GD News

Gillis Delaney Lawyers

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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.

Unfair Terms In Insurance Contracts

On 20 December 2012 the Federal Government announced that existing protections from unfair contract terms available for consumer contracts would be extended to general insurance contracts. Following on from that announcement an exposure draft of proposed legislation was released for public comment in May 2013.The closing date for submissions was 31 May 2013 and we can now look forward to amendments to the Insurance Contracts Act 1984 designed to protect consumers against unfair terms in insurance contracts.

The proposed legislation if passed will have a significant impact on the insurance industry with insurers facing the prospect of disputes over terms that are perceived by an insured to be unfair. The legislation will commence 12 months after it is passed allowing insurers to review their insurance contracts and remove unfair terms.

Under the new regime a term in a contract of general insurance is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

If an insurer is found by a court to have an unfair term in a standard form consumer contract of general insurance, they will be in breach of the duty of utmost good faith imposed by the *Insurance Contracts Act* and will not be able to rely on the term.

When determining whether a term is unfair a court may take into account such matters as it thinks relevant, but must take into account the extent to which the term is transparent and the contract as a whole.

A term is transparent if the term is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term.

The unfair contract term provisions will apply to insurance contracts entered into by individuals for personal, domestic or household use or consumption. However, the provisions will only apply to standard form contracts.

If an insured alleges that a contract of general insurance is a standard form contract it is presumed to be a standard form contract unless the insurer proves otherwise.

When determining whether a contract of general insurance is a standard form contract a court may take into account such matters as it thinks relevant, but must take into account the following:

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- whether the insurer has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by the insurer before any discussion relating to the transaction occurred with the insured;
- whether the insured was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
- whether the insured was given an effective opportunity to negotiate the terms of the contract;
- whether the terms of the contract take into account the specific characteristics of the insured or the particular transaction.

The insurer will bear the onus of establishing a term is not unfair as a term is presumed not to be reasonably necessary in order to protect the legitimate interests of an insurer unless the insurer proves otherwise.

If the insurer proves that the term reflects the underwriting risk accepted by the insurer then the insurer is taken to have proved that a term is reasonably necessary in order to protect its legitimate interests.

Terms that define the main subject matter of the insurance contract or set the upfront price payable under the contract are not affected by the reforms.

Examples of unfair contract terms are specified in the proposed legislation and include:

- a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- a term that limits, or has the effect of limiting, one party's right to sue another party;
- a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
- a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

Consumers and the Australian Securities and Investments Commission will be able to take action for unfair contract terms and seek a declaration a term is unfair or an injunction against the insurer to prevent them relying on the term.

The challenges created for insurers by these proposed changes cannot be underestimated. The Courts power to declare a term in an insurance contract as unfair is bound to cause havoc for insurers.

Additional Consequences Of the Reforms To The NSW CTP Scheme –Food For Thought!

The proposed legislation reforming the motor accident injury scheme in New South Wales continued its journey through Parliament in May 2013. The Bill introducing the reforms was passed by the Lower House on 21 May without significant

amendment. The Bill was then read for the first time in the Upper House on 22 May with the debate on the Bill being adjourned which will not occur before 18 June 2013 when Parliament next sits. The Bill needs to be passed by the Legislative Council to become a fact of life.

If the Bill is passed in the same form as approved by the Legislative Assembly NSW motorists can look forward to a no fault compensation scheme as well as the retention of a modified damages regime provided an injured person satisfies the necessary impairment threshold. The reforms will commence on 1 January 2014. We examined the changes introduced by the original Bill in a Special Edition of GDNews last month. That edition can be accessed at www.gdlaw.com.au/Services/News.htm.

In this article we examine some of the amendments made to the Bill so far as it has progressed through Parliament.

We have also examined some of the potential consequences of the new scheme as the reforms have consequences for those injured in circumstances involving any vehicle propelled by a motor, those who are injured in public transport accidents involving trains and ferries, for workers compensation insurers, and employees injured during the course of their work or whilst travelling to and from work.

Trains and Ferries

The *Transport Administration Act 1988* provides that Chapter 5 of the *Motor Accidents Compensation Act 1999* ("MAC Act") applies to and in respect of an award of damages which relates to the death of or bodily injury of a person caused by or arising out of a public transport accident. Accordingly Chapter 5 of the MAC Act prescribes the damages regime that applies to public transport accidents.

What is a public transport accident? An accident caused by or arising out of the use of any form of public transport in New South Wales including public transport in the form of passenger railway or a water ferry or taxi but not including:

- public transport in the form of air transport; or
- public transport that is operated primarily for tourists, for the purposes of recreational or historical interest or that is an amusement device, or
- an accident for which, or the extent to which, a person is liable otherwise than in the capacity of the owner or driver of, or other person in charge of, the vehicle or vessel used for public transport.

When considering whether or not an accident involves a public transport accident, it is necessary to properly characterise the negligence that has caused the injury.

However, with the reforms to the Motor Accidents Act 1999, Chapter 5 has been amended to provide that damages will only be recoverable for past and future loss of earnings and for non economic loss. In addition no damages are recoverable unless permanent impairment is greater than 10%. Further, there are caps on economic loss which limit claims to economic loss to a maximum rate set under the Workers Compensation Act 1987.

The original Bill did not address what would happen to persons injured in public transport accidents. The effect of the original Bill was to restrict those injured in public transport accidents to damages for non economic loss and economic loss with no entitlement to past and future medical expenses, domestic assistance, aids or care. Further, those injured would need to fend for themselves when it came to the costs of medical treatment for their injuries. The reason for this was that the statutory benefits regime for motor accidents that would compensate a person for medical expenses and wage loss only applies by virtue of Chapter 3A of the MAC Act which was to be inserted by the amending legislation. The Transport Administration Act does not provide that Chapter 3A of the MAC Act will apply to public transport accidents.

This created a potential dilemma. Should there be a no fault scheme for those injured in public transport accidents with the government agencies responsible for the management of trains and ferries involved in the management of statutory benefits for commuters injured on trains and ferries irrespective of fault?. An alternative would be for the Government to legislate to amend the *Transport Administration Act* so that public transport accidents were governed by the damages regime in the *Civil Liability Act* rather than the MAC Act.

The Government chose not to follow either of these courses. Instead the Bill was amended to provide that that Chapter 5 of the MAC Act in its pre-amendment form will apply when assessing damages in public transport accident claims. The status

quo for public transport accidents has been maintained. Thos injured in public transport accidents will not be effected by the reforms to the CTP scheme. The restriction of damages to economic loss and non-economic loss will not apply.

However that is not necessarily the end of the game for those injured in public transport accidents. We have no doubt there will be some circumstances where a person injured in a public transport accident will seek to argue that their accident falls within the definition of "motor accident" in the MAC Act and therefore they are entitled to statutory benefits.

It is certainly possible for an accident involving a train to fall within the compensation regime in the MAC Act. That is because motor vehicle is defined to mean a motor vehicle within the meaning of the *Road Transport (General) Act 2005* ("RTG Act"). The RTG Act defines a motor vehicle to mean a vehicle that is built to be propelled by a motor that forms part of that vehicle. The RTG Act defines vehicle to mean any description of vehicle on wheels (including a light rail vehicle) but not including other vehicles used on railways and tramways. So light rail vehicle users could be winners when it comes to claims for statutory benefits.

Savings For Workers Compensation Insurers

The amendments to the damages regime under the MAC Act will also deliver savings to workers compensation insurers.

As a consequence of the definition of motor vehicle in the MAC Act, accidents involving vehicles in the workplace including forklifts and loaders can be subject to an assessment of damages under the MAC Act. It must be remembered that not all vehicles require CTP insurance under the MAC Act. Generally, only vehicles used on public streets require CTP insurance. It does not matter that vehicles are not registered or do not have motor vehicle insurance cover as the MAC Act will still apply to the assessment of damages.

A claim made arising from an accident involving a registered forklift with CTP insurance can result in a damages claim being brought against the owner of the forklift. In the workplace, it is common to find that a person driving the registered forklift is an employee and the employer is also the owner of the forklift. If the injury is caused by the negligence of the driver of the registered forklift, the injured person is entitled to claim damages from his employer as the employer is vicariously liable for the actions of the employee and if the employer is also the owner of the vehicle, Section 112 of the MAC Act provides that the driver of the vehicle is deemed to be the agent of the owner.

This means that both the CTP policy and the workers compensation policy will respond to the claim.

The workers compensation legislation provides that where the MAC Act applies, damages will be assessed under the damages regime found in Chapter 5 of the MAC Act.

Accordingly, where an employee is injured as a consequence of an accident which falls within the auspices of the MAC Act, the damages payable by the workers compensation insurer will be reduced significantly compared to a pre 1 January 2014 assessment as the only damages recoverable are damages for non economic loss and past and future economic loss.

Whilst the CTP and workers compensation insurers will still be liable to share equally in the damages that must be paid for injuries sustained by employees injured by the fault of the driver of a registered motor vehicle in the use and operation of the vehicle where the vehicle is owned by the employer and has CTP insurance, those damages will be significantly less than would have been payable but for the reforms.

Section 151Z Recovery Claims Against CTP Insurers

The CTP reforms will not eliminate 151Z recovery actions brought by workers compensation insurers seeking to recover payments made under the Workers Compensation Act 1987 for injuries sustained by workers in motor accidents.

Whilst the NSW Government's changes to the workers compensation scheme in June 2012 limited the circumstances where a worker's compensation insurer is obliged to make payments to a worker injured in a journey to and from work, including those where a motor vehicle is involved, there are still situations where a worker can be injured in a motor accident and entitled to payments under the Workers Compensation Act 1987.

However under 151Z claims, recovery will only be available against a CTP insurer where there is a liability to pay damages and the amount payable will be capped at the damages payable by the CTP insurer.

Accordingly, as a consequence of the impairment threshold introduced for common law CTP claims, workers compensation payments will only be recoverable under section 151Z of the Workers Compensation Act 1987 where a person injured has an impairment of more than 10% assessed under the MAC Act. Further, the amount recoverable will be limited to the damages payable under the MAC Act. The notional assessment of damages to calculate the maximum that must be paid by the CTP insurer will be based on non economic loss and past and future economic loss with no allowance for medical expenses or the like.

Section 151Z will permit the workers' compensation insurer to recover the totality of payments including medical expenses, any care costs paid, impairment lump sums and weekly compensation. However, the amount recovered will be limited to the damages that would be payable under the new damages regime.

There will be a significant reduction in the number of 151Z recoveries as in many situations the injuries suffered by a worker will not satisfy the impairment threshold. In other claims, the notional damages assessed may well be less than the totality of workers compensation payments made.

This is an issue that will confront both CTP and workers compensation insurers.

Journeys To And From Work

In June 2012 the NSW Government reformed the workers compensation scheme to limit workers' entitlements to compensation where they were injured in a journey to or from work. Essentially, the Government abolished a worker's entitlement to bring a journey claim for injuries sustained on a journey between their place of abode and place of work unless there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arises.

This change has provoked workers compensation disputes where injuries have occurred on the way to or from work with arguments about the link between the employment and the accident. For example, an employee asked to drop something off on the way home from work will argue that the journey to the place of drop off had a real and substantial connection with the employment. If the drop off point is on the way home, there is a potential for a claim to be brought under the Workers Compensation Act 1987.

However, now that there is a no fault CTP scheme, why bring a claim against the workers compensation insurer? A claim can simply be made for medical expenses and wage loss against the CTP insurer.

However an injured person will however be confronted with a hurdle when they make a claim for statutory benefits under the CTP regime. That hurdle arises as the CTP scheme provides that the CTP statutory benefits are not payable if compensation under the Workers Compensation Act 1987 is payable.

The CTP insurer cannot refuse payment of statutory benefits unless the injured person has made a successful claim for workers compensation or has failed to comply with a request from a CTP insurer to make a claim for workers compensation in respect of the injury.

A successful workers compensation claim is one where liability has been accepted under the Workers Compensation Act 1987 and liability is considered to have been accepted until liability is wholly denied.

The game will play out as follows.

- In a motor accident, a person will need to consider whether or not to bring a claim for statutory benefits under the Workers Compensation Act 1987 or statutory benefits under the CTP scheme.
- If the CTP insurer believes there is a worker's compensation claim available, they can direct the claimant to make a worker's compensation claim.
- If the Injured person fails to comply with the CTP insurer's request, the CTP insurer is entitled to refuse to pay statutory benefits.
- If the injured person does make a worker's compensation claim, they will not be entitled to statutory benefits from the CTP insurer until the workers compensation insurer wholly denies liability for any claim.
- Once liability has been denied in whole by the workers compensation insurer, the injured person's rights to statutory

benefits under the CTP regime begins.

An injured person may well find themselves caught between a difference of views held by a CTP insurer and a workers compensation insurer as to whether the injured person has an entitlement to worker's compensation payments. That difference of opinion could lead to a period where the injured person does not receive statutory benefits from either the workers compensation insurer or CTP insurer.

As a consequence of the reforms, there will be some push and shove between workers compensation insurers and CTP insurers over whether a motor vehicle accident falls within the journey provisions in the *Workers Compensation Act 1987*. CTP insurers will be entitled to avoid paying statutory benefits if the injured person is entitled to workers compensation benefits.

Conclusion

The CTP scheme reforms will impact on motorists and CTP insurers, as well as workers compensation insurers and commuters that are injured in public transport accidents involving trains and ferries. The debate on the proposed reforms in the Legislative Council will be an interesting spectacle.

Risk Warnings In Recreational Activity Claims

Paintball was one of the first outdoor action games that introduced potential combatants to warfare in the bush. Laser Tag subsequently developed where teenagers can now find themselves in a bush location with replica guns and rifles fitted with lasers to enjoy a painless form of warfare. Laser Tag has become a popular birthday event for teenage boys and some teenage girls.

However, those who play Laser Tag find themselves in the bush and the bushland is not a sporting field without hazards.

The NSW Court of Appeal in *Action Paintball Games Pty Limited (In Liquidation) v Barker* was recently called on to determine a claim for damages brought by a teenage girl attending her brother's birthday party when she tripped on a tree root. In an induction before the game commenced Barker, accompanied by her father, had received a warning that "there is a lot of sticks and obstacles in the way, so not to run full out, because you might fall over, and hurt yourself". The question for the Court of Appeal was whether or not this warning was a risk warning which would defeat Barker's claim as the Civil Liability Act 2002 provides that a person does not owe a duty of care to another person who engages in a recreational activity in respect of a risk of the activity if the risk was subject to a risk warning.

Sections 5M and 5N of the Civil Liability Act sets out the framework for the regulation of liability where there has been a risk warning provided to a person who engages in recreational activities.
In this case there was no doubt that Barker had engaged in a recreational activity.

Section 5M provides that a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. A defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning. A warning does not need to be specific to the particular risk and can be a general warning of the risk that includes the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

Barker's claim originally proceeded to hearing in the District Court and she succeeded in the claim. During the trial Barker established that there were rough tracks through the bush and fallen branches and debris on the tracks. Barker tripped on what appears to have been a tree root and fell suffering a significant fracture to her elbow. Whilst the Trial Judge found that Barker was aware of the general kind of risks attendant on running through bushland, the Trial Judge ultimately concluded it was reasonable to prepare the site by removing and keeping removed trip hazards on fallen pathways but otherwise leaving the vegetation for effect. The Trial Judge found that the failure to remove the tree root over which Barker tripped caused her injuries.

In NSW, the Civil Liability Act provides that when determining liability for negligence, a person who suffers harms is presumed to have been aware of the risk of harm if it was an obvious risk unless that person proves on the balance of probabilities that they were not aware of the risk. Further, a person does not owe a duty of care to another person to warn of an obvious risk. The Trial Judge in this case determined that the risk was not an obvious risk. He reached that conclusion on the basis that

this was not ordinary or natural bushland used for walking, it was a location for playing games and Barker had never seen the land before and she had not played Laser Tag before. On that basis, it was said that there was not an obvious risk. However, the Trial Judge did not go on to determine whether or not the warning that was provided by Action Paintball was sufficient to discharge any obligation to warn that may have arisen.

The Trial Judge then went on to consider Section 5M the provisions relating to risk warnings for recreational activities and concluded there had been no risk warning and although a warning had been given to the children prior to the commencement of the game, it did not qualify as a risk warning because the defendant's employees did not warn of any specific obstacles, such as tree roots, and the warning was not there should be no running only not to run "full out".

The Court of Appeal dealt with the claim in quick fashion. The Trial Judge's decision could not stand. In a unanimous judgment, Basten JA noted:

> *"Making full allowance for the plaintiff's age, her evidence that she was aware of the general kind of risks attendant on running through the bushland was accepted. She was in any event given a warning as to the dangers and there is no reason to suppose that a further warning would have changed her conduct. Further, reasonable care did not require that the appellant (Action Paintball) take the precaution of removing the tree root. For these reasons the finding of liability is unsustainable".*

The Court of Appeal noted that Section 5M provided a straightforward path for disposing of the appeal. Basten JA noted:

> *"no duty of care is owed in respect of a risk of the activity, if the risk were 'the subject of a risk warning'".*

The Court of Appeal concluded that there had been a risk warning. Basten JA noted:

> *"The suggestion that one specific hazard should have been identified is a function of hindsight. The suggestion that children should be told not to run at all would be disproportionate to the risk and would greatly diminish the attractiveness of the game, if the instruction were followed.*
>
> *A 'risk warning' is a warning with respect to the existence of a risk. It is perfectly possible to warn of a risk without instructing the recipient as to all the steps necessary to avoid the risk: Indeed such instruction might be counter-productive. Further, an adequate warning can be given, at least in some circumstances, by reference to the general kind of risk involved without precise delineation of each separate obstacle or hazard which may be encountered".*

The Court of Appeal noted Barker's contention that because of her age, she was an "incapable person" so that Action Paintball might only rely upon a risk warning if the warning had been given to a parent, which it was said did not happen. The father was present at the time the warning was given. In any event a person is only an incapable person for the purpose of Section 5M if they lack the capacity to understand the warning. There was no evidence to suggest that Barker fell into this category.

Accordingly, Action Paintball's reliance on Section 5M was upheld with the end result that it did not owe the plaintiff a relevant duty.

Basten JA noted that even if Section 5M had not applied, the Trial Judge's formulation of the duty of care was too high. Basten JA noted that on the one hand the Trial Judge found that the tree branch should have been removed. On the other hand, the Trial Judge concluded there was a duty to warn. It was noted these findings involved a potential inconsistency. In those circumstances, it could be inferred that the duty was to take one or other of the alternatives. The more plausible alternative was to provide a warning. If a failure to warn was to be the basis of negligence, it was incumbent on the Trial Judge to determine that the failure to warn was a necessary condition of the harm, that is, but for the failure to warn the risk would not have resulted. There was no evidence as to causation in respect to any failure to warn.

Barker had received a succinct warning that spoke of general risks. Basten JA noted the evidence fell short of determining that additional warnings were required. The lack of a finding on causation left any issue on negligence to turn on the obligation to remove the tree root. Basten JA noted:

> *"The risk of harm through tripping and falling is a common risk of daily life. It can occur inside a house, in a garden, on a pavement or a roadway or in the bush. Absent a rocky environment, the risk of serious injury from trip and fall are probably less in bushland than in some other places. That is a relevant consideration pursuant to Section 5B(2)(b) of the Civil Liability Act. Further, the likelihood that children running through the bush will avoid such hazards, even when chasing others or seeking to escape is reasonably high. There is no evidence, apparently of any similar injury occurring in the bushland, whilst playing Laser Tag".*

The Court of Appeal concluded there was no duty of care owed which obliged action Painball to remove the offending tree root.

At the end of the day, the Court of Appeal confirmed the Trial Judge had erred in finding that there was a duty remove the tree. Further Section 5M of the *Civil Liability Act* provided an effective defence to the claim as there had been a risk warning provided by Action Paintball.

Those that engage in recreational activities are confronted with risks and provided there has been a risk warning the organiser of the recreational activity will not owe a duty of care in respect of a risk of the activity. The risk warning can be of a general nature and does not need to identify the specific risk but needs to be sufficiently broad to encompass a warning about the risks which will incorporate the specific risk that results in injury.

Insurance Policies - Naming the Correct Insured

The recent decision of the NSW Court of Appeal in *Bon McArthur Transport Pty Limited (in liquidation) v Caruana* has confirmed that it is the policy schedule issued by an insurer that forms the basis of a contract of insurance and not the broker's summary which forms the basis of a contract of insurance. Accordingly, a difference between the named insured's in a schedule and information contained in a broker's summary will not impact on the coverage agreed. Caruana was an employee of a labour hire company that supplied his services to Bon McArthur Transport Pty Limited (in liq). Caruana was injured when he was struck by a forklift as a consequence of the negligent operation of the forklift by an employee of CAL, the labour hire company.

A claim for damages was brought by Caruana against CAL and BMT. The liability of the employer was said to be based solely on the negligence of the driver with the employer being vicariously liable for the negligence of its employee. The liability of BMT was said to arise from the fact that BMT was the owner of the forklift. Caruana argued that BMT were liable for the actions of the labour hire employee on the basis that the driver was BMT's agent pursuant to deeming provisions in Section 112 of the Motor Accidents Compensation Act 1999. Accordingly, Caruana claimed that BMT and CAL were both liable for the actions of the driver of the forklift. Ownership of the forklift was an issue. Bon McArthur Transport Pty Limited and Mireau Pty Limited (formerly Bon McArthur Pty Limited) operated out of the same premises. BMT was not a subsidiary of Bon McArthur Pty Limited or McArthur Corporation Pty Limited. Mireau Pty Limited had simply licensed BMT to carry out its transport and warehousing business.

Caruana brought an alternate claim that Mireau Pty Limited was the owner of the forklift and also liable for the actions of the driver of the forklift.

Bon McArthur Pty Limited and McArthur Corporation Pty Limited and/or Australian Subsidiary Corporations, the first company, had entered into a broadform liability contract of insurance with QBE Insurance (Australia) Limited. A schedule to the policy was issued, identifying the insured as Bon McArthur Pty Limited, McArthur Corporation Pty Limited and/or Australian Subsidiary Corporations. Renewals of the policy identified Mireau Pty Limited, McArthur Corporation Pty Limited and Australian Subsidiary Corporations as the insured consistent with the name change of Bon McArthur Pty Limited to Mireau Pty Limited.

Bon McArthur Group's insurance was placed by AEI Brokers. In 2003 QBE had issued a policy schedule to Bon McArthur Transport Pty Limited, Mireau Pty Limited, six other named corporations and/or Australian Subsidiary Corporations. Approximately two years later and before the accident the broker asked QBE to correct the names on the policy schedule and properly identify the insured as Bon McArthur Pty Limited, not Bon McArthur Transport Pty Limited. QBE issued a revised policy schedule and as a result BMT was not a named insured. It was also not a subsidiary of any of the named insured. The policy was subsequently renewed on two occasions without identifying BMT as a named insured. From the amendment of the policy schedule BMT was not noted in any of the QBE policy schedules. However, the broker's closing tax invoice after the initial change described the insured as McArthur Express Pty Limited, Bon McArthur Transport Pty Limited and subsidiaries. Despite the information in the broker's closing slip supplied to QBE, QBE issued a policy schedule in accordance with the brokers to bind cover in accordance with the offer made by QBE.

Four months before the accident the broker requested QBE to add an additional insured for no additional premium, that insured being a Victorian corporation not involved in any way in the accident. The closing tax invoice for the endorsement of the additional insured referred to Bon McArthur Transport Pty Limited as the insured. The coverage summary also included reference to Bon McArthur Transport Pty Limited as one of the insured. However, the QBE policy schedule that issued did not

note BMT as a named insured.

When the matter came to trial the trial judge determined that BMT was entitled to indemnity under QBE's policy. As a consequence of that finding and other issues concerning the trial judge's conclusions, an appeal followed.

QBE argued that the contract of insurance was evidenced by the terms of the policy and the policy schedule and not effected by the identification of BMT in the broker's closing slips. QBE argued there was no ambiguity in the schedule in relation to the identification of the insured.

The Court of Appeal agreed with QBE.

The Court of Appeal determined that the written communication between the broker and QBE established that a binding contract of insurance was made on the terms of QBE's quotations and the broker's unqualified acceptance of that offer on behalf of its client. QBE's offer unambiguously identified the insured as Bon McArthur Pty Limited, McArthur Corporation Pty Limited and Australian Subsidiary Corporations. The broker had advised QBE to "bind cover accordingly" in accordance with QBE's offer. QBE's broadform liability policy stated that the policy schedule would be prepared by QBE and the schedule would set out the specific terms applicable to the cover. QBE issued a schedule which set out those terms which did not include the naming of BMT as the insured.

The Court of Appeal noted that the broker's coverage summaries:

- *"inaccurately reflected the contract;*
- *had no contractual effect as offers or counter offers; and*
- *did no more than wrongly record the names of the parties insured under a contract which had been made."*

An argument that QBE's conduct in accepting the closing invoice and summary without comment constituted an agreement to BMT's inclusion as an insured was also rejected.

The Court of Appeal concluded that the broker's closing did not seek to renegotiate terms or alter terms which had been offered by QBE and to do so, more would have been needed.

In this case, BMT was not entitled to coverage under QBE's broadform liability policy as it was not a named insured and was not a subsidiary of any of the named insured's. Accordingly, BMT had no insurance that would respond to the claim made by Caruana. Caruna was not an employee of BMT and the workers' compensation policy would not respond either.

Another issue considered by the Court of Appeal was ownership of the forklift as Caruana argued that Mireau Pty Limited, which did have liability insurance, was the owner of the forklift as well as BMT. The Court of Appeal concluded that both BMT and Mireau Pty Limited were not the owners of the forklift. The trial judge had determined that both Mireau Pty Limited and BMT were entitled to immediate possession of the forklift and therefore were owners of the forklift. Whether another person not lawfully in actual possession is entitled to immediate possession depends on whether the person can retake possession from the person in actual possession. BMT were in actual possession of the forklift. The Court of Appeal concluded the evidence that Mireau Pty Limited was in actual lawful possession of the forklift, either for itself or jointly with BMT was not established. Mireau Pty Limited was not entitled to immediately retake possession of the forklift on demand being made. Mireau Pty Limited was a named insured on QBE's broadform liability policy but as it had no liability for the loss and damage of Caruana, QBE had no liability.

That left the trial judge's findings that both BMT (uninsured) and CAL had been negligent as a consequence of the negligence of the driver of the forklift. The trial judge had apportioned liability equally between BMT and CAL. The apportionment was challenged, however, the Court of Appeal noted that where two parties had been found liable by virtue of the acts and omissions of the same person, then an equal apportionment was appropriate.

BMT were liable on the basis of the presumed agency provisions found in the MAC Act which deemed the owner of a vehicle to be liable for the acts of the driver as the driver is deemed to be the owner's agent.

CAL were liable for the acts of its employees as it was vicariously liable for the acts and omissions of an employee.

Here both BMT and CAL were negligent and liability for the damages was to be borne equally(subject to damages being assessed differently with damages assessed against BMT under the *Civil Liability Act* and damages against CAL assessed

under the *Workers Compensation Act*).

At the end of the day Caruana has ended up with a judgment against his employer's insurer for work injury damages and a judgment for damages assessed under the Civil Liability Act against BMT although BMT appears to have no insurance available to meet that claim.

The use of labour hire, corporate structures where assets and employees are found in different entities and licensing arrangements where parts of a businesses are conducted by others can give rise to personal injury claims where liabilities arise for various entities. In this case BMT did not have an insurance gap because of the nature of the policies obtained. Rather the gap arose as a consequence of its failure to arrange insurance.

When insurance is arranged it is important to ensure that the correct legal entity is named in the policy schedule. As can be seen, a failure to do so can and will result in a finding that insurance cover will not extend to a party who is named on a broker's summary of insurance but not the policy schedule issued by the insurer.

An Accident Is Not A Motor Accident Just Because A Motor Vehicle Is Involved

The NSW Court of Appeal in RG & KM Whitehead Pty Limited v Lowe has recently confirmed that an accident that occurs as a consequence of the fault of a driver of a motor vehicle in the use of a motor vehicle is not necessarily a motor vehicle accident for the purposes of the *Motor Accidents Compensation Act 1999* ("MAC Act").

The Court of Appeal held in this case that whilst an employee was injured as a consequence of negligence, their entitlement to damages did not fall for assessment under the motor accidents compensation regime.

Essentially, the reason that the claim fell outside of the MAC Act was that Section 3A(1) of the MAC Act was not satisfied.

Section 3A of the MAC Act at the time this accident occurred was in the following terms:

> *"This Act (including any third party policy under this Act) applies only in respect of the death of or injury to a person that is caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle and only if the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during:*
>
> *(a) the driving of the vehicle, or*
>
> *(b) a collision, or action taken to avoid a collision, with the vehicle, or*
>
> *(c) the vehicle's running out of control, or*
>
> *(d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control".*

As can be seen, when considering whether or not the circumstances of an accident fall within the auspices MAC Act it is necessary to determine:

- whether or not a motor vehicle was involved?
- whether or not there has been fault by the owner or driver;
- was the fault in the use or operation of the vehicle?
- whether the incident falls within the four sub-paragraphs in sction 3A of the MAC Act which prescribe the circumstances under which the MAC Act will apply?

The definition of "motor vehicle" in the MAC Act is a wide one. The MAC Act defines motor vehicle by reference to the definition of "motor vehicle" under the Road Transport (General) Act 2005. In the *Road Transport (General) Act 2005*, "motor vehicle" is defined to be a vehicle that is built to be propelled by a motor that forms part of the vehicle.

There are a wide variety of vehicles which are caught by this definition and they include forklifts, excavators and other heavy commercial vehicles.

In Lowe's case, the vehicle involved in was a front-end loader. Lowe was an employee of RG & KM Whitehead Pty Limited. Rodney Whitehead, who was a director of RG & KM Whitehead Pty Limited, was operating the front-end loader in an attempt to position a chute which was to be attached to a chipper. The chute needed to be pushed into place so it would clip onto an

attachment on the chute. Whitehead had only achieved a partial connection and he instructed Lowe to mount a cage on the chipper and use a mallet or sledgehammer to tap the chute so the chute would move into alignment.

When Lowe tapped the chute, it dislodged from the connection and swung towards him, knocking him off the chipper and he suffered injuries.

Lowe claimed damages from his employer and the question was whether or not this was a system of work claim or a motor accident injury claim. When the claim was originally heard, the Trial Judge determined that the injury was caused by the fault of Mr Whitehead, the driver of a motor vehicle, and was caused in the use or operation of the vehicle during the driving of the vehicle or a dangerous situation caused by the driving of the vehicle or action taken to avoid a collision with the vehicle. The claim fell within provisos (b) and (d) of section 3A(1) of the MAC Act. Accordingly, Whitehead's damages were assessed under the MAC Act.

Unfortunately, for Lowe the matter did not end there. An appeal followed.

RG & KM Whitehead Pty Limited argued that this was a system of work accident and not a motor accident.

There was no dispute that there was a motor vehicle involved however the motor vehicle was stationary at the time the incident occurred. It was holding the chute. The tynes on the loader were being operated to hold the chute. It was argued that the motor vehicle was not being driven.

Tobias AJA delivered the leading judgment for the Court of Appeal. Tobias AJA noted that it was necessary to consider whether or not the fault had occurred "in the use or operation of a vehicle" and these words mean:

> *"with respect to, as a consequence of or by reason of the use of the relevant vehicle in the circumstances. That in turn points to the need to examine the alleged fault in the actual use or operation of the relevant vehicle at the particular time and place of the injury … relevantly the question is whether the facts of the case are to be characterised as revealing fault (in this case, negligence) on the part of the driver of the relevant vehicle in its use or operation".*

The Court of Appeal noted there was no doubt Whitehead was negligent in requiring Lowe to mount the chipper to tap the chute. Tobias AJA with some hesitation decided that this case did fall within the use of a vehicle. Tobias AJA noted it was movement of the chute by operating the tines of the loader that caused the chute to separate from the sleeve and strike Lowe. To that extent it was Whitehead's negligence manoeuvring the chute whilst Lowe was standing close to the chute which caused it to disconnect. Accordingly, there was fault in the use of the vehicle.

Tobias AJA then turned to determine whether or not there was driving of the vehicle.

It was noted there have been many cases that have considered whether or not a vehicle is being driven when it is stationary and lifting devices and the like on a vehicle are being used. There is a difference between operating lifting devices on a vehicle and moving a vehicle. Tobias AJA accepted that there is a difference between the actual driving of the vehicle in the sense of locomotion and the operation of the lifting device independently of the driving.

In this case Whitehead gave evidence the vehicle was stationary although the hydraulic system operated by the motor was being used to manoeuvre the tines in various directions. Whitehead was only manipulating the tines not propelling the motor vehicle forward. The Court of Appeal concluded the loader was being operated when its tines were being manipulated but the vehicle was not being driven.

It must be remembered that it does not simply follow that a vehicle is not being driven when it is stationary. However, the Court of Appeal noted that Courts have recognised that it is possible for a vehicle to be driven on one occasion and used in a different mode immediately afterwards, even as part of a single overall activity.

Tobias AJA then turned to the question of whether there was a collision with a vehicle or a dangerous situation caused by the driving of a vehicle. Tobias AJA noted that any collision was between Lowe and the chute and not the vehicle. The chute was not part of the loader and therefore the collision between the chute and Lowe did not fall within the provision of Section 3A(1)(b). Lowe's arguments that the claim fell within Section 3A(1)(d) of the MAC Act failed as there was no driving in the situation so the dangerous situation could not have been caused by the driving of the vehicle.

Accordingly, this case whilst there had been fault by the driver of the loader in the use or operation of the loader, the circumstances did not fall within the auspices prescribed by Section 3A(1) of the MAC Act and therefore the claim failed.

Surprisingly, in this case, Lowe did not make an alternative claim that the circumstances of the accident gave rise to a work injury damages claim. If such a claim had been made, the circumstances of the accident would have given rise to an entitlement to damages under the work injury damages regime, provided Lowe satisfied the impairment thresholds necessary to bring such a claim. Perhaps he did not meet those thresholds and that is the reason why there was no alternative claim.

Interestingly, if the employer was the owner of the loader and the loader was being driven forward when the incident occurred rather than simply having its tynes operated, an incident in those circumstances would have fallen within the auspices of the MAC Act. The CTP insurer and the worker's compensation insurer would then have been liable to indemnify the employer in respect of its liability to Lowe. As two policies of insurance would have been liable to respond to the claim, dual insurance would have applied.

A finding that a claim does not fall within the MAC Act ensures that only one insurer could be liable for Lowe's damages and in this case that would have been the worker's compensation insurer if there was an entitlement to bring a work injury damages claim. But for Lowe, in this case, he had no viable claim.

Whilst this decision may not have any significant implication in cases involving vehicles such as ordinary cars, trucks or buses, it reiterates that in circumstances where the "motor vehicle" in question has a function that can be utilised as an independent function, eg. forklifts, bobcats, excavators, loaders, it is necessary to consider the events immediately occurring at the time of injury to consider whether at that specific time the vehicle is being "driven" in the relevant sense.

Hiring Employees That Worked for Competitors

Employment contracts that contain post employment restraints preventing an employee from soliciting the clients that they came into contact with during their employment are designed to protect the goodwill of a business. When an employee of one company is employed by a competitor a concern will arise as to whether or not the former employee will act consistent with those restraints.

It is not uncommon to see litigation commenced against the former employee to seek to enforce restraints when the former employee joins a competitor. The new employer may find themselves involved in that litigation as a defendant based on a claim of aiding and abetting the former employee to breach the terms of the restraint or the new employer might find itself funding the defence of the litigation with the employee arguing that the restraints of trade are unreasonable, against public policy and not enforceable.

However, the new employer needs to be aware there can be consequences of funding litigation for a new employee and those consequences include being liable for the former employer's costs of bringing proceedings against the former employee if those proceedings are ultimately successful.

Costs orders can be made against an active party behind the defence of the proceedings and it is not necessary for an entity to be an actual party in the litigation as was seen in the recent decision of Justice Bergin in *HRX Pty Limited v Scott*.

Scott was employed by HRX Pty Limited who are a company providing human resources. The services include recruitment and the provision of labour. Talent2 was one of its competitors.

Scott was employed by HRX and his employment contract contained post employment restraints preventing him from soliciting HRX's clients and from working in a competitor's business for a particular period. Scott who left the employ of HRX went to work for Talent2, HRX's principal competitor, during the restraint period.

HRX commenced proceedings in the Supreme Court seeking an injunction to restrain Scott from working for Talent2 and soliciting HRX's clients.

When Scott joined Talent2, HRX's solicitors wrote to Talent2 seeking undertakings that Talent2 would not permit, assist or counsel Scott to perform work in any capacity for it prior to the expiration of the restraint period. Undertakings in respect of non solicitation and acting in competition with HRX were also sought. No undertaking was proffered by Talent2.

Scott's employment contract with HRX had a 12 month restraint. He advised Talent2 that he had signed a contract with a six month restraint. Scott assured Talent2 that he had not breached any restraints. Scott also advised Talent2 that he could not contribute financially to defending any litigation.

With the threat of litigation present Talent2 sought a fee estimate from their lawyers as to the cost of defending any litigation. Talent2 received a copy of the employment contract which had a 12 month restraint clause and Scott suggested the contract might not be real and maintained that he had signed a contract with a six month non compete restraint.

The solicitors for Talent2, after the supply of the cost estimate, continued to communicate with HRX's lawyers. HRX sought confirmation from Talent2's lawyers whether they had instructions to accept service of process on behalf of both Scott and Talent2. Talent2's lawyers confirmed that they did. Proceedings were commenced by HRX against Scott only.

The costs of defending the litigation were met by Talent2.

Scott, when he left the employ of HRX, had taken a USB drive with information taken from HRX. The lawyers acting for Scott and Talent2 concluded that Scott had breached his employment contract. The lawyers advised Talent2 that the information on the USB was of a type that might make Talent2 reconsider whether Scott should continue to be employed with Talent2 and therefore, as the interests of Scott and Talent2 had potentially diverged, they could no longer act for both.

An interim injunction was sought by HRX, however, only a limited restraint was granted, restraining Scott from dealing with HRX's clients. Proceedings were fixed for urgent final hearing.

Talent2 became concerned about Scott's conduct. The cost of running the proceedings were spiralling. Talent2 decided that it was unable to fund the case going forward due to the nature of the evidence that had come to light and Scott could not afford to support the case on his own.

Talent2 ultimately came to the conclusion they could not continue to employ Scott or fund litigation. Consequently, the litigation resolved quickly, with Scott agreeing to the orders being sought by HRX. Scott had essentially been unsuccessful in the proceedings.

HRX then applied to the Court for an order that Talent2 pay HRX's costs of the proceedings on the basis that it had actively been involved in the defence of the proceedings and funded the costs of the defence of the proceedings. Talent2 did not dispute that it funded the defence of the litigation.

Under Section 98 of the Civil Procedure Act 2005 the NSW Courts have "full power" to determine by whom, to whom and to what extent costs are to be paid. Justice Bergin noted the guiding principle is whether an order would be in the interests of justice with the Court exercising its full power judicially.

Justice Bergin noted:

"Factors for consideration in determining whether an order should be made under S.98 of the Act include:

- *that the non party played an active part in the conduct of litigation;*
- *that the non party funded the litigation;*
- *that the non party had been the cause of proceedings in that such proceedings would not have been undertaken had it not been for the non party's intervention;*
- *that the unsuccessful party to the litigation is a "man of straw"; and*
- *that the non party, or its principal had a substantial interest (not necessarily financial) in the litigation.*

Obviously these factors are not to be considered in isolation. One or more factors may feature more prominently than others in the Court's consideration, however, it is necessary to consider the whole circumstances of the case."

Here the litigation had been funded by Talent2. Had the litigation not been funded, Scott would have capitulated to the orders at the outset.

The Court noted that HRX was put to the expense of bringing the proceedings that were resisted by Scott with the assistance of Talent2 with the strategy for the defence being influenced by Talent2's willingness to remain financially involved in the litigation.

Talent2 stood to derive a benefit from defending and funding the litigation as it employed Scott and wished to continue to employ him. However, the Court noted that HRX elected not to join Talent2 to the proceedings (as it did not want confidential information that needed to be disclosed during the trial to come into the hands of Talent2).

In all of these circumstances the Court determined that it was appropriate to make an order against Talent2 in relation to costs and order Talent2 to pay the costs of HRX in the proceedings against Scott.

Those who engage employees who worked for competitors are often confronted with the impact of some post employment restraint provision that protects the former employer's legitimate interest in the goodwill of their business. Aiding and abetting an employee to breach restraints can lead to litigation, however, even if proceedings are not commenced against a new employer, where litigation is commenced against the former employee and funded by the new employer, that new employer may find itself liable for not only the legal costs of its employee but any costs order obtained by the former employer.

Squabbles over post employment restraints will continue as a part of life. In this case Scott had received advice from Senior Counsel that a 12 month restraint period was too long and potentially unenforceable, however, Scott did not have the money or support from his new employer to test that issue in Court. Further, his conduct in taking confidential information gave rise to other issues for him.

The cost of litigation involving proceedings seeking injunctions can be significant. In the course of these proceedings Talent2's group general manager of operations for Talent2's parent company, when asked about the issue of costs in the proceedings, gave evidence that:

> *"We started out seeking some advice on restraints. We were given a quote of about $2,500. Fairly quickly, within about three or four days that escalated to about $10,000 to defend Mr Scott at an injunction hearing, hearing an injunction. A few days after that we were on $30,000 and then literally, not, it didn't feel like, maybe a few days beyond that we were beyond $70,000".*

No doubt HRX's legal costs were similar to those of Talent2 and at the end of the day, in this case Talent2 will be liable for the costs that it incurred and those of HRX.

As can be seen, employing someone who has worked for a competitor can have unintended consequences, expose a business to potential legal proceedings, the involvement of its new employee in legal proceedings and potentially the legal costs of proceedings that will be incurred in the proceedings.

New Work Place Anti-Bullying Laws

In March 2013 the Federal Government introduced the *Fair Work Bill 2013* ("FWB") into parliament for consideration in response to the recommendations of the Fair Work Act Review Panel and issues of workplace bullying.

The FWB will amend the Fair Work Act and allow a worker who reasonably believes they have bullied at work to apply to the Fair Work Commission (FWC) for an order to stop the bullying. The FWB is in its initial stages of consideration and was referred to a Committee which reported back to parliament on 14 May 2013.

If the FWB is passed as legislation any person who carries out work in any capacity for a person conducting a business or an undertaking may apply for an order from FWC in relation to alleged bullying. The persons that can apply include:

- employees
- an apprentice
- a trainee
- an outworker;
- contractors;
- students gaining work experience; and
- volunteers.

However members of volunteer associations will have no right to seek orders.

The FWC can issue an order to stop bullying where an individual or group of individuals have repeatedly behaved

unreasonably towards a worker. The behaviour of the individuals or group must:

- be repeated; and
- be unreasonable; and
- create a risk to health and safety.

Unreasonable behaviour is behaviour that a reasonable person, having regard to the circumstances, is seen to be unreasonable. This includes, but is not limited to, behaviour that is:

- victimising,
- humiliating,
- intimidating or
- threatening.

Proceedings in FWC for an order to stop bullying

The FWC has power to make any order it considers appropriate (other than an order for payment or a pecuniary amount) to prevent a worker from being bullied. The FWC must deal with an application by a person seeking an order within 14 days after the application is made. The FWC may issue an order:

- that the individual or group of individuals involved in the repeated and unreasonable behaviour stop the specified behaviour;
- that an employer regularly monitor the behaviour of persons or groups;
- requiring persons or an employer to comply with the employer's workplace bullying policy;
- requiring the provision of information and additional support to the training of workers;
- requiring an employer to review its workplace bullying policy.

The FWC must be satisfied the worker has been bullied at work by an individual or group of individuals and there is a risk the worker will continue to be bullied at work by the individual or group. In considering the terms of the order, the FWC will take into account:

- any procedure available to the worker to resolve grievances and disputes;
- any final or interim outcomes arising from the investigation into the matter that has been or is to be undertaken by a person or a body;
- any procedure available to the worker to resolve grievances or procedures; and
- any other matters the Commission considers relevant.

Failure to comply with an order made by the FWC under the new provisions is a civil penalty offence. A person affected by the contravention of the provisions of the FWB, including an Industrial Association or a WorkCover inspector, may apply to the Court for a penalty to be imposed.

Actions for Employers

Employers must take steps to educate their employees, managers and supervisors in relation to the proposed FWB. Whilst the FWC does not have an immediate power to impose penalties on employers, the Commission can conduct their own investigation and refer potential bullying conduct at a work place to WorkCover for investigation.

Employers should be aware that the FWB provides victims of work place bullying with an avenue for complaint where an employer's anti bullying and harassment policies have failed to adequately deal with bullying and harassment at the work place. Consequently, as the FWC will review any bullying policies of an employer and the procedures and actions taken by an employer where bullying has allegedly taken place before it makes an order, it is essential employers review their:

- education and training provided to employees regarding avenues available for their employees to lodge complaints and/or grievances regarding their treatment by others; and
- bullying policies; and
- training to employees on their positive duty to inform their employer (on a confidential basis) of any conduct which could be found to be bullying.

Employees should be encouraged to make complaints, on a confidential basis, if they feel they have been bullied and harassed. It is essential employers have the tools and appropriate procedures to:

- protect an individual's identity where a complaint has been made; and
- properly investigate complaints by individuals without further exposing them to workplace bullying and harassment;
- adequately deal with findings from those investigations to ensure the health and safety of the victims and persons involved in the investigations.

Workers Compensation Roundup

Retrospectivity of Reforms For Impairment Claims

Following on from the Court of Appeal's decision in *Goudappel v Adco Constructions* the President of the NSW Workers' Compensation Commission ("WCC") has delivered judgment in *Di Matteo v RDM Ceramics Pty Limited* confirming that the legislative reforms dealing with lump sum impairment claims do not apply to claims for impairment made after 19 June 2012 where a clam for whole person impairment was made prior to 19 June 2012. Accordingly deterioration claims will become a fact of life for scheme agents where there has been a pre 19 June 2012 impairment claim previously made and workers seek to pursue additional compensation in respect of their impairment.

Mr Di Matteo was injured in the course of his employment on 31 May 1994 when he injured his back and left leg whilst carrying a bag of sand. On 5 September 1996, Mr Di Matteo claimed permanent impairment compensation pursuant to s 66 of the Workers Compensation Act 1987. In June 2001 and October 2008 he entered into complying agreements under s 66A of the 1987 Act for the payment of lump sum compensation in respect of impairments to his back and left leg. On 20 June 2012, Mr Di Matteo made a further claim for lump sum compensation as a result of sexual dysfunction associated with his accepted back injury. He claimed 12 per cent permanent loss of his sexual organs.

Entitlements to lump sum compensation pursuant to s 66 were amended by Schedule 2 of the amending legislation which introduced reforms to the NSW workers compensation scheme including repealing s 67 which provided for payments for pain and suffering. The amendments apply to claims made on or after 19 June 2012. The reforms introduced a 10% whole person impairment threshold and limited workers to one impairment claim only.

However the WCC has confirmed that the reforms do not apply to Di Matteo's claim or the circumstances that gave rise to his claim.

Goudappel v Adco Constructions confirmed:

> *"The amendments to Division 4 of Part 3 of the Workers Compensation Act 1987 introduced by Schedule 2 of the Workers Compensation Legislation Amendment Act 2012 do not apply to claims for compensation pursuant to s 66 which are made before 19 June 2012 in respect of an injury that results in permanent impairment whether or not the claim specifically sought compensation under s 66 or s 67 of the 1987 Act."*

De Matteo had made an impairment claim before 19 June as well as a post 19 June impairment claim. The WCC accepted that it was bound by the decision in Goudappel and the reforms did not apply to this claim as compensation had been claimed before 19 June 2012.

Spinelli v Integrated Labour Network Pty Limited was another case that was pending in the Commission waiting on the decision of Goudappel.

Mr Spinelli suffered an undisputed injury to the lower back on 31 October 2007 whilst manoeuvring a heavy laden pallet jack in the course of his employment with the respondent. On 30 September 2008, an Arbitrator made an award by consent in favour of Mr Spinelli for lump sum compensation pursuant to s 66 of the 1987 Act in respect of 14 per cent whole person impairment and an amount of $19,000 for pain and suffering pursuant to s 67 of the 1987 Act. By the time the Approved Medical Specialist issued his Certificate, Mr Spinelli had undergone surgery. He subsequently underwent further surgery in May 2010. On 21 May 2011, Spinelli underwent a lumbar decompression and interbody fusion from L4 to S1.

In May 2012, Mr Spinelli was reassessed by Dr Peter Conrad following his surgery. Dr Conrad assessed that Mr Spinelli suffered a 29 per cent whole person impairment by reason of the subject injury. On or after 19 June 2012, Mr Spinelli's solicitors made a further claim on his behalf for $40,382.50 in respect of a further 15 per cent whole person impairment

pursuant to s 66 and a further $26,000 for pain and suffering pursuant to s 67.

If the amended scheme applies to the circumstances no permanent impairment compensation was payable for a degree of permanent impairment of 10% or less and only one claim could be made for permanent impairment compensation in respect of the injury.

Given the decision in Goudappel President Judge Keating arranged for a telephone conference between the parties on 27 May 2013 and there was general acceptance among the parties that the questions of law raised for determination in this application had been answered by the Court of Appeal's decision in Goudappel. Accordingly President Judge Keating refused leave of the Commission to deal with the matter as Goudappel had clarified the issue. The amended provisions had no application to Spinelli's claim.

Deterioration and additional impairment claims will now proliferate where injuries occurred prior to 19 June 2012 and compensation was claimed prior to that date. Workers injured in those circumstances have no limit to the number of impairment claims they can pursue and the claims will not be subject to the thresholds introduced by the reforms.

WorkCover have sought leave from the High Court to challenge the decision in Goudappel and we will have to wait and see whether the High Court decides to entertain that challenge. Uncertain times are ahead but for now the law is that stated in Goudappel and the workers compensation reforms do not apply to claims for compensation pursuant to s 66 which are made before 19 June 2012 in respect of an injury that results in permanent impairment whether or not the claim specifically sought compensation under s 66 or s 67 of the 1987 Act.

Administrative Law Challenges Over Medical Appeal Panel Findings

In New South Wales, the workers compensation legislation prescribes a regime for the referral of questions on impairment to a medical assessor. The medical assessor will issue a certificate pursuant to Section 327 of the Workplace Injury Management & Workers Compensation Act 1998. There is a right of appeal from that assessment. An appeal must be referred to a Medical Appeal panel. An appeal is often dealt with on the papers, that is on the basis of an application made by a dissatisfied party and the response filed. The appeal is often dealt with without any provision for further submissions being made whether orally or in writing. The Medical Appeal Panel will often make a determination that it is appropriate to determine the appeal without an assessment hearing. However a question arises as to whether or not there is an administrative law remedy is available to set aside a Medical Appeal Panel's findings when there has been no assessment hearing.

There is no merits review from a determination of a Medical Appeal Panel, and the only challenge that is available is an application to the Supreme Court to quash the decision on the grounds that there is an error of law on the face of the record or that there has been a denial of natural justice.

The NSW Court of Appeal in *Galuzzo v Little* was recently called on to consider the mechanisms involved in an appeal to a Medical Appeal Panel and whether there is an error on the face of the record where the Medical Appeal Panel does not conduct an assessment hearing and permit oral submissions in the Appeal.

Little was injured in a work accident and suffered multiple injuries. An assessment of the worker's impairments was necessary.

The worker's injuries included an injury to the right knee, an injury to the left knee and an injury to the lumbar spine. The issue for determination was the whole person impairment attributable to the injuries assessed together.

In this case the matter proceeded to a medical assessment and subsequently an appeal to the Medical Appeal Panel. Before a matter proceeds to an appeal, it is necessary for a Registrar of the Workers Compensation Commission to determine that it is appropriate to refer the matter to the Medical Appeal Panel. Essentially the Registrar acts as a gatekeeper. In this case the gatekeeper accepted that it was appropriate for the matter to proceed.

Workers' compensation impairment claims are assessed under AMA5 in NSW. There is a formula for the aggregation of impairments resulting from more than one injury.

The Medical Appeal Panel ultimately dealt with the appeal on the papers, that is on the basis of the Application made and the submissions in response filed. There was no additional hearing.

The employer brought proceedings in the Supreme Court seeking to quash the medical Appeal determination on the grounds that there was an error on the face of the record. Ultimately an appeal from the Supreme Court determination on that issue resulted.

The Court of Appeal noted that the mechanisms found in the *Workplace Injury Management and Workers Compensation Act 1998* provide for the assessment of impairments and where a worker has suffered several injuries arising out of a single incident, those injuries are treated as a single injury and the impairments resulting from the composite single injury are to be assessed together and even where the several injuries are not treated as a single injury, the impairments resulting are to be assessed together in order to quantify the degree of permanent impairment of an injured person.

The Court of Appeal noted that a single incident can cause more than one injury. An injury is the pathology that has resulted from the relevant work incident or injurious event.

The employer in it's submissions argued that there had been an error on the face of the record of the Medical Appeal Panel's findings when it did not permit an oral hearing.

The Court of Appeal confirmed that an appeal to the Medical Appeal Panel does not involve an adversarial hearing. It was noted the appeal was heard by a three person panel and WorkCover Guidelines contemplate that the Appeal Panel may determine how the appeal is to proceed. The Appeal Panel is authorised to set a date for an assessment hearing and to decide the appeal on the papers without further involvement from the parties. The legislation did not impose an obligation on the Medical Appeal Panel to provide an obligatory assessment hearing. A hearing only needed to be arranged if the Medical Appeal Panel determined that the matter was not capable of determination on the papers.

Effectively, the Court of Appeal accepted that a person is heard when a claim is determined on the papers and there does not need to be an oral hearing. In fact, there is a general expectation that issues will be determined on the papers. The Court of Appeal noted in this case the Medical Appeal Panel decided that the matter was capable of determination on the papers. Whilst the Medical Appeal Panel criticised the standard of the employer's submissions, it noted that employers were aware that appeals were routinely determined on the papers and they should have framed their submissions accordingly rather than proceed on the basis that they would advance further submissions or amplify the written submissions at a hearing they were requesting.

The Court of Appeal confirmed it is the task of the Medical Appeal Panel to decide which method of proceeding is apt and coupled with the fact that disposal on the papers is stated to be the preferred method, unless the Panel itself decides that it is unsuitable, that means that a determination on the papers is appropriate.

The Court of Appeal noted that:

> *"There may be cases of particular difficulty or complexity which cannot be dealt with adequately in writing and where some oral elaboration or explanation is needed. In such an instance, however, it is for the applicant to point to factors making the matter unsuitable for determination on the papers and advance cogent reasons why an oral hearing should be convened. In this case, the employer has made no attempt to explain why an oral hearing was necessary. They simply put from the start the proposition that there should be an oral hearing and effectively declined to give more than a skeleton outline of the grounds on which they relied and the submissions they advanced. It does not avail them to refer in abstract terms to a 'right to be heard' since this entails no more than a fair opportunity to present one's case in the context of the procedures applicable to the particular decision-making function".*

In this case, the employer was not entitled to assume that there would be an oral hearing. It ought to have delivered the written material necessary to put forward the entirety of its case. In this case there was no denial of procedural fairness in the Medical Appeal Panels' decision not to convene an oral hearing.

The employer also argued that the Medical Appeal Panel fell into error when it did not invite the employer to make further submissions or give the employer an opportunity to make further submissions. The Medical Appeal Panel had criticised the standard of the employer's submissions and their brevity. Nevertheless the Court of Appeal noted the Medical Appeal Panel was quite able to understand the case that was put. The Medical Appeal Panel in this case engaged with the employer's submissions and dealt with them on their merits as it saw them. Whilst the standard and quality of the submissions were criticised, the fact that it formed a poor opinion of them did not give rise to a duty to seek further and better submissions when the employer has consciously chosen to be brief as part of what can only be regarded as a ploy to obtain an oral hearing. This

was not a case where it was necessary to seek clarification of submissions. The employer had a reasonable opportunity to advance its position in the submissions and contrary to the original Trial Judge's determination, the Medical Appeal Panel did not deny natural justice when it did not give the employer an opportunity to make further written submissions or to supplement them.

Another question considered in the appeal was whether or not the Medical Appeal Panel erred in failing to remit the matter for assessment to a medical assessor. It was said that the Medical Appeal Panel should have quashed the decision and remitted it for re-determination.

The Court of Appeal did not agree with the employer's submissions. In this case the Trial Judge when originally considering the challenge to the Medical Appeal Panel, determined that the Medical Appeal Panel had correctly construed the statutory provisions although had not adequately stated the reasons for its opinion. The Court of Appeal noted on remittal, a Panel would be obliged to proceed according to the view of the law that was adopted by the Medical Appeal Panel. In those circumstances, remittal for a new decision would be futile. The failure to provide reasons did not result in a miscarriage of justice as the correct view of the law had been applied by the Medical Appeal Panel.

Administrative law remedies will come into vogue with the reform to the workers' compensation scheme and the introduction of work capacity decisions. Administrative law challenges will be seen as a possible way to address shortcomings that seem to flow from work capacity decisions. The legislation however has sought to restrict the ways in which challenges can be made including administrative law challenges. However, we will have to wait and see whether or not the legislation is effective when it comes to limiting administrative law challenges to work capacity determinations.

However when it comes to Medical Appeal Panel decisions administrative law remedies are available however there is no right to an oral hearing and it is within the power of the Medical Appeal Panel to determine whether or not there should be an oral hearing and if it determines that a matter can be decided on the papers then that will be the end of that issue.

Generally there is not an obligation on the part of the Medical Appeal Panel to permit or suggest additional written submissions be provided. Whilst the Medical Appeal Panel may need to seek clarification of issues, if it understands the issues raised and engages with those submissions, the Medical Appeal Panel has no obligation to seek further submissions.

Finally, it must be remembered that even if the Medical Appeal Panel gets it wrong and there is an error on the face of the record, that does not necessarily result in the remission of the matter for reconsideration by a medical assessor.

Remittance for reassessment will not result if the remittal is futile in the sense that a different outcome would not result. Medical Appeal Panels are obliged to provide reasons for their decision. A failure to provide reasons can result in an error on the face of a record which can result in the Supreme Court quashing the determination. However, where the determination accords with the law and there would not be a different result if the decision was quashed and remitted for redetermination then the Supreme Court will not quash the certificate of determination.

Workers compensation lawyers are bound to be getting their administrative law textbooks out and refreshing themselves on administrative law rights and remedies. The Supreme Court is also likely to find itself as the recipient of many more administrative law challenges from decisions made in workers compensation matters.

CTP Roundup

Challenging Decisions of CARS Assessors

In a motor accidents compensation claim in New South Wales, awards of damages for future economic loss are governed by Section 126 of the *Motor Accidents Compensation Act 1999* (the "MAC Act"). That section provides that a Court cannot make an award of damages for future economic loss unless a claimant first satisfies the Court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.

In assessing a claim, CARS Assessors can determine issues about fault or liability for the claim as well as the amount of damages or compensation to be paid to the claimant. If the insurer has admitted liability, the CARS assessment is binding on the insurer and the insurer must pay the amount of damages or compensation assessed. The claimant can reject the assessment and proceed to court however, cost penalties can apply if the claimant does not do significantly better at court.

Not all claims can be assessed at CARS and some claims are not suitable for assessment at CARS. If CARS issues a certificate of exemption, the claim will not be assessed and the claimant will need to proceed to court so that the court can determine the claim. However CARS Assessors are bound by the same assessment criteria as the Court.

The difficulty for an insurer when a matter proceeds to CARS for assessment is that there is no merit review. An insurer's right to challenge an assessment rests with a challenge to the Supreme Court to set aside or quash the Certificate that issued on the basis that a determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.

Justice Hall in *NRMA Insurance Limited v Pham* has confirmed that where a claims assessor fails to act in accordance with the requirements of Section 126 of the MAC Act there will be an error on the face of the record (the Assessment Certificate) and the insurer is entitled to have the Assessor's Certificate set aside and a new assessment conducted by CARS.

Pham was injured in a motor accident and liability was admitted by the insurer. The matter proceeded to an assessment conference. The key issues were the extent of economic loss and whether Pham had any residual earning capacity.

At the time of the accident Pham had conducted his own business as a dry cleaner. His tax returns revealed losses and minimal if any nett income in the five years leading up to the incident however the tax return for the financial year ending two months before the accident revealed a nett income of $35,000. No doubt the tax returns for the year before the accident were lodged after the accident.

In light of the miniscule earnings pre-dating the accident Pham's lawyers submitted that absent the ability to earn sufficient income as a self employed dry cleaning proprietor, Mr Pham would be compelled by economic necessity to return to some form of work and the evidence disclosed the only work Pham could do was in the dry cleaning industry or work as a stonemason. It was argued that he should be compensated at a rate based on what he could earn as an employee dry cleaner. This was substantially more than his earning predating the accident.

The assessor ultimate adopted the Claimants suggested approach and in the assessment of damages and when assessing past and future economic loss used the earnings of employee dry cleaners as a yardstick to calculate the loss. That resulted in an award of $166,780 for past economic loss and $311,376 for future economic loss.

NRMA subsequently brought proceedings in the Supreme Court seeking to quash the Assessment Certificate on the basis of an error of law that appeared on the face of the record of the proceedings.

The error of law asserted in this case was that the assessor had erred in making the award for past and future economic loss on the basis of a determination that were it not for the accident, the claimant would have been forced to sell or close his business and seek employment either as a dry cleaner or as a stonemason. When proceeding upon that basis the assessor adopted the average weekly nett earnings of an employed laundry worker and calculated economic loss on that basis. It was asserted that:

- there was no evidentiary foundation for findings of this nature;
- the assessor failed to comply with the provisions of Section 126 of the MAC Act in determining the most likely future circumstances;
- the most likely future circumstances were not that Pham would be employed as a laundry worker;
- the assessor's findings were against the weight of the evidence;
- there had been a failure by the assessor to state her reasons why she determined that Pham would have been forced to sell and close the business.

NRMA argued that these factors supported the conclusion there was an error on the face of the record.

Justice Hall agreed that there was an error on the face of the record.

Pham had been self employed for many years and intended but for the accident to continue to be so. There was no evidence that he would be forced by economic circumstances to change and to work for wages in an employed capacity. Proceeding upon the basis that past economic loss was to be assessed upon the basis that Pham would have taken up employment and

received remuneration as an employee was not established by the evidence as the most likely future circumstance. In those circumstances the certificate revealed an error on the face of the record. Justice Hall set aside the Assessment Certificate and the matter ws remitted for reassessment to a different claims assessor.

In passing Justice Hall noted that it is loss of earning capacity and not loss of earnings that is the subject of compensation and the remuneration earned up to the time of an accident and the rate likely to be earned in the future affords the basis for assessing compensation for the loss of earning capacity. It was noted that it is the capacity that has been lost and the economic consequences which must be identified. It was also noted past earnings can provide a very useful guide about what a person would have earned if that person had not been injured, however, the evidence of past events does not always provide guidance about the future.

The income earned before the injury is relevant to an assessment of economic loss but only as an evidentiary aid in assessing damages for the loss of capacity to earn.

In this case the claims assessor was not entitled to look past the tax returns and conclude that an appropriate measure of damages was based upon theoretical earnings Pham could achieve as an employee. The evidence did not establish that employment was Pham's most likely future circumstance but for the injury.

Where a claims assessor exercises their power or authority in an improper way their actions will give rise to a jurisdictional error of law. In a judicial review where there has been an error of law deriving from the identification of the wrong question, ignoring relevant material, making findings contrary to the evidence and reaching inappropriate conclusions a challenge in the Supreme Court is available

Challenges to Assessment Certificates will lie where:

- there is no evidence for a particular finding,
- where the assessor has failed to give proper, genuine and realistic consideration to material,
- where the wrong issue has been identified by the assessor,
- where the assessor has reached a mistaken conclusion,
- where the assessor has incorrectly applied the law, and
- where there has been a failure to provide reasons or adequate reasons where reasons are required.

As noted by Mark Robinson SC in his paper "The Legal Framework of Challenges to Administrative Decision Making in NSW – A NSW Administrative Law Refresher", delivered on 1 April 2012, the issues which may affect determinations by administrative bodies include challenges that a determination:

- "is devoid of any plausible justification;
- is one that no reasonable person could have made;
- concerns the engagement by the decision maker in an abuse of discretion;
- is manifestly unreasonable in that it simply defies comprehension;
- it must be obvious that the decision maker consciously or unconsciously acted perversely;
- involves manifest illogicality in arriving at the decision (there being illogical findings or inferences of fact unsupported by appropriate material or logical grounds);
- involves irrationality (which encompasses disregard of relevant considerations, giving regard to irrelevant considerations and manifest unreasonableness);
- is manifestly illogical;
- involves an absence of any foundation in fact for the fulfilment of the conditions upon which the existence of the power depends;
- involves a factual finding where all of the evidence points one way, and the opinion rests upon a contrary view;
- where the decision is not supported on logical grounds by the material adduced;
- where important parts of the reasons of the decision maker were, upon consideration of the evidence, in error and could not be supported on any reasonable basis;
- if the facts disclose no basis for the decision, it will be invalidated without any distinction being drawn between errors of law and fact, or where by the decision maker's own criteria it can be seen that the factual result is perverse."

Pham's case is the latest in the list of matters that have successfully challenged an Assessment Certificate. As can be seen the grounds to challenge a CARS assessment are significant however where there is an error on the face of the record the Supreme Court will not remake the decision, the matter will be submitted for reassessment.

Judicial Review of MAS Review Panel Certificates

Purnell v Pittendridge and Anor [2013] NSWSC 463

This case is another example of a party seeking to quash a decision of the MAS Review Panel on multiple grounds.

Ms Kim Purnell ("Purnell") was involved in a motor vehicle accident on 22 March 2000. Breach of duty of care was admitted by the CTP insurer on 23 June 2008.

On 15 June 2009 Purnell was referred to MAS for assessment of Complex Regional Pain Syndrome (CRPS) in her head, neck, shoulder girdle, right arm, right wrist and right hand.

Assessor Brian Noll determined that Purnell sustained soft tissue injuries to her neck and right upper extremity in the accident. He opined that the accident did not cause CRPS. He assessed 7% WPI at Purnell's right upper extremity injury.

Due to prolonged treatment of with narcotic analgesics, Purnell eventually required a permanent ileostomy (bowel surgery) in December 2010.

Purnell then lodged an application for a further assessment on the basis that narcotics taken as a result of the accident created the need for an ileostomy procedure. On 16 December 2011 the claimant was assessed by Dr Harvey-Sutton.

Dr Harvey-Sutton determined that the injury referred to her for assessment (colon-ileostomy) was not related to the motor accident and hence she was not required to assess the degree of permanent impairment.

Purnell then made an application to the MAS Review Panel disputing Assessor Harvey-Sutton's findings. The panel agreed with the Assessor. It concluded that a causal link could not be established between the motor vehicle accident and the ileostomy.

The conclusions by Dr Harvey Sutton and the Review Panel turned on analysis of the chronology of symptoms and medication requirements. That chronology emerged from treating evidence:

> *"The Panel understands the appellant's claim is that the need for an ileostomy arose because of severe constipation consequential upon prolonged treatment with narcotic analgesics following the physical injuries sustained in the motor vehicle accident of 22 March 2000. Further, it is the Panel's opinion on considering all documentation that the predominant opinion of other medical practitioners is that all symptoms of discomfort following the subject motor vehicle accident had subsided some six or seven weeks after the accident. There was indeed no need to take analgesics until a subsequent incident in 2006 ... Following that incident, narcotic analgesics were commenced ...*
>
> *The Panel believes that on balance the overwhelming evidence is that there was no use of narcotic medication in the six year period between 2000 and 2006 and consequently causation has not been demonstrated as concerns the occurrence of severe constipation as related to the subject motor vehicle accident occurring in March 2000."*

There was no argument concerning the connection between narcotic use and the constipation that brought about the surgery. The issue was whether narcotic use related to the motor vehicle accident or to a subsequent event. The Review Panel applied treating records and histories taken by doctors to conclude that the narcotics were required for the latter injury.

On 7 August 2012 Purnell filed a Summons seeking relief with respect to the Review Panel's decision.

Purnell contended that the Review Panel decision fell into jurisdictional error, committed an error of law on the face of the record, denied the plaintiff procedural fairness and failed to give reasons as required by law.

The central point of the application was a contention that the 7% WPI must enliven a connection between impairment and narcotic use. Purnell argued that a conclusion that the narcotic use was unrelated to the accident was tantamount to a

negation of the established impairment. This was cast by Purnell as a test of causation.

Counsel for the CTP insurer submitted that there had been no failure by the Review Panel during its application of the test of causation and in its finding that there was no direct or indirect relationship between the surgical procedure and the motor vehicle accident. The finding was merely an interpretation of events within their chronological framework.

Johnson J relied upon the decision in Minister for Immigration & Citizenship v SZMDS [2010 HCA 16]. The issue before his Honour was whether, having regard to the probity of evidence before the Review Panel, a logical and rational decision maker could have come to the same conclusion. His Honour concluded that the historical evidence before him permitted the conclusion reached.

Johnson J was not persuaded that the Review Panel had erred. Purnell's Summons was dismissed and she was ordered to pay the CTP insurer's costs.

In summary, parties ought to consider the probity of factual evidence that is placed before the Review Panel and determine whether it has been interpreted logically and rationally towards a reasonable and fair outcome. In particular, this matter demonstrates that MAS Assessor's are entitled to reach independent opinions concerning the relevance of factual evidence, and in this instance, a chronology of evidence. The courts will not substitute their own interpretation of those facts merely because an alternative conclusion exists. The Assessor's findings will not be overturned unless a court concludes that they were not available to a logical and rational decision making process.

Pedestrians And Contributory Negligence

The NSW Court of Appeal in *Scott v Williamson* and *Picken v Williamson* was recently called on to consider whether a driver of a vehicle should be held responsible for a motor vehicle accident on a dual carriageway when two pedestrians were injured early in the morning when they moved off a median strip into the path of an oncoming vehicle.

The accident occurred on Windsor Road, Rouse Hill at 1:30am one morning. A group of friends had been celebrating a birthday at a hotel. A minibus had been hired to drive the group to and from the hotel. Alan Picken and Ms Scott had quarrelled whilst at the hotel and left the hotel together. The group eventually left the hotel in the min bus travelling along Windsor Road and when one of the passengers in the bus saw Picken and Scott, the min bus pulled over into the breakdown lane in Windsor Road. It was stopped under a street light and the hazard lights were activated. At the point where the bus stopped, there was a dual carriageway separated by a median strip with vegetation. Alan Picken and Scott were on the other side of the road. The median strip was separated from the roadway by a chain fence.

James Picken, who was on the bus, alighted from the bus, crossed the road and went to speak to his brother, Alan Picken and Ms Scott. He crossed the road, walked through the bushes, stepped over the median strip and the chain fence and crossed to the other side of the dual carriageway. Alan Picken then left his girlfriend, Ms Scott, and his brother, James Picken, who had just crossed to talk to him, and walked across the road to the minibus, walking around the back of the minibus and entered the front door of the minibus.

James Picken and Ms Scott followed Alan Picken across the road some distance behind. James Picken assisted Ms Scott to step over the median strip and lifted her over the chain fence and she was placed on the road.

A driver, travelling in the same direction that the mini bus was travelling at 80kms, struck Ms Scott and James Picken. The driver of that vehicle conceded he saw a dark figure cross the road some 100 to 110 metres ahead of him and saw that figure entered the front of the minibus. Williamson was travelling using cruise control at 75kms per hour and when he saw the figure cross the road, he started to brake and reduce his speed to around 60kms and he applied his brakes about 50 metres from the rear of the min bus. Williamson did not observe the other two crossing the road until it was too late for him to effectively brake to avoid a collision with them.
At trial Picken and Scott succeeded in establishing that Williamson had been negligent in travelling at an excessive speed in the circumstances. An appeal followed.

The issue in the Appeal was whether or not Williamson ought to have observed Picken and Scott on the median strip in sufficient time to stop. Expert evidence was given on the reaction times involved in the situation, the distances involved and the visibility at the time of the accident. It was early in the morning and it was dark. Williamson was driving along a road at a reasonable speed with his headlights on. However there was the presence of the minibus and Williamson had observed a

person crossing the road. The Court of Appeal noted that the presence of the stationary mini bus in the breakdown lane was a sign that there was some activity occurring on the roadway and this led to a need for Williamson to take heed that there may have been others on or about the road. In the circumstances, Williamson had been negligent.

Interestingly, there was also a claim which had been brought against the driver of the minibus based on a contention that the driver should have warned the Scott and Picken not to cross the road. The Court of Appeal determined that the driver of the minibus either did not owe a duty of care to those that were injured or did not owe a duty of care to warn them of an obvious risk in crossing the road. Accordingly there was no viable claim against the minibus driver.

However, when it came to contributory negligence it was clear the pedestrians played a role in their own demise. The Trial Judge had determined that contributory negligence should be assessed in the order of 65% to Mr Picken and 30% to Ms Scott. Picken argued that the assessment against him was excessive as did Scott.

The Court of Appeal noted that when determining apportionment between a plaintiff and defendant it is necessary to consider both culpability, that is the degree of departure from the standard of care of a reasonable man and the relevant importance of the acts of the parties in causing the damage. In this case the assessment of the Trial Judge was seen to be appropriate. Picken was lifting Scott over the fence shortly before the accident occurred. Picken had the opportunity to look for oncoming traffic both before he lifted Scott over the fence and a second time after he lifted Scott over the fence, before he climbed over the chain. That was sufficient justification for the difference in the assessed contributory negligence.

As can be seen, Williamson was confronted with a situation that many drivers dread, a pedestrian stepping out in front of them from a median strip, obscured by foliage whilst travelling at what appeared to be a reasonable speed at night. Williamson's liability in this case arose from the fact that he ought to have been aware that something was amiss when he saw the minibus parked on the side of the road and a person crossing the road approximately 100 metres in front of him. That ought to have put Williamson on alert. He did not react adequately and slow down.

At the end of the day, in this case the Court of Appeal determined that the pedestrians were not solely responsible for the accident and Williamson did play a role. Somewhat surprisingly Picken's responsibility was held to be significantly greater than Scott's and his damages were reduced substantially more. Chivalry does have its costs!

Director Penalty Notice Update – The ATO Is Now Taking Full Advantage Of Its New Powers

This article examines the previous director penalty notice (DPN) laws, the new laws which extend the DPN regime and give the ATO substantial new powers, the limited defences available to directors who receive a DPN and what they must do to avoid personal liability for the company's tax obligations.

The old laws

With the implementation in 1993 of reforms recommended in the Harmer report, the Commissioner of Taxation's priority over other unsecured creditors in a company winding up was removed. However, the Commissioner obtained new powers, and among those was the ability to issue a director penalty notice in relation to a company's outstanding PAYG liability. Issuing a DPN allowed the Commissioner to pursue a director personally for PAYG liabilities of their company.

A director who received a DPN and who wanted to avoid personal liability for the company's PAYG withholding amount (or the Commissioner's estimate of that amount) had 21 days in which to either pay the debt, appoint an administrator to the company or appoint a liquidator to the company. Provided the director took one of those steps within the 21 day period, the penalty to the director was waived. That is not always the case under the new DPN laws.

The new laws

Major changes to the DPN regime took effect on 29 June 2012. The new laws intend to prevent a director from continuing to trade a company while accruing arrears of PAYG and super contributions, and putting the company into external administration within 21 days to escape the effects of a DPN. Doing so often deprived the ATO of the ability to collect the arrears either from the company or from the director personally. Some of the amendments to the law address failings in the old law relating to service of DPNs, phoenix activity and the exploitation of certain defences by unmeritorious directors and their spouses.

In overview, the changes are as follows:

- The extension of DPNs so they can apply to a company's unpaid superannuation guarantee amounts as well as unpaid PAYG amounts.
- The appointment of an administrator or liquidator to the company within 21 days after the DPN is issued no longer prevents the director from being liable for the company's unpaid super and/or PAYG unless:
- The company's PAYG withholding amounts have been reported to the ATO within 3 months of the due date; and
- The company's superannuation guarantee amounts have been reported to the ATO within 3 months of the due date.
- The failure to make these lodgements can result in the issue of a "lock down" DPN.
- The lodgement of overdue reports to the ATO so that the company's PAYG arrears can be calculated precisely will not stop the director from becoming personally liable for the Commissioner's estimate of those arrears if a lock down DPN is issued.
- In some instances directors and their associates will be liable to PAYG withholding non-compliance tax. This is an offset against PAYG credits in the personal tax return of the director and their associates, which might otherwise have been available to those persons.
- The new laws are retrospective to the extent that any outstanding PAYG withholding amounts which should have been reported for the period 1 April to 30 June 2012 and which were not reported by 28 August 2012 will automatically result in a DPN being issued. In such instances, the penalty to the director cannot be remitted (that is, waived) by the appointment or an administrator or liquidator to the company, even if that appointment is made within 21 days after the issue of the DPN.

The date of issue of the DPN is the date on the DPN. The ATO's practice is now for an employee involved in the preparation of the notice to post the notice to the director's address disclosed to ASIC in records relating to their directorship of the company on the date of the notice. Allowing time for the DPN to arrive by post, in reality, a director who receives a DPN usually has less than 21 days in which to comply with it.

Lock down DPNs

The ATO can issue these where the company's PAYG withholding and/or superannuation guarantee is not paid and not reported to the ATO for more than 3 months after the due date. The issue of a lock down DPN does not give the director the opportunity to escape their personal liability by appointing an administrator or liquidator to a company, so the director is effectively "locked down". In such a case the director must pay the amount in the DPN within the 21 day period or make an arrangement with the ATO to do so under section 255-15, Schedule 1 of the Taxation Administration Act 1953 (Cth). Even if an arrangement is made, the general interest charge applies and penalties are payable.

The ATO has issued lock down DPNs this year. In at least one case, a lock down DPN was issued after a director had already placed a company in liquidation. In that case, the ATO contacted the director in July 2012 requiring that the company's unreported PAYG withholding amounts be reported. The director identified outstanding lodgements dating back to 2005, realised a large debt was overdue to the ATO and appointed a liquidator to the company in September 2012. In January 2013, the ATO issued a lock down DPN to the director for amounts unpaid and unreported in the period from 1 October 2005 to 31 December 2011.

PAYG withholding non-compliance tax - the new offset power

The ATO's new power to offset amounts the director might otherwise have been able to claim in their own tax return for PAYG credit entitlements also applies to an associate of a director. An associate includes the director's spouse. An associate may become liable for the company's unpaid PAYG and super obligations if the associate does not either:

- Influence the director to report and pay the overdue amounts;
- or appoint an administrator or liquidator to the company; or
- Report the director to the ATO, ASIC, police or the Minister for failure to pay the PAYG or super amounts.

Defences available to a director who receives a DPN

The only defences are:

- Because of illness or another good reason, the director was not involved in management of the company and it was

reasonable for that director not to be so involved; and

- The director took all reasonable steps to ensure that one of the following steps were taken (or none of those steps could reasonably have been taken):
  - The company pays the amount;
  - An administrator is appointed to the company; or
  - A liquidator is appointed to the company.

A deadlock between directors which prevents the appointment of an administrator or liquidator by resolution of the board is not a defence. A director in that situation must make an urgent court application to wind up the company to avoid personal liability under a DPN. Similarly, deregistration of the company, by which it ceases to exist as a legal entity and thus cannot pay PAYG or super arrears, is not a defence.

Although not strictly a defence, a director who receives a DPN and pays the company's PAYG tax or super liability is entitled to claim a contribution in relation to the amount paid from other directors. Such a director could also claim contribution from the company, so that if the company is deregistered at the time of payment under the DPN, it could be reinstated and the amount the director has paid to the ATO recovered from the company at the time of its reinstatement or at a later time. A court application may be required.

Incoming directors must ensure that unreported liabilities are brought up to date swiftly because after 30 days from the date of their appointment they become exposed to the risk of a DPN being issued to them for unreported and unpaid PAYG and super amounts. Careful due diligence in relation to tax is therefore important before providing a consent to act as a director.

Conclusion – what to do?

Under the new DPN laws, the Commissioner's powers to recover company liabilities from directors are now wide and retrospective. The new DPN laws can also apply to spouses and other associates of directors. Vigilance in lodging quarterly returns is essential in this environment. The key point is that company lodgements to the ATO regarding PAYG and super must be made on time.

A director of a company which is more than 3 months behind in lodging returns for PAYG withholding amounts should ensure all outstanding returns are lodged immediately. When the returns have been brought up to date, the ATO will calculate the amount which is due, rather than making an estimate of the amount due. The Commissioner will then issue a DPN, but it will not be a lock down DPN. The advantage for directors is that the option will then exist to appoint an administrator or liquidator to the company if it cannot pay the amounts in question, thereby avoiding the director being held personally liability for the outstanding amounts of PAYG and super. The appointment of an administrator has the added advantage of allowing a deed of company arrangement to be proposed if some funds and/or assets can be realised, which can mean that the company survives.

If a director receives a DPN they should quickly obtain advice on whether any defence is likely to succeed, take advice on the recovery of contributions from others and whether any urgent court applications must be made. In some circumstances, a defence in letter format can be provided to a particular senior officer within ATO collections. Gillis Delaney has the relevant details. Alternatively, an instalment arrangement might be negotiated, but the success of that option will depend upon the financial position and the circumstances of the particular case. Contact our senior practitioners, Nick Dale or Gerald Carides, on 02 9394 1144 for assistance with these matters.

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