Civil Procedural Rules, in particular Rule 16.19 is only

available where Rule 16.19(1)(a) and (b) are satisfied. A party may join more than one defendant as of right if those conditions are satisfied.

Rule 16.1 provides:

> *"Two or more persons may be joined as plaintiffs or defendants in any originating process if:*
>
> *(a) separate proceedings by or against each of them would give rise to a common question of law or fact, and*
>
> *(b) all rights or relief claimed in the originating process are in respect of, or arise out of the same transaction or series of transactions, or if the court gives leave for them to be joined."*

The relevant circumstances to trigger the joinder of an insurer pursuant to the Law Reform Miscellaneous Provisions Act 1946 did not apply in this case, however, there was a risk for Bazem that the architect did not prosecute its entitlement to indemnity. It was necessary for NRMA to obtain the leave of the Court of Appeal to challenge the trial judges order. The Court of Appeal chose to refuse a grant of leave and at the end of the day, it was unnecessary for the Court of Appeal to determine whether there were common questions of law or fact or the same transactions or series of transactions as required by Rule 16.1. The end result is that the original order of the trial judge stands and NRMA now finds itself a party to the proceedings.

The case serves as a reminder to insurers that they are exposed to a direct joinder in proceedings, even where an insured is not insolvent.

OH&S Changes in NSW

The NSW Government has decided to lead from the front when it comes to implementing the new national OH&S Regime. Whilst all States and Territories, other than Western Australia have signed on to implement a national OH&S scheme which adopts model Legislation, Regulations and Codes of Practice that have been developed by the Federal Government, the NSW Government has stepped it up and introduced draft legislation that will apply in NSW in the near future and when implemented the legislation will implement some of the changes found in the model Legislation with immediate effect.

The NSW Government introduced two bills, the Work Health and Safety Bill 2001 and the Occupational Health and Safety Amendment Bill 2011. When these Bills are passed there will be substantial changes to the NSW OH&S Regime. The strict duties imposed by the existing legislation to ensure the health and safety and welfare of persons at work will be qualified by introducing the concept of reasonable practicability.

The Work Health and Safety Bill, if passed, will not commence until 1 January 2012. This Bill effectively enacts the model OH&S Legislation which has been prepared by the Federal Government, however there is a sting in the tail for the NSW Industrial Relations Commission. Currently prosecutions for breaches of the OH&S Act are brought either in the Chief Industrial Magistrate's Court or the NSW Industrial Commission. After 1 January 2012 the NSW Industrial Commission will no longer deal with prosecutions as the Local Court and District Court of NSW will be vested with the power to deal with prosecutions.

In addition, the legislation when passed will sound the siren to bring an end to the rights of Unions to bring prosecutions for breaches of the OH&S legislation. The NSW Labour Government had opposed the removal of the right of unions to prosecute businesses for OH&S breaches and opposed any nationalised OH&S regime that did not include such a right, however that opposition was put to bed with the recent change in Government.

The mainstream criminal courts will from 1 January 2011 be responsible for the enforcement of breaches of the Work Health and Safety Laws. The changes are designed to better integrate breaches of work health and safety legislation with the general criminal law and provide clear avenues of appeal. Decisions of the District Court will be able to be appealed to the Court of Appeal and eventually the High Court.

The Occupational Health and Safety Bill will amend the existing OH&S legislation with effect from the date the legislation commences. It will change the duty owed to ensure the health, safety and welfare of persons from strict liability where a business needed to show that it was not reasonably practicable to comply with the duty to avoid conviction.

In a prosecution WorkCover will need to prove beyond a reasonable doubt that a business had not acted so far as is reasonably practicable to secure a conviction.

The concept of reasonably practicable will be introduced to existing legislation by changing the phrase "*must ensure the health and safety*" to "*must ensure so far as is reasonably practicable the health and safety*...".

There will be some clarification or the way the Court is to assess what is reasonably practicable and the following provision will be included:

> *"7A The Concept of Ensuring Health & Safety*
>
> *A duty imposed on a person by this division (or any other provision of or made under this Act) to ensure, so far as is reasonably practicable, health and safety requires a person:*
>
> *(a) to eliminate risks to health and safety so far as is reasonably practicable; and*
>
> *(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable."*
>
> *When considering what is reasonably practicable the relevant matters which have to be taken into account and weighed up include:*
>
> *(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."*

In addition, the Deeming Provisions which provide that directors and persons concerned in the management of a corporation are deemed to have committed the same offence as a corporation subject to various defences will be removed. Instead the new legislation provides that a duty will be placed on officers of the corporation to exercise due diligence to ensure that the corporation complies with health safety and welfare duties.

Due Diligence is defined to include taking reasonable steps:

> *(a) "to acquire and keep up to date knowledge of occupational health and safety matters; and*
>
> *(b) to gain an understanding of the nature and the operations of the trade, business or other undertakings of the corporation and generally the hazards and risks associated with those operations; and*
>
> *(c) to ensure that the corporation has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the trade, business or other undertaking of the corporation; and*
>
> *(d) to ensure that the corporation has appropriate processes for receiving an considering information regarding incidents, hazards and risks and responding in a timely way to that information; and*
>
> *(e) to ensure that the corporation has, and implements processes for complying with any duty or obligation of the corporation under the relevant provisions of the OH&S Act; and*
>
> *(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e)."*

The persons required to exercise Due Diligence are officers of corporations and the term officer is defined in the same way as in Section 9 of the Corporations Act 2001.

Proceedings for Category I offences under the legislation will be dealt with by way of indictment and the Criminal Procedure Act in NSW will apply to proceedings for an offence taken before the District Court. This will bring a substantial change to the management of OH&S prosecutions which will now be dealt with by different judges to those that have dealt with prosecutions in the past. The Industrial Commission would no longer play a role in hearing prosecutions.

The two Bills have been passed by the Legislative Assembly and have had their second reading in the Legislative Council with some amendments proposed and the Bill was returned to the Legislative Assembly on 27 May 2011 to consider the proposed amendments. When passed the OH&S regime proposed by the Gillard Government will be a fact of life for NSW effective from 1 January 2012 and with the passing of the legislation with immediate effect the duties to ensure the health and safety and welfare at a place of work of persons will be qualified to a duty to ensure so far as is reasonably practicable ensure the safety , health and welfare of persons.

Dismissal For Viewing Pornography At Home On A Work Laptop- Is There A Privacy Issue?

The Federal Court recently determined that the termination of a senior public servant for viewing pornographic material on a Department laptop in the privacy of his own home was lawful. The Court further determined that the collecting of personal data for the purpose of identifying breaches of the policies was not contrary to the right of privacy.

Mr Griffith who was employed by the Commonwealth Department of Resources, Energy and Tourism (the Department) was issued a laptop on the basis that it was used for work with limited personal use. On eight separate occasions in the period from Saturday 30 May 2009 to 21 June 2009 Mr Griffith used the laptop to view pornographic material in the comfort of his own home and using his own internet provider. Mr Griffith deleted each entry on his browser's internet history in the hope that it would prevent other people who could access the laptop from acquiring knowledge of pornographic material. Unknown to Mr Griffith, the Department had implemented software known as Spector360 which performed various functions including logging the occurrence of particular words and taking precise snapshots of the user's desktop every 30 seconds. Once Mr Griffith's laptop was connected to the Department's network, the data would be collected and sent to the dedicated server.

On 21 July 2009 a security officer performed a standard operational audit of the keywords logged and found that Mr Griffith had searched the word "knockers". As a result an investigation was conducted and samples of screenshots recorded were obtained.
On 28 July 2009, Ms Rose, an officer of the Department found that Mr Griffith had breached the Department policy on the prohibited use of Departmental ICT facilities. This stated that:

> *"Employees are prohibited from using Departmental ICT facilities to deliberately access, display, download, distribute, copy or store:*
> - *Pirated software and/or material;*
> - *Racist material;*
> - *Pornography; or*
> - *Links to such material"*

It was also determined that Mr. Griffith's behaviour had breached various sections of the Public Service Act 1999 (Cth). Pursuant to Section 15 of the Act, Ms Rose determined that Mr Griffith's conduct warranted termination of his employment. This decision was later reviewed by Mr Pettifer who determined that the sanction was appropriate.

Mr Griffith commenced proceedings seeking orders to quash the decision that he had breached the Code of Conduct and Mr Pettifer's decision to uphold the sanction.

Griffiths argued that the running of Spector360 to capture details of sites visited during periods of personal use constituted a gross invasion of privacy. Griffiths also argued that the policy relied on by the Department was not applicable to personal use; and fin any event the policy and direction were not "lawful".

Griffiths did not succeed. Justice Perram determined the Department had a legitimate interest in ensuring their equipment was used appropriately, in particular that it did not come into contact with pornographic material. The Department's concern was not "unreasonable" or "unfair" given that the intended use of the software was to monitor Mr Griffith's compliance with the Code of Conduct. In addition the laptop was the personal property of the Department and consequently the Department could instruct Mr Griffith on what could be done with the laptop.

Justice Perram confirmed that the policy and direction prohibiting the viewing of pornographic material was lawful and that there was no invasion of privacy by monitoring computer use, even during periods of private use.

Mr Griffith had prior knowledge of the Department's policy and he demonstrated he had an understanding of the Department's

Code of Conduct when he signed an acknowledgement that he understood the Code of Conduct. Mr Griffith had also been explicitly warned that his usage would be monitored by the Department.

An employer has a right to make policies that concern the use of the employer's property whether or not the personal use of the property is permitted. Employees are obliged to comply with an employer's policies when it comes to personal use of the employer's property and misue of the property in breach of a policy can result in a valid right to terminate the employee.

Workers Compensation Roundup

Consent Orders in the Workers Compensation Commission

Deputy President Bill Roche of the NSW Workers Compensation Commission ("WCC") recently examined in *Manpower v Harris* the concept of the words "without admission of liability" when contained in Consent Orders. The worker was an electrician who alleged he suffered a hernia to his right groin whilst undoing bolts in the course of his employment on 19 May 2008. He brought proceedings in the WCC for weekly compensation and medical expenses in relation to that hernia. He had been referred to an Approved Medical Specialist for assessment of the employment due to the injury and his capacity for work/prognosis. A non-binding medical assessment was issued on 11 June 2009. The AMS had concluded that the worker's employment appeared to be substantial contributing factor to the inguinal neuralgia.

With consent of the parties, the Commission issued a Certificate of Determination – Consent Orders in the following terms:

> *"Without admission of liability –*
>
> *Part A – The Application to Resolve a Dispute*
>
> *Injury Decision – To delete hernia and insert inguinal neuralgia.*
>
> *Respondent to pay the applicant weekly compensation pursuant to Section 40 of the Act to the full statutory rate for a single worker with no dependants as adjusted for the period 28 July 2000 to date and continuing."*

Following an internal review, the employer's scheme agent issued a Section 74 Notice on 31 March 2010 wherein liability was declined for the worker's injury. Payments of weekly compensation were stopped and the worker sought further relief in the WCC.

The Arbitrator and the Deputy President agreed that Manpower was estopped from disputing injury to the worker arising out of the course of his employment, that the injury was an inguinal neuralgia, that the worker's employment was a substantial contributing factor to such an injury and that the worker was incapacitated for work up until the date of the issue of the Section 74 Notice.

The Consent Orders gave rise to a res judicata estoppel that bound the parties and the scheme agent was not entitled to stop payments to the worker and dispute liability for injury. The words "without admission of liability" held no effect when contained within the Consent Orders. It was a binding admission by the employer. The Consent Orders were as effective as any decision of the Commission made after a contested hearing and were binding on the parties until revoked or varied on appeal or by further order of the Commission.

The Deputy President pointed out that the employer still had some remedies if it believed the Consent Orders resulted in an injustice. It was entitled to seek a re-consideration of the orders under Section 350(3) of the Workplace Injury Management Act 1998. The employer could have also sought a review of the Consent Orders under Section 55 of the Workers Compensation Act 1987. Such a review could take place if the scheme agent could establish a change in circumstances.

The important consideration arising out of this decision is that despite intentions by the parties through the use of the words "without admission of liability" any Consent Order issued by the Commission will prevent parties from later arguing the issues the subject of that Consent Order. If the parties desired to preserve arguments as to injury, employment, etc for a later time, the parties should seek to have any certificate issued with any agreement "below the line" on the Certificate of Determination. It should be specifically noted on the Certificate of Determination "The following is not an Order of the Commission and the parties have voluntarily agreed to… In the alternative voluntary agreement could be noted separately and not on the Certificate of Determination." Any orders issued by the Commission under the heading "Consent Orders" will have the effect of a full contested hearing and termination by an Arbitrator of the Commission. As many scheme agents would be acutely aware, seeking to review a decision at a later date under a change of circumstances pursuant to Section 55 is notoriously difficult.

Worker's Solicitor's Costs Where There Is No Dispute Notice

All scheme agents and employers in NSW deal with correspondence from workers' solicitors at various stages of a worker's claim for compensation. This correspondence can be at the initial stage before liability has been accepted or, more frequently, after liability has been accepted, when issues arise regarding non-payment of medical expenses or weekly benefits. More often than not, the solicitor's correspondence achieves the desired result for the worker without the need to commence proceedings in the Commission.

The issue then arises as to whether the solicitor is entitled to claim payment of his costs where there is no entitlement in the Tables specified in the Workers Compensation Amendment (Costs) Regulation 2006 ("WCCR"), and when there is no order for costs from the Commission.

A number of decisions by the Registrars of the Commission indicate that costs may be recoverable based on the discretion granted in the WCCR and by various sections of the Workplace Injury Management & Workers Compensation Act 1998 ('WIM").

Section 332 defines "costs" as:

> *""costs" includes:*
>
> *(a) costs actually incurred or to be incurred by a person claiming compensation or work injury damages, and*
>
> *(b) if liability for a claim is admitted without recourse to the Commission or court - the reasonable expenses incurred by a person in pursuing the person's claim, and …"*

Section 340 of the Act provides:

> *"Application of Division*
>
> *This Division applies to costs payable by a party, or a party's insurer, in or in relation to a claim for compensation."*

Section 341 relevantly provides:

> *"Costs to be determined by the Commission*
>
> *(1) Costs to which this Division applies are in the discretion of the Commission.*
>
> *(2) The Commission has full power to determine by whom, to whom and to what extent costs are to be paid. ….."*

By way of example of the application of these provisions, we refer to the following decisions:

Graham Hogbin v Northern Marketing Management Pty Limited: As a result of the worker's solicitor's letter seeking payments of weekly compensation, the insurer paid the amount claimed after appropriate investigation of the worker's claim. The solicitor's letter was the first evidence that the insurer had received notice of the worker's claim for compensation consequent to termination of his position five months earlier. No Dispute Notice was issued and thus the worker had no entitlement to costs under Item C of Table 1.

Arbitrator Foggo commented that clause 13 of Schedule 6 of the WCCR provides a wide discretion to the Registrar to declare particular proceedings "other proceedings" as referred to in Item C of Table 3, indicating that this wide discretion is obviously designed to allow for the awarding of costs in circumstances that do not appropriately fit within Items in the Table. Given the considerable time the letter would have taken to draft and the level of skill exhibited in the letter from the worker's solicitor, he awarded costs at the upper limit of $1,100 as provided for in Item C of Schedule 3.

Lantin Wu v Perfect Embroidery Pty Limited: In this case, the worker had the benefit of an award for weekly payments and costs pursuant to a determination of the Commission. The claim for costs arose out of steps taken by the solicitor to assist the worker to obtain reimbursement of Section 60 expenses when complete reimbursement had not been forthcoming from the insurer. There, the worker sought an order for payment of costs pursuant to Section 341 of the WIM Act in circumstances where the insurer had not reimbursed an amount of $50 that was claimed, for the TENS machine as part of physiotherapy expenses. The worker's solicitor wrote a number of letters to the insurer. In the meantime the file was transferred to another scheme agent. Some ten months after initially submitting the receipts for reimbursement, the missing $50 was reimbursed.

The solicitor claimed the sum of $1,100 pursuant to Item C or Item E of Table 3. The Registrar's Delegate found that the

Commission had jurisdiction to award costs based on the provisions of the WIM Act. He found that Item C was the appropriate Item and, after reviewing the legal service that the solicitor had reasonably provided to rectify the situation, he found the sum of $300 was an appropriate allowance for the work performed. The worker's solicitor was also awarded the costs of the proceedings to enforce his entitlement to costs.

Erni Sim v Dalton Packaging Pty Limited: In 2008, the worker's solicitors wrote to the employer and the insurer making a claim for weekly compensation in respect of an injury to the right thumb that occurred in 2006 for which liability had previously been accepted. During the relevant twenty one day period, the employer neither declined liability nor commenced making weekly payments. After a further six weeks of correspondence between the parties, the payments of weekly compensation finally commenced.

Although an Application to Resolve a Dispute was filed after weekly payments had commenced, it was discontinued when it was discovered that payment had commenced during the Christmas vacation. The worker sought an order for costs incurred until the time of filing the Application. The employer submitted that there was no entitlement to costs as no Dispute Notice was issued. The Registrar's Delegate commented that the worker was entitled to commence proceedings in the Commission in light of the employer's failure to determine the claim within twenty-one days and found that the worker was entitled to be paid the costs for his solicitor's actions taken in order for the worker to recover his entitlement to compensation. He allowed costs specified in Item E of Table 1 of $4,250.

All three decisions indicate that where a solicitor's involvement is required to enforce a worker's compensation entitlements, the Commission will adopt a beneficial view to any application for costs made commensurate with the amount of work that the solicitor is required to undertake to achieve the objective.

Underlying the decisions is the need for the scheme agents and employers to act promptly to determine claims within the appropriate timeframes and to promptly consider and action any correspondence received from a worker's solicitor.

Discretionary Powers of the Commission in Partial Incapacity Cases

A key component in determining the appropriate amount of weekly compensation to be paid to an injured worker in partial incapacity (Section 40) cases is the discretion exercised by Arbitrators in the Workers Compensation Commission ('WCC") Deputy President Bill Roche of the WCC carefully examined this discretionary power in *Northern Co-operative Meat Company Limited v Kitto (2011)*. The Deputy President particularly focused the exercise of this discretion in a situation where a worker had resigned whilst on suitable duties.

The worker had originally been employed as a full time casual meat packer. She originally injured her left shoulder before returning to light duties for 32 hours per week. She continued with pain and discomfort before undergoing surgery. Although the surgery did not relieve all her symptoms, she did return to light duties on a full time basis.

The worker's evidence was that the new duties caused an increase in her pain and discomfort and she resigned on 27 March 2009 before re-locating to Queensland with her family. The Arbitrator initially determined that the worker was only fit to perform light duties for 20 hours per week. The employer had appealed this finding on the basis there was no medical evidence that the worker was only fit to perform light duties for 20 hours. The Deputy President concluded the Arbitrator was required to look at and did look at the totality of the evidence before coming to his conclusions. Although there was evidence the worker may be able to work as a shop assistant, due to the fact that that work required physical work and lifting, the Arbitrator correctly accepted the worker did not have a capacity for unrestricted work in that area.

The Deputy President reinforced that determining a worker's incapacity was a practical exercise and not simply purely a medical question. Although the worker had been employed on selected duties with the employer for 32-40 hours per week, this provided little guidance of her ability to earn on the open labour market. Such suitable employment on selected duties was provided pursuant to the employer's obligations under legislation. Any assessment of the worker's ability to earn once on the open labour market required simply more than the identification of a particular job or jobs that a worker might be able to perform.

The Commission focused on the "practical realities" of the worker in his or her injured condition. This included taking into account their age, abilities, limitations and circumstances in life in being able to secure and maintain subsequent employment.

The Deputy President reinforced the Arbitrator's decision that it was appropriate to consider "a weighted average" in

determining an ability to earn. A weighted average takes into account the probability there may be long periods where an injured worker is unable to find any suitable work. In adopting such an approach, it was reasonable to determine that the worker's earning capacity would result in a long term average of 20 hours per week in suitable employment as a shop assistant. Simply because the doctors had not restricted her to 20 hours per week, due to her injury, education and training, the prospects of obtaining and retaining suitable employment were severely restricted.

The employer further argued that the worker's resignation without further consultation with them for the provision of other more suitable duties constituted a removal from suitable employment. The Commission relied upon the evidence the employer had provided the worker with wrong suitable duties. Even if the suitable duties had been correct, if the worker experienced significant increase in her symptoms, it was understandable she had no alternative but to resign. Her decision to resign was not unreasonable rejection of suitable employment. Once she had resigned, she was entitled to have her ability to earn determined on the basis of her ability to obtain employment in the labour market reasonably accessible to her.

This decision clearly sets out the wide discretion available to the Commission in determining partial incapacity claims. Simply because the majority of medical evidence is such that a worker may be able to return to some form of suitable duties on a full time basis, it is encumbent on the Commission to look at other factors that may impact on the ability to obtain and maintain suitable employment. We suspect workers in more remote geographical locations or tighter labour markets (such as was the case in this matter), will seek to rely heavily upon the "weighted average" approach to account for periods when they may not be able to secure suitable employment. Clearly, the generous and beneficial nature of the Commission continues to make it difficult for employers and scheme agents to obtain a sustainable reduction in weekly compensation payments.

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